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TAX EXEMPTION OF PROPERTY DEVOTED TO
OUT-OF-STATE CHARITY

Realty in the State of West Virginia was conveyed to trustees with the direction that the rents and profits and any amount realized from a subsequent sale, be used for the benefit of the Mariners' Museum, a Virginia charitable corporation, situated at the head of Hampton Roads in the State of Virginia. The trustees sought mandamus to compel the West Virginia State Tax Commissioner to indorse his approval on the deed of trust in order that the property might be listed as exempt from taxation. The court denied exemption. *Ferguson v. Townsend, State Tax Commissioner*.¹

Subject to the Constitution of the United States, every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory.² The West Virginia Supreme Court of Appeals has held that tax exemptions are an essential attribute of that sovereignty.³

Although under some authorities the constitutional power of the legislature to exempt property will be liberally construed,⁴ strict construction of statutory exemptions is common,⁵ for the reason that exemption is an extraordinary grace of the state⁶ and operates to increase the burden on tax-productive property.⁷ Exemption will not be implied.⁸ The West Virginia Supreme Court

¹ 111 W. Va. 432, 162 S. E. 490 (1932).

CONSTITUTION OF WEST VIRGINIA, article 10, § 1, provided ". . . property used for educational, literary, scientific, religious or charitable purposes, all cemeteries and public property may, . . . be exempted from taxation . . ."

Article 10, § 1 was amended in the fall of 1932 but the changes are immaterial for present purposes.

W. VA. REV. CODE (1931) c. 11, art. 3, § 9, exempts: ". . . property belonging to colleges, seminaries, . . . property used for charitable purposes, and not held or leased out for profit."

The statute was amended during the last regular session in 1933, but the changes are immaterial for present purposes.

² *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565 (1878).

³ *C. & O. v. Miller*, 19 W. Va. 408, 418 (1882), *aff'd.* in 114 U. S. 176, 5 S. Ct. 813 (1885); *Probascio v. Moundsville*, 11 W. Va. 501 (1877). See also *New Orleans v. Campbell Manning*, Unrep. Cas. 47 (La. 1880); *Milford v. Worcester County*, 213 Mass. 162, 165, 100 N. E. 60 (1912); *Brenau Ass'n v. Harbison*, 120 Ga. 929, 48 S. E. 363 (1904); *City of Kansas v. Kansas City Medical College*, 111 Mo. 141, 20 S. W. 35 (1892); *State v. Newark*, 26 N. J. L. 519 (1856); *Sisters of Charity v. Thompson*, 73 N. J. L. 699, 65 Atl. 500 (1906).

⁴ *Phil. Library Co. v. Donohugh*, 86 Pa. 306 (1878).

⁵ 2 COOLEY, TAXATION, (4th ed. 1924) §§ 503, 672, 673; *Horton v. Colorado Springs Masonic Bldg. Soc.*, 64 Col. 529, 173 Pac. 61 (1918).

⁶ *New Orleans v. Campbell Manning*, *supra* n. 3.

⁷ *Mass. Gen. Hospital v. Belmont*, 233 Mass. 190, 12 N. E. 21, 25 (1919).

⁸ *Fairview Heights Cemetery v. Fay*, 90 N. J. L. 427, 101 Atl. 405 (1917);

of Appeals has adhered to strict construction of such statutes.⁹ The rule of liberal construction¹⁰ has been supported on the ground that benevolence which would relieve the state of some of its burdens, would be encouraged and that a state should avoid taxing property devoted to purposes germane to those of the government itself. Under this analysis, exemptions are not simply acts of grace but are granted in aid of the public interest.¹¹

The notion that West Virginia property devoted to out-of-state charity is not exempt from West Virginia taxation has the support both of authority¹² and reason.¹³ Since the paramount justification for exemptions, no matter how construed, is the benefit of the state and its people either directly or by reducing the burden of government, and not the benefit of mankind at large,

State v. Newark, 26 N. J. L. 519 (1856); *Academy of Fine Arts v. Philadelphia*, 22 Pa. 496 (1854); *Bangor v. Masonic Lodge*, 73 Me. 428 (1882); *Haverford College v. Davis*, 2 Del. County Rep. 33, 34 (Pa. 1883). (The death grip of the church upon nearly all the land of Europe previous to the statutes of mortmain, clearly illustrates the danger of too free exemption from taxation.)

⁹ *Harvey Coal, etc., Co. v. Dillon*, 59 W. Va. 605, 53 S. E. 928 (1905); *B. & O. v. Supervisors*, 3 W. Va. 319 (1869); *Probasco v. Moundsville*, *supra* n. 3; *B. & O. v. Wheeling*, 3 W. Va. 372 (1869).

A rational interpretation, however, is permitted. *State v. Martin*, 105 W. Va. 600, 143 S. E. 356 (1928) (The use must be primary and immediate, not secondary or remote); *State v. Kittle*, 87 W. Va. 526, 105 S. E. 775 (1921). See also *New Haven v. Sheffield Scientific School*, 59 Conn. 163, 166, 22 Atl. 156 (1890); *Indianapolis v. Grand Lodge*, 25 Ind. 518, 521 (1865).

¹⁰ See n. 4, *supra*.

¹¹ *M. E. Church v. Hinton*, 92 Tenn. 188, 190, 21 S. W. 321 (1893); *Brenau Ass'n. v. Harbison*, *supra* n. 3; *In re Curtis*, 88 Vt. 445, 450, 92 Atl. 965 (1915); *Horton v. Colorado Springs Masonic Bldg. Soc.*, *supra* n. 5; *Commonwealth v. Lynchburg Y. M. C. A.*, 115 Va. 745, 748, 80 S. E. 589 (1913). A tax exemption statute will not be as strictly construed against a charity as it will be against a railroad or other commercial enterprise. *Linton v. Lucy Cobb Institute*, 117 Ga. 678, 681, 45 S. E. 53 (1903).

¹² *Layman Foundation v. City of Louisville*, 232 Ky. 259, 22 S. W. (2d) 622 (1929) and other cases cited therein; *Alfred University v. Hancock*, 96 N. J. Eq. 470, 46 Atl. 178 (1900). *Contra*: *State v. Johnston*, 65 N. J. L. 196, 46 Atl. 776 (1900). (Trustee held title to New Jersey land, the beneficiary was a New York Corporation. Held: does not militate against the general policy of New Jersey to exempt it from taxation). Property of a Missouri municipality has been denied exemption in Kansas. *State ex rel. Taggart v. Holcomb*, 85 Kan. 178, 116 Pac. 251 (1911).

¹³ *Baker, Tax Exemption Statutes* (1928) 7 TEX. L. REV. 50; *Baker, Some Questions Raised in the Field of Tax Exemption* (1930) 8 TEX. L. REV. 196; Note (1930) 19 KY. L. J. 88; Note (1929) 42 HARV. L. REV. 137; Note (1930) 4 CIN. L. REV. 249. See also *In re Prime*, 136 N. Y. 347, 32 N. E. 1091 (1893); *Hays v. Harris*, 73 W. Va. 17, 22, 80 S. E. 827 (1914); *Beta Xi Chapter of Beta Theta Pi v. City of New Orleans*, 137 So. 204 (La. App. 1931); *In re Huntington*, 168 N. Y. 399, 407, 61 N. E. 643 (1901); *Horton v. Colorado Springs Masonic Bldg. Soc.*, *supra* n. 5; *Brenau Ass'n. v. Harbison*, *supra* n. 3; *In re Curtis*, *supra* n. 11; *M. E. Church v. Hinton*, *supra* n. 11.

the conclusion of the West Virginia court is sound.¹⁴ The state's charitable responsibilities in a legal sense both begin and end at home.

That the exemption is not expressly limited to West Virginia charitable objects is not controlling; it is believed that unless otherwise expressly stated the objects of the constitutional and statutory provisions of a state are rationally to be deemed confined to the jurisdiction of that sovereign.

Nor does it appear that comity¹⁵ will aid in the solution. Interstate comity is not obligatory¹⁶ and policy and expediency do not dictate reciprocity for the reason that it might well involve an unequal arrangement operating to the disadvantage of West Virginia.¹⁷

A charity devoted to both domestic and foreign objects presents a more troublesome situation. Under the Constitution¹⁸ and present statute¹⁹ of West Virginia, the court might well hold the property of the charity to be exempt in totality, due to the impracticability of allocation.²⁰ It is believed, that the standard applied by the West Virginia court would warrant exemption only

¹⁴ It is the writer's belief that there are too many tax exemptions. With each exemption comes an increased burden on the private citizens to subsidize their governmental needs.

¹⁵ *Newlin v. St. Louis & S. F. R. Co.*, 222 Mo. 375, 391, 121 S. W. 125, 130 (1909); *Parker-Harris Co. v. Stephens*, 205 Mo. App. 373, 378, 224 S. W. 1036, 1037 (1920); *Jones v. Habersham*, 107 U. S. 174, 2 S. Ct. 336 (1882).

¹⁶ *Hilton v. Guyot*, 159 U. S. 113, 16 S. Ct. 139 (1895).

It appears unsettled as to when interstate comity will be applied. In *State (Congregation of Mission of St. Vincent De Paul in Bordentown, Prosecutor) v. Brakley, Collector*, 67 N. J. L. 176, 50 Atl. 539 (1901), a Pennsylvania charitable corporation owned land in New Jersey. The house on the land was occupied by members of the corporation for study for the priesthood. *Held*, only the house and so much of the land as was necessary for the fair enjoyment of the building was exempt. The court in the *Ferguson* case said this case was not in point because some part of the foreign corporation was in New Jersey. In *The People ex. rel. Huck v. The Western Seaman's Friend Society*, 87 Ill. 246 (1877), an Ohio charitable corporation had a branch in Chicago and was caring for sailors and stock-men of that city. Exemption from taxation denied, for it was not a corporation created by the laws of Illinois, and only by comity might gain access to the state.

¹⁷ It might well eventuate that much more West Virginia property would be devoted to Virginia purposes than the converse.

¹⁸ N. 1, *supra*.

¹⁹ N. 1, *supra*.

²⁰ In *Mission of St. Vincent De Paul v. Brakley*, *supra* n. 16, the court really did attempt to allocate. If part of the property is used in the State for charitable purposes, "so much of the property as is used for charitable purposes is exempt" even though it is owned by a foreign corporation. See also Note (1930) 4 *CIN. L. REV.* 137; *Mount v. Tuttle*, 91 N. Y. Supp. 195, *Aff'd*, 183 N. Y. 358, 76 N. E. 873 (1906); *Chamberlain v. Chamberlain*, 43 N. Y. 424 (1871).

if it be apparent on the face of the trust instrument, or in the corporate charter of an incorporated charity, that West Virginia objects are bound to share in at least some proportion of the benefits. Where that element is wanting, the relation to West Virginia charity would be too remote to justify exemption. In those cases where it is apparent on the face of the trust or in the corporate charter of the charity, that at least some of the objects are West Virginia objects or that there be some assurance that West Virginia objects will benefit in the future as in the case of the American Red Cross, a statute providing for allocation would seem feasible. It would be desirable to insure flexibility in administration.

Nothing is apparent in the *Ferguson case* that would not require a denial of the other legal advantages normally accorded charities where the charitable object is out of the state. As to tort liability, the West Virginia Supreme Court of Appeals has held that a charity is not liable to an injured beneficiary if no negligence appeared in the employment of the tortfeasor.²¹ It would seem that this partial exemption from tort liability would only be applied to West Virginia charities within the meaning of the principal case. This conclusion is fortified by the just criticism of the theories under which a charity is permitted to enjoy partial freedom from tort liability.²²

Considerations of policy do not militate so strongly against relaxing the rule against restraints on alienation²³ in favor of West Virginia property devoted to out-of-state charity, as against exempting such property from taxation. That the West Virginia court would extend the logic of the principal case so far, or that any substantial social or economic evils would arise as a consequence of its not doing so, is hardly to be anticipated.

—WESLEY R. TINKER, JR.

²¹ *Roberts v. Ohio Valley General Hospital*, 98 W. Va. 476, 127 S. E. 318 (1925).

²² *Feezer, Tort Liability of Charities* (1928) 77 U. OF PA. L. REV. 191; Note (1929) 14 IOWA L. REV. 212. The present trend appears to be liability based on the doctrine of *respondeat superior* with insurance as the safeguard.

²³ *Mercantile Banking, etc., Co. v. Showacre*, 102 W. Va. 260, 135 S. E. 9, 48 A. L. R. 1138 and note (1926); GRAY, *PERPETUITIES* (3rd ed. 1915) 472; Gray, *Remoteness of Charitable Gifts* (1894) 7 HARV. L. REV. 406, 409; Clark, *Unenforceable Trusts and the Rule Against Perpetuities* (1910) 10 MICH. L. REV. 31; Note (1930) 40 YALE L. J. 143.