Volume 53 | Issue 1 Article 6

December 1950

Charities--Charitable Corporations--Liability For Torts

C. M. H.
West Virginia University College of Law

The need of physical appropriation is even more forcefully illustrated by the *Plant* case, *supra*. There a guardian severed the infant's coal. Subsequent to his majority the former infant sought to cancel the deed for fraud. When challenged for laches, the infant sought to defend on the ground that he had at all times been in possession of the surface. The court held, however, that after severance, the possession of the surface was not possession of the underlying coal, and the surface owner must show that he had had actual physical possession of the coal apart from the surface.

It is submitted that these cases emphasize the attitude of the state court in requiring actual possession of the severed mineral interest as a requisite for the acquisition of a possessory statutory title, and that the introduction of actual or constructive notice to the adverse claimant is primarily a result of misapplication of the statutes as to bona fide purchasers and antithetical to the theory of adverse possession. It is interesting to note that the decision in the principal case is not in accord with the principle recently incorporated into our statutes that ". . . ownership or possession of the surface after severance shall not be adverse to the interests of the owner or owners of such minerals and appurtenant rights." W. VA. CODE c. 55, art. 2, § 1a (Michie, 1949).

N. E. R.

CHARITIES—CHARITABLE CORPORATIONS—LIABILITY FOR TORTS.—*A*, while attending *B* university, was injured when a trapeze supplied by her instructor collapsed. *A* brought action against *B* university for injuries sustained. The university averred that it was a charitable corporation and therefore not liable for torts of its agents and contended that this defense, where interposed, was absolute. *A* contended that there were non-trust funds from which to collect a judgment. The issue was whether a judgment in an action in tort could be obtained against a charitable corporation for the negligence of its servants where that corporation was protected by liability insurance. The trial court dismissed the action and this was affirmed by the appellate court. Judgment reversed on appeal. *Held,* that the question of protecting the trust funds did not affect the liability of the institution, but only the manner of collecting any judgment that might be obtained. *Moore v. Moyle*, 92 N.E.2d 81 (Ill. 1950) (5-2 decision).

There is a distinction between a charitable corporation and a charitable trust. 3 SCOTT, TRUSTS § 348.1 (1939). Most of the cases in point involved the former, often without a technical trust, but by analogy many of the same principles apply to both charitable corporations and charitable trusts. It appears to be the custom to use the phrase "trust fund" in connection with either, so that term will be used as a matter of convenience.

In an earlier Illinois case the court said that a charitable organization was immune because, first, a judgment would destroy or divert the trust funds from the purpose for which they were given and would thwart the donor's intent; second, since the trust funds could not be directly diverted by the agents of the trust funds, they could not be indirectly diverted in this manner. *Parks v. Northwestern University,* 218 Ill. 381, 75 N.E. 991 (1905). Although the question of non-trust funds was not discussed in this case, it apparently held in favor of absolute immunity. A step toward modifying the rule in the *Parks* case was made in *Marabia v. Mary Thompson Hospital,* 309 Ill. 147, 140 N.E. 836 (1923). There the court reversed the lower court's decision and held that there was no immunity from an action, and that the charity should have presented its defense if it wished to contest the action. It appears that the principal case is another step in modifying the rule of absolute immunity for charitable organizations from tort liability.

There has been a wide divergence of holdings and reasoning in recent cases on the subject. Liability is imposed for negligent hiring or retention of agents and negligent selection of equipment. *Medical & Surgical Memorial Hospital v. Cauthorn,* 229 S.W.2d 932 (Tex. Civ. App. 1949). A beneficiary impliedly exempts the benefactor from liability for negligence of servants. *Bardinelli v. Church of All Nations, Methodist Episcopal,* 23 Cal. App.2d 713, 73 P.2d 1264 (1937). Immunity is not destroyed because the charity has liability insurance. *Siidekum v. Animal Rescue League of Pittsburgh,* 353 Pa. 408, 45 A.2d 59 (1946). A judgment can be obtained but only enforced against non-trust property. *O'Connor v. Boulder Colorado Sanitarium Ass'n,* 105 Colo. 259, 96 P.2d 835 (1939). A charity is a government agency and is performing governmental functions. See *Gable v. Salvation Army,* 186 Okla. 687, 690, 100 P.2d 244, 247 (1940). Liability would deprive the public of the benefit of the charitable funds. *Southern Methodist University v. Clayton,* 142 Tex. 179, 176 S.W.2d 749 (1943). Liability

is imposed or immunity is granted depending on whether the injured party is a gratuitous beneficiary, paying beneficiary, invitee, or business visitor. See *Foster v. Roman Catholic Diocese of Vt.*, 116 Vt. 124, 128, 70 A.2d 230, 234 (1950). See also 3 SCOTT, TRUSTS § 402; RESTATEMENT, TRUSTS § 402 (1935).

All of the cases supporting the immunity doctrine are apparently based to some extent on the trust-fund theory. Under this theory the basic purpose for favoring immunity is to prevent depletion of the trust funds. *Gregory v. Salem General Hospital*, 175 Ore. 464, 153 P.2d 837 (1944). It appears that the reasoning in the partial immunity cases defeats the purpose behind the rule. If the purpose is to avoid depletion of the trust funds, there should be absolute immunity. Furthermore, the injured party is just as badly damaged whether he is a beneficiary, employee, or stranger; and the implied waiver theory appears to be nothing more than a fiction invented to support a conclusion.

The only West Virginia case in point held that a plea that defendant was a charitable corporation was not sufficient where it failed to allege reasonable care in employing and retaining its agents. The court gave as its reason for this holding that when administered by incompetent servants, charity, instead of becoming a great boon to humanity, may become a menace. *Roberts v. Ohio Valley General Hospital*, 98 W. Va. 476, 127 S.E. 318, 31 W. VA. L.Q. 299 (1925). Query whether this reason could not be given for imposing the same universal standards of care, and, consequently, the same liability.

The *Roberts* case, *supra*, leaves a number of questions open in West Virginia. If the charity has non-trust funds available, would it make a difference whether the negligence was in the employment and retention of the negligent employee, or in the act of the employee? If the funds are to be protected, is it the judgment that is to be denied, or merely the execution of the judgment? Is the availability of non-trust funds to determine the granting or denial of a judgment? The latter question becomes more important when it is realized that if West Virginia were to follow the principal case a judgment may be obtained when the charity has only trust funds, and execution levied when it acquires non-trust funds.

The rule laid down in the principal case is apparently a modification of the earlier decisions in Illinois. In other cases discussed, liability of the trust fund for torts is being allowed in some limited

instances. This trend of modifying the rule of immunity is actually doing away with the reason behind the rule. Is it not doing away with the purpose of protecting the trust funds to impose liability in any instance? In the interest of justice and public policy there should be tort liability placed on charities. It seems to be the trend of the cases to place liability on these organizations. Examples of cases denying immunity are: *Goldman v. Winkelstein,* 263 App. Div. 958, 32 N.Y.S.2d 949 (2d Dep't 1942); *Humphreys v. San Francisco Area Council, Boy Scouts of America,* 22 Cal.2d 436, 139 P.2d 941 (1943); *Foster v. Roman Catholic Diocese of Vermont,* 116 Vt. 124, 70 A.2d 230 (1950). Since the piecemeal cutting of the immunity rule is doing away with the reason behind the rule, why not do away with the rule completely? England and Canada have repudiated the rule of immunity. *Hillyer v. St. Bartholomew Hospital,* 2 K.B. 820 (1909); *Lavere v. Smith's Falls Hospital,* 35 Ont. L.R. 98 (1915).

In the preservation of the trust funds, are the courts really accomplishing their object—that of preserving the benefit of the charity to the public? Where there is immunity there is likely to be neglect. Would it not be more to the interest of the public and of the donor's intent if the charity were held to a standard of care and efficiency than if the trust funds were protected at the expense of the former? C. M. H.

CONSTITUTIONAL LAW—TREATIES—THE UNITED NATIONS CHARTER AS THE SUPREME LAW OF THE LAND.—Plaintiff, a Japanese alien, brought this action against the State of California to determine whether land bought by him had escheated to the state under the provisions of California's Alien Land Act. Basically, the act provided that any alien who was eligible to become a citizen of the United States could own land in California; but those who were ineligible for citizenship could hold agricultural land only when a treaty so stipulated. No treaty between the United States and Japan had given this right. The superior court found that the property bought by the plaintiff had escheated on the date of the deed. *Held,* on appeal, that the statute was unenforceable because it was contrary to the provisions of the United Nations Charter, which, as a treaty of the United States, became the supreme law of