

1941

## Cemeteries - Unemployment Compensation - Meaning of "Charitable" in Exemption Clause of Statute

Lloyd J. Planert

Follow this and additional works at: <https://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Lloyd J. Planert, *Cemeteries - Unemployment Compensation - Meaning of "Charitable" in Exemption Clause of Statute*, 25 Marq. L. Rev. 95 (1941).

Available at: <https://scholarship.law.marquette.edu/mulr/vol25/iss2/6>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized editor of Marquette Law Scholarly Commons. For more information, please contact [elana.olson@marquette.edu](mailto:elana.olson@marquette.edu).

## RECENT DECISIONS

**Cemeteries—Unemployment Compensation—Meaning of “Charitable” in Exemption Clause of Statute.**—A cemetery corporation brought action against the tax collector to recover money paid under protest to the State unemployment compensation fund. The cemetery corporation had no capital stock, was a non-profit making corporation, had no provisions for dividends or profits, its officers received no compensation, it was required by charter to hold three-fourths of the annual residue solely for the preservation, improvement, and enlargement of the cemetery and to give the remaining one-fourth to a horticultural society for the advancement of horticulture. The corporation claimed exemption from assessment under the Unemployment Compensation Act because of the latter's provision excepting “service performed in the employ of a corporation organized exclusively for a religious, charitable, literary or educational purpose, or for any combination of such purposes, no part of the net earnings of which enures to the benefit of any private shareholder or individual.” MASS. STAT. (1937) C. 151A, § 1 (f) (7). *Held*, the cemetery was not exempt because it was not a charitable corporation. *Proprietors of Cemetery of Mount Auburn v. Fuchs*, 25 N.E. (2d) 759 (Mass. 1940).

Where a cemetery corporation applied its income only to charitable uses but was not compelled to do so by its charter, it was held not a charitable corporation. *Donnelly v. Boston Catholic Cemetery Assoc.*, 146 Mass. 163, 15 N.E. 505 (1888). Even where the charter of the corporation provided that its members and officers should receive no dividends or compensation, but where the proceeds were applied to the care of individual lots, it was held not a charitable corporation. *Town of Milford v. Commissioners of Worcester County*, 213 Mass. 162, 100 N.E. 60 (1912).

But it has been held that a bequest for the maintenance of a cemetery is a charitable bequest. *In re Mawhinney's Will*, 261 N.Y. Supp. 334, 146 Misc. 30 (1932); *In re Braasch's Will*, 200 N.Y. Supp. 404, 206 App. Div. 96 (1923); *McElwain v. Allen*, 241 Mass. 112, 134 N.E. 620 (1922). New Jersey has held a cemetery corporation a charitable trust since otherwise the legislature would not have authorized it to receive general gifts in perpetuity for its general maintenance as a cemetery. *Atlas Fence Co. v. West Ridgeland Cemetery*, 110 N.J. Eq. 580, 160 Atl. 688 (1932). In a suit by an unpaid vendor of real property against vendee cemetery corporation for an injunction and appointment of a receiver the question arose whether the cemetery was a charitable corporation so as to bring the controversy within the jurisdiction of a court of equity. It was held that a trust for the establishment and maintenance of a public burying ground is a “charitable use.” *Bliss v. Linden Cemetery Assoc.*, 81 N.J. Eq. 394, 87 Atl. 224 (1913). Iowa has held likewise. *Meecker v. Lawrence*, 203 Iowa 409, 212 N.W. 688 (1927). The Tennessee Supreme Court has held that a fund retained for the improvement of a cemetery in general is retained for a charitable purpose. *Forest Hill Cemetery Co. v. Creath*, 127 Tenn. 686, 157 S.W. 412 (1913).

A charitable corporation has been defined as a corporation which 1) has no capital stock, 2) is non-profit making, 3) has no provisions for dividends or profits, 4) derives its funds mainly from public and private charity, and 5) holds them in trust for charitable objects, purposes or uses. *People ex rel. Hellyer, County Collector v. Morton*, 25 N.E. (2d) 504 (Ill. 1940); *Farm and Home Savings and Loan Assoc. of Mo. v. Armstrong*, 337 Mo. 349, 85 S.W. (2d) 461 (1935); FLETCHER, ENCYCLOPEDIA ON CORPORATIONS, Permanent Ed. Vol. I, sec. 110, p. 400; *Ettringer v. Trustees of Randolph-Macomb College*, 31 F. (2d) 869

(Va. 1929). Charitable trusts include among other gifts "all gifts for the public convenience, benefit, utility, or ornament, in whatever manner the donors desire to have them applied." *Novice v. Schnell*, 101 N.J. Eq. 252, 137 Atl. 582, 52 A.L.R. 965 (1927). If the purpose to be attained is personal, private or selfish, it is not a charitable trust. If the purpose accomplished is that of public usefulness unstained by personal, private or selfish considerations, it is a charitable trust. *In re Kennedy's Estate*, 269 N.Y. Supp. 136, 220 App. Div. 20 (1934).

The cemetery in the principal case seems to fall within the definition of a charitable corporation although it derives its funds from the sale of lots rather than from public and private charity. A small charge for personal benefits extended does not deprive a corporation of its charitable character. *Farm and Home Savings and Loan Assoc. of Mo. v. Armstrong*, *supra*; *People ex rel Heller, County Collector v. Morton*, *supra*. The cemetery in the principal case had no capital stock, was non-profit making, had no provisions for dividends or profits, and held its funds in trust for its charitable objects, purposes or uses. Where a cemetery holds its funds for the improvement of the cemetery in general, it holds them for a charitable purpose. *In re Mawhinney's Will*, *supra*.

However, both the Massachusetts and the Wisconsin statutes, when they have exempted cemeteries from taxation, have exempted them not as charitable corporations but in addition to and in a category separate from charitable corporations. Accordingly both the Massachusetts and the Wisconsin courts construe the statute which exempts only charitable corporations as not being broad enough to include a cemetery corporation.

Wisconsin holds with the principal case. Although a cemetery is open to the public, although the members of the corporation realize no pecuniary benefits therefrom, although the officers receive no compensation and although the cemetery hold its funds in trust for the improvement of the cemetery in general, it is not a charitable corporation within the meaning of WIS. STAT. (1939) Sec. 108.02 (5) (g) 7 . . . the exemption provision of the Wisconsin Unemployment Compensation Act. A cemetery corporation, in order to be exempt, must be expressly exempted. *Industrial Commission v. Woodlawn Cemetery Assoc.*, 232 Wis. 527, 287 N.W. 750 (1939). The reasoning in the Wisconsin case is as follows: The exemption provision of the Unemployment Compensation Act was made to conform to that in the Federal Social Security Act. The Federal Social Security Act adopted this exemption feature from the federal income tax law. The federal income tax law does not exempt cemetery corporations as charitable corporations or corporations organized for charitable purposes. It exempts them only by an exemption clause applicable especially to cemetery corporations. *Industrial Commission v. Woodlawn Cemetery Assoc.*, *supra*. The Wisconsin court emphasized an additional point not treated by the Massachusetts court in the principal case. It held that cemeteries cannot be exempt from contribution to the unemployment compensation fund under a statute exempting cemeteries from taxation. WIS. STAT. (1939) Sec. 70.11 (8). The contribution required by the Unemployment Compensation Act are not "taxes" within the meaning of such a statute. The Unemployment Compensation Act is merely an exercise of the police power, and the contributions enforced implement and make effective the exercise of that power. *Industrial Commission v. Woodlawn Cemetery Assoc.*, *supra*.

The primary purpose of the Unemployment Compensation Act is not to provide taxes but rather to provide security for employees. This is probably the basic reason why the Massachusetts and Wisconsin courts refused to exempt cemetery corporations where the statutes did not expressly so provide. Both

jurisdictions, as exemplified in *McElwain v. Allen*, 241 Mass. 112, 134 N.E. 620 (1922), would probably hold a cemetery a charitable corporation for the purpose of receiving a charitable gift, but when such a decision would deprive employees of benefits explicitly granted to them by an exercise of the police power, these same jurisdictions will hold that a cemetery is not a charitable corporation.

LLOYD J. PLANERT.

---

**Criminal Law—Crimes Committed by or Against Indians On and Off Reservations in the State—Jurisdiction of State Court.**—The defendant, a Chippewa Indian listed on the Indian rolls of the Lac Du Flambeau band of Lake Superior Indians in Wisconsin, was charged with wrongfully having in his possession parts of a doe deer during the closed season in violation of the state game laws. By stipulation it was agreed that the crime was committed on lands located adjacent to an Indian reservation but within territory ceded by the Indians to the United States under various treaties. The defendant admitted his guilt but objected to the jurisdiction of the circuit court. The circuit court adjudged him guilty, providing it had jurisdiction. *Held*, upon certified question, the state court has jurisdiction, notwithstanding the reservation of hunting rights contained in the treaties. *State v. La Barge*, 234 Wis. 440, 291 N.W. 299 (1940).

The court rested its disposition of the case upon *State v. Morrin*, 136 Wis. 552, 117 N.W. 1006 (1908); *State v. Johnson*, 212 Wis. 301, 249 N.W. 284 (1933); *Ward v. Race Horse*, 163 U.S. 504, 16 Sup. Ct. 1076, 41 L.Ed. 244 (1896), and *People ex rel. Kennedy v. Becker*, 241 U.S. 556, 36 Sup. Ct. 705, 60 L.Ed. 1166 (1916). The gist of these cases is that Congress has the power to abrogate the provisions of an Indian Treaty and that when an act of Congress admits a state into the Union, and declares without reservation that such state shall have all the powers of the other states of the Union, this constitutes an abrogation of any previous treaty stipulation with the Indians within the territory of such state respecting their right to fish and hunt. To exempt such Indians from state laws regulating fishing and hunting within the borders of a state after its admission into the Union would deprive the state of its sovereign power to regulate the rights of hunting and fishing, and would deny to such state admission into the Union on an equal footing with the original states, upon the ground that a treaty with the national government giving the right to hunt and fish within territory which subsequently is embraced within the limits of a state is a privilege in conflict with the act of admitting the state into the Union on an equality with the other states and is repealed thereby.

For many years the policy of the United States was to give the Indians themselves jurisdiction of crimes committed by one Indian against another of the same tribe, and accordingly it was uniformly held that the United States courts had no jurisdiction of such crimes. *United States v. Rogers*, 4 How. 567, 11 L.Ed. 1105 (1846); *Nofire v. United States*, 164 U.S. 657, 17 Sup. Ct. 212, 41 L.Ed. 588 (1897). Neither the federal or state courts had jurisdiction of these offenses, such offenses being punishable solely by the laws of the tribe. *Ex parte Kan-gi-shun-ca*, 109 U.S. 556, 3 Sup. Ct. 396, 27 L.Ed. 1030 (1883); Act March 3, 1885 (23 St. at L. 385); Pen. Code § 328. This original policy was changed in 1885 when Congress conferred jurisdiction on the federal courts of the more serious crimes committed by an Indian against another Indian or other person within the limits of an Indian reservation located within a state, and on territorial courts when the reservation was located within the limits of a territory.