Municipal Corporations - Governmental and Proprietary Functions - Temporary Employee Injured by City Truck

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ment reversed; there was a sufficient delivery of the "indicia of ownership," together with a clear statement of gift, to complete a valid gift *causa mortis*. *In re Schreihart's Estate*, (Wis. 1936) 270 N.W. 71.

The case opens discussion of a problem considerably in conflict: does delivery of a bank check constitute a transfer to the payee of title to the funds to which it is subject, sufficient to sustain a gift *causa mortis*? It has been held that a check is not sufficient in any way to constitute a gift *causa mortis*. *Dickerson v. Snyder*, 209 Ky. 212, 272 S.W. 384 (1925). Many courts hold contrary to the *Dickerson* case, but there are various grounds of distinction in these courts as to what additional elements must be present to make the check valid as a gift *causa mortis*. In *Varley v. Sims*, 100 Minn. 331, 111 N.W. 269 (1907), the Minnesota Supreme Court held that a check as a gift *causa mortis* is sufficient as long as it covers the entire amount of the deposit. See also *First National Bank v. O'Bryne*, 177 Ill. App. 473 (1913) and *Aubrey v. O'Bryne*, 188 Ill. App. 601 (1914). It has been held that when the check is not drawn for the exact amount in the bank account it is not an executed gift of money where actual payment does not precede the death of the drawer. *In re Millers Estate*, 320 Pa. 150, 182 Atl. 388 (1936). Contrarily, the Washington Supreme Court has decided that a check delivered by the drawer to the payee in fear of impending death as a gift *causa mortis* is enforceable although the check did not reach the bank until after the donor's death and although it did not include all of the donor's deposit. *Phinney v. State*, 36 Wash. 236, 78 Pac. 927, 68 L.R.A. 119 (1904). The court in *Carter v. Greenway*, 152 Ark. 339, 238 S.W. 65 (1922), does not distinguish between a check for part of the fund or for the whole of it, but simply holds that a gift *causa mortis* by check is valid. Some courts decide that such a check is enforceable as a gift whether honored before or after the death of the drawer. *Phinney v. State*, supra; *Carter v. Greenway*, supra. Others decide that a check is valid as a gift *causa mortis* only if accepted by the bank before the death of the donor. *In re Miller's Estate*, supra; see also *In re Knapp's Estate*, 197 Iowa 166, 197 N.W. 22 (1924); *Weiss v. Fenwick*, 111 N. J. Eq. 385 162 Atl. 609 (1932); *In re Ehler's Estate*, 132 Misc. Rep. 910, 231 N.Y. Supp. 16 (1928).

It is difficult to decide from the facts of the principal case how the Wisconsin court would decide each of the questions discussed.

PAUL G. NOELKE.

MUNICIPAL CORPORATIONS—GOVERNMENTAL AND PROPRIETARY FUNCTIONS—TEMPORARY EMPLOYEE INJURED BY CITY TRUCK.—The plaintiff, who was unemployed, applied to the board of public welfare of the defendant city for relief. He was told to report at the city farm on a day stated. He did so, and with others was driven to Field Park, which was owned by the city, in an automobile truck registered in the name of the board of public welfare and operated by one of its employees. He worked all day carrying wood from the park to a road. At the close of the day, he and other men, at the direction of the driver, climbed upon the rear of the truck, on which was a load of wood tied with a rope. The driver started down hill and drove into deep frozen ruts. The wood shifted, striking the plaintiff, throwing him off the truck, and causing severe injuries. The plaintiff contended that because some of the wood collected at the park was used for heating shops maintained at the almshouse and farm, at the time of the accident, the driver was engaged and the truck was being used not only in the performance of a public duty but was an enterprise partly commercial in character and productive of profit or corporate benefit to the
defendant city. Trial court judge found for the defendant. On appeal, held, order affirmed; where comparatively insignificant income to city incidentally results from performance by public officers of a public duty, the dominating public character of the undertaking is not thereby changed, and the city does not thereby become liable for negligence of officers or their employees in performance of such duty. Orlando v. City of Brockton, (Mass. 1936), 3 N.E. (2d) 794.

In discussing the liability of a municipality for the torts committed by its agents, the courts distinguish between governmental and proprietary functions of the city. The governmental duties in which there is no civil liability for negligent performance are: the police functions, Engel v. City of Milwaukee, 158 Wis. 480, 149 N.W. 141 (1914); the care and preservation of public health, Kuelsh v. City of Milwaukee, 92 Wis. 263, 65 N.W. 1030 (1896); public education, Folk v. Milwaukee, 108 Wis. 359, 84 N.W. 420 (1900). These are duties which the state itself owes to the public, and which it delegates for administrative convenience. At the other extreme there is universal assent in imposing responsibility upon the municipal corporation for torts committed in the carrying on of its commercial enterprises or public utilities for compensation. It was held in Piper v. City of Madison, 140 Wis. 311, 122 N.W. 730 (1909), that where the city voluntarily maintained a system of waterworks and sold water for the accommodation of its citizens, it was acting in its private character and was liable in damages for the negligence of its agents and servants in the conduct of such business.

Between these two classes of functions, there are cases intermediate, and here the authorities are found to be irreconcilably conflicting. These partake of the governmental and corporate elements. It was held in Wasilevitsky v. City of Chicago, 280 Ill. App. 531 (1935), that the city, in the removal of garbage and operation of truck and trailers for that purpose, was not engaged in a governmental function, and was therefore not exempt from liability for the negligence of its employees. The holding of a state fair under the management of the Wisconsin State Board of Agriculture is the carrying on of a governmental function of the state, and since the board derives no pecuniary benefit therefrom, no private or proprietary interest is involved. Morrison v. Fisher, 160 Wis. 621, 152 N.W. 475 (1915). Fire departments are also usually governmental in nature, but in Mulcairns v. Janesville, 67 Wis. 24, 29 N.W. 565 (1886), recovery was permitted where the plaintiff was injured while the building of a cistern was in progress. In Holland v. City of Platteville, 101 Wis. 94, 76 N.W. 1119 (1898), a cemetery was said to be held by the city in its private capacity.

The Wisconsin legislature, becoming aware of the fact that there was no recourse for injuries suffered by anyone when negligently run over by a city owned automobile against such city, added Section 66.095 to the statutes in 1929. This section gives to the person injured the right to file a claim against the city. And in Schumacher v. Milwaukee, 209 Wis. 43, 243 N.W. 756 (1932), the court, construing that statute, declared that the clear legislative intent and purpose was to create a liability on the part of the city in favor of those who were injured by the negligent operation of vehicles owned and operated by the city in the discharge of a governmental function, as well as in its proprietary capacity.

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