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LIABILITY OF CHARITABLE ASSOCIATIONS FOR
NEGLIGENCE OF THEIR SERVANTS, AND THE
EFFECT OF THE MOTIVE OF A FOUNDER.

The commentary, or criticism, on the decision of the Supreme Court of Pennsylvania in *Boyd v. Insurance Patrol*, 28 AMERICAN LAW REGISTER 669, deserves notice, and opens interesting subjects. It consists of two parts. The first is addressed to the legal meaning of *charity*, that is, what constitutes a charity in the legal aspect, and it seems to be supposed that if the motive of the giver is selfish, the subject ceases to be a charity. The basis of this, the only pretence put forward, I believe, is a brilliant passage in Mr. Binney's argument in the Girard Will Case, assumed to be a legal definition, of mathematical accuracy, of charity.

It is a capital illustration of the pestilential habit of confounding reasons for a decision with the point decided. In place of reading the facts and the judgment and drawing conclusions, we read the essay justifying the conclusion, and call *that* the decision.

The fallacy ought to have been made patent by the inquiry, Did anyone ever set up, in avoidance of a gift by deed or will, that the motive of the donor was tainted, in those cases where the gift was certainly void if the object was not a charity? Did any Chancellor, or anyone else, ever direct an inquiry into that fact? Is not this the legal test of materiality?

Let us look however to illustrations: they are better adapted to this purpose than any verbal discussion, for this really seems to do nothing but mislead.

Take a fire engine for the use of a village. Does anyone doubt this is a charity? If authority can be wanted to support this assertion, we have it in the case of Sarah Zane's Will, [*Magill v. Brown* (1833), Brightley's (Pa.) Rep. 346, in U. S. Circ. Ct., E. Dist. Pa.] the most remarkable decision ever made in Pennsylvania. Not because it decided this point of law, but because of the trouble taken to demonstrate that such a devise was valid, though there was no person appointed to carry it out and it was impossible to exist without such a person, which involves the very essence of the most important peculiarity of the law of charitable uses.

Suppose this engine company were founded and maintained by subscription of the villagers? Does it require reasoning to show that the object, or subject, that is, the engine and hose and the house to keep them in, is not changed in its legal character by proof of the sources from which the property came into being? It is difficult to believe that anyone can discern a distinction in respect of the qualities or incidents of property, between that which is bought by an executor in pursuance of a testamentary direction, and what is bought with gifts by living men. I mean the incidents of the property, after it is bought, paid for and vested in trustees. But, in *Boyd v. Patrol*, the Court below (the majority, I mean) evidently thought that the motive for the gift, changed the character of the property when it was bought. And if it could be shown that the motive of the contributors was self-protection, the property that was to be used for that purpose was not a charitable use. That is, a school, a church, a hospital, an almshouse, endowed and maintained by gifts or contributions, does not become a charity, if the motives of the givers were selfish or vicious; or ceases to be a charity when the motives of the founders can be ascertained to have been selfish.

Singular specimen of reasoning certainly, if the process can deserve that epithet. One would have supposed that the pertinent question that presented itself would be, If these are not charities, because of this vice in their origin, in whom is the

title vested? When I have ascertained there is a trustee, I must also find a *cestui que* trust, or what follows? Can there be a trustee and no *cestui que* trust, and if there is no charity, who is the beneficial owner of the hospital?

“ We have had recently in Philadelphia, a memorable instance of the misapprehension that exists on the subject of property dedicated to charitable uses. *Attorney General v. Pauline Home*, CP. No. 2, (December 2, 1889). A charity was founded to remove children from the evils of the almshouses. The legislature, by prohibiting the maintenance of children in almshouses, made the particular form of the charity useless. The corporation dissolved and the question was, what was to be done with the proceeds of the property, a lot of ground intended for an asylum? The donors were shocked to find they had nothing to do with this. They were not owners and had no rights, except to see that the property was properly applied.

It is surprising how incapable many not unintelligent persons are of comprehending, that, after donation perfected, they have no more right in the property than a seller after he has been paid; that their right is that of a founder, and that right is confined to the enforcement of the trust.

To the lawyer, this is the explanation of the somewhat startling proposition, that in charities there is no resulting trust or use. The donor does not create a base fee by the gift. The objects of charity cannot fail. The poor ye have always with you.

The whole mystery of this branch of the law, lies just here. It was the recognition, by courts of equity, of the capacity to give ownership to a class such as the poor, the blind, and the like, that constitutes the whole of that anomaly, the law of charitable uses, one of the most remarkable specimens of judicial legislation that we possess, if only we can read the statutes, which it is evidently very difficult to do, for they consist of the judgments of chancellors.

Recurring to the principal case; if the Court had looked at the judgment of their predecessor, Judge KING, in *Thomas v. Ellmaker* 1 Pars. Sel. Eq. Ca. (Pa.) 98, they would have seen that this definition was unknown to him. For no one could possibly be ignorant that the foundation there, came from subscriptions, and

no one can question that the necessity of a Fire Department to the safety of the contributors' property, was the motive for contributing.

It was a great compliment to Mr. Binney that a brilliant rhetorical sentence of his argument, was treated as a complete definition that excluded all other elements: but one cannot say as much for those who rested on such a foundation. It is the absence of selfishness, no doubt, that is necessary to a charity, but only in this, that no particular person can have private property in the thing, or derive profit, otherwise than as one of the public, until selected as the beneficiary. For such an interest, when vested in third persons, is fatal to a charity, whether they be children, or strangers to the giver.

The selfish element is fatal, if connected with the enjoyment, for the property then becomes private property and ceases to be charitable. But in the creation of a charity, the motive of the founder has nothing to do with the question, any more than it has to do with the incidents of any other estate, after it is created.

What is more to the purpose would be to look to the point before the Court in the Girard Will Case, and note that the point of Mr. Binney's sentence was not in the case before the Court. Certain property had been devised to the City of Philadelphia in trust for certain purposes. Was the devise void? The only objection, bearing upon the present question, was, that being a charity it was void for want of a trustee, the corporation being incompetent to act. The quoted sentence, therefore, had nothing to do with the case. The real point, and it was the only one about which a difficulty existed, was, that it is quite immaterial whether there was a trustee or not, for equity would always supply that deficiency. The reason why the argument took such a wide scope, was, that two of the most eminent of the American Courts, misled by a *dictum* of Lord LOUGHBOROUGH, had fallen into the error of supposing that this jurisdiction to thus aid a trust, if it was a charitable one, depended on the statute of Elizabeth, and this statute was not in force in Pennsylvania. Judge STORY had committed himself to this view, by his note printed in Wheaton's Reports, and the Chief Justice had argued one of the cases I have mentioned. The point was, therefore, a most perilous one, requir-

ing two of the most influential members of the Court to acknowledge an error, though at the present time and with our lights, it is one most difficult to conceive to have been a possible one. They, however, did not hesitate to do so.

But as bearing on the present subject it will be observed, Mr. Girard's motives were not put in issue, so that the motives of the giver had nothing to do with the case; the plaintiff's case conceded the gift was a charity, it was the basis of their argument.

It is not a little surprising that so singular a view of the law of charity should have been entertained in Pennsylvania, when we have a very conspicuous illustration of the precise reverse, being the rule in the case of the *Philadelphia Library* [*Donoghue's Appeal* (1876), 86 Pa. 306], where the contributions are assessments on stockholders, who thereby pay for the use of the books. The test put there, by counsel, was: Could the stockholders elect to sell out and divide the accumulations intended for the public posterity? The converse is found in *Babb v. Reed* (1835), 5 Rawle (Pa.) 151—and the definition of SERGEANT, J., in that case, avoids everything like what Mr. Binney's definition assumed. No one will dispute its superiority, for accuracy. Its positive and negative are almost perfect. *Mutual benevolence* is not charity; and why? Its *mutuality* is fatal, but it is in the receiver and not in the giver.

But there is something deeper still that deserves notice; its consequences seem to have been overlooked. Charity has introduced a new law of property: it, and it only, can validate a gift when there is no person that has or ever can have any beneficial interest. The importance of this is obvious.

In fact, it is the purpose or object to which the property is to be applied that is the test. Gifts *for any legal public, or general purpose*, as Sir JOHN LEACH said, are charities, provided they do not come from a duty imposed on the donor. Hence taxes are not charitable funds, because compulsory, but money to be used as taxes, and in reduction of the burdens is a charity.

II. RESPONDEAT SUPERIOR.

The next branch of criticism deserves more consideration, and the subject is extremely important and interesting.

The apparent and possibly real differences of opinion in the men whose judgments are cited, certainly deserve attention. One, the Rhode Island Case [*Glavin v. R. I. Hospital*, 1879, 12 R. I. 411], goes to the length of the judgment of ALLISON, P. J. [in the court below in the Pennsylvania Case], which was reversed. Nothing approaching to this is to be found in the English Cases. The nearest thing to it is found in the dicta of Lord WESTBURY in *Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 H. L. 126. Anything more misleading I cannot imagine, than putting, as he there did as an analogy, the liability of trust funds to be lost by the act of the trustee, and the liability of the trust funds for the act of the trustee. In the former, the loss only occurs *because the trust was not known*. Had there been notice of the trust, the loss could not have been incurred. How in the world does this tend to show liability of the trust funds as such for the act of the trustee? The inference is directly the other way. Certainly such a slip as this is very unusual over there. The fact that Lord WENSLEYDALE assented to the liability solely on the ground of precedent, and the candid statement of M. J. BRETT of the conflict of authorities or dicta deserving consideration, shows that the question is extremely difficult and delicate, but I doubt if it ever occurred to any English lawyer to extend the doctrine of *respondeat superior* as the Rhode Island Case, and the case in our Common Pleas did. They shock common sense.

It has considerable bearing on this question, which is, when does the doctrine apply, and above all when is it that trust property is legally made liable to pay the damages for the wrongful act of the trustee or his servant, when the property belongs neither to the wrongdoer nor his master, but to a class that have not done the wrong nor employed the person that did it? I say it has a bearing on this question if we start with the fact that *Respondeat Superior*, as we understand it, is probably a piece of local English law.

I do not propose to investigate this question and therefore will do no more than point to three things I have stumbled on that are sufficient to prove to any mind this to be the fact.

(1.) In Broom's Maxims, there is not under this head, an

allusion to the Roman law, or to the origin of the rule in that law.

(2.) In a note of Story on Agency (§458) there is extracted a bit of a learned essay, showing where and to what extent the maxim was introduced into the Roman law, and that it was confined to cases where the agent was performing the duty contractually assumed by the principal, and that the rule as we apply it was unknown to Roman lawyers.

(3.) No such law is known in Spain. *The Moxham* (1876), 1 Pro. Div. 110, and as that is a medieval country, probably there never has been an innovation in the law from the time of Julius Cæsar.

To hold one liable for the neglect or carelessness of another when I did not direct or intend the act, requires a considerable process of reasoning to justify in any case. But to make me liable because a man I have paid to do an act of kindness to an unfortunate, hurts somebody by his carelessness, at first blush seems monstrous, and I think must always seem so to minds not perverted by mere scraps of legal phraseology.

Let us look at some illustrations. If the good Samaritan, after binding up the wounds and pouring in the oil and the wine, and lodging the wounded wayfarer, had been sued by that ungrateful man, because the innkeeper's cook dropped some scalding water on him, we would have had the parallel to the application of *respondeat superior* by the Common Pleas, and for declining to accept this doctrine the Chief Justice is taken to task by the commentator. In fact, the Court of Common Pleas went much further; it held the Samaritan liable for the act of the innkeeper's cook, not only to the wayfarer, but to casual passers, if the cook was attending to the wants of the wayfarer, and therefore was in the employ of the Samaritan. No Courts have ever carried the doctrine further than those of England, but such nonsense as this, we may depend upon it, they were never guilty of. It is wise to consider common sense before we launch out into the realms of legal reasoning.

To hold me liable for the acts of a man I have hired to act as a nurse for a destitute sick person, to make me liable for the defect of a carriage I hire to carry a sick person home, or

to a hospital, or to give him an airing, is, I think, perfectly absurd. It really confounds the relation; the contract is between the nurse or the driver, and the sick person, not between me and him. That I pay for the service, has nothing to do with the subject. I am not the employer, but the paymaster, and if there is a relation of employer on my part, it is that of voluntary bailee, which requires something like fraud, that is, intentional wrong, to create a liability. For the employment is only in the selection of an agent. What possible distinction is there between such a person, and one who volunteers to pay the tolls, or the passage money for a poor person? Does he thereby become the carrier or owner of or liable for defects in the bridge?

In the English cases that raised a doubt, together with some reasoning given in other cases, the defendants were engaged in commercial enterprises where the plaintiff paid for the use of the works, and the defendants received the profits. It is very difficult for me at least to see why the fact that the funds were applicable to another purpose, had anything to do with the case, further than as an argument that as the parties acted under a statute, this diversion of the fund created an implication of exemption. If it had been the case of a trustee acting under a settlement, no one would have paused to enquire whether the trust property could be applied to recoup the damages incurred in executing his duties. The Court could not bring themselves to say, that in such things the employer is not liable, and they held that the corporation and not its officers are the proper persons to look to: *Mersey Docks Trustees v. Gibbs* (1866), L. R. 1 E. and Ir. Appeal. pp. 107, 118, 124, 126.

In these cases, the profits were applicable to the reduction of the charges, and if we can rid ourselves of *forms*, we will see that the ultimate beneficiaries were a mere trading company for a profit, and the machinery of corporation, or trustees, was no more than a partnership for this purpose.

In the *Herriot School* (1846), 12 Cl. & F. 507, the notion of making the charity estate responsible for the wrongful act of a manager, would be merely ludicrous, were it not for the hardship on the manager that must result from exempting the

fund, where in all honesty and sincerity, he makes a mistake. But how is it with trustees generally? Did any one ever hear of their defending for a wrong on the ground that the trust estate and not they were liable, or asking to be recouped out of the trust estate for damages they had been compelled to pay for a breach of duty confessedly not in accordance with the trust?

But the particular point is, where the master is manager of a charity, does the person employed by him in that duty, occupy the relation of servant, so that the servant is not, and the master is liable for the carelessness of the servant? The remarks I have made as to the origin of this most artificial of rules, are here very pertinent.

If the natural rule is, as I have endeavored to show that it is, viz.: that no one is answerable for the conduct of another, unless he directed it, but each man is liable for his own sins and he only (we have the Hebrew prophet's authority for this rule, in the loftiest conception of moral responsibility), is it unreasonable to make the same exception in our artificial rule known as that of *respondet superior*, when the master is a charity or the managers of a charity, and to hold that here the same rule shall apply as is applied, when the employer is a government or a servant of a government or of a municipality when acting for the government and not as a private person.

It should then be borne in mind, that the owners of a charity are the beneficiaries, the class intended to be benefited. The legal title is a corporation or in trustees, but the trust is known, and to charge the funds with a dereliction of the trustees is not less absurd than it would be to charge an infant's property with the misconduct of a trustee in the marriage settlement under which the infant claimed. The results such as those of the Rhode Island Case, are possible only where the corporation is supposed to be the equitable as well as legal owner of the property. Test that by a dissolution of the corporation and the rule for distributing the assets. This will show who is the legal owner of the property.

Now the first thing that may be observed, is the rule as to public servants. No one doubts, I suppose, the liability of a man for his own acts, and no one would demand that the

public should compensate for injuries inflicted by its servants. We are of course dealing with acts that were not commanded. The remarkable fact is that it was once attempted to make the intermediate agent liable, because his master, being the government, was not liable, at least it so strikes my mind. But I am probably wrong, for such a palpable objection, if it exists, would not have been overlooked by the men who had to deal with *Whitefield v. Despenser* (1778), 2 Cowp. 754.

Then we come to municipalities, and it cannot be disputed that there is a clear division between omissions of duties imposed on the municipality, and misconduct in performing duties imposed on the servant or person employed by the municipalities. Possibly the true distinction may be between those duties which are public duties, such as police and the like, and those that differ not from duties imposed on private persons, such as repair of roads: *Elliott v. The City* (1874), 75 Pa. 347, and *Freeman v. The City* (1879) [Common Pleas, No. 4, of Philadelphia], 7 W. N. C. (Pa.) 45 are illustrations, and in the latter this distinction is noticed. The famous case of *Whitefield v. Despenser* (1778), 2 Cowp. 754, shows that the distinction between public servants, such as the Post Master General, and the Trustees of a public work, such as Docks, where no one but those using them derive a profit, must rest on something like that I have alluded to, viz. the distinction between ordinary commercial operations, though without profit directly to the undertakers, and those performing a public duty.

All these show that the rule is artificial; it is a creature of the courts. No one would ever waste time to discuss the propriety of the rule in the ordinary run of human affairs. But if the Post Master is not liable for the negligence of his servants, why should a trustee for a charity which is a public duty, quite as much as that of the Post Master?

What are all these rules made for? The general good only. The contributors and managers of charities are always volunteers. Nothing of private profit enters into the arrangement. Natural justice demands no more than that the person causing the injury should answer. To load persons willing to serve the public with this responsibility, is certainly not for the public good. And if the employer is not liable for the

selection and conduct of his servants, it is really absurd to fasten the liability on property they are required to administer, where there is not an instance in which a trustee can lawfully bind his estate except by a power.

If we desire to bring distinctly to the mind the steps that are necessary to fasten upon charitable estates a liability for acts of servants under the rule of *respondet superior*, we must first define that rule, to ascertain what sort of *superior* it is that is liable and when and why.

It is either because the servant is *alter ego*, or because of the duty to select a proper person to be the servant. And we are met by the well-known exception that if the employer does not retain the power of directing the servant, the rule does not apply, as when we employ a builder to put up a house. That is, the relation of employer and builder does not admit the rule to be applied. This would at once dispose of the Rhode Island case.

The next step is, that the real owners are the beneficiaries, all others are trustees or agents, and the beneficiaries do not select the servant. They have no voice in the matter. How then do the parties administering the charity become entitled to charge the fund for damages caused by their own misconduct? For it is only with misconduct that we are dealing. We are not dealing with conduct that is in performance of the duty of administration.

It is quite clear, I suppose, that no one can charge the property of another without a power is conferred to do so. And it is equally clear that the beneficiaries, the equitable owners, do not give any such power and were not asked to do so.

It is also clear that while all trustees are entitled to be indemnified out of the trust estate, it is only for legitimate expenditure. I doubt if any one ever heard that a trustee was allowed credit for damages recovered for misconduct even when doing anything that was his duty to the estate to do, still less for damages incurred when doing what he ought not to do.

If the trustees of a charity differ in this respect from other trustees and are entitled to apply the funds in their own relief it must arise from an authority implied in the appointment or

the creation of the trust, that they may so apply the funds. There is nothing absurd in this, any more than in an agent stipulating for indemnity from a principal. But the action cannot lie against the principal, for you cannot sue the blind or the sick as a class, so the fund cannot be sued. A defendant must be a person, not a thing, except when the proceeding is *in rem*. Hence, the only possible claim against the fund, is by the wrongdoer for indemnity.

Is it then part of the implied terms of charitable uses that the administrators may be indemnified for their unlawful acts? Or, to go a step further, for the unlawful acts of their servants?

As far as I know, until the Rhode Island Case, it never entered into the mind of man to conceive such an anomaly in the law of trusts. And it seems to me impossible to assert as a rule of law that while that class of *cestui que* trusts and their property, under a marriage settlement, are not liable, though they are quite capable of self-protection, the *cestui que* trusts and their property who can have no status in court are liable for the unlawful acts of agents appointed to manage the property. This is what was decided in the Rhode Island Case, and by the Common Pleas of Philadelphia. The community is to be congratulated on the decision of our own Court on this question, as it has withdrawn one class of cases from the burden of a rule that might very well put an end to some of the best institutions we enjoy. Limit the liability for negligence to the person really in fault and charities are safe, a general law to that effect is not to be hoped for, for what would become of the bar if such a rule was adopted by the legislature, but surely we do not need to extend this rule to subject to liability property to which the wrongdoer cannot lawfully apply it.

RICHARD C. McMURTRIE.

NOTE.—The facts of the Patrol case were stated upon page 670 of THE AMERICAN LAW REGISTER for November, 1889 (Vol. 28, N. S.), and they finally developed, upon the second hearing in the Supreme Court of Pennsylvania (*Boyd v. Insurance Patrol*, 1889, 120 Pa. 624) the two interesting questions discussed by Mr. Gest and Mr. McMurtie. In brief, an action was brought against the Fire Insurance Patrol of Philadelphia, to recover damages for the death of the plaintiff's husband, alleged to have been caused by the negligence of the defendant's servants while engaged in their chartered employment. On the trial, the plaintiffs offered the defendants' charter in evidence, which showed that the latter was

organized "to protect and save life and property, in or contiguous to burning buildings, and to remove and take charge of such property, or any part thereof, when necessary," that it was armed with the necessary police powers to carry out these objects, and that there was no provision for creating a capital stock, or for acquiring any emoluments, or declaring dividends. The Court, BIDDLE J., entered a non-suit, on the ground that the charter showed the defendant to be a public charitable corporation, and therefore not liable for the negligent acts of its servants, no negligence having been shown by the corporation in its selection of them. This ruling was reversed by the Supreme Court, on the ground that the charter was not sufficient evidence of the character of the defendant corporation, but that it must affirmatively show, to escape liability, that its practical working was strictly in accordance with the terms of the charter. On the second trial it was shown that the Patrol protected the property of insured and uninsured alike, without any discrimination; that it was supported solely by voluntary contributions donated by a number of fire insurance companies in Philadelphia, without regard to the amount of property saved to each company; that there was no capital, means of making profit, nor method for declaring dividends, and that its general effect was to greatly reduce the losses of personalty at fires, as well as to lower the rates of insurance. On these facts, the learned Court, ALISON J., held it was not a public charitable corporation, but a private business enterprise organized for gain, sufficient to prevent the body from being a charity, though outsiders shared in that gain, and that the motive of a donation is an element in determining whether the use is charitable or not. This was reversed by the Supreme Court, who held an indirect gain to the donors, in which all the public share, will not prevent a gift from constituting a charitable use; that no court has ever held that the donor's motive in a gift is a test as to whether it is a charitable use; that a charitable association cannot be held liable for the negligent acts of its employes, where no negligence is shown in their selection, that to hold the body thus liable, would be a diversion of the funds given for other purposes, and that the facts showed the defendant to come within the definition of a public charitable use.

A. B.

By the courtesy of the editor of THE AMERICAN LAW REGISTER, I have been permitted to read the above and to add a few words in explanation of some points in my previous article.

Mr. McMurtrie has apparently misunderstood the writer's observations upon the legal test of a charity. No one supposes, and certainly I never said, that "if the motive of the giver is selfish, the subject ceases to be a charity." On the contrary, it is expressly stated (28 AMER. LAW REGISTER p. 686) that Mr. Binney's definition, to which Mr. McMurtrie objects, may be rhetorical rather than exact, and it is expressly admitted that foundations established from selfish motives have been often recognized as charities. What was maintained is simply this, that no precedent can be found for a decision which holds an institution to be a charity which is "*founded and maintained for the express purpose of benefiting its contributors pecuniarily.*" This, the very point of my remarks, is not answered and no such precedent is cited.

Nobody doubts that a fire engine for the use of a village, is a charity, although the motive of the contributors was the safety of their own property. But the dis-

inction between that case and the Fire Patrol is simply this : in the latter there is the "element of gain" to which Mr. Justice Paxson refers in the *Women's Christian Association Case* (1889), 125 Pa. 579.

It is not intended to reply at length to what is said upon the second branch of the case, but merely to explain that the writer has in this also been misunderstood. Mr. McMurtrie argues as if it were asserted by me, that "The charity is liable for the tortious act of its servant, but the trustee is not." Nothing of the kind was said in my article. Lord CAMPBELL indeed, in the *Heriot's Hospital* case said, "The trustees would in that case (i. e., in the event of a recovery against the Hospital) be indemnified against their own misconduct," and I took pains to say that the truth of the matter was just the other way (28 AMER. LAW REGISTER p. 677). In ordinary cases, where a master is held liable for his servant's negligence, does any one suppose that the servant is "indemnified against his own misconduct" because, so far as the injured third party is concerned, recourse may be had, under the rule of *respondet superior*, against the master? The argument, if it be an argument at all bearing on the case, is directed against the rule itself and not against any exception to it in the case of a charity.

As to the rule itself, does it merit such wholesale condemnation? If so, it is strange that, so far as I know, it has not been abolished by statute in any of our States or in England. If charitable corporations are to be made an exception, on the ground of public policy, let the Court say so distinctly, and the argument turn on the question of expediency only. My purpose was to show that the exception does not rest on precedent or principle, that therefore the "higher ground" on which the case was rested, is insecure and the judgment (if it be right, as very possibly it is) should have been placed upon the ground alluded to by the Court, that the Patrol was a corporation created in aid of a municipality.

But it is said that the rule of *respondet superior* is probably a piece of local English law. Perhaps it is, but Judge HOLMES' account of its origin merits consideration. In his work upon "The Common Law," the rule is shown to have arisen from the Roman law, and what is equally to the point, its later development according to that author's opinion (foot note to p. 230) has been due to the same influence.

Granting however that Judge HOLMES is wrong in his view, one thing is certain, that for some hundreds of years the principle has been firmly established in the English law, and to say that it is merely local, is only to say what might be said of the Rule in Shelley's Case, or the whole system of real estate law. Certainly *respondet superior* is no more "artificial."

It is stated above (p. 211) to be clear "that no one can charge the property of another without a power is conferred to do so. And it is equally clear that the beneficiaries, the equitable owners, do not give any such power and were not asked to do so."

Now the first proposition is true as a general rule, but the rule is by no means of universal application. A familiar instance occurs in the rule that the chattels of a stranger found upon demised premises may be distrained for rent. Other cases may be recalled by the reader. And if it be so that the necessary power must be conferred by the beneficiaries, that is, the class to be benefited by the charities, I ask whence do the trustees derive their power to bind the funds of the charity by their contracts?

JOHN MARSHALL GEST.