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INJURIES SUSTAINED, RESULT NEGLIGENCE OF OFFICERS AND EMPLOYES, ACTING WITHIN SCOPE OF DUTIES — THE OHIO STATE ARCHAEOLOGICAL AND HISTORICAL SOCIETY — PRIVATE CORPORATION — LIABLE FOR SUCH INJURIES — NOT EXCEPTED BECAUSE AGENCY, STATE, IN PERFORMANCE GOVERNMENTAL FUNCTION — STATE MEMORIALS.

SYLLABUS:

The Ohio State Archaeological and Historical Society is a private corporation, and as such is liable for injuries sustained as a result of negligence of its officers and employees, when acting within the scope of their duties, even though at such time said society, through its officers or employees, was engaged as an agency of the state of Ohio, in the performance of a governmental function.

Columbus, Ohio, May 17, 1941.

Mr. E. C. Zepp, Curator of State Memorials, Ohio State Museum, Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your request for my opinion, which reads as follows:

> "The opinion of your office is requested concerning a situation which exists at Mound City State Memorial, Chillicothe, Ohio.
>
> A small launch powered by an outboard motor is operated by a state employee taking passengers for short rides on the Scioto River. A charge of ten cents (10c) per person is collected for the ride.
>
> To what extent is the Division of State Memorials liable in the event of drowning or injury of a passenger or what steps can be taken to remove this liability?"

Although your inquiry refers to the Division of State Memorials the real question involved concerns the possible liability of the Ohio State

Archaeological and Historical Society, of which the Division of State Memorials is but an administrative department thereof.

The Ohio State Archaeological and Historical Society, a corporation not for profit, was formed under the general corporation laws of the state of Ohio on March 12, 1885. The incorporators declared the purpose of the corporation in the following language:

> "The purpose for which said corporation is formed is to promote a knowledge of Archaeology and History, especially of Ohio, by establishing and maintaining a library of books, manuscripts, maps, charts etc. properly pertaining thereto, a museum of prehistoric relics and natural or other curiosities or specimens of art or nature promotive of the objects of the association, — said library and museum to be open to the public on reasonable terms, — by courses of lectures, and publications of books, papers and documents touching the subjects so specified, with power to receive and hold gifts and devises of real and personal estate for the benefit of such association and generally to exercise the powers legally and properly pertaining thereto."

Whether the Ohio State Archaeological and Historical Society is clothed with the immunity of the sovereign from suit for tortious acts done by its agents within the scope of their authority and in the course of their employment is a question not entirely free from doubt and may depend upon classification, that is, whether the society is a public or private corporation.

The legal immunities and liabilities enjoyed or suffered by corporations public and private, are clearly set forth in the case of Dunn v. Agricultural Society, 46 O.S., 93, 96, wherein it is stated:

> "There is a class of public corporations, sometimes called civil corporations, and sometimes *quasi* corporations, that, by the well settled and generously accepted adjudications of the courts, are not liable to a private action in damages, for negligence in the performance of their public duties, except when made so by legislative enactment.
>
> Of this class, are counties, townships, school districts and the like. The reason for such exemption from liability, is that organizations of the kind referred to, are mere territorial and political divisions of the state, established exclusively for public purposes, connected with the administration of local government. They are involuntary corporations, because created by the state,

> without the solicitation, or even consent, of the people within their boundaries, and made depositaries of limited political and governmental functions, to be exercised for the public good, in behalf of the state, and not for themselves. They are no less than public agencies of the state, invested by it, of its own sovereign will, with their particular powers, to assist in the conduct of local administration, and execute its general policy, with no power to decline the functions developed upon them, or withhold the performance of them in the mode prescribed, and hence, are clothed with the same immunity from liability as the state itself. * * *
>
> This rule of exemption, however, extends no further than its reason, and therefore has no application to corporations called into being by the voluntary action of the individuals forming them, for their own advantage, convenience or pleasure. Corporations of this class, which are but aggregations of natural persons associated together by their free consent, for the better accomplishment of their purposes, are bound to the same care, in the use of their property, and conduct of their affairs, to avoid injury to others, as natural persons; and, a disregard or neglect of that duty, involves a like liability."

In classifying the society as a public or a private corporation it becomes necessary to examine the charter and the subsequent statutory references, direct or indirect, that have been enacted by the General Assembly.

From the charter itself it appears that certain private benefactors become interested in promoting a knowledge of archaeology and history by establishing and maintaining a library of books, manuscripts, etc., and a museum of prehistoric relics to promote the objects of the association; to exact a reasonable fee of those members of the public desiring to use the library or museum; and to have the power to receive and hold gifts and devises of real and personal estate for the benefit of the association. Said benefactors applied to the state for a charter under the general corporation laws of Ohio, which charter was granted in the year 1885.

The legal conclusion from the facts cited in the charter is to the effect that the society was founded by the benefactors and not by the state. The question of founding assumes importance in the light of the remarks of Justice Story in the Dartmouth College case, 4 Wheat. 518, 668, to wit:

> "Public corporations are generally esteemed such as exist for public political purposes only, such as towns, cities, parishes,

> and counties; and in many respects they are so, although they involve some private interests; but strictly speaking, public corporations are such only as are founded by the government for public purposes, where the whole interests belong also to the government. If, therefore, the foundation be private, though under the charter of the government, the corporation is private, however extensive the uses may be to which it is devoted, either by the bounty of the founder or the nature of the objects of the institution. * * * "

Neither are the objects of the society for the promotion of the interests of the state of Ohio particularly, but rather the promotion of a knowledge of archaeology and history generally. Nor can it be said that the promotion of knowledge constitutes a participation in the administration of government. The charter does not bestow on Ohio any exclusive right to the property of the society, for it is stated that the realty shall be held for the benefit of the association.

Hence it can be stated that the Ohio State Archaeological and Historical Society did not become a public corporation from the source of its charter. The question arises: Has it become a public corporation by subsequent legislative declarations, appropriations, and delegations?

An examination of the statutes that pertain directly and indirectly to the society indicates that the General Assembly while designating the society as an agency of the state and granting the right of condemnation in certain cases, recognized that the corporation was a private entity by authorizing the society to receive state appropriations; by requesting the consent of the society before designating the director of education as a member of the board of trustees of the society; by authorizing the transfer of state documents, manuscripts, etc. to the custody of the society on terms and conditions that may be agreed upon; by authorizing the transfer of canal property to the custody of the society as may be agreed upon; and by exempting from taxation certain lands. See Sections 154-55, 154-59, 154-59a, 154-59d, 5362, 5363, 15301-1, 15301-2, 15301-4, 15301-5, 10198-1, General Code.

With respect to the statutory designation of the society as an agency of the state and with respect to the appropriations made by the state to the society, it was held in Board of Education of the State vs. Bakewell, 122 Ill. 339, 29 L.R.A., 381, "that appropriations for a university by the

state do not change the private character in which it was established by private benefactions, and that a declaration by the legislature that a state normal university, which was in fact a private corporation, was a state institution and that it is property belonging to the state, is a mere harmless declaration upon the statute book having no effect."

And in Regents of University of Maryland vs. Williams, 9 Gil. and J. 365, 29 L.R.A., 381, it was said of the University of Maryland that it had none of the characteristics of a public corporation because the state was not the founder of it but merely gave it capacity to acquire and hold property, and that its private character was not affected by subsequent endowment by the state.

The fact that the state in authorizing the transfer of public property to the custody of the society declared that the purpose of the transfer was that of preservation and practical and educational uses would not have the effect of changing the society from a private to that of a public corporation.

In the Dartmouth College case, supra, it was held that public corporations are such only as are founded by the government for public purposes, where the whole interest belongs to the government. And again in Ten Eyck v. Del. and Raritan Land Company, 18 N.J.L. 200, 203, this test was announced in the following language:

> " * * * Public corporations are political corporations or such as are founded wholly for public purposes and the whole interest in which, is in the public. The fact of the public having an interest in the works or the property or the object of the corporation, does not make it a public corporation. All corporations, whether public or private, are in contemplation of law, founded upon the principle, that they will promote the interest or convenience of the public. * * * The interest therefore, which the public may have in the property or the objects of a corporation, whether direct or incidental (unless it has the whole interest) does not determine its character as a public or private corporation. * * * "

As for the investiture of the society with the right of condemnation the case of Peter Tinsman vs. The Belvidere Dela. Railroad Company, 26 N.J.L. 148, treats this question in the fourth and fifth branches of the syllabus, as follows:

"4. Such corporations (private corporations) are vested with the sovereign power to take private property for public use, but are not vested with the sovereign immunity against the liability from damages resulting from their acts. (Parenthetical material the writer's).

5. Public corporations are such as are created for political purposes. But a corporation is not public merely because its object is of a public character."

Section 154-55, supra, requiring the consent of the society to the provisions therein before permitting withdrawal of moneys appropriated to the society is indicative of the private character of the corporation. The recognition by the General Assembly of the power of the society to decline the designation of the director of education as a member of the board of trustees clearly shows that the corporation is not amenable to the will of the sovereign, and hence not public, for it is established that the legislature has control over those corporations which are designated public corporations, either to modify or repeal their charters as will best promote public interest. Bank of Toledo vs. Toledo, 1 O.S., 622.

Despite legislative declarations and the assumption on the part of the society of certain delegated duties of a public nature, the charter of 1885 establishing a private corporation has not been amended in any material aspect. It was private in the beginning and continues now as a similar entity. The legislative delegation of public functions and the acceptance by the society does not work an amendment of the charter, abolishing the private corporation and creating a public corporation in its stead.

Private corporations are subject to suit under Section 8623-99, General Code, which provides that corporations not for profit shall have authority to sue and be sued.

The statutes above referred to and the delegation of certain functions to be performed by the society while not affecting the private aspect of the corporation in so far as its charter is concerned, may have affected its liability in certain specific instances.

In accomplishing lawful purposes of legislation the General Assembly may act through the recognized departments and instrumentalities of

government or they may act through specially designated agencies. For more than one hundred years corporations have been used as agencies for doing work for the government. Keifer and Keifer vs. R.F.C., 306 U.S. 381.

With respect to the situation that you present in your inquiry, one of my predecessors has ruled that so far as Mound City State Memorial is concerned, the Ohio State Archaeology and Historical Society is a state agency, inasmuch as all the funds expended by the society for the preservation, protection, upkeep and policing of the state park are state funds appropriated by the legislature of Ohio for that purpose. Opinions of the Attorney General for the year 1934, Vol. II, page 913.

Mound City State Park, or Memorial, formerly a portion of Camp Sherman Military Reservation is territory belonging to the United States. In March, 1923, the Secretary of War granted a license to the Archaeological and Historical Society, which reads as follows:

"REVOCABLE LICENSE

The Ohio State Archaeological and Historical Society is hereby granted a license, revocable at will by the Secretary of War, to care for, preserve, protect, and maintain the 'Mound City Group' of prehistoric mounds located on the Camp Sherman Military Reservation at Chillicothe, Ohio, and declared a national monument by Presidential Proclamation No. 1653, dated March 2, 1923, under authority of Act of Congress approved June 8, 1906 (34 Stat. 225), and for that purpose to occupy the tract of land upon which they are situated, which tract was reserved by said proclamation as the site of the said mounment, the site so reserved and hereby authorized to be occupied and cared for being described as follows:

> All of Sections N and O, bounded on the north by East Liverpool Street, on the east by the Scioto River, on the west by Columbus Avenue, and on the south by Portsmouth Street, containing fifty-seven (57) acres, more or less.

This license is granted upon the following provisions and conditions:

1. That the said site shall be open to all people desiring to visit these mounds and shall be properly cared for and policed by the licensee without any expense whatever to the United States.

2. That no buildings or structures of any kind whatever shall be erected upon the property without the consent of the Secretary of War.

3. That no excavations of the said mounds shall be allowed, except upon permission granted by the Secretary of War.

WITNESS my hand this 27th day of March, 1923.

(Signed) DWIGHT F. DAVIS,

The Assistant Secretary of War."

Appropriations for the maintenance of the park are made by the state to the society. Under the appropriation acts of the 93rd General Assembly of Ohio $76,022.00 was appropriated to the society for personal services in connection with state memorials and $37,854.00 was set aside for maintenance.

Our question, therefore, concerns itself with state immunity and whether a suit against the agency is a suit against the state. As to the state, immunity from suit was written into the 11th Amendment of the Federal Constitution.

The Ohio Constitution, Article I, Section 16, providing that suits may be brought against the state in such courts and in such manner as may be provided by law was declared to be not self-executing and requiring statutory authority as a prerequisite to suit. Raudebaugh v. The State of Ohio and Palmer et al. v. The State of Ohio, 96 O.S. 513.

Although the question has not been widely litigated, the reported cases on the subject hold that state agencies in the performance of governmental functions are immune from suit. See for example Minear v. State Board of Agriculture (1913), 259 Ill. 549; Zoeller v. State Board of Agriculture (1915), 163 Ky. 446; Haines v. State Board of Agriculture (1913), 184 Ill. App. 191.

In all of the cases examined, however, where such state agencies were rendered immune from suit, the corporations were brought into existence at the volition of the legislature. Thus the question of liability or non-liability when such agencies are performing governmental functions is a matter dependent on the question of organization. This distinguishing factor is brought out in the case of Tri-State Fair v. Rowton (1918), 140 Tenn. 304, 52 A.L.R. 1410, where it was said by the court:

"It is the settled rule that where the legislature of a state constitutes a state board of agriculture or a board of managers an agency of the state, and devolves directly upon them the duty of conducting a state fair, there is so far exercised by them a governmental function that the institution is not liable for injuries sustained as a result of negligence of officers or employees. Morrison v. Fisher (Morrison v. MacLaren (1915) 160 Wis. 621, L.R.A. 1915E, 469, 152 N.W. 475), and several cases cited in the opinion and note. But we have no such case before us. We deal with a corporation brought into existence at the volition of the incorporators; the state has not undertaken to name the members of a board to exercise any imposed governmental function belonging to it. The control of the affairs of the defendant association as to admission fees, choice of officers and servants, was in the hands of a board of directors named by its own members; these directors had the power to purchase ground and erect new structures, or to lease an existing fairground with defective structures, as it chose to do, and to repair the same or not. No state official had power to direct in those regards. The association may dissolve at the will of its members, and the state would not receive its property or have any claim against it or the corporation's property in the absence of a contract so providing."

The Ohio State Archaeological and Historical Society, although having certain members of its board named by the state, still has the power by amending its by-laws to deny to such governmental officials the right to determine its policies. Also the Ohio State Archaeological and Historical Society may dissolve at any time at the will of its members since it is in fact a private corporation.

In view of the distinctions above mentioned and the analogy to the Tri-State Fair case, supra, regardless of the functions of the society, immunity from suit is not one of its attributes. It therefore becomes unnecessary to consider the particular factual situation that you present in your inquiry.

In specific answer to your request, therefore, it is my opinion that:

The Ohio State Archaeological and Historical Society is a private corporation, and as such is liable for injuries sustained as a result of negligence of its officers and employees, when acting within the scope of their duties, even though at such time said society, through its officers

or employees, was engaged as an agency of the state of Ohio, in the performance of a governmental function.

Respectfully,

THOMAS J. HERBERT,

Attorney General.

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TOWNSHIP TRUSTEES — WITHOUT AUTHORITY TO LEASE PORTION TOWNSHIP BUILDING, TERM NINETY-NINE YEARS.

SYLLABUS:

Township trustees are without authority to lease a portion of a township building for a term of ninety-nine years.

Columbus, Ohio, May 23, 1941.

Hon. Elmer E. Welty, Prosecuting Attorney,
Bellefontaine, Ohio.

Dear Sir:

In an inquiry received from your office my opinion is requested on the question of whether township trustees may lease a portion of a township building for a term of ninety-nine years. Inclosed with the letter is a copy of the particular lease and upon examination of it, it appears that the term of the lease begins January 3, 1923 and ends on January 3, 2022, and conveys a certain portion of a township building to the lessee who, in consideration of the grant, agrees to furnish heat and light for the premises concerned. The only provision in the lease providing for its termination before the expiration of the term is based upon the lessee's failure so to heat and light the premises.