

## Tort Immunity for Charities, Loans to Schools

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## RECENT DECISIONS

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### Tort Immunity of Charities

Plaintiff's intestate brought this personal injury action for injuries sustained in a fall on the icy steps of the entrance to the defendant church. The intestate was planning to attend the evening service at the time of the accident. Wisconsin had a safe-place statute prescribing a certain standard of care for public buildings and their structures. In affirming the dismissal of the complaint, the court *held* that the plaintiffs failed to show the applicability of the statute in that the step construction is neither integral to a public building or a separate structure within the meaning of the statute. The evidence also was insufficient to constitute a cause of action for nuisance. *Meyers v. St. Bernard's Congregation*, 69 N.W.2d 302 (Wis.1954).

The case is significant in that the action had to be founded on a statutory violation or on a nuisance for the plaintiff to recover because of the qualified espousal of Wisconsin to the doctrine of an immunity to a charity from liability in tort.<sup>1</sup> This immunity may be absolute or subject to certain qualifications. The grant of non-liability may be based on one or more of five theories,<sup>2</sup> or it

<sup>1</sup>See *Schumacher v. Evangelical Deaconess Society of Wisconsin*, 218 Wis. 169, 260 N.W. 476 (1935); *Morrison v. Henke*, 165 Wis. 166, 160 N.W. 173 (1916).

<sup>2</sup>a. *Trust Fund doctrine* "[i]s based upon the reasoning that the assets of the institution created by the founders thereof constitute a trust for particular charitable purposes and if it should be diverted to the payment of judgments that might be obtained in suits against the institution, the purpose of the charity as well as that of its donors would be frustrated and the charity perhaps destroyed." *Foster v. Roman Catholic Diocese*, 116 Vt. 124,

may be withheld on the fact of the status of the wronged party,<sup>3</sup> or the result may be dependent on whether there is a finding of negligence in the selection or retention of the tortfeasor employee or servant.<sup>4</sup> Irrespective of the legal soundness and desirability of

70 A.2d 230 (1950). This doctrine was followed in *Loeffler v. Trustees of Sheppard & Enoch Pratt Hospital*, 130 Md. 265, 100 At1. 301 (1917). But see *Moore v. Moyle*, 405 Ill. 555, 92 N.E. 2d 81 (1950) (trust fund immunity rule falls where liability insurance carried); *Nicholson v. Good Samaritan Hospital*, 145 Fla. 360, 199 So. 344 (1940).

b. *Respondeat superior doctrine* provides the immunity on the basis that service by the servant is not rendered for the financial benefit of the master. *Bachman v. Young Women's Christian Ass'n*, 179 Wis. 178, 191 N.W. 751 (1922). *Contra*: *Kellogg v. Church Charity Foundation*, 128 App. Div. 214, 112 N.Y.S. 566 (2d Dep't 1908). c. *Governmental Immunity doctrine* relies on the fact that its close connection with the state in its purposes entitles it to the immunity of the state from suit, *Schumacher v. Evangelical Deaconess Society of Wisconsin* 218 Wis. 169, 260 N.W. 476 (1935). But see *Old Folks' and Orphan Children's Home v. Roberts*, 91 Ind. 533, 171 N.E. 10 (1930).

d. *Implied Waiver doctrine* extends to beneficiaries where by reason of accepting benefits they waive or assume the risk of negligence. *Downs v. Harper Hospital*, 101 Mich. 555, 60 N.W. 42 (1894). But see *Sheehan v. North Country Community Hospital*, 273 N.Y. 163, 7 N.E. 2d 28, 29 (1937).

e. *Public Policy Theory* supports the immunity by declaring that the public interest of the charity is of paramount interest to the state, even to the extent of denying individuals recovery for its torts. *Southern Methodist University v. Clayton*, 142 Tex. 179, 176 S.W. 2d 749 (1943). But see *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P.2d 220 (1951).

<sup>3</sup>See note 6 *infra*.

<sup>4</sup>See note 11 *infra*.

this immunity,<sup>5</sup> the fact remains that the immunity of charitable organizations exists in some form in over half of the states and has existed in many others.

The treatment herein is limited to the immunity as it extends to the beneficiary of a charity. The success of a claimant against the charity may depend upon his status as a gratuitous or paying beneficiary.<sup>6</sup> It appears as a general rule that a charity enjoys a complete immunity as to its non-paying recipients in fifteen states;<sup>7</sup> twelve others confer

<sup>5</sup>See *Andrews v. Young Men's Christian Ass'n*, 226 Iowa 374, 284 N.W. 186, 205 (1939). Bogert, *Trusts and Trustees* § 401 (1935); Elkins, *Tort Liability of Charitable Institutions*, 3 Hudson Co. Bar Bull. 3 (Oct. 1954); Comment, *Charitable Institutions-Immunity from Tort Liability*, 4 De Paul L. Rev. 56 (1954).

<sup>6</sup>*Taylor v. Flower Deaconess Home and Hospital*, 104 Ohio St. 61, 135 N.E. 287 (1922).

<sup>7</sup>*Nev.* *Bruce v. Young Men's Christian Ass'n*, 51 Nev. 372, 277 P. 798 (1929); see *Md.* *Howard v. South Baltimore General Hospital*, 191 Md. 617, 62 A.2d 574, 575-576 (1948); *Mass.* *Roosen v. Peter Bent Bringham Hospital*, 235 Mass. 66, 126 N.E. 392, 393 (1920); *Mo.* *Nicholas v. Evangelical Deaconess Home and Hospital*, 281 Mo. 182, 219 S.W. 643 (1920); *Ohio*- *Taylor v. Flower Deaconess Home and Hospital*, 104 Ohio St. 61, 135 N.E. 287, 291 (1922); *Ore.*- *Gregory v. Salem General Hospital*, 175 Ore. 464, 153 P.2d 837, 844-845 (1944); *S.C.*- *Vermillion v. Woman's College of Due West*, 104 S.C. 197, 88 S.E. 649, 650 (1916); *Tenn.*- *Anderson v. Armstrong*, 180 Tenn. 56, 171 S.W. 2d 401, 402 (1943); see *Ky.* *University of Louisville v. Hammock*, 127 Ky. 564, 106 S.W. 219 (1907); *Idaho*- *Wilcox v. Idaho Falls Latter Day Saints Hospital*, 59 Idaho 350, 82 P.2d 849 (1938); *Ill.* *Moore v. Moyle*, 405 Ill. 555, 92 N.E. 2d 81 (1950); *Me.* *Jensen v. Maine Eye and Ear Infirmary*, 107 Me. 408, 78 Atl. 898 (1910); *Mich.* *Downs v. Harper Hospital*, 101 Mich. 555, 60 N.W. 42 (1894); *N. J.* *Jones v. St. Mary's Roman Catholic Church*, 7 N. J. 533, 82 A.2d 187 (1951); *Wis.* - *Schumacher v. Evangelical Deaconess Society of Wisconsin*, 218 Wis. 169, 260 N.W. 476 (1935).

In Nevada, a charitable organization may voluntarily waive its exemption for the benefit of its

this exemption provided that there is no showing of negligence in the selection or retention of the injuring employee;<sup>8</sup> and nine adhere to the policy of liability.<sup>9</sup> In cases where paying beneficiaries seek redress against the charity, twelve states grant an

members. *Springer v. Federated Church of Reno, Inc.*, 283 P.2d 1071 (1955).

<sup>8</sup>*N. C.* - *Williams v. Union County Hospital Ass'n, Inc.*, 234 N. C. 536, 67 S.E. 2d 662 (1951); see *Ga.* - *Burgess v. James*, 73 Ga. 857, 38 S.E. 2d 637, 638 (1946); *La.* - *Jurjevich v. Hotel Dieu*, 11 So. 2d 632, 635 (La. 1943); *Mont.* - *Borgeas v. Oregon Short Line R. Co.*, 73 Mont. 407, 236 P. 1069, 1074 (1925); *Neb.* - *Duncan v. Nebraska Sanatorium Benevolent Ass'n*, 92 Neb. 162, 137 N.W. 1120, 1121 (1912); *Pa.* - *Gable v. Sisters of St. Francis*, 227 Pa. 254, 75 Atl. 1087, 1088-1089 (1910); *W. Va.* - *Fisher v. Ohio Valley General Hospital Ass'n*, 73 S.E. 2d 667, 671 (W. Va. 1952); see *Ark.* - *Crossett Health Center v. Crosswell*, 221 Ark. 874, 256 S.W. 2d 548 (1953); *Conn.* - *Evans v. Lawrence Memorial Associated Hospitals, Inc.*, 133 Conn. 311, 50 A.2d 443 (1946); *Tex.* - *Southern Methodist University v. Clayton*, 142 Tex. 179, 176 S.W. 2d 749 (1943); *Va.* - *Weston's Adm'x v. Hospital of St. Vincent de Paul*, 131 Va. 587, 107 S.E. 785 (1921); *Wyo.* - *Bishop Randall Hospital v. Hartley*, 24 Wyo. 408, 160 Pac. 385 (1916). See also Restatement, *Trusts* 402 (1935) (restricted to situations in which title to trust property is in trustees personally rather than in the charitable corporation).

<sup>9</sup>See *Kan.* - *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P.2d 934, 943 (1954); *N. D.* - *Rickbeil v. Grafton Deaconess Hospital*, 74 N.D. 525, 23 N.W. 2d 247, 259-260 (1946); *N. H.* - *Welch v. Frisbe Memorial Hospital*, 90 N.H. 337, 9 A.2d 761, 763-764 (1939); *N. Y.* - *Sheehan v. North Country Community House*, 273 N.Y. 163, 166, 7 N.E. 2d 28, 29 (1937); *Okla.* - *Gable v. Salvation Army*, 186 Okla. 687, 100 P.2d 244, 248 (1940); see *Ariz.* - *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P. 2d 220 (1951); *Colo.* - *O'Connor v. Boulder Colorado Sanitarium Ass'n*, 105 Colo. 259, 96 P. 2d 835 (1939); *Iowa* - *Haynes v. Presbyterian Hospital Ass'n*, 241 Iowa 1269, 45 N.W. 2d 151 (1950); *Vt.* - *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A. 2d 230 (1950).

However, New York grants immunity when a professional act is involved.

unqualified immunity to the charity,<sup>10</sup> at least eleven make it dependent on an absence of corporate negligence in the selection and retention of the wrongdoer,<sup>11</sup> and seven-

<sup>10</sup>*Idaho* — *Wilcox v. Idaho Falls Latter Day Saints Hospital*, 59 Idaho 350, 82 P. 2d 849 (1938); *Me.* — *Jensen v. Maine Eye and Ear Infirmary*, 107 Me. 408, 78 Atl. 898 (1910); *Mass.* — *Roosen v. Peter Bent Brigham Hospital*, 235 Mass. 66, 126 N.E. 392 (1920); *Mich.* — *Downs v. Harper Hospital*, 101 Mich. 555, 60 N.W. 42 (1894); *Mo.* — *Nicholas v. Evangelical Deaconess Home and Hospital*, 281 Mo. 182, 219 S.W. 643 (1920); *N. J.* — *Jones v. St. Mary's Roman Catholic Church*, 7 N.J. 533, 82 A. 2d 187 (1951); *Ore.* — *Gregory v. Salem General Hospital*, 175 Ore. 464, 153 P. 2d 837 (1944); see *S. C.* — *Vermillion v. Woman's College of Due West*, 104 S.C. 197, 88 S.E. 649, 650 (1916); see *Tenn.* — *Anderson v. Armstrong*, 180 Tenn. 56, 171 S.W. 2d 401 (1943) (satisfaction limited to non-trust property); *Ill.* — *Moore v. Moyle*, 405 Ill. 555, 92 N.E. 2d 81 (1950); *Ky.* — *Cook v. John N. Norton Memorial Infirmary*, 180 Ky. 331, 202 S.W. 874 (1918); *Wis.* — *Schumacher v. Evangelical Deaconess Society of Wisconsin*, 218 Wis. 169, 260 N.W. 476 (1935). Rhode Island has an immunity provided by statute for the torts of officers and servants while acting in the management of said hospital. 1938 Laws of R. I., c. 116, §95.

<sup>11</sup>*Conn.* — *Evans v. Lawrence Memorial Associated Hospitals, Inc.*, 133 Conn. 311, 50 A. 2d 443 (1946); *La.* — *Jurjevich v. Hotel Dieu*, 11 So. 2d 632 (La. 1943); *Mont.* — *Borgass v. Oregon Short Line R. Co.*, 73 Mont. 407, 236 Pac. 1069 (1925); *Ohio* — *Taylor v. Flower Deaconess Home and Hospital*, 104 Ohio St. 61, 135 N.E. 287 (1922); *Va.* — *Weston's Adm'x v. Hospital of St. Vincent de Paul*, 131 Va. 587, 107 S.E. 785 (1921); *W. Va.* — *Fisher v. Ohio Valley General Hospital Ass'n*, 73 S.E. 2d 667 (W. Va. 1952); *Wyo.* — *Bishop Randall Hospital v. Hartley*, 24 Wyo. 408, 160 Pac. 385 (1916); see *Ga.* — *Burgess v. James*, 73 Ga. 857, 38 S.E. 2d 637, 638 (1946); see *Ark.* — *Crossett Health Center v. Crosswell*, 221 Ark. 874, 256 S.W. 2d 548 (1953); *Ind.* — *Old Folks' and Orphan Children's Home v. Roberts*, 91 Ind. App. 533, 171 N.E. 10 (1930); *Tex.* — *Southern Methodist University v. Clayton*, 142 Tex. 179, 176 N.W. 2d 749 (1943). See Restatement, Trusts §402 (1935) (restricted to situations in which title to trust property is in the trustees personally rather than in the charitable corporation).

teen others make no distinction between the torts of the charity's officer, employee, and servant and the torts of others.<sup>12</sup> The law in the other states is unsettled, with two states having no reported cases.<sup>13</sup> The weight of authority appears only slightly in favor of some type of immunity with the trend towards liability.<sup>14</sup> Thus, if the cause of action is based on nuisance<sup>15</sup> or if the charity car-

<sup>12</sup>*Ala.* — *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4 (1915); *Ariz.* — *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P. 2d 220 (1951); *Cal.* — *Silva v. Providence Hospital of Oakland*, 14 Calif. 2d 762, 97 P. 2d 798 (1939); *Del.* — *Durney v. St. Francis Hospital*, 7 Ter. 392, 83 A. 2d 753 (1951); *Fla.* — *Nicholson v. Good Samaritan Hospital*, 145 Fla. 360, 199 So. 344 (1940); *Iowa* — *Haynes v. Presbyterian Hospital Ass'n* 241 Iowa 1269, 45 N.W. 2d 151 (1950); *Kan.* — *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P. 2d 934 (1954); *Minn.* — *Borwege v. City of Owatonna*, 251 N.W. 915 (Minn. 1933); *Miss.* — *Mississippi Baptist Hospital v. Holmes*, 156 Miss. 676, 55 So. 2d 142 (1951); *N. H.* — *Welch v. Frisbe Memorial Hospital*, 90 N.H. 337, 9 A. 2d 761 (1939); *N. Y.* — *Sheehan v. North Country Community House*, 273 N.Y. 163, 7 N.E. 2d 28 (1937); *Okla.* — *Sisters of the Sorrowful Mother v. Zeidler*, 183 Okla. 454, 82 P. 2d 996 (1938); *Utah* — *Sessions v. Thomas D. Dee Memorial Ass'n*, 94 Utah 460, 78 P. 2d 645 (1938); *Vt.* — *Foster v. Roman Catholic Diocese*, 116 Vt. 124, 70 A. 2d 230 (1950); *Wash.* — *Pierce v. Yakima Valley Memorial Hospital Ass'n*, 43 W. 2d 162, 260 P. 2d 765 (1953); See *Colo.* — *O'Connor v. Boulder Colorado Sanitarium Ass'n*, 105 Colo. 259, 96 P. 2d 835 (1939); *N. D.* — *Rickbeil v. Grafton Deaconess Hospital*, 74 N.D. 525, 23 N.W. 2d 247 (1946).

<sup>13</sup>New Mexico and South Dakota.

<sup>14</sup>Six states since 1950 have laid down a liability rule either rejecting precedent or resolving an open question. Ariz., Del., Iowa, Kan., Miss., and Wash. Six others, however, in this period have reaffirmed their immunity policy. Conn., Ill., Mo., N. J., N. C., and W. Va.

<sup>15</sup>See, e.g., *Smith v. Congregation of St. Rose*, 265 Wis. 393, 61 N.W. 2d 896 (1954).

ries liability insurance,<sup>16</sup> the plaintiff may be successful.

Some of the arguments advocating immunity are: (1) If the doctrine is overruled in any particular fact pattern, it may have unintended deleterious consequences elsewhere;<sup>17</sup> (2) both the paying and non-paying recipients receive charity benefits and therefore no distinction should be drawn in their treatment;<sup>18</sup> (3) the policy supporting immunity is stronger than that upon which the doctrine of respondeat superior is based;<sup>19</sup> (4) our society often makes a private person sublimate himself for the common good;<sup>20</sup> and (5) the place of the private charity is not to be displaced by a paternalistic government and liability would necessitate larger donations to meet added operating expenses.<sup>21</sup>

The proponents of liability urge the following reasons for their position: (1) charities are now operating in the area of big business;<sup>22</sup> (2) the confused state of the law demands that the legislature and not the judiciary declare any policy exemption;<sup>23</sup> (3) federal and state welfare measures have

<sup>16</sup>See, e.g., *Wendt v. Servite Fathers*, 332 Ill. App. 618, 76 N.E. 2d 342 (1947).

<sup>17</sup>See *Weiss v. Swedish Hospital*, 16 Wash. 446, 133 P. 2d 978, 981 (1943).

<sup>18</sup>See *Hospital of St. Vincent de Paul v. Thompson*, 116 Va. 101, 81 S.E. 13, 15 (1914).

<sup>19</sup>See *Schumacher v. Evangelical Deaconess Society*, 218 Wis. 169, 260 N.W. 476, 477 (1935).

<sup>20</sup>See *Vermillion v. Woman's College of Due West*, 104 S.C. 197, 88 S.E. 649, 650 (1916).

<sup>21</sup>See *Forrest v. Red Cross Hospital, Inc.*, 265 S.W. 2d 80, 82 (Ky. 1954).

<sup>22</sup>See *Mississippi Baptist Hospital v. Holmes*, 214 Miss. 906, 55 S. 2d 142, 153 (1951).

<sup>23</sup>See *Welch v. Frisbe Memorial Hospital*, 90 N.H. 337, 9 A. 2d 761, 764 (1939).

destroyed their public policy basis;<sup>24</sup> (4) accumulations are so large as to permit an absorption of liability;<sup>25</sup> and (5) the charities can carry liability insurance.<sup>26</sup>

It is to be observed that the leading cases in most jurisdictions have been concerned with hospitals almost to an exclusion of the other types of charitable endeavors. The cases seem to bear out the thought that the size and apparent financial soundness of these institutions has been of no little moment in the formulation of a liability doctrine. However, it must be realized that the rule of law so formulated from a hospital fact pattern is probably binding down to the least financially sound charity, such as special schools, orphan homes, old-age homes, religious activities, and the like. Insurance costs of an expensive nature imposed by a carrier over and above a reasonable standard of care, might prove burdensome to a hospital, and yet these may be met and not substantially affect the achievement of its humanitarian objective. It does not follow that the other charities have as consistent an income against which the reasonable insurance protection required could be obtained and that the end result will not be substantially detrimental to its philanthropic purpose. This nevertheless is the necessary result under the probable universal rule of law that follows from a hospital fact pattern.

It is probable that this adverse effect has been considered by the courts. Indeed, had the courts differentiated among charities on

<sup>24</sup>See *Ray v. Tucson Medical Center*, 72 Ariz. 22, 230 P. 2d 220, 229 (1951).

<sup>25</sup>See *Noel v. Menninger Foundation*, 175 Kan. 751, 267 P. 2d 934, 939 (1954).

<sup>26</sup>*Pierce v. Yakima Valley Memorial Hospital Ass'n*, 43 W. 2d 162, 260 P. 2d 765, 771 (1953).

the basis of size or type of activity, it apparently could be challenged as discriminatory under the Fourteenth Amendment. The thought that liability must be imposed on the larger undertakings has necessarily carried over to the smaller. The conclusion nevertheless remains that the compelling reasons for any immunity still exist for many types of activities and at least to preserve the smaller capitalized ones for their societal value to the state.

Legislation appears to be the only solution and this would have to be relative to conditions in each jurisdiction. In some, all activities might find justification under an immunity statute and in others, only a few would deserve a non-liability status for their negligent harms. Such precise law-making would be equitable and beneficial to the individual, the charity, society and the state.

It is submitted that consideration be given to the following suggestions to rectify by legislation the unfortunate results that a decisional law of liability in this field necessarily must carry:

- (1) Eliminate the cause of action in those activities of a charitable institution where insurance costs would substantially frustrate the purpose of the charity;
- (2) Limit the maximum recovery in negligent harms in which certain enumerated types of charities are involved;
- (3) Require more frequent and closer scrutinization of rates to charities by the State Superintendents of Insurance that these may be as uniform and as reasonable as conditions permit;
- (4) Consider the number of individuals

in the jurisdiction who carry liability insurance, either in their own or through their employers, and the relevance of this to the average incidence of negligent charitable wrongs in the jurisdiction; and

- (5) Evaluate the state-afforded facilities in each type of charitable endeavor as against the societal value of the particular activity in that jurisdiction by private operation.

### *Loans to Schools*

Recently, a bill was introduced in the New Hampshire Legislature creating an Authority to act as an agency and subdivision of the state, for the purpose of making construction loans at advantageous rates of interest to *any* academy, seminary of learning, private school, junior college or college, incorporated and situated in New Hampshire, provided such institution was operated for charitable purposes and its net income was devoted exclusively to such purposes. If an educational institution met these qualifications it would then have to furnish security, contribute to a reserve fund to be held as insurance against loss, pay the costs of processing the loan and, until repayment, hold and use the project for which the loan is made, for educational purposes.<sup>1</sup>

The funds to be loaned would not come from the state treasury, but rather the Authority would issue bonds which would be payable solely out of the receipts from the loans. Moreover, the bonds would not be a debt of the state, except that their payment

<sup>1</sup> New Hampshire Senate Bill No. 41 (printed in the appendix of the Senate Journal on Tuesday, May 17, 1955 at pages 21 to 30 inclusive).

would be guaranteed in the state's name.

The Senate referred the bill to the Justices of the Supreme Court who are authorized to render an advisory opinion as to the constitutionality of pending legislation. The Justices held the bill constitutional, and, although the bill was ultimately defeated, the opinion is significant.

The Justices noted that the New Hampshire Constitution imposes a duty upon legislators to encourage private and public educational institutions,<sup>2</sup> and that the program did not involve any expenditure of state money. The bonds would be self-liquidating. Apparently the Court believed its opinion should go further. Since the bonds would be guaranteed by the state, it is possible (despite all the safeguards incorporated in the bill) that the state might some day be liable on its guaranty, if the borrower defaulted. Therefore, the bill was considered on an equal footing with any bill that would be certain to require the expenditure of state funds raised by taxation. The Justices held it would be constitutional, even when examined in this light.

The Court considered the bill with relation to the test of public or private benefit.

"The furtherance of education is universally regarded as a public purpose," said the court in rejecting the argument that this bill would involve diverting public funds towards private enterprises. Citing the case of *Trustees of Phillips Exeter Academy v. Exeter*,<sup>3</sup> as authority for the proposition that such an expenditure of public funds is within the scope of the protective power of the state, the court fortified its arguments by referring to a later opinion in the same case, wherein it was said, "[a]n educa-

tional institution established for no personal profit and serving only the public benefit is a charity. . . . The charity being solely a form of public service, a grant to it is for public use and benefit."<sup>4</sup>

Although not adverted to in the opinion, it should be observed that the New Hampshire Constitution does contain the following statement, ". . . *provided, nevertheless*, that no money raised by taxation shall ever be granted or applied for the use of the schools or institutions of any religious sect or denomination . . ."

It does not appear whether the Court attempted to reconcile this clause of the New Hampshire Constitution with its statement that, since the bill in question could involve an expenditure of public funds it "stands on equal footing" with any bill certain to require such an expenditure. Perhaps the court considered the constitutional prohibition as relating only to direct grants by the state to schools or institutions of any religious sect or denomination and as not barring payments to bondholders who had loaned money to such schools or institutions through a state agency when those obligations were guaranteed by the state. However, the solution to this apparent conflict lies elsewhere. The Supreme Court of New Hampshire pointed to a long history, dating from 1833, of legislative aid to private educational institutions. The opinion of the court that the bill under consideration was not unconstitutional is consistent with this firmly established tradition.

A contrary result would be reached in the State of New York. "Neither the state nor any subdivision thereof shall use its property or *credit* . . . or permit either to be

<sup>2</sup> N.H. Const. Pt II, art. 83.

<sup>3</sup> 90 N.H. 472, 482-83, 27 A. 2d 569, 579 (1940).

<sup>4</sup> *Trustees of Phillips Exeter Academy v. Exeter*, 92 N.H. 473, 479, 33 A. 2d 665, 670 (1943).

used, *directly or indirectly*, in aid or maintenance . . . of any school or institute of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught. . . ." [emphasis supplied]<sup>5</sup> This section, prohibiting the use of the state's credit, would bar the device of setting up an Authority to issue state guaranteed bonds. Incidentally, the constitution would not allow aid to any incorporated nondenominational institution.<sup>6</sup>

Unfortunately, these provisions of the New York State Constitution are found in some form or other in almost every state Constitution. There are 26 state Constitutions that forbid state aid to any sectarian schools or institutions of learning.<sup>7</sup> Some 27 state Constitutions prohibit the lending of the credit of the state to any individual, association, or corporation.<sup>8</sup> It should be

observed that this section, although typical, is not always literally construed. In Louisiana, for example, a similar section has not prevented the enactment of a statute giving direct aid to sectarian schools.<sup>9</sup>

Although 13 states have no constitutional prohibition,<sup>10</sup> legislation similar to that recently defeated in New Hampshire might meet with the same unsurmountable obstacles of an extra-legal nature. Such legislation might have to contend with deep-rooted ideas of a socio-political nature.

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§192; Mich. Const. art. 10 §12; Minn. Const. art. 9 §10; Miss. Const. art. 14 §258; Mo. Const. art. 3 §39; Mont. Const. art. 13 §1; Neb. Const. art. 13 §3; N. J. Const. art. 8 §2 ¶1; N. M. Const. art. 9 §14; Ohio Const. art. 8 §4; Pa. Const. art. 9 §6; S. C. Const. art. 10 §6; Tenn. Const. art. 2 §31; Wash. Const. art. 8 §5 and art. 12 §9; W. Va. Const. art. 10 §6; Wis. Const. art. 8 §3; Wyo. Const. art. 16 §6.

<sup>9</sup> "The Louisiana State Board of Education shall construct, repair, equip, and furnish necessary buildings and improve the facilities at the educational and charitable institutions of the state, whether such institutions are under its supervision or not. . . ." La. Rev. Stat. tit. 17, §2151.

<sup>10</sup> Conn. Const. art. 8 §2; Del. Const. art. 8 §4 (such appropriation would require a ¾ vote of the members of both houses); Ga. Const. art. 7 §3 §2-5601 (State itself cannot incur the debt); Ind. Const. art. 10 §5 (State itself cannot incur the debt); Kan. Const. art. 11 §7 (State itself cannot incur the debt); Me. Const. art. 8 and art. 9 §14; Mass. Const. art. 46 §148 (prohibition of state aid does not apply to institutions of higher learning. *Opinion of the Justices*, 214 Mass. 599, 102 N.E. 464 (1913) ); N.C. Const. art. 5 §4 (State's credit may be loaned if a majority of the people so vote); Ore. Const. art. 1 §5 (money for benefit of religious institutions may not be drawn from the treasury); R. I. Const. art. 4 §14 (such appropriation would require a ⅔ vote of members elected to each house of the general assembly); S. D. Const. art. 10 §2; The Constitutions of N. D. and Vt., make no reference to the lending of state credit.

<sup>5</sup> N.Y. Const. art. XI §4.

<sup>6</sup> *Id.* at art. VII §8.

<sup>7</sup> Ala. Const. art. 14 §263; Cal. Const. art. 9 §8 and art. 4 §30; Colo. Const. art. 5 §34 and art. 9 §7; Del. Const. art. 10 §§3-4; Fla. Const. art. 12 §13; Idaho Const. art. 9 §5; Ill. Const. art. 8 §3; La. Const. art. 4 §8 and art. 12 §13; Mass. Const. art. 46 §148; Minn. Const. art. 8 §3; Miss. Const. art. 8 §208; Mo. Const. art. 9 §8; Mont. Const. art. 11 §8; Neb. Const. art. 7 §11; Nev. Const. art. 11 §155; N. M. Const. art. 12 §3; N. Y. Const. art. 11 §4; Ohio Const. art. 6 §2; Okla. Const. art. 2 §5; Pa. Const. art. 3 §§17-18; S. C. Const. art. 11 §9; Tex. Const. art. 7 §5; Utah Const. art. 10 §13; Va. Const. art. 9 §141; Wash. Const. art. 1 §11; Wyo. Const. art. 3 §36.

<sup>8</sup> Ariz. Const. art. 9 §7; Ark. Const. amend. no. 20 (majority of voters may suspend); Colo. Const. art. 11 §1; Fla. Const. art. 9 §10; Idaho Const. art. 8 §2; Ill. Const. art. 4 §20; Iowa Const. art. 7 §1; Ky. Const. §177; La. Const. art. 4 §8; Md. Const. art. 3 §34; Mass. Const. art. 46 §148 and art. 62