BENEVOLENT CORPORATIONS: A vigilant society or association is not a benevolent organization.

August 24, 1938

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Honorable W. W. Graves
Prosecuting Attorney
Kansas City, Missouri

Dear Sir:

This will acknowledge your communication of August 4th in which you request an opinion of this office relative to the subject matter stated therein, as follows:

> "My attention has been called to the proposed incorporation of the National Vigilance Alliance under Article X, Chapter 32, Revised Statutes of the State of Missouri, 1929. Incorporators are to be G. M. Babst, G. A. R. Slocum and R. T. Brewster, reputable citizens of Kansas City, Missouri.
>
> "The purpose is to form a non-profit benevolent corporation to combat crime and to create a trust fund through the payment of dues by members to carry on the work of the organization. Rewards are to be paid members for information concerning burglary and robbery of members and to peace officers for the arrest and conviction of the offenders. All money received from members is to be used to pay the expenses of the organization and to meet obligations contained in 'membership reward certificates'.
>
> "I attach hereto a copy of the petition for a pro-forma decree, the articles of agreement, the membership reward certifi-

> cate and the by-laws. I would appreciate your opinion on the following questions of law:
>
> "1 Is the National Vigilance Alliance entitled to incorporation under Article X, Chapter 32, Revised Statutes of the State of Missouri, 1929?
>
> "2. Would the National Vigilance Alliance be engaged in the insurance business so as to come under the jurisdiction of the Superintendent of Insurance?"

In dealing with your questions, we must necessarily take, and accordingly do take, into consideration the memoranda attached to your letter, namely, the petition for a pro forma decree, the Articles of Agreement, the Membership Reward Certificate, and the By-laws, as constituting the facts of the case, so far as presented to us, upon which our conclusions of law are to be predicated.

I.

The "Alliance", as we will hereinafter refer to it, seeks to justify its contemplated incorporation, according to its memorandum brief, solely on the ground that it is a benevolent association, and with this position we agree--if it is entitled to incorporate at all--because manifestly it is not a religious, scientific or educational association, within the meaning of the provisions of Section 21, Article X, of the Missouri Constitution, or within the meaning of such terms, including the additional named fraternal-beneficial association, as found in Sections 4996 and 4999, R.S. Missouri, 1929.

Hence, the first question is, do the facts as presented by the memoranda aforesaid entitle it under the law to incorporate as a benevolent corporation?

(a) Section 21, Article X, of the Missouri Constitution reads in part as follows:

> "No corporation, company or association, other than those formed for benevolent, religious, scientific or educational purposes, shall be created or organized under the laws of this State, unless the persons named as corporators shall, at or before the filing of the articles of association or incorporation, pay into the State treasury fifty dollars for the first fifty thousand dollars or less of capital stock, and a further sum of five dollars for every additional ten thousand dollars of its capital stock."

Section 4999 of the 1929 statutes undertakes to define or specify what associations are benevolent, religious, scientific and educational, respectively. Such statute, so far as pertinent here, reads as follows:

> "Any association formed for benevolent purposes, including any purely charitable society, hospital, asylum, house of refuge, reformatory and eleemosynary institution, fraternal-beneficial associations, or any association whose object is to promote temperance or other virtue conducive to the well-being of the community, and, generally, any association formed to provide for some good in the order of benevolence, that is useful to the public, may become a body corporate and politic under this article."

Manifestly, the declared purpose of the Alliance is not embraced in any of the above terms used in the statute, namely, a purely charitable society, hospital, asylum, house of refuge, reformatory, eleemosynary institution, or association to promote temperance. Hence, unless the meaning of the concluding language of the statute, to-wit, "or other virtue conducive to the well-being of the community, and, generally, any association formed to provide for some good in the order of benevolence, that is useful to the public," can justify the Alliance, under the facts displayed, as being a benevolent association, then its effort to incorporate as such must fail.

It is to be noted, however, that statutory provisions as to what is or is not a benevolent association are not conclusive. In the case of State v. McGrath, 95 Mo. l. c. 197, the court said:

> "If, in point of fact, the incorporation authorized by the act is not a corporation for benevolent purposes, the declaration of the legislature that it is a benevolent corporation does not make it so, any more than a legislative declaration that a horse is a cow would alter the fact and convert the horse into a cow. Such legislative legerdemain is to be condemned, not approved.
>
> "The nature or character of corporations authorized to be created by the act of 1887 is to be determined from the purpose to be accomplished and the business they are authorized to engage in."

Returning to the above language taken from the statute, namely, "or any association whose object is to promote temperance or other virtue conducive to the well-being of the community, and, generally, any association formed to provide for some good in the order of benevolence, that is useful to the public," as a possible justification under which the Alliance might claim to be a benevolent association, it may be profitable to first determine, so far as can be, what the Legislature intended by such language when read in conjunction with the preceding language found in such statute. We have been unable to find any decision from any of the appellate courts of our state construing this particular language, so we are left to general principles of law and our own conclusions based thereon for a solution of the question.

The Legislature at the beginning of the statute in question, used the following language: "Any association formed for benevolent purposes." We believe it fair to presume that if an association is formed for a benevolent purpose, then such purpose is necessarily useful to the public. Hence, the other phrase of the statute--and one which is in question here--namely, "and, generally, any

association formed for some good in the order of benevolence, that is useful to the public," appears to us to be merely an inadvertent repetition, expressed in a slightly different form, of the above language used at the beginning of the statute.

It is to be further noted that the Legislature in providing for the incorporation of "any association formed for benevolent purposes" apparently took pains to express what character of associations could be classed as benevolent for the purpose of incorporation. If the Legislature did not apprehend that the class as specified would cover all associations or groups that could, legally speaking, operate for benevolent purposes, useful to the public, then it did a useless and unnecessary thing in so specifying, because if such statute contained only the above phrases as stated in general terms, such general terms would have served any contrary intention on the part of the Legislature to limit benevolent associations to those named.

In the view just expressed that the two phrases, namely, at the beginning and end of the quoted part of the above statute, both expressed in general terms (which we believe to mean one and the same in effect), as contained in the statute, are limited by or to the objects so specified as benevolent, and whatever is incident to such objects, we have in mind well recognized rules of statutory construction which are illustrated by the case of City of St. Louis v. Laughlin, 49 Mo. l. c. 564, which is about as near apposite in principle as we could find, wherein the court said:

> "In the present case the charter specifically enumerates the classes of persons intended to be taxed, and the sweeping words 'all other business, trades, avocations or professions,' we do not think can be made to include persons not of the same generic character or class. In specifying and enumerating the trades and professions to be taxed, it was intended to limit the taxation to them or to persons engaged in similar trades or occupations."

More recently, the Supreme Court in Kansas City v. Threshing Machine Co., 337 Mo. l. c. 930, said:

> "'It is a general principle of (statutory) interpretation that the mention of one thing implies the exclusion of another thing; expressio unius est exclusio alterius.' 25 R. C. L. 981, sec. 229; 25 C. J. 220, 59 C. J. 980-86, secs. 580-83.) 'Where there are, in an act, specific provisions relating to a particular subject, they must govern, in respect of that subject, as against general provisions in other parts of the statute, although the latter, standing alone, would be broad enough to include the subject to which the more particular provisions relate."

Passing on to the further discussion of the aforesaid generalities expressed in the statute in question, we are left to deal with the other mooted phrase or clause, namely, "or other virtue conducive to the well-being of the community." It is to be seen that the words "other virtue" are used as an alternative to the word "temperance" contained in the preceding clause, namely, "any association whose object is to promote temperance." It is evident that the Legislature in writing this statute assumed on its own initiative that an association formed, and whose object is, to promote temperance was a benevolent association and could be incorporated under the Constitution as a benevolent corporation. However, neither at the time the statute was enacted, nor since, was there, or has there been, any decision in existence from our appellate courts holding that a temperance association comes within the meaning of the word "benevolent" as used in the Constitution. Accordingly, the fact that the Legislature has denominated a temperance society a benevolent association and entitled to incorporate as such does not necessarily validate such incorporation. In this respect the Supreme Court in the case of Rockhill Tennis Club v. Volker, 331 Mo. l. c. 958-959, said as follows:

> "By the plain and positive terms of this section of the Constitution, no corporation can be formed in this State in the manner provided by the statutes mentioned,

> that is, without paying into the State treasury at least fifty dollars on its capital stock, except 'those formed for benevolent, religious, scientific or educational purposes.' There is no pretense that plaintiff complied with this constitutional provision, and when a corporation is formed by a pro forma decree of the circuit court under the statutes mentioned, it is not contemplated that it shall do so. But it is equally imperative that the corporation so formed shall be of the kind permitted by this constitutional provision, that is, formed for either benevolent, religious, scientific or educational purposes. This constitutional provision curbs the power of the Legislature, and it was held in an early day that the Legislature had no power to declare a corporation to be of the class exempted from paying the corporation tax required for its formation unless it actually is of that class. Whether it is or not is a judicial question."

In any event, if the Legislature in denominating temperance as a virtue of mankind which, if promoted by an organization, would acquire the attributes of benevolence such as to entitle such organization to incorporate, then we believe that such Legislature further intended by the phrase "or other virtue," following the word "temperance," that the other virtue or virtues meant were of like or similar kind to that of temperance. We would hesitate to say that the Legislature intended to run the entire gamut of virtues human born or acquired by mankind, which would include, among others, affability, generosity, kindness, integrity, and industry, and by reason of which, if practiced by any substantial number in a community, would be conducive to its well-being, and hence attribute to the Legislature that it meant that if any one or more of such virtues would be promoted by an organization, it would or could become a benevolent corporation.

In view of the foregoing, the query is pertinent here, can crime prevention or crime punishment be said to come within the meaning of the word "virtue", and if so, is

crime prevention or crime punishment, or both in the conjunctive, a virtue of like or similar kind as temperance? Generally speaking, temperance is understood to mean a moral attribute of human character, whereas crime prevention or crime punishment is more or less the operation of the mechanics of criminal law enforcement provided for under our criminal code. Furthermore, the fact, if it be a fact, that the practice of temperance and crime prevention and punishment might both achieve a like result, namely, "conducive to the well-being of the community, * * * and useful to the public," yet merely reaching the same result is not the test. For instance, the Ford Motor Company employs many thousands of laborers in the community in which it is located, thus providing gainful occupation and the fruits thereof for these many thousands, together with their families. Hence, the promotion or operation of this corporation, whether or not a virtue, is at least conducive to the well-being of the community and reaches the same result as presupposed for temperance and crime prevention and punishment. Notwithstanding, no one would say that the Ford Motor Company could lay claim to being an organization or corporation of a benevolent character.

In the case of State v. McGrath, supra, by reason of the association therein concerned having no paid up capital and operating on membership dues or assessments for the purpose of furnishing homes to its members, such association claimed it was one of a benevolent character and in fact had legislative declaration that it was such. It is conceivable that its purposes as shown were "conducive to the well-being of the community, and useful to the public." Yet the court failed to find any benevolent characteristic about this association, the court saying, l. c. 198:

> "It is clear, we think, from the sections above quoted as well as from the articles of association, that the leading purpose of this corporation is not to promote benevolence or charity, but to better the pecuniary condition of its members or shareholders alone, and we are unable to see how the fact that such an association may tend to promote frugality and economy, and open up a way 'whereby the shareholders, out of their savings, may

> be enabled to secure houses, or loan their savings to others at high rates of interest, to be fixed by the directors,' can be said to impress or characterize the association as one formed for benevolent purposes, when the chief incentive to each stockholder is that he may benefit himself."

We are not unmindful of the fact that considerable argument could be made that the Alliance is entitled to incorporate as a benevolent association under the general clause of the statute as hereinabove set forth, and hence a close question might be involved, if the right to so incorporate turns solely upon this point. However, we believe a further question taken in connection with the above will dispose of the matter of character of the Alliance, and consequently it may be unnecessary to decide this first point.

(b) The Articles of Agreement of the Alliance, under Article III therein, setting forth the purpose of the organization, state such purpose in general terms, but qualify or circumscribe such general terms by specifying in some seven or eight enumerated paragraphs following (six of which are material here and likewise qualified or circumscribed by the Membership Certificate) in what way it proposes to carry out its purpose so expressed generally at the outset. The gist of enumerated paragraphs 1 and 2 provides for the inspection of premises of members of the Alliance, and advising them, and adopting methods of protection against robbery, burglary, and like crimes.

The salient feature of the enumerated paragraphs 3 to 6 inclusive, taken as a whole, which we believe can be fairly stated as to effect, is to use the proceeds of a trust fund to be created by requiring members to pay stipulated dues wherewith to pay members for loss of property, who have been victimized by robbery, burglary, and counterfeiting, for a report of the case, which could be used, if needed, by law enforcement officers toward effecting the arrest and conviction of the perpetrators of such crimes and the recovery of the stolen money or property.

The Membership Certificate undertakes to reimburse members for money or property loss, or, put differently, to insure them against such loss by reason of burglary, robbery or counterfeiting by the indirect method of paying the member victimized, who suffers the loss, what is denominated in the Articles of Agreement and Membership Certificate, a reward for exposing the crime and reporting the facts connected therewith.

The By-laws as proposed provide, among other things, that the officers of the Alliance are three, namely, the president, secretary and treasurer; that the president shall have full authority over the funds, the personnel, members, and the management of the Alliance; that the officers mentioned above shall constitute the managing board, and the managing board shall determine the general policies of the Alliance. Further provisions of the By-laws provide for trustees, not less than three nor more than seven in number, by election or selection, in which the members have no say or voice. In fact, there is no provision as to how the trustees are to be selected or elected. Hence, the aforesaid provisions giving the broad powers to the president, or the president together with the other two officers, as the managing board, might with reason be construed to give the president or the board the authority to name or select themselves as the minimum three trustees. A further provision, coupled with the sole authority of the president over the funds of the Alliance, permits him, after twenty per cent thereof is set aside wherewith to pay rewards, to control the other eighty per cent and the investment thereof.

While a provision of the By-laws does not permit any of the three officers to make pecuniary profit out of the Alliance, save their salaries as such officers, yet the By-laws can be amended, without voice of the members, by a two-thirds vote of the said trustees. It is to be noted by the petition to be filed for incorporation that the three incorporators necessary under the statute, to-wit, the president, secretary and treasurer, will accordingly fill such offices indefinitely so far as by-law provisions are concerned. Hence, if the three officers named as incorporators become the three officers, respectively, and the three minimum trustees provided for, it is within the power of any

two of such officers and trustees to amend the By-laws to the end that such officers could profit substantially thereby.

We are mindful of the rule that by-laws can neither increase nor diminish the powers granted in the articles of agreement or charter of the corporation, but nevertheless such by-laws--and as well the Membership Reward Certificate in this case--can be used for the purpose of aiding construction so as to arrive at the true intent of the purposes set forth in the articles of agreement. In point of fact, statutory provisions provide for extrinsic aid in determining the true character or purposes of the association seeking to incorporate as a benevolent corporation.

Section 4997, R. S. Mo. 1929, provides in part as follows:

> " * * * it shall be his (the court's) duty to appoint some competent attorney, as a friend of the court, whose duty it shall be to examine said petition and show cause, if any there be, on some day to be fixed by the court, why the prayer of said petition should not be granted, and said attorney shall not be confined in his examination to said petition and articles of association, but may introduce such testimony as may be available and proper in order to fully disclose the true purposes of the association; * * *."

If the By-laws are interpreted to the end that the officers of the proposed corporation could or would become the first three trustees provided for, then the By-laws are subject at any time to a change by the trustees that could result in unlimited personal advantage to said three officers.

In the case of In re St. Louis Inst. of Christian Science, 27 Mo. App. l. c. 640-641, wherein the control and use of the unexpended income of the association therein concerned was in question, there is presented a more or less analagous situation to the instant case concerning the control and use of the eighty per cent of the trust fund of the Alliance. The court in the above case said:

"By section 978, of the Revised Statutes, it is directed that 'No association, society, or company, formed * * * for pecuniary profit in any form * * * shall be incorporated under this article.' The constitution of the institute provides that, after the payment of certain expenses out of the tuition fees charged to pupils and the amounts paid by patients, the remainder of such receipts 'shall be devoted to the furtherance of the principles taught in the said school, in such way as to the board of directors shall seem best.' This opens as wide a field for unrestricted appropriation and expenditure by the petitioners (who constitute the board of directors) as may be found in any corporation established purely for the pecuniary profit of its founders. The residual expenditure is to be, not for the support or advancement of the institute itself, but for the furtherance of its 'principles,' in whatever way the directors--i.e., the petitioners, who are to be sole judges thereof--may choose to adopt. The directors may be of opinion that the principles of the institute will be best furthered by their own personal comfort and exemption from the crying wants of life. There is hardly any limit to the number of ways in which the personal advantage of the directors may be considered by themselves, as in furtherance of the 'principles' taught by the institute. The residual fund is, practically, as much under their entire personal control, as if the constitution had plainly declared that such was the special object in view. To this extent, the corporation would be created for the pecuniary profit of its founders, and, therefore, contrary to the letter of the law."

As pertinent to the instant case, we quote from Section 5003, R. S. Mo. 1929, as follows:

> "No association, society or company formed for manufacturing, agricultural or business purposes of any kind, or for pecuniary profit in any form, * * * shall be incorporated under this article."

We take it that the three incorporators you mention in your letter contemplate signing the petition and becoming the first officers of the Alliance if incorporated, and consequently we do not wish to be understood as saying that such incorporators as officers will operate the Alliance to the members' disadvantage and to such officers' own personal advantage. In view of the statement made that the persons mentioned in your letter are reputable citizens, we presume fidelity, on their part, to the best interests of the members. However, in construing corporate powers, the law looks to what can be done by those presently in charge and their successors in office, and not what will be done.

However, in passing, it may not be amiss to allude to the salaries provided for the three officers in question, namely, $12,000 for the president, $3,600 for the secretary, and $2,400 for the treasurer, making a total of $18,000 in all for the three chief officers. In view of the full authority given the president over the funds of the association and the full powers given the managing board (the president, secretary and treasurer) to determine the general policies of the association, it would be well within the authority of the three officers to determine that the salaries of the officers should be the first item to be paid out of the income. While it is not our province to pass upon the amount of salaries to be paid, or any other expense of the association, and we do not do so, yet critics might observe that in the forming of the proposed corporation, it would be accomplished not without substantial pecuniary profit to the three officers, whether justified or unjustified.

We believe it fair to say that the most prominent purpose, if not the sole or outstanding one, of the Alliance is to enable members of the proposed corporation to receive pay, or money reimbursement for property loss through certain criminal acts, by reporting the circumstances of the crime to the Alliance. The purposes of the Alliance go even further and permit any and all members to receive pay,

without any property loss connected therewith, for what is termed outstanding contributions toward crime prevention. In other words, a member, by paying the stipulated monthly dues, may in turn receive a substantial profit for such contribution. We doubt if any stockholder in a business corporation would have any greater opportunity of receiving dividends or profit, if the business of the corporation is successful, than would a member of the Alliance have of receiving pay or reimbursement, if victimized by burglary, or if he contributes to crime prevention. Hence, it appears to us that the chief incentive to each member of the Alliance would be that he may benefit himself. We recur to the quoted language in State v. McGrath, supra, wherein the court said in substance and effect, that an association could not characterize itself as one formed for benevolent purposes, where the chief incentive to each member is that he may benefit himself. The setup of the Alliance appears to us to fall within the provisions of Section 5003, aforesaid, relative to corporations formed for business purposes or for pecuniary profit rather than for benevolent purposes.

Consequently, it is our conclusion, by reason of what we have said in the foregoing, that the Alliance is not a benevolent association within the meaning of the law, and hence is not entitled to incorporate as such.

II.

Passing to the question of whether the Alliance would be engaged in the insurance business so as to come under the supervision of the State Insurance Department if it pursues the purposes as set forth in the memoranda, to-wit, of paying members for loss of property due to burglary, etc., by the route of a so-called "reward" for reporting the facts of the case so that the possibility of the arrest and conviction of the perpetrator of the crime might follow, can best be answered by first ascertaining what is the law's definition of insurance. 32 C. J., Sec. 1, page 975, states the definition or rule as follows:

> "Broadly defined, insurance is a contract by which one party, for a compensation

> called the premium, assumes particular risks of the other party and promises to pay to him or his nominee a certain or ascertainable sum of money on a specified contingency. As regards property and liability insurance, it is a contract by which one party promises on a consideration to compensate or reimburse the other if he shall suffer loss from a specified cause, or to guarantee or indemnify or secure him against loss from that cause."

Second, do the facts in this case, as displayed by the memoranda aforesaid, bring the purposes of the Alliance, if carried out, within the purview of the aforesaid definition of insurance so that the Alliance would be engaged in the insurance business?

The Alliance proposes to issue in connection with, and as part and parcel of, its declared purposes in its Articles of Agreement, what is denominated by the Alliance a "Membership Reward Certificate," having a face value of $500, which is to be issued to a member upon payment by the member to the Alliance of a stipulated amount in money, termed "dues", whereby the Alliance assumes the risk of the member suffering money or property loss, or loss of life, through burglary, robbery, or counterfeiting, and the Alliance promises to pay such member, or his family in case of death, a certain amount of money if the contingency provided for in the certificate, namely, loss of property or death, occurs, as the case may be. Manifestly, applying the aforesaid legal definition of insurance to the Membership Reward Certificate, there could hardly be any reasonable doubt that if the Alliance proposes to issue the certificate in question and carry out its provisions, that it would be engaged in the insurance business.

It is true that the Certificate denominates the payment of the money called for to the member or his family for the occurrence of the contingency specified as a "reward" for information given by the member of the occurrence of the contingency provided for. Nevertheless, it is to be seen that the payment of the so-called award or reward is not limited to payment <u>only</u> in the event that the "information" supplied <u>must</u> cause the arrest and conviction of the

perpetrator of the crime, but that merely the giving of the information is sufficient, whether it results in arrest and conviction or whether it doesn't. In point of fact, nothing is said anywhere or in any part of the Articles of Agreement, Reward Certificate, or By-laws as to what is to be done, if anything, by the Alliance with this information when reported to it. It might be inferentially concluded that the Alliance will, in turn, report the information given it by the member to the proper peace officers, but the certificate, itself, requires the member, in the first instance, to collaborate with the peace officers, who have investigated the crime, before the member makes his report to the Alliance. If the member is required, as the terms of the certificate so provide, to obtain first of all a signed statement of the peace officer, who has investigated the crime, which statement is to accompany the member's report to the Alliance, then manifestly the peace officer's investigation would be based in whole or in part upon all the information the victimized member could give such peace officer. Clearly, the report thereafter of the member to the Alliance under such circumstances, if done for the purpose of enabling the Alliance, in turn, to report the information to the peace officers, would be superfluous. The peace officers already have the information; furthermore, such report to the peace officers would be the moral duty of each and every member of the Alliance, and of the Alliance, as the composite entity of all the members, whether incorporated or not, to inform the peace officer of the community of the perpetration of a crime, and which report or information given would in no wise constitute benevolence on the part of the members of the Alliance, or the Alliance itself.

A further circumstance, and it may be a singular one, is that the amount of the "reward paid for information" in the case of property loss by the member is measured by the amount of money or value of property lost. The death payment calls for a flat $150 as a "reward" to the family for reporting the death of a member by violence and the surrounding circumstances, so far as known, to the proper peace officer, which, it appears to us, would seem to be a natural course for such family to take, whether paid indirectly or directly therefor or not paid at all.

Consequently, it is, or ought to be, obvious to anyone of average intelligence that the denomination or calling by the Alliance of the payments to be made members, under the Articles of Agreement and Membership Certificate, as "rewards for information," is but a thin veil to cover the true purposes and picture of the contemplated operation of the Alliance.

Accordingly, it is our opinion and conclusion that the Mem ership Certificate in question is nothing more or less than an insurance policy or contract, and that if the Alliance should issue such certificate to its members, it would be engaged in the business of life and property insurance, and should incorporate under the appropriate provisions of the statute for insurance companies, and accordingly it would be subject to the supervision of the Insurance Department of the State of Missouri.

Respectfully submitted

J. W. BUFFINGTON
Assistant Attorney General

APPROVED:

J. E. TAYLOR
(Acting) Attorney General

JWB:HR