HOSPITALS: When a benevolent institution, and when engaged in the practice of medicine.

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St. Louis Medical Society

Missouri Pacific Hospital Association

Gentlemen:

The question presented in this matter, so far as this department is concerned, is whether or not, under all the facts and circumstances presented in the case, quo warranto proceedings could be sustained, and, as a consequence, whether or not such proceedings should be instituted by the Attorney General upon the request of the St. Louis Medical Society, which we will hereafter refer to as the "Society," against the Missouri Pacific Hospital Association, a corporation, which we will hereafter refer to as the "Hospital."

The quo warranto proceedings is sought by the Society upon two grounds, namely:

> 1. That the incorporation of the Hospital was and is void ab initio and that legally it is not now a corporation, although exercising corporate functions.
>
> 2. That it was validly incorporated, but is functioning beyond its charter and corporate powers by reason of the contention that it is engaged in the practice of medicine.

Due to commendable frankness on the part of the Society, both grounds are aimed at the one result, namely, to force the Hospital to discontinue its practice of furnishing its patients only with physicians who constitute its regularly employed medical staff.

The Facts.

Based upon the memoranda, briefs, records, etc., oblingingly furnished us by respective counsel, together with the oral arguments advanced, we have probably gleaned enough therefrom to denominate same as the facts in the case, which, briefly stated, may be taken as follows:

From the 24th annual report of the Hospital Association for the year ending December 31, 1936, it appears that a Hospital Department of the Missouri Pacific Railroad was organized in 1876, under the exclusive control of the Railroad, and continued so until on or about August 1, 1912, when by reason of the Hospital Department being self-sustaining, the Hospital property, or real estate, and the funds on hand were turned over by the Railroad Company to the control of the employees of the Railroad for their operation and benefit. The Hospital was thereafter operated by the employees, through a Board of Managers, apparently as a voluntary association, until May 29, 1922, when it became incorporated under a pro forma decree of the Circuit Court of the City of St. Louis, in conformity with the provisions of Article 11 of Chapter 90 of the Revised Statutes of Missouri, 1919 (now Article 10, Chapter 32, Revised Statutes of Missouri, 1929), entitled "Benevolent, Religious, Scientific, Fraternal-Beneficial, Educational and Miscellaneous Associations," and hence is a non-stock and non-profit corporation.

The charter provisions of the corporation, among other things, provided that all officers and employees of the Railroad Company, and all employees of the Hospital (subject to enumerated exceptions) constituted the membership of the corporation, together with employees of allied railroad lines who could become members, depending on certain provisions relating to such allied lines and the employees thereof; that the financial support of the Hospital should be from a fund denominated "membership dues," derived by monthly assessments deducted from each member's wages or salary in accordance with a scale in proportion to wages received; that the management of the Hospital should be vested in a Board of Managers elected as representatives from and by the several employee organizations; that the chief surgeon shall be appointed by the chief operating officer of the Railroad Company, and shall be a member of the Board of Managers, with voice, but no vote, and the chief surgeon shall appoint all assistant physicians,

surgeons and specialists, subject to the approval of the Board.

The By-laws of the Hospital provide that a patient, in order to be admitted therein for treatment, should be waited on by the Hospital's regular staff of doctors. However, a further provision permits a member or employee to engage his own doctor at the member's own expense (this latter mentioned provision may relate to treatment outside the Hospital, but, considering the two provisions, some confusion is created in arriving at what is intended).

It appears to be a fact in the case that the member doctors of the regular staff, who are furnished to patients, are paid either a fixed salary or per call, by the Hospital.

It further appears that the Hospital has a bonded indebtedness amounting to approximately $90,000.00, which is held by and among the membership.

The above facts and outline of operation will probably suffice for the purpose of determining the applicable law to the case.

I.

IS THE HOSPITAL LEGALLY INCORPORATED?

Counsel for the Society contend that the Hospital could not be legally incorporated under Article 11, Chapter 90, R. S. Mo. 1919, or, put differently, that it was incorporated for business purposes and for pecuniary profit. Counsel for the Hospital contend, on the other hand, that it was legally entitled to incorporate as a benevolent association under the statutes.

Article 10, Section 21, of the Constitution of Missouri provides:

> "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. * * * *"

Sections 4996 and 4999, R. S. Mo. 1929 (heretofore Sections 10264 and 10267, R. S. Mo. 1919), provide in part as follows:

> "Sec. 4996. Any number of persons not less than three, who shall have associated themselves by articles of agreement in writing, as a society, company, association or organization formed for benevolent, religious, scientific, fraternal-beneficial, or educational purposes, may be consolidated and united into a corporation."

> "Sec. 4999. Any association formed for benevolent purposes, including any purely charitable society, hospital, * * * and in general, any association, society, company or organization which tends to the public advantage in relation to any or several of the objects above enumerated, and whatever is incident to such objects, may be created a body corporate and politic by complying with sections 4996 and 4997."

The Society contends that by reason of the words found in Section 4999, to-wit, "including any purely charitable society," that the words "purely charitable" qualify the word "hospital." If such a view could be taken, it would logically follow that each and every of the additional objects enumerated in the statute must likewise be purely charitable, when it is common knowledge that some of such objects, incorporated or not incorporated, depend in whole or in part upon financial support from those who partake of the benefits to be derived from such objects. This is especially true in the case of a fraternal-beneficial association, which cannot be and is not a purely charitable organization, but is, nevertheless, held to be a benevolent organization, as shown by the case of Umberger v. M. B. A., 162 Mo. App. l. c. 143, wherein the court said:

> "Such associations are benevolent associations. * * * It is manifest that notwithstanding the insurance feature, they do not represent trade or commerce. They are essentially benevolent."

In view of the constitutional provision and Sections 4996 and 4999, both using the word "benevolent" in their respective contexts, without such, or any limitation thereto, as counsel contend for, and considering the necessary character of some of the other objects enumerated, we would hesitate to place such a limited construction as contended for without direct authority therefor from our Missouri courts, or out-state decisions construing a statute of the same context or wording. Counsel have presented nothing, and we have been unable to find any such authority from independent research.

Hence, it appears to us, so far as this case is concerned, that the character of the Hospital turns upon the question of whether or not it is an organization or incorporation formed for benevolent purposes within the legal meaning of the term.

Counsel for the Society assert, first, in their brief, that "The General Assembly may not otherwise provide or make a benevolent corporation out of that which is not such," and present authority sustaining this general principle of law. Counsel for the Hospital agree with this principle. Hence, no issue is created on the point, and such point, in our judgment, not being determinative of any real issue in the case, we pass on to the Society's next point, namely, as presented, "It is a business organization and not a benevolent institution or charitable institution." The Society cites a number of decisions for the purpose of sustaining its contention, first among which, in analogy, so far as our Missouri courts are concerned, is Phillips v. Railroad, 211 Mo. 419. A reading of this case, at first blush, gives a strong impression that it is decidedly in point. However, a closer reading and analysis of the case results in substantial doubt as to its force, because, first, the suit was against the railroad company and not the hospital in question. The railroad's defense is stated as follows, l. c. 426:

> "Defendant contends that it is in no sense responsible for the negligent acts, if such there were, of 'The Employees'

> Hospital Association of the Frisco Line;' that it is a distinct corporate entity, not under control of defendant, and that it is responsible for its own acts of negligence."

The court then said, l. c. 426:

> "This relationship between the defendant and the Hospital Association is important on the question of excluding certain evidence, in addition to the point now in review."

We take it that the court alludes, by the language shown in the above excerpt, "in addition to the point now in review," to the point raised as to whether or not the Hospital in question was a distinct entity, not in control of the defendant. Hence, it appears to us that there was in reality no issue in the case respecting whether or not the Hospital was a charitable organization and it was not necessary to so decide. The case further shows that the hospital physicians in charge of the welfare of the plaintiff were likewise the physicians in charge of the railroad, and hence the real issue involved was one of agency and not the character of the hospital. Furthermore, the court's view that the hospital in question was not a public charity and had but few, if any, of the earmarks of a voluntary benevolent association, we believe was unnecessary to express under the facts, because even if it had been found that the hospital was a charitable institution, we apprehend that if the physicians working therein were likewise the agents and employees of the railroad company (as found by the court), the same liability would attach to the railroad company as was found in the case.

Counsel for the Society presents Haggerty v. Ry. Co., 100 Mo. App. 426. This case presents the same situation as the Phillips case, namely, the issue involved was agency or the application of the rule of respondeat superior. It was shown that the relief organization brought into the case was a department of the defendant railroad company. Hence, the character of this organization was in no wise decisive of the issue in the case.

In addition to reviewing all of the Missouri cases cited us by counsel for the Society, we have also read with interest all of the out-state authorities presented in the brief on this point; and it appears to us that there is enough difference between the facts shown in these several out-state cases and the instant case, coupled either with some difference in legal issues involved, or purpose of corporate organization, as to throw doubt as to their applicability here.

Two Federal cases have been shown which are of interest here, one by the Society, namely, St. Louis Southwestern Ry. Co. v. Yates, 23 F. (2d) 283, and one by the Hospital, namely, Union Pacific R. R. Co. v. Artist, 60 F. 365. Both cases concern a hospital setup and both setups are strikingly similar to the hospital setup here involved. However, if we were forced to choose between one or the other, as sustaining authority for or against the point here discussed, we believe the last mentioned case would prevail, because in the first one the question involved was tax exemption of the hospital, and, as well known, the law is strictly construed against tax exemption. The second case concerned the question of liability of the hospital for personal injury. Hence, we believe the second case is more apposite as an authority in the instant case, as supporting the Hospital's contention.

The opposing contention on the part of counsel for the Hospital is that, while not conceding that the Hospital is not a charitable institution, they emphatically contend that, without question, it is a benevolent institution. Counsel thus draw a distinction between an institution which is charitable and one which is benevolent. There appears to be respectful authority sustaining this view.

In State ex rel. v. Lesueur, 99 Mo. l. c. 558-559, the court in discussing the provisions of the Constitution involved herein, said:

> "And it is to be observed in the first place, that the constitution uses the words 'for benevolent, religious, scientific and educational purposes,' in a broad and comprehensive sense. The corporations thus exempted from the payment of the tax are, to a certain extent, mentioned in contradistinction to such as are organized for pecuniary profit.

> " * * * Some degree of liberality must be allowed in the formation of those associations where all pecuniary profit is excluded."

In the case of Westerman v. Supreme Lodge K. of P., 196 Mo. l. c. 701, the court in speaking of a fraternal beneficiary association, said:

> "It is only essential to constitute the defendant a fraternal beneficiary association that it be organized for the benefit of its members, and not for gain or profit."

7 C. J., page 1140-1141, says as follows:

> "Since the context may qualify or restrict the ordinary meaning of the term 'benevolent,' the word is frequently used as synonymous with 'charitable;' but this is not necessarily so, 'benevolent' being, it seems, a word of somewhat broader, larger, and wider meaning than 'charitable.' In other words, charity may be benevolence, but all benevolence is not necessarily charity."

Hence, it would seem that our Missouri courts give a broad and liberal construction to the term "benevolent," especially so when a fraternal beneficiary association is classed as a benevolent organization. The likeness between a fraternal-benefit association and the hospital is more or less striking in that both exact dues or assessments from its membership in order to dispense the benefits respectively provided for. Both operate without profit. The only difference, if there be one, is that the one organization incidentally dispenses social benefits to its members, while the other dispenses medical benefits to the sick and injured.

As heretofore stated, the Hospital does not concede that it is not a charitable institution within the legal meaning of the term.

In reviewing the case of Nicholas v. Evangelical Deaconess Home, 281 Mo. 182, which involves a suit by a patient against the aforesaid Home, the salient features of the setup of the Home, held by the court to be a charitable institution, bear a marked similarity to the salient features of the setup of the Hospital here, as will appear by the following:

The Home.	The Hospital.
(a) Object. To nurse the sick and care for the poor and aged.	(a) Object. The medical and surgical care of members, with an allowance for burial expenses of the poor or indigent members.
(b) Membership. Every Protestant Christian of a certain belief.	(b) Membership. All persons who are, or shall become, employees of certain railroads.
(c) Dues. Members required to pay at least $2.00 annually.	(c) Dues. Members required to pay annually amounts proportional to wages.
(d) Substantially all of the annual revenue necessary to support the Home was received from pay patients.	(d) All the revenue necessary to support the Hospital was received from dues of members.
(e) Control of the Home vested in twelve persons.	(e) Control of the Hospital vested in nineteen persons.
(f) A non-stock, non-profit corporation.	(f) A non-stock, non-profit corporation.

Practically speaking, we can see but little, if any, difference in the respective setups of the two institutions so far as actual charity is concerned. If the revenue figures of the Home for 1914 are a fair average of the annual operation, it would appear that the pay patients (leaving out of consideration what additional amount was received from membership dues) all but paid the way of whatever indigent patients were treated.

On the other hand, there may be as much practical charity on the part of the Hospital in treating the employees, mentioned in Section 4, Article 4, of its By-laws, free, and in the allowance provided for burial of indigent employees.

However, legally speaking, there may be some difference between the two institutions from the charity standpoint, but until so pointed out to us, a substantial doubt exists as to any difference.

After consideration of the issue as to whether the Hospital is a charitable or benevolent institution, or whether it is neither, we believe (without passing on such issue) the solution as to whether or not quo warranto would likely be sustained against the Hospital on the point now being discussed, resolves itself into the question, would the proceeding be timely?

The Hospital has existed as a corporation for substantially the past twenty years, conducting its operations, including a regular paid medical staff, in the same way throughout this period. We take it, from more or less common knowledge, that the St. Louis Medical Society has existed as such for a much longer period. In any event, there must be members of the present Society who have been practitioners for more than twenty years, and who, as individuals, or a collection thereof, could have long ago made the same complaint against the Hospital as is now being made.

That the time element can play an important and decisive part in the court's action in quo warranto proceedings is shown by the following cases:

In State ex rel. v. Town of Westport, 116 Mo. l. c. 595, the court said:

> "If there is to be no limit to such proceeding and if at any period of time, however remote from the time of the organization of a municipality, a proceeding by quo warranto can be resorted to, and such municipality and its officers ousted of their franchises, because of irregularity in its organization, it would effectually destroy the credit of municipalities generally, to such an extent as to render it impossible to grade and improve their streets, or to construct any kind of improvements promotive of the health, welfare and convenience of their inhabitants, and issue bonds or tax bills in payment thereof."

In State ex inf. Attorney-General v. School District, 314 Mo. l. c. 329, the court said:

> "That aptly applies to the situation here. Here, there was acquiescence in the status quo for four years. The relator brought suit attacking the validity of the change and only questioned it after four years and after his failure to get his taxes reduced by other proceedings. He brought his first proceeding after four years and he brought this one, the only legal proceeding, in eight years. All the time his reason was, not on account of poor schools or bad management or to accomplish better school facilities, but merely to escape higher taxes."

Again at page 331:

> "In case of State ex inf. v. Arkansas Lumber Company, 260 Mo. l. c. 284, after quoting the Statute of Limitations, this court said at page 284: 'There have been cases adjudged in which the rights of towns and villages to exercise their corporate franchises were brought in question by informations in the nature of quo warranto. It has been held upon the doctrine of laches, however, that the right to investigate such matters is sometimes barred without regard to the Statute of Limitations.'"

And again at page 332:

> "The granting of a writ of quo warranto is a matter of discretion. The court will not grant it unless some good purpose can be served by it. (State ex rel. v. Cupples, 283 Mo. l. c. 145.) The quotation above from the language of Judge Goode in the Mansfield case aptly fits this case. Unless some equity in favor of the State is shown, its laches ought to preclude it from attempting to cancel the proceeding by which the School District of Lathrop was extended and cause the injurious results which would follow from the disorganization of that district. * * * * Thus without any evidence that the school conditions

> would be improved, but with a situation which suggests that they would be impaired, with no complaint from any one who had school children or is interested in any school, this court should exercise its discretion and deny the relief sought."

A number of other Missouri cases, both before and since, in point of time, could be cited, but we believe that the foregoing cases will suffice to show the legal principle which could be applied to the instant case.

Furthermore, another question that asserts itself here in addition to that of laches, and as a companion question, is, that while a writ of quo warranto will issue at the instance of the Attorney General as a matter of course, yet the granting of the writ is a matter of discretion and the court will not grant it unless some good purpose can be served by it.

In the case of State ex rel. v. Cupples Station L. H. & P. Co., 238 Mo. 1. c. 146, the court quotes with approval from Judge Goode in State ex rel. v. Town of Mansfield, 99 Mo. App. 146, 1. c. 152, as follows:

> "'That the court may exercise a considerable latitude of discretion both as to whether it will grant a rule upon the defendant to show cause, where the proceeding is instituted in that way, and as to whether there has been sufficient abuse of franchises by a corporation to warrant their forfeiture, there can be no doubt upon the authorities. But so many relations, public and private, are involved in a forfeiture at suit of the State, and each case involves so many considerations peculiar to itself, that no definite general rules can be stated to guide courts and practitioners. It must be borne in mind that specific facts which have been held sufficient to warrant a judgment of forfeiture in one or several adjudged cases may be so modified by extraneous facts in another case as to

> deprive the former of value as guides to a correct decision. The most important if not the only interest to be served is that of the public. If that is kept constantly in view, but little difficulty should be encountered. Especially do these observations apply in cases where the proceedings are based upon misuser or non-user of franchises. It may be considered well settled that not every misuser which may be detected will justify a forfeiture, but only those which constitute a prejudice to some public interest, or which, being persisted in, will involve the safety, welfare, or security of the community. * * *.
>
> "Since the public good is the element chiefly to be considered, we are persuaded that, under the facts in this case, we ought in the exercise of a sound discretion to decline to oust respondent from the overhead district."

See, also, State v. Ellis, 329 Mo. l. c. 129.

In view of the fact that this Hospital, as well as all hospitals, administer to and treat the sick and injured, and in most cases return the individuals to society in reasonably good physical condition, bespeaks for a hospital a work of public benefit. Public health is public wealth. The public health is of such paramount concern to the public interest that both the national and state governments maintain departments of public health. It would seem to us that every city, town, or community would welcome as many hospitals located therein as could efficiently maintain themselves. Manifestly, in view of all that is said and done in furtherance of public health, the Hospital in question, or any hospital, if reputable and operating efficiently, could not be subversive of the public interests or work any harm or injury to society or such interests.

We comment here on the fact that the Hospital has an outstanding bonded indebtedness as of January 1, 1937, of substantially $90,000.00, carried by the individual members of the Hospital. Consequently, to oust this institution by quo

warranto, if the result be to destroy its operations as a hospital, would, in our opinion, be not only against public interest, but would visit upon that part of the public, namely, those of it who are members of the Hospital holding the indebtedness of the institution, a particular or additional injury, because, if this, or any hospital, should be forced to shut down and cease operation, the value of the buildings and equipment would compare in value with that of the proverbial "white elephant". On the other hand, if the Hospital could be deprived of its corporate charter, and if it would then be possible to continue its operations as at present, including its employment of its own doctors, as a voluntary association, then nothing would be accomplished by quo warranto in gaining the one result sought by the Society.

Hence, in its final analysis, and even tho gh its character as to being a charitable or benevolent institution be resolved, for argument, against the Hospital, yet we believe the court in passing upon the writ, if issued, would decide that the remedy to be applied to achieve the cure desired would be too drastic; and hence we further believe that the result of a quo warranto proceedings would be unsuccessful so far as invalid incorporation is concerned.

II.

IS THE HOSPITAL ENGAGED IN THE CORPORATE PRACTICE OF MEDICINE?

This question has been directly answered by the St. Louis Court of Appeals in the case of State ex inf. v. Lewin, 128 Mo. App. 149, wherein it is shown that quo warranto proceedings were instituted against Lewin Hernia Cure Company, a corporation, charging that such corporation was exercising the right and privilege of engaging in the practice of medicine. The judgment was against the State and the court in ruling on the case, said, page 155:

> "In all the larger cities, and connected with most of the medical colleges in the country, hospitals are maintained by private corporations, incorporated for the purpose of furnishing medical and

> surgical treatment to the sick and wounded. These corporations do not practice medicine but they receive patients and employ physicians and surgeons to give them treatment. No one has ever charged that these corporations were practicing medicine. The respondents are chartered to do, in the main, what these hospitals are doing every day, that is, contracting with persons for medical treatment and contracting with physicians to furnish treatment, and the fact that Dr. W. A. Lewin is the principal stockholder and the manager of respondent corporation, and is employed by it to furnish medical and surgical treatment to patients who may contract with it for such treatment does not alter the legal status of the corporation or show it has violated the terms of its charter."

It seems to us that the Lewin case is controlling as it passes upon the precise point here involved, namely, the right of the Hospital to furnish medical and surgical treatment or care for diseased and injured patients. While the language used in the charter of the Hospital in stating its object or purpose may not be identical with the language so used in the charter of the Lewin corporation, yet, in substance and effect, we believe it to be the same. In any event, the Hospital, in carrying out its purpose, is, in point of fact, furnishing doctors to treat the sick and injured, the same as done in the Lewin case.

We say the Lewin case is controlling because the St. Louis Court of Appeals is a court of last resort when acting within its jurisdiction. (See State v. Trimble, 271 S. W. 1. c. 46.) However, if anything more be needed with respect to the ruling in the Lewin case, it has the stamp of approval of the Supreme Court as shown in the case of State v. Gate City Optical Co., 97 S. W. (2d) 1. c. 92, 93, wherein the court said:

"The case of State ex inf. v. Lewin et al., 128 Mo. App. 149, 106 S. W. 581, 582, furnishes an apposite application of that rule and another. That was a proceeding by quo warranto to oust a medical corporation from engaging in the practice of medicine and surgery. The charter of the company contained this language: 'The company is formed for the purpose of furnishing treatment for hernia and medical and surgical treatment for all other diseases, accidents and deformities.' Respondent Levin, a duly licensed physician, entered into contract with the company as manager thereof '"and during that time to personally treat all persons who employed said company to furnish treatment for the cure of hernia," etc.' The interpretation of the quoted charter power turned on the meaning to be ascribed to the word 'furnish.' The court said that if the meaning be taken to be 'to give,' then the charter conferred the power on the corporation to practice medicine and was void. The court applied the rule of construction, that where a grant from the state is susceptible of two constructions, one of which would render the grant void and the other make it legal and enforceable, the latter should be adopted, for the state should not, in the making of contracts, be convicted of doing a void and useless thing. Accordingly, the court construed 'furnish' to mean 'supply,' and further said: 'The corporation is not restrained by its charter from entering into contracts with persons to supply medical treatment, nor from entering into contracts with physicians to render medical and surgical services, and has, in this respect, the same right to contract as a private individual (citing the King case, supra)' and the exercise thereof in the manner stated 'does not alter the legal status of the corporation, or show it has violated the terms of its charter.'

* * * * * * * * * * *

> "The elucidations contained in the cases reviewed herein, and particularly as contained in State ex inf. v. Lewin et al., State v. Knapp, Jaeckle v. L. Bamberger & Co., and in the dissenting opinion in Eisensmith v. Buhl Optical Co., are clear, rational, logical, and convincing. The common result reached properly exemplifies the public policy of our state, and renders further discussion unnecessary."

Counsel for the Society say with respect to the Lewin case that,

> "This decision was handed down many years ago, and at that time there was not present the urgent necessity of guarding the standards and roster of the professions which has made itself felt today."

Be that as it may, the Lewin case still stands today as the law of this state on the precise question before us.

Counsel again say that the Gate City case has no application here because it held (so counsel say) that it was considering a field of practice which was not a learned profession. In our review of the case we do not find that the court ruled on such point, but merely comments on the fact that there appears from out-state authority to be two lines of decisions, one line holding that optometry is a learned profession, and the other line that it is not. But whether or not the case so ruled on such point is immaterial here in view of the fact that it has not overruled the Lewin case on the precise question here involved.

Counsel for the Society further urge upon us as supporting authority for their contention, despite the Lewin case, the cases of State v. St. Louis Union Trust Co., 335 Mo. 845, and State v. C. S. Dudley & Co., (Sup. Ct.) 102 S. W. (2d) 895. The first notable difference between the last mentioned cases and the Lewin case (as ruled by the Court of Appeals and approved by the Supreme Court) is that the rulings in the Trust Company and Dudley cases are confined

to one class only of the so-called learned professions, namely, lawyers, and not doctors. Of course, it might be claimed that the rulings in the Trust Company and Dudley Company cases ought to be applied to, and overrule the Lewin case, but our Supreme Court has not seen fit so to do. In fact, the Supreme Court en banc, two years after the divisional opinion in the Trust Company case, and on the eve of the divisional opinion in the Dudley case, specifically ruled, by expressly approving the Lewin case, that a corporation could furnish doctors to treat the sick and injured.

Again, the Trust Company and Dudley Company were profit-making corporations, organized for the purpose of making, and hence must make, profits for stockholders. Consequently, there could be a motive for the lawyers employed by such profit-making corporations to act in its interest rather than in the interests of the patron whom the lawyer was supposed to act for and protect. Hence, such relationship between the lawyer and corporation, under such circumstances, was adjudged to be injurious to the public interest.

But in the case of a non-profit corporation, such as the Hospital here, there could be no motive for the Hospital doctor to act any differently towards his patient in the hospital than in the case of treatment by him of a non-member patient outside the hospital. It would seem far-fetched to say that the treatment of a patient in the hospital here, or in any other reputable hospital, by a reputable and skilled physician, could harm the patient, or the public interest, merely by reason of the doctor receiving a fixed salary from the hospital. Hence, the Trust Company and Dudley cases are not apposite by reason of the fact that the basis for the decisions in the Trust Company and Dudley cases, namely, harm to the public interest, is not shown to be the fact in the Lewin case, and, we believe, could not be shown to exist under the circumstances in the case of the Hospital.

After all is said and done, it seems logical to us that if the operation of the Hospital itself, and the furnishing of its own medical staff, paid upon a fixed salary basis,

was in fact harmful to the public interests, some member of the Hospital, or past or prospective patient thereof, would undoubtedly be the ones more concerned in making, or joining in making, the complaint here lodged. Or, next in line, some one or more of the lay public, to whom no other motive than an altruistic one could be ascribed, would do likewise. On the other hand, so far as we are informed, the complaint is solely made by some or all of the members of the Society. Its counsel with commendable frankness states the purpose of the complaint in the following language:

> "What we are trying to accomplish in these proceedings is to curtail the salary staff at the hospital to a point where it can only take care of the emergencies, make a schedule of fees such that private practitioners can work under, and give free choice of physicians to both the in and out patients at the hospital."

It does not appear from the above stated purpose, either by express words or by inference, that harm, if any, to the public interests were in any wise considered or involved. We believe a fair inference to be concluded from the purpose stated is that of loss of fees or compensation only to those members of the Society who might procure employment from among the patients of the Hospital.

We believe counsel desire us to be frank. But whether or no, we must be frank with ourselves, and in view of all the facts and circumstances hereinabove set forth, together with the authorities cited, we are impelled to the conclusion that a court, in exercising its discretion in the matter, would deny ouster in this case.

It would seem to us that the remedy for the complaint by the Society might be brought about with much more likelihood of success by action within the ranks of the physicians themselves or by legislative relief.

We cannot let pass unnoticed the sincere, frank and able manner in which counsel for the Society have presented their views to us, and as well on the part of counsel for the Hospital, all of which has been sincerely appreciated, and which also has been most helpful to us in resolving and reaching the conclusion that quo warranto proceedings in this matter would not bring a successful result.

Respectfully submitted,

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JWB:HR