5293.

MUNICIPAL HOSPITAL — OFFICERS THEREOF MAY NOT CONTRACT WITH PRIVATELY OWNED HOSPITAL UNDER "GROUP HOSPITALIZATION PLAN."

SYLLABUS:

The proper officers of a municipally owned hospital cannot legally enter into an arrangement with privately owned hospitals whereby they appoint a corporation to act as their agent in the sale of contracts for hospital service for an annual charge, the collection thereof and the distribution of such funds among the participating hospitals, the person subscribing to such plan being entitled to such hospital service as they may need during such year, not, however, to exceed more than a certain number of days and whereby the hospitals are to be paid from such common fund at certain daily rates for services which they have rendered to the subscribers and whereby the hospitals in the event that such agent does not in any month have enough funds to pay all the claims of such hospitals, obligate themselves to pay to said agent their proportionate shares of the deficit.

COLUMBUS, OHIO, March 25, 1936.

Bureau of Inspection and Supervision of Public Offices, Columbus, Ohio.

GENTLEMEN: This acknowledges receipt of your communication which reads as follows:

> "We are in receipt of a request from Director of Law R. G. Curren, City of Lakewood, through our Examiner D. L. Rupert, for an opinion as to the legality of municipal hospital trustees adopting what is known as 'A Periodic Payment Plan for Hospital Care.' Mr. Curren advises that a number of private hospitals in Greater Cleveland are interested in the program, which provides for the organization of a corporation, The Cleveland Hospital Service Association, as the agent of the participating hospitals. The said Association sells an annual charge for hospital services and makes a contract with the various hospitals to provide hospital services to those who pay the annual service charge. We are attaching hereto a pamphlet covering the proposed plan.
>
> Will you kindly give us your opinion on this question at your convenience?"

Under the above mentioned plan, contracts for hospital service are sold to groups of ten or more persons employed by the same employer who

then are entitled to admission in any participating hospital during the life of such contracts. The administration of the program is delegated by the hospitals to the Cleveland Hospital Service Association, Inc., a corporation not for profit, which has sole charge of the sale of contracts, promotion, education, collection of fees and distribution of funds among the hospitals. The subscribers are charged a certain sum per year and the participating hospitals are to receive a certain rate for each day of service rendered to a subscriber. The contract is entered into between the participating hospitals and the Cleveland Hospital Service Association, which recites the desire of the hospitals to unite in a program for rendering hospital service at a fixed annual rate. By this contract, the association is appointed as exclusive agent for the hospitals to carry out the purposes of group hospitalization, to procure subscribers, to collect from them the annual fees and to distribute among the participating hospitals the funds as therein provided. The contract further provides that on or before the tenth of each month the service association shall remit to each participating hospital out of the funds held by it on the last day of the preceding month a sum which would compensate such hospital for all service rendered by it to subscribers during said preceding month, but no hospital shall be entitled to receive compensation from the association for service rendered to any subscriber who is not in fact entitled to receive hospital service thereunder. The contract further provides:

> "4. If, at the close of business on the last day of any calendar month, the Service Association should not hold sufficient funds to pay all claims which have matured against it during such calendar month, including the claims of Participating Hospitals arising under the next preceding paragraph, but excluding claims to which it shall upon advice of its counsel have a meritorious defense, then the total amount of all such claims shall constitute a deficit for such calendar month and such deficit shall be apportioned among the Participating Hospitals as follows, to wit: The total cost of all hospital service rendered to Subscribers by all Participating Hospitals during such month, computing the cost of hospital service in a semi-private room at the rate of Six Dollars ($6.00) per day and the cost of hospital service in a ward at the rate of Four and 50/100 Dollars ($4.50) per day, shall be divided into the cost of the hospital service rendered by each Participating Hospital during such month, computing the cost of such hospital service at the same rates, and the resulting fraction or per centum shall constitute the portion of the deficit chargeable against such Participating Hospital. The Service Association shall promptly give notice to each Participating Hospital of the amount charged against it by reason of such

deficit, and each Participating Hospital shall pay such sum to the Service Association on or before the 10th day of the succeeding calendar month.

5. If, at the end of any calendar year, the Service Association shall hold more than sufficient funds to pay all outstanding claims against it, including the claims of Participating Hospitals arising under paragraph 3 of this Article, but excluding claims to which it shall, upon advice of its counsel, have a meritorious defense, such excess shall constitute a surplus for such calendar year, and such surplus shall be applied by the Service Association, in the following order, to the following uses and purposes, to-wit:

(a) The Service Association shall repay to the Participating Hospitals any sums theretofore paid by the Participating Hospitals to the Service Association in discharge of any deficit, as in paragraph 4 of this Article provided; and if such surplus is insufficient to repay said sums in full, it shall be distributed pro rata among the Participating Hospitals, in proportions predicated upon balances then outstanding of all payments theretofore made by the several Participating Hospitals pursuant to said paragraph 4, without priority by reason of the dates upon which any such payments were made.

(b) Out of any balance of such surplus remaining after satisfaction of the provisions of sub-paragraph (a) next preceding, the Service Association shall set aside and withhold as a reserve for satisfaction of future claims of the Participating Hospitals, operating expenses and other contingencies, such sum as shall be determined by agreement of two-thirds (2/3) or more of the Participating Hospitals and the Service Association. Such reserve, or any part thereof, at the option of the Service Association, may be treated as a separate fund and/or may be invested in bonds or other evidences of indebtedness of the United States Government.

(c) Any balance of such surplus remaining after satisfaction of the provisions of sub-paragraphs (a) and (b) next preceding shall be held and/or distributed by the Service Association for the benefit of the persons then and/or thereafter becoming Subscribers. It shall be disbursed to such Subscribers through the medium of an extension of the period of service rendered by the Participating Hospitals or a reduction in the annual charge for hospital service, in such manner and at such time or times as shall be determined by agreement of two-thirds (2/3) or more of the Participating Hospitals. No part of such balance shall be disbursed to any subscriber in the form of money.

ARTICLE VIII

1. The Service Association is authorized to establish and maintain offices and from time to time to purchase furnishings and supplies therefor; to hire clerical, stenographic and other office employes, solicitors for subscriptions, agents and attorneys; to conduct promotional and educational campaigns for the advancement of group hospitalization; and, out of funds collected and held by it hereunder, to pay the reasonable cost of any and all of the foregoing, and to make any other expenditures necessary to the operation of the program of group hospitalization herein contained.

ARTICLE XIII

5. The Service Association shall from time to time, with the approval of the Participating Hospitals, adopt regulations for the interpretation and construction of this contract, and of the Service Contract for which provision is made in Article IV hereof, and such regulations, when so adopted, shall be final and conclusive upon the parties to this contract and to all Service contracts."

The question arises as to whether such an arrangement, if entered into by a municipality, through its proper officers, would be violative of Section 6 of Article VIII of the Ohio Constitution. This section reads in part as follows:

"No laws shall be passed authorizing any county, city, town or township, by vote of its citizens, or otherwise, to become a stockholder in any joint stock company, corporation, or association whatever; or to raise money for, or to loan its credit to, or in aid of, any such company, corporation, or association; provided, that nothing in this section shall prevent the insuring of public buildings or property in mutual insurance associations or companies. * * *."

This constitutional provision has been construed by the Supreme Court in a number of cases. Walker v. Cincinnati, 21 O. S. 14; Taylor v. Commissioners, 23 O. S. 22; Wyscaver v. Atkinson, 37 O. S. 80; Alter v. Cincinnati, 56 O. S. 47; Markley v. Mineral City, 58 O. S. 430; State, ex rel. v. Ry. Co., 97 O. S. 283; Cincinnati v. Harth, 101 O. S. 344; Ohio Traction Co. v. Huwee, 127 O. S. 444; Brewster v. Hill, 128 O. S. 343.

In the case of Cincinnati v. Harth, supra, the following is said:

"This constitutional provision was adopted by the people after painful and expensive experiences. Prior to its adoption

disastrous results had followed the investment of public money and credit in enterprises which were vainly supposed to be of benefit to the public. In the light of these experiences it was the deliberate judgment of the people that such aid to private or quasi-public enterprises was unwise and must stop.

This constitutional provision has been under consideration by this court in a number of cases and the court has been constantly impressed with its duty to steadfastly enforce its letter and spirit."

The following quotations are referred to for the purpose of showing how strictly this provision has been construed:

Walker v. Cincinnati, 21 O. S. at p. 54.

"The mischief which this section interdicts is a business partnership between a municipality or subdivision of the State, and individuals or private corporations or associations. It forbids the union of public and private capital or credit in any enterprise whatever."

Wyscaver v. Atkinson, 37 O. S. at p. 97.

"In short, the thing prohibited is the combination in any form whatever of the public funds or credit of any county, city, town or township with the capital of any other person, whether corporated or unincorporated, for the purpose of promoting any enterprise whatever."

Alter v. Cincinnati, 56 O. S. at p. 64.

"This section of the constitution not only prohibits a 'business partnership,' which carries the idea of a joint or undivided interest, but it goes further and prohibits a municipality from being the owner of part of a property which is owned and controlled in part by a corporation or individual. The municipality must be the sole owner and controller of the property in which it invests its public funds. A union of public and private funds or credit each in aid of the other, is forbidden by the constitution. There can be no union of public and private funds or credit, nor of that which is produced by such funds or credit."

Markley v. Mineral City, 58 O. S. at p. 438.

"The other, section 6 of article 8, expressly denies to the assembly power to authorize any such corporation to become a stockholder in any joint stock company, corporation or associa-

tion whatever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation or association. And that this interdict applies as well to the case of an individual, as to the aggregations named, is without question. It is intended to prevent the union of public and private capital in any enterprise whatever."

The inhibition of this constitutional provision against the raising of money or loaning of credit to or in aid of a company or association is not confined to money raised by taxation but applies also to the earnings from the operation of a city's property. The following was held in State, ex rel. v. Railway Co., supra:

"In this case the earnings—the income of the city's property—are pledged as security for the securities now existing and hereafter issued by the company. It is the exact thing which the constitution expressly prohibits. We, therefore, think it clear that these provisions of the ordinance with reference to the distribution of the gross receipts are in violation of the constitutional inhibition. It must be remembered that the thing prohibited is not only the gift of money or property but also the loan of credit to or in aid of any such company.

This enterprise was initiated in recognition of the urgent needs of the city for better means of transportation for the large population in its suburbs which participates in its manifold activities. But it is not within the sphere of the court's power to consider the wisdom, safety or advantage of the proposed arrangement, and these considerations have nothing to do with the authority of the city to so loan its credit. The constitution is the superior law and the ultimate criterion. The court's sole duty is to enforce it. The office of a judge is *jus dicere non jus dare.*" See also Brewster v. Hill, supra.

In the case of Zanesville v. Crossland, 8 C. C. 652, the court held constitutional Section 4022, General Code, which provides that council may agree with a corporation organized for charitable purposes and not for profit for the creation and management of a hospital or for an addition to such hospital and for a permanent interest therein and that council shall provide for the payment of the amount agreed upon for such interest either in one payment or in annual installments, provided that such agreement must be approved by a vote of the electors. The court also upheld a contract entered into in pursuance of said statute. It was held in that case that said statute and contract did not come within

the prohibition of Section 6 of Article VIII of the Constitution by reason of the fact that said statute and contract applied only to charitable institutions not organized with a view to gain. This decision, however, was reversed by the Supreme Court in 56 O. S. 735.

Under the plan which you have submitted, the participating hospitals associate themselves together in a joint enterprise whereby the annual fees collected from the subscribers are placed in a common pool from which the expenses of the Cleveland Hospital Service Association are first paid and the balance distributed to the hospitals in accordance with the service which each hospital has rendered to the subscribers, provided that if there is more than sufficient in the common pool to pay for said expenses and hospital service, the balance is placed in a surplus fund to be handled in the manner provided in such plan and if there is not sufficient to pay for said expenses and hospital service, the hospitals bind themselves to pay to the association their proportionate shares of such deficit as provided in said plan. Presumably, the annual fee charged to subscribers is estimated to be sufficient to pay the expenses of the association and all claims of the participating hospitals for one year. The amount that goes into this pool, therefore, represents the expenses of the association and the income from the operation of the participating hospitals in rendering hospital service to the subscribers. If a municipality were to be a participating hospital, that would in my opinion be a union of public and private capital in one enterprise which is prohibited by Section 6 of Article VIII of the Constitution. The fact that this pool is held by a separate association makes no difference as such corporation is merely an agent for the participating hospitals and holds such funds for the payment of their claims for services rendered to the subscribers. What the Constitution forbids cannot be done indirectly. As stated in the case of Taylor v. Commissioners, supra:

> "Section 6, article 8, of the constitution, declares, that 'the general assembly shall never authorize any county, city, town, or township, by vote of its citizens or otherwise, to become a stockholder in any joint-stock company, corporation, or association whatever; or to raise money for, or loan its credit to, or in aid of, any such company, corporation, or association.' What the general assembly is thus prohibited from doing directly, it has no power to do indirectly."

In the case of Brewster v. Hill, supra, the court said:

> "If the village is prohibited by the Constitution from acting directly it has no power to act indirectly."

See also Wyscaver v. Atkinson, supra, at page 97.

Furthermore, the municipality through the hospital trustees would make itself subject to a contingent liability and in the event of a deficit would be compelled to pay its share thereof which would be paid either from the income from the operation of the hospital or from the proceeds of taxation and to that extent the plan would result in the city giving its aid or credit, in violation of said constitutional provision. The fact that the extent of such aid or credit may be small is immaterial. As stated in the case of Taylor v. Commissioners, supra:

> "The extent of such aid can make no difference. The mandate of the constitution is, that such aids shall *never* be authorized."

As stated in Brewster v. Hill, supra:

> "In the domain of business, where its debt incurring or taxing power is concerned, the constitution and laws of this state have placed municipalities under legislative control."

I know of no valid authority whereby a municipality may enter into such a contract. In fact, such a contract may result in a violation of Section 4050, General Code, which reads as follows:

> "Such trustees shall incur no liability for hospital purposes beyond the amount of the funds levied or received for such purposes."

I am of the opinion, therefore, that the proper officers of a municipally owned hospital cannot legally enter into an arrangement with privately owned hospitals whereby they appoint a corporation to act as their agent in the sale of contracts for hospital service for an annual charge, the collection thereof and the distribution of such funds among the participating hospitals, the person subscribing to such plan being entitled to such hospital service as they may need during such year, not, however, to exceed more than a certain number of days and whereby the hospitals are to be paid from such common fund at certain daily rates for services which they have rendered to the subscribers and whereby the hospitals in the event that such agent does not in any month have enough funds to pay all the claims of such hospitals, obligate themselves to pay to said agent their proportionate shares of the deficit.

Respectfully,

JOHN W. BRICKER,

Attorney General.