

It will be noted that this section says "he shall prosecute on behalf of the state all complaints, suits and controversies in which the state is a party" in the probate court, common pleas court and court of appeals. No duty is placed upon the prosecuting attorney to prosecute suits before a mayor.

A careful consideration of all statutes in *pari materia* leads to the following conclusion:

It is the duty of the city solicitor to prosecute state cases in a mayor's court and the council may, by ordinance or resolution, require him to prosecute these cases in higher court.

It is the duty of the prosecuting attorney to prosecute state cases on error from the mayor's court in the common pleas and higher court.

Respectfully,

C. C. CRABBE,
Attorney General.

1447.

TAXATION—"X" HOSPITAL NOT EXEMPT FROM TAXATION—SPECIFIC CASE PASSED UPON.

SYLLABUS:

The "X Company" Hospital as described herein is not "an institution used exclusively for charitable purposes," and is therefore not exempt from taxation, under amended section 5353, General Code.

In passing on cases similar to the said "X Company" Hospital, the Tax Commission should not consider, as a deciding factor, the ratio that may exist as between pay patients and those admitted who are unable to pay.

COLUMBUS, OHIO, May 9, 1924.

The Tax Commission of Ohio, Columbus, Ohio.

Gentlemen:—

Acknowledgment is hereby made of your recent communication, which reads as follows:

"The X Company is organized as a corporation not for profit and has been operating a hospital ever since the 10th day of December, 1920. As stated in its charter its purpose is as follows:

'Said corporation is formed for the purpose of establishing, maintaining and conducting a hospital for medical and surgical treatment of persons; conducting a training school for nurses, and granting of diplomas to nurses graduating therefrom, engaging in research work in medicine, surgery and kindred subjects, receiving funds by donation, bequest or otherwise; holding, investing and disbursing the same, charging and receiving compensation for treatment, services and accommodations, all for the purpose of maintaining said hospital and not for profit; and the doing of all things necessary and incident thereto.'

There are twelve stockholders, all but one of whom are physicians

and surgeons. The original stockholders (six in number) furnished the funds for the purchase and equipment of the building but since that time there have been a number of changes in the ownership of the stock by way of purchase and sale. The last such change having taken place in March, 1923. No dividends have ever been paid nor does any physician or surgeon receive any remuneration from the company as officer or otherwise. Physicians and surgeons in owning stock have no advantage over other physicians and surgeons in the use of the hospital facilities except that they have the first right to the use of the hospital rooms for their patients, but if such rooms are not all occupied the patients of non-stockholding physicians and surgeons are admitted.

Patients are expected to pay for the hospital facilities as well as for the services of the physicians and surgeons but no one unable to pay has for that reason been refused admission. The fees derived from the pay patients have been sufficient to meet all the hospital expenses so that none of the stockholders have been required to contribute.

The entire fees chargeable by said corporation during the term of its operation average \$100,000.00 annually, the revenues derived from pay patients average \$80,000.00 annually, the fees chargeable and charged but remaining unpaid for services rendered to patients unable to pay average \$20,000.00 annually.

Please advise as to whether or not the property of this corporation is entitled to exemption from general taxation as being 'property belonging to institutions used exclusively for charitable purposes' as provided by section 5353 of the General Code (110 O. L. 77).

In passing on this and similar cases should the Commission consider as a deciding factor the ratio that may exist as between the services rendered for which pay is expected and received and those to patients unable to pay?

Or, if the operating company is incorporated not for profit, is the hospital property to be exempted, if it is shown that free patients are admitted, without regard to the amount of free services thus rendered when compared with those for which compensation is received?"

Article XII, section 2, Constitution of Ohio, reads in part as follows:

"Laws shall be passed, taxing by a uniform rule, all moneys, credits, * * *, institutions used exclusively for charitable purposes, * * *, may by general laws, be exempted from taxation."

(Adopted Nov. 5, 1918.)

Section 5328, General Code, passed pursuant to the requirements of section 2 Article XII of the Constitution of Ohio requires that:

"All real or personal property in this state * * shall be subject to taxation, except only such property as may be expressly exempted therefrom."

The exemption must be clearly and expressly stated in the statute and must be such only as the above section of the Constitution authorizes to be excepted.

Wilson Aud. vs. The Licking Aeria 104 O. S. 157.

Section 5353, General Code, as amended in 110 O. L., page 77 reads in part as follows:

"* * * property belonging to institutions used exclusively for charitable purposes, shall be exempt from taxation."

This section now conforms to the provision of Article XII, section 2 of the Constitution.

It is clear from the present constitutional and statutory provisions, that institutions in order to be exempt from taxation as charitable institutions must come within the provision that they are "used exclusively for charitable purposes."

Section 5328, General Code, passed pursuant to the mandatory requirement of Section 2 of Article XII of the Constitution, contains the provisions that all property shall be subject to taxation, "except only such property as may be expressly exempted therefrom." It will thus be seen that any exemption must be clearly and expressly stated in the statute.

In *Lee, Treasurer vs. Sturges*, 46 Ohio State, 153, it is said, at page 159:

"For every presumption is in favor of that construction of the law which gives effect to the requirement of the section of the constitution referred to," and, further, that "where an exception or exemption is claimed, the intention of the general assembly to except must be expressed in clear and unambiguous terms. * * * 'At the outset every presumption is against it. A well-founded doubt is fatal to the claim. It is only where the terms of the concession are too explicit to admit fairly of any other construction that the proposition can be supported.' *Railway Co. vs. Super-visors*, 95 U. S., 595, *Tucker vs. Ferguson*, 22 Wall., 527. Intent to confer immunity from taxation must be clear beyond a reasonable doubt, for, as in case of a claim or grant, nothing can be taken against the state by presumption or inference."

Webster's dictionary defines "charity" as:

"Liberality to the poor, or to benevolent institutions, generosity. Whatever is bestowed gratuitously on the poor for their relief."

Said author defines "charitable" as:

"Liberal in benefactions to the poor, and in relieving them in distress."

"The word 'charity' has a well known and acknowledged meaning, broad enough to include every gift for a general public use. Indeed, the word has been shortly and tersely defined as a gift to a general public use which extends to the poor as well as to the rich. A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. In its more restricted and common sense it means relief or alms to the poor. Neither of these meanings are precisely descriptive, however, of the sense in which the courts use the term in applying the law relating to charities. In other words, charity in the legal sense is not confined to mere almsgiving or the relief of poverty and distress, but has a wider signification which embraces the improvement and promotion of the happiness of man."

"Charitable purposes are distinguished from ordinary trusts by the uncertainty of their beneficiaries, that is, a public charity begins only when uncertainty in the recipient begins, and while in a private trust the gift will fail and revert to the donor or to his heirs, when the beneficiaries are so uncertain, or so incapable of taking, that they cannot be identified or cannot legally claim its benefits, yet in the case of a charitable gift it is immaterial that the beneficiaries are indefinite or not ascertained, or that the trustee is uncertain or incapable of taking."

11 Corpus Juris, page 302.

"On account of charitable institutions being generally exempt from taxation * * * it is frequently important to determine whether or not a particular corporation, association, society, or other institution is a public charitable institution. The test of a charitable gift or use and the test of a charitable corporation are in law the same; but some cases draw a distinction between organizations which may receive charitable gifts or bequests and those which are exempt from taxation, and confine the latter class to a much smaller number. Their principal and distinctive features are that they have no capital stock and no provision for making dividends or profits, but derive their funds mainly from public and private charity and hold them in trust for the object of the institutions. In other words, the test of whether an enterprise is charitable is whether it exists to carry out a purpose recognized in law as charitable, or whether it is maintained for gain, profit, or private advantage."

11 Corpus Juris, page 303.

"It is essential to a valid charitable gift that it be for a purpose recognized in law as charitable. As to what constitutes a charitable use or purpose, various statements of the rule are that the purpose must be a public as distinguished from a private one; that the gift must be for the public use or benefit; and that the gift must be for the benefit of the public at large, or of a portion thereof, or for the benefit of an indefinite number of persons."

11 Corpus Juris, page 313, section 18.

"A gift for the relief or amelioration of the condition of the poor, or the aged, homeless, sick, and afflicted, or other persons in unfortunate circumstances, is one for a charitable purpose. The fact that a bequest for the relief of the poor of a town also works a benefit to the taxpayers of the town does not change the charitable nature of the gift.

Gifts for the purpose of establishing or maintaining hospitals, asylums, public homes, or like institutions for the benefit of the sick, injured, aged, infirm, insane, needy, homeless, friendless, or other persons in unfortunate circumstances, are for a purpose recognized by the courts as charitable. A gift for such a purpose is not invalid as a public charity because it does not impose poverty as a condition to the receipt of its benefits, or because the inmates are expected to have some means and to contribute to its support and development."

11 Corpus Juris, section 19, page 315.

The fact that the "X Company" Hospital accepts "pay patients" does not change its character, if it is a charitable institution.

Taylor, Admr. vs. The Protestant Hospital Association, 85 O. S. 90.

But do the facts, as derived from the articles of incorporation and the Commission's letter justify the conclusion that said Hospital is a charitable institution and that it is used exclusively for charitable purposes?

Among other things, as stated in the articles of incorporation, said corporation is formed for the purpose of

"establishing, maintaining and conducting a hospital for medical and surgical treatment of persons: * * *, receiving funds by donation, bequest or otherwise; holding and disbursing the same, charging and receiving compensation for treatment, services and accommodations, all for the purpose of maintaining said hospital or not for profit."

While it is shown by the articles of incorporation that said corporation was organized as a corporation not for profit, under the general corporation laws of the state, said articles do not show that the corporation was organized for an exclusively charitable purpose.

It is shown by the Commission's letter, the articles of incorporation, and the memorandum brief furnished by counsel for said company, that said organization has a capital stock of \$60,000.00, divided into shares of \$100 each; that originally there were six stockholders, and now there are twelve. There have been a number of changes in the ownership of said stock by way of purchase and sale. Patients are expected to pay for the hospital facilities as well as for the services of the physicians and surgeons. No one unable to pay has for that reason been refused admission. The fees derived from the pay patients have been sufficient to meet all the hospital expense. The average fees chargeable are \$100,000 annually, 80 per cent of which are collected and 20 per cent remain unpaid, but charged upon the corporation books. No dividends have been paid. No physician or surgeon who is a shareholder in said corporation has ever been paid anything by said hospital. Many patients have received treatment in said hospital without fee for medical services rendered.

In the case of Wilson, Auditor vs. Licking Aerie, 104 O. S., 137, at page 146 Johnson J. in the opinion of the Court says:

"It would not be competent for the legislature to enact a statute exempting the property of the organization from taxation, unless it was shown to be an institution used exclusively for charitable purposes. The constitution itself determines the question in this case, in the light of the undisputed evidence as to the nature of the defendant in error and the use made of its property."

It seems clear that the "X Company" was not intended to be, and does not exist as, "an institution used exclusively for charitable purposes;" and is therefore not exempt from taxation.

Counsel for the "X Company" has cited the case of O'Brien, Treas. vs. The Physicians Hospital Association, 96 O. S., 1, holding that "Grace Hospital" organized by physicians of the city of Cleveland, Ohio, was exempt from taxation.

While this case has some points in common with the "X Company" yet it has many vital points of difference.

"Grace Hospital" was organized as a corporation not for profit and has no capital stock. Donahue J. in the Court's opinion says:

"The oral evidence fairly establishes the fact that this hospital is conducted as a public hospital, open at all times to the public, regardless of color, and is at the service of any reputable physician of any school of medicine to the extent of its facilities, without limitation or discrimination as to the individual applicant * * *

It also appears from the evidence that the expenses of operating the hospital are largely in excess of the revenues derived from patients; that the physicians who are members of this corporation, and one other donated the original fund necessary for the purchase and equipment of the hospital; and that since that time further donations have been made, for none of which certificates of stock were issued, nor can they be issued under the charter.

Taken in connection with this evidence, the petition of the plaintiff filed in this case—now a matter of public record, the truth of which can never be challenged by The Physicians Hospital Association—declares this hospital is operated and conducted exclusively for charitable purposes. The trial court found these allegations to be true, and unless reversed by this court in this error proceeding that judgment becomes res adjudicata of the facts so found. Therefore, notwithstanding the indefiniteness of its charter and constitution, this corporation is forever estopped from denying its eleemosynary character, and can never divert its revenues from the purposes of public charity. The property in question was purchased with trust funds donated for the purpose of a public charity hospital, and is impressed with that trust. It cannot be withdrawn from the uses of this trust at the will of the trustee, or of any or all of the donors of the fund.

The donors of this fund have parted with all private ownership in the fund itself."

It is evident that while this case was decided before the recent amendment of the statute, yet the facts show that "Grace Hospital" was "an institution used exclusively for charitable purposes" and therefore differs from the "X Company" hospital in this regard.

The Commission further asks as follows:

"In passing on this and similar cases should the Commission consider as a deciding factor the ratio that may exist as between the services rendered for which pay is expected and received and those patients unable to pay?"

It is not believed that the relative number of either free or pay patients is a deciding factor. As stated herein, under authority of Taylor, Admr. vs. Protestant Hosp. Assn. 85 O. S. 90,

"Nor does the fact that a public charitable hospital receives pay from a patient for lodging and care affect its character as a charitable institution."

In Downes vs. Harper Hospital, 101 Mich., 555, the court says:

"The fact that patients who are able to pay are required to do so does not deprive the defendant of its eleemosynary character * * *."

It also seems equally clear that the receipt of free patients by a non-charitable

institution does not affect its character to the extent that it becomes an institution used exclusively for charitable purposes.

The latter part of the Commission's second question is as follows :

"* * * or, if the operating company is incorporated not for profit, is the hospital property to be exempted, if it is shown that free patients are admitted, without regard to the amount of free services thus rendered when compared with those for which compensation is received?"

This part of your second question contains practically a restatement of the facts in regard to the "X Company" Hospital. This company is incorporated not for profit and has some free patients; but as before stated herein this fact does not exempt said hospital from taxation, and the number of free, or pay patients, is not the deciding factor.

However, this question will not confront the Commission in every case, for the remedy frequently will be other than placing the company upon the tax duplicate. In the case of *O'Brien vs. Hospital Assn.* 96 O. S. 1, Donahue J. in delivering the opinion said :

"The fact that it may receive pay patients, without losing its character as a public charitable hospital, does not authorize it to receive pay patients in such numbers as to exhaust its accommodations, so that it cannot receive and extend hospital service to the usual and ordinary number of indigent patients applying for admission under proper rules and regulations of the board of trustees. * * * It is sufficient if it conforms its conduct along the lines of its experience as to the ordinary and usual demand made upon it by charity patients, provided always that it act in good faith and consistent with the purpose of its organization.

If this defendant in error fails in these particulars, the remedy is not by placing this property upon the tax duplicate, but by action to enforce a proper administration of the trust, or the proper revocation of its corporate franchise."

While the foregoing language was used in regard to a public charity hospital, yet it is pertinent to a consideration of institutions used exclusively for charitable purposes.

Summarizing, you are advised :

1. It is the opinion of this department, based upon the statement of facts as furnished by the Commission, and the authorities discussed herein, that the "X Company" Hospital is "not an institution used exclusively for charitable purposes" as provided in amended section 5353 G. C., 110 O. L., 77, and is therefore not exempt from taxation.

2. In passing on this and similar cases the Tax Commission should not consider as a deciding factor the ratio that may exist as between pay patients and those admitted who are unable to pay.

Respectfully,

C. C. CRABBE,
Attorney General.