4661.

APPROVAL, LEASE TO RESERVOIR LANDS AT LAKE LORAMIE, OHIO.

COLRMBUS, OHIO, September 30, 1932.

HON. EARL H. HANEFELD, *Director of Agriculture, Columbus, Ohio.*

DEAR SIR:—This is to acknowledge receipt of your recent communication submitting for my examination and approval a certain lease in triplicate by which there is leased and demised to the lessee therein named a certain parcel reservoir land at Lake Loramie.

Said lease is for a term of fifteen years and calls for an annual rental of six per cent upon the appraised value of the parcel of land leased. The lease above referred to is the following:

Lessees.	Valuation.
Ray Westerheide, Andrew Steinemann and Ernest Nagel, Minster, Ohio	$333.34

Upon examination of said lease and the provisions thereof, I find that the same has been executed in conformity with the authority and provisions of Section 471, General Code, and in conformity with the requirements of other statutory provisions relating to leases of this kind.

My examination also discloses that one of the provisions is of doubtful authority and effect, but I do not think said provision affects the validity of the lease or its main purposes as provided by the valid provisions therein. Such provision has reference to a new lease being required from the State at the expiration of this lease by the actual owners of the building or buildings located upon said ground and the ground used in connection therewith.

However, I do not think that the provision of the lease above discussed, in any wise, affects the other provisions of the lease which are within the scope and authority of statutory provisions relating to leases of this kind, and said lease is, accordingly, hereby approved as to legality and form as is evidenced by my authorized signature upon said lease and upon the duplicate and triplicate copies thereof.

Respectfully,
GILBERT BETTMAN,
Attorney General.

4662.

MUNICIPAL HOSPITAL—MUNICIPALITY NOT LIABLE IN TORT FOR INJURY TO PATIENTS OR THIRD PERSONS THROUGH NEGLIGENCE OF ITS SERVANTS OR AGENTS.

SYLLABUS:

A municipal corporation, in the construction, operation and maintenance of a municipal hospital by favor of Sections 4023 *et seq., of the General Code of Ohio, is in the performance of a governmental function and is not liable in tort either*

to patients in said hospital or to third persons on account of the negligence of the municipality or its servants and agents notwithstanding the fact that some patients pay for services which the hospital affords.

COLUMBUS, OHIO, September 30, 1932.

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

GENTLEMEN:—My opinion is requested in answer to the following question:

> "Is a municipality owning and operating a hospital wherein (pay) patients as well as (charity) patients are accepted, exempt from liability for damages caused by the negligent acts of its agents and servants to patients while receiving treatment, or to persons other than patients who might be injured while in the hospital?"

Your inquiry is prompted by a letter to you from the City Solicitor of the City of Sprinfield. From information furnished by the Solicitor it appears that the city of Springfield has constructed and is maintaining a municipal hospital by authority of Sections 4023, et seq., of the General Code of Ohio. This hospital was constructed from the proceeds of a bond issue authorized by vote of the people, in the sum of $1,800,000.00. The cost of operating the institution is approximately $193,000.00 per year which is met, for the most part, by moneys appropriated by the city commission for hospital purposes out of general tax funds. These moneys are supplemented by the income from trust funds which have been bequeathed to the city from time to time under wills authorizing the expenditure of the income to care for indigent poor of the city requiring hospital services. This supplemental income amounts to approximately $8,200.00 per year.

The fact that the operating expenses of this hospital are met in a relatively small part by the income from a trust fund which has been bequeathed to the city for hospital purposes does not, in my opinion, change the nature of the hospital from that of a purely municipal institution owned and operated by the city of Springfield under and by virtue of statutes authorizing the same.

It appears that the hospital receives some patients who pay for services but the receipts from these pay patients fall approximately $50,000.00, annually, short of the funds necessary to operate the institution and the difference is made up by appropriations from municipal revenue.

The building in which this hospital is operated, is six or seven stories high and there have been constructed therein several batteries of elevators which are used by the public and by employes of the institution. The question which the solicitor seems to be most interested in is whether or not the city of Springfield would be liable in tort for damages which might be received by employes or third persons on account of accidents occurring in the operation of these elevators.

A very similar question was before the Court of Appeals for Lucas County, in the case of *Lloyd* vs. *City of Toledo,* 42 O. App., 36, Ohio Bar, issue of August 1, 1932. In that case the plaintiff brought an action against the city of Toledo for personal injuries sustained by her through the alleged negligence of servants and employes of the city of Toledo in the course of a treatment given her while a patient in the Toledo Municipal Hospital. In the course of the opinion the court said:

"In our judgment, the facts recited above, which are conceded by the pleadings, show that the hospital is a municipal institution maintained and operated at the expense of the city in the interest of and for the preservation of the public health, and that the municipality in conducting the institution is performing a governmental function. The situation in this respect is not altered by the mere fact that there were some patients who paid for the accommodations and service. The rule is well settled that a municipal corporation is not liable for the torts of its officers and employees engaged in the operation of a municipal hospital, mainly at the public expense, to promote the public health. *University of Louisville* vs. *Metcalfe,* 216 Ky., 339, 287 S. W., 945, 49 A. L. R., 375, 379."

The court further said that inasmuch as the city was performing a governmental function in maintaining and operating the hospital in question no liability existed in favor of the plaintiff in the case. Citing the case of *Aldrich* vs. *City of Youngstown,* 106 O. S., 342.

Although this case involved an injury to a patient in the Municipal Hospital of Toledo, I am of the opinion, inasmuch as the case turned upon the question of whether or not the city in maintaining the hospital did so in furtherance of a governmental function and it was held that the city was in the performance of a governmental function in maintaining and operating the hospital, the same rule would apply to strangers or third persons as does to a patient in the hospital.

The case referred to above was not carried to the Supreme Court. It stands as the only decided case in Ohio which is reported bearing directly on the question which we have here under consideration, although the cases of *Overholser* vs. *National Board of Disabled Soldiers,* 68 O. S., 236; *Finch* vs. *Board of Education,* 30 O. S., 37; *Board of Commissioners* vs. *Mighels,* 7 O. S., 109, bear some analogy to the questions involved, and are authority for the doctrine that a political subdivision or governmental agency in the performance of a governmental function is not liable in tort in the absence of the expressed consent of the sovereignty manifested by statutory expression creating such liability.

In my opinion, the municipal hospital of Springfield, which we have here under consideration, is the same class or kind of hospital which was under consideration in the Lloyd case, supra, that it is owned and operated by the city of Springfield by favor of statutory authority and that the city of Springfield in operating and maintaining the hospital is engaged in the performance of a governmental function and is not liable in tort to patients or to third persons on account of negligence of the servants and agents of the city of Springfield, or otherwise, in the operation and maintenance of the hospital. This clearly appears to be the holding in the Lloyd case, supra, and is sustained by the weight of authority in other jurisdictions, 49 A. L. R., 379, note; see also *Nichitta* vs. *New York,* 228 N. Y. S., 528.

I do not regard the case of *Taylor, Administrator* vs. *Protestant Hospital Association,* 85 O. S., 90; *Taylor* vs. *Flower Deaconess Home and Hospital,* 104 O. S., 61 and *Sisters of Charity of Cincinnati* vs. *Duvelius,* 123 O. S., 52, as being in point. In my opinion the doctrine upon which those cases were decided has no bearing whatever on the question before us. None of these cases involved the liability of a political subdivision or governmental agency when in the performance of a governmental function. Although in each of the cases the court speaks of the hospital involved as being a "public" institution, obviously the court used the word "public" in referring to these institutions, not in the sense of being publicly

owned but rather in the sense that they served the public in accordance with the purposes of their foundation.

There is a wide divergence of opinion in the various jurisdictions of this country regarding the liability of charitable institutions whose funds are provided by benevolences. 11 C. J. 374, 377.

In many jurisdictions it is held that charitable institutions of whatever nature are completely immune from liability for negligence. The Supreme Court of Ohio is committed to the doctrine as stated in the syllabus of the Cincinnati case, supra:

> "1. A charitable institution may not claim total exemption from liability for damages caused by the negligence of its agents and servants, on the ground that it is supported by gifts and bequests in trust for charitable uses and purposes.
>
> 2. Charitable institutions, public and private, are on the same basis as other corporations and individuals as to liability for negligence to those who are not beneficiaries of the charity."

The Supreme Court has held that a public charitable hospital is not liable for injuries to a patient resulting from the negligence of one of its employes. *Taylor, Administrator,* vs. *Protestant Hospital Association, supra.* In a later case, however, the court made an exception to the foregoing principle by holding that such charitable hospital is required to use reasonable care in the selection of its physicians, nurses or attendants in order to avoid liability for their negligence. *Taylor* vs. *Flower Deaconess Home and Hospital, supra.*

In the first Taylor case, supra, there was an effort made to base liability upon a contractual relation arising by reason of the acceptance by the hospital of the injured plaintiff as a pay patient; however that phase of the case did not create a liability upon the part of the hospital in the view of the Supreme Court.

In the case of *Sisters of Charity of Cincinnati* vs. *Duvelius,* suit was brought by a nurse not an employe of the hospital, who was nursing a patient of the Good Samaritan Hospital of Cincinnati incorporated under the name of "Sisters of Charity of Cincinnati," for injuries suffered due to the alleged negligence of an employe of the hospital who was operating a passenger elevator. In that case the court went further than it ever had in previous cases in its divergence from the rule of complete immunity from liability for negligence of such institutions, by holding that charitable institutions of the nature under consideration were on the same basis as other corporations and individuals as to liability for negligence to those who are not beneficiaries of the charity.

It will be noted that none of the hospitals involved in the three cases mentioned above was a publicly owned hospital and the question of the liability for tort of a political subdivision or governmental agency when in the performance of a governmental function was not involved. For that reason I am of the opinion that the doctrines and principles discussed and applied in those cases have no bearing whatever on the question of the liability of the city of Springfield, either to patients or to third persons, for injuries resulting from alleged negligence in the operation and maintenance of the Springfield Municipal Hospital.

It is significant that the court in its decision of the Lloyd case, supra, made no mention of any one of these three cases although the first Taylor case, supra, arose in Lucas County and was taken to the Supreme Court on error from the Court of Appeals of that county.

Respectfully,
GILBERT BETTMAN,
Attorney General.