

1931

# William Budge Memorial Hospital v. E.N. Maughan : Brief of Respondent

Utah Supreme Court

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Stewart, Alexander, & Budge; attorneys for respondent.

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# In the Supreme Court of the State of Utah

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WILLIAM BUDGE MEMORIAL  
HOSPITAL, a corporation,

*Plaintiff,*

vs.

E. N. MAUGHAN, as County  
Treasurer of Cache County,  
State of Utah,

*Defendant.*

4925-

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## Respondent's Brief

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STEWART, ALEXANDER & BUDGE,  
*Attorneys for Respondent.*

In the  
**Supreme Court of the State of Utah**

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**Respondent's Brief**

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STATEMENT OF THE CASE.

The property described in the complaint, located in the City of Logan, and belonging to the William Budge Memorial Hospital, and on which is located a hospital and nurses' home, was assessed for taxes for the year 1928, the real property at \$1,480.00 valuation, and the buildings and improvements at \$20,800.00. When the property was advertised for sale for non-payment of taxes this suit was brought to enjoin the collection of the tax on the ground "that said property was not, nor was any part thereof,

subject to taxation for the year 1928, but the same was wholly exempt from taxation by virtue of Section 3, Article 13, Constitution of the State of Utah, and Section 5863, Compiled Laws of Utah, 1917." A restraining order was issued pending the hearing of the cause. By way of particularity it is alleged in the complaint:

### "III.

"That upon said property plaintiff continuously, during the year 1928, and for a long time prior thereto, has maintained and operated a hospital for the care and treatment of sick, wounded and infirm persons, and in connection with such institution plaintiff has also maintained and conducted a home for the accommodation, comfort, education and training of nurses in the service of said hospital, and said real estate hereinbefore described is necessary for the convenient use and occupation of said hospital establishment of plaintiff.

### "IV.

"That the occupation, use and maintenance of said property for the aforesaid purposes is the sole and only business of plaintiff and plaintiff at no time during the year 1928 operated, nor was said property, or any part thereof, at any time during said year, used for the gain or profit of the stockholders of the plaintiff, but said property, and the whole thereof, with the buildings thereon, has at all times been and now is used exclusively for charitable purposes."

In his answer the defendant denies that the property is used for charitable purposes and denies that it is

exempt from taxation. Defendant also sets up an affirmative defense which is, in substance, that plaintiff was organized in 1914 for carrying on the hospital business for pecuniary profit and gain, and that said hospital is operating and has always operated under that policy and for that purpose and object; that plaintiff, since its organization, has been duly and regularly assessed and has regularly paid taxes; that it requires the payment of large and substantial hospital fees by all patients entering the hospital for care and treatment; that it has requested the county to pay fees for indigent patients; that it has demanded the payment of hospital fees before permitting patients to leave the hospital, and that the hospital is not a general hospital open to all medical practitioners in good standing, but in 1928, and prior thereto, was operated for the gain and benefit of doctors belonging to the Budge Clinic.

By its reply plaintiff admits that it paid taxes prior to 1928. Admits that in 1928, and prior thereto, it was the policy of the institution to collect its regular hospital fees from all patients who were able to pay, and that it has at various times applied to the County Commissioners for the payment of hospital charges for indigents who received treatment. Plaintiff denies all other allegations of the affirmative defense and alleges that the hospital operates under the closed staff plan, whereby all major surgery must be performed by members of the hospital staff assigned to that particular service.

The court found the issues in favor of the plaintiff and this appeal is from the judgment.

### ARGUMENT.

When the case was called for trial the plaintiff moved to amend paragraph four, above quoted, by inserting in the next to the last line of said paragraph, after the word "thereon," the words "during said year," so that the paragraph would read "but said property and the whole thereof, with the buildings thereon, *during said year*, has at all times been and now is used exclusively for charitable purposes."

The defendant objected to the amendment, upon the ground that the paragraph, as it stood, presented an issue as to the character of use of said property, not only in 1928, but for all prior years since the establishment of the hospital; that this same issue was presented by the allegations of the affirmative defense and plaintiff's reply thereto, plaintiff having made no motion to strike such affirmative allegations, so as to eliminate the question as to the use of said property prior to 1928. The court denied the motion to amend, using this language:

"THE COURT: I take it the issue is with respect to the use of the property during the year 1928. It may be true that the court should go into a time prior to that to determine what bearing it has, but the sole question now is to determine the use of the premises during 1928. Now you may go into the years prior to that perhaps as having a bearing on the issue as to the year 1928.

"MR. FONNESBECK: That is all we want, your Honor.

THE COURT: But I think the question is the use of the property in 1928.

MR. FONNESBECK: We do not feel that we should be restricted on the question of the entire use that has been made of this property——

THE COURT: Well, I don't think it is necessary to argue that question now; you can argue that during the introduction of evidence, but I don't think that the amendment is necessary to paragraph four." (Tr. 53-55.)

There is but one question for determination by this court: Was the plaintiff's property, during the year 1928, used exclusively for charitable purposes, and therefore exempt from taxation for that year?

Article 13, Section 3, of the Constitution of the State of Utah, provides:

"Lots, with the buildings thereon, used exclusively for either religious worship or charitable purposes \* \* \* shall be exempt from taxation."

Section 5863, Compiled Laws of Utah, 1917, provides:

"Lots, with the buildings thereon, used exclusively for either religious worship or charitable purposes \* \* \* shall be exempt from taxation."

The evidence, without contradiction, establishes the fact that during the year 1928, the hospital property consisted of a main building 100 feet long by 40 feet wide,

and a nurses' home, 80 feet long and 40 feet wide, the latter building being used, in part, for the accommodation of patients. There are about fifty beds in the hospital and the rates charged are \$2.50 per day in a ward; \$2.75 per day semi-private; \$4.00 per day for private rooms, and there are two rooms in the entire hospital at \$5.00 each per day. There are thirty nurses who are paid during their three-year course of instruction as follows: Freshmen \$9.00, Juniors \$10.00 and Seniors \$11.00. These payments cover such items as books, clothing, etc. (Sup. Abs. 5.) The nurses receive a course of instruction given by the hospital staff and superintendent of nurses, to qualify them to pass the State Board examination. The hospital is equipped with laboratories, X-rays, accessories and all other paraphernalia necessary for carrying on hospital activities, and is standardized as required by the American College of Surgeons. It is recognized by the Federal Government as an institution that is permitted to withdraw alcohol for the treatment of patients and the government does not require it to file an income tax report. (Sup. Abs. 7.) The hospital is open to all who desire the benefit of its facilities, without distinction as to race, color or creed. No person applied for admittance in 1928 who was rejected and the same consideration and care is given to all who enter the institution. Most of the patients are admitted through some member of the medical staff, but there are also numerous patients received who are sent by Rotary and



Kiwanis Clubs, Bishops of wards, Relief Societies and other organizations, and there are also patients received whose hospital fees are paid by the county. It was the practice of the institution in 1928 to list each patient upon entrance to the hospital and to charge against such patient or the person or organization at whose request the patient was received, the regular hospital fees, which cover room accommodations, nursing, food, medicines and supplies, laboratory fee (outside of special laboratory work) and for use of the operating room, in case an operation was necessary. It was the policy and practice of the institution during 1928 to collect from all patients who are able to pay and to receive from the county the hospital fees for indigent patients. During the year 1928 the hospital received about 1800 patients and the fees charged amounted to approximately \$48,000.00. (Deft.'s Ex. 12.) The whole amount was collected, save and except about \$272.00, which amount represents the aggregate of bills owing by twenty-one patients who failed to pay. (Deft.'s Ex. 14.) County patients and all patients sent in by Rotary and Kiwanis Clubs, Bishops and Relief Societies, were treated by members of the medical staff free of charge, in accordance with the provisions of the By-Laws, which read as follows:

“It shall be the duty of the medical staff to treat at the hospital the worthy poor as charity cases, free of charge; the worthiness of such cases is to be determined by the bishops of the various wards or the clergymen of the various churches,

or other heads of some recognized charitable organizations or institutions, who shall nominate the patient for free treatment and such nomination shall be concurred in or indorsed by some one of the members of the medical staff of the institution residing in or near the locality from which such patient comes." (Deft.'s Ex. 2.)

The charity work done by the doctors in 1928 aggregated \$2500.00. (Sup. Abs. 6.)

Except as provided in the foregoing By-Law, the hospital had absolutely nothing to do with the fixing of the fees of the doctors for services performed by them, or with the collection of any such fees. For X-ray work and special laboratory work, which requires the services of an expert, the hospital employed a radiologist and technician, who was a member of the Budge Clinic, and who received a commission on each case of seventy-five per cent of the charge made, the check for which commission was made payable to the Budge Clinic. This commission charge was made in lieu of employing a person at full time, and is the practice adopted in other hospitals, as shown by the testimony of Mr. Rawson, the president of the State Hospital Association. (Sup. Abs. 13-14.)

None of the stockholders of the corporation ever received any returns from their investment by way of dividends or otherwise, and none of the officers or directors of the corporation have ever received any compensation, and no part of the hospital income has been devoted

to any other purpose whatsoever, save and except to the maintenance and enlargement of the institution and the improvement of its facilities. (Sup. Abs. 7, Tr. 45-46.) The evidence shows that in 1927, after a period of fourteen years, the hospital had on hand a surplus of \$31,000.00 (Abs. 33), and that during that year Drs. D. C. Budge and T. B. Budge made a donation of \$5,000.00 (Abs. 34), and that this whole amount of \$36,000.00 was invested in the addition to the hospital, part of which, as before stated, is used as a nurses' home. The hospital was, at the time of the trial, indebted to the amount of approximately \$8,000.00. Its net income for the year 1928 was approximately \$5,000.00, and this amount also was devoted to the payment of interest and to maintenance and operation expenses.

While there is no evidence of any specific case of a person applying to the hospital in 1928 for treatment, who at the time, was known by the hospital authorities to be unable to pay the hospital charges, Dr. Budge testified that if at any time any such application had been made such patient would have been received. (Tr. 67, 87.) He explains that the territory from which the hospital draws its patronage is one in which there are very few transients; generally the people own their own homes (Tr. 67) and there is little question ever raised about hospital charges (Tr. 138); but in proof of his assertion that it was the policy of the institution to receive and take care of worthy cases, even though no

compensation would come to the hospital, Dr. Budge, on cross-examination, called attention to one or two cases in prior years; one of a person who was passing through Wellsville, who was kept in the hospital for a period of sixteen weeks without pay (Sup. Abs. 9), and he also mentioned other cases where persons were taken to the hospital without regard as to whether or not they would be able to pay, and without any inquiry being made to ascertain that fact. As to the policy of the institution he testified:

“Q. Doctor, what is the rule—I believe you stated that a charge was made by the hospital against all patients who come to the hospital, is that right?

A. Yes, sir.

Q. Is that the rule——

A. Now, I won't say that. There have been a few cases that I do not call to mind where nobody was responsible that we have taken and treated free of charge and we haven't made any charge against them.

Q. Don't have any record of it?

A. I stated one this morning that happened here a little bit ago where no charge was made. I could refresh my memory and look it up and tell you more about it, but right off hand I couldn't. The superintendent looks after that part of it.

Q. Has the superintendent authority to take parties into your hospital if they say they have no means and can't pay you.

A. When they say they have no money or means or friends or a dollar on earth, the superintendent would be kicked out if he didn't take them.

Q. Would he?

A. Yes, that is if I had the vote.

Q. You generally have, don't you?

A. Well, I might have some say so, but that is the object of the hospital all the time.

Q. Do you recall the Williams case? He was run over a year ago last July 4th?

A. Yes, sir, that was in 1926.

Q. It was in 1927, wasn't it?

A. Maybe it was, I don't remember.

Q. He had no friends here and was a total stranger, was he not?

A. Yes, I think he was. I didn't take care of him, but I assisted with the case.

Q. He was very badly mutilated and broken up by an automobile running over him, wasn't he?

A. Yes.

Q. You came down yourself the next morning in that case, when the man was brought to your hospital; he was brought there in the night time, was he, on July 4th?

A. I think he was, yes.

Q. Didn't you go down the next morning to the county commissioners to see them?

A. No, I did not.

Q. Did you send somebody down?

A. No, I did not.

Q. Did somebody go, to your knowledge?

A. Yes, I think so; I think they called up and asked them if they would be responsible for the case.

Q. And the reason they desired to know that?

A. Yes, they make inquiry in these cases.

Q. Before they took him in?

A. No. They took him in and took care of him without regard to whether they were going to get a dime or not." (Tr. 87-88.)

LORENZO HANSEN, President of respondent organization, testified as follows:

"Q. Now, you made the remark, Mr. Hansen, on your direct examination, that you made an effort to collect from everybody who is able to pay?

A. That is our policy, yes.

Q. Where did that policy appear; does it appear any place on the minutes of your board meetings, or in your By-Laws, or your records, that your policy is to admit patients who are unable to pay?

A. I don't believe that I could recall the record, but the opinion amongst all of them——

Q. Well, I don't want your opinion——

MR. BUDGE: I insist that he should make his answer.

THE COURT: Yes, he may answer.

Q. Go ahead, the court said you may state your opinion.

A. My opinion is the policy is that everybody is admitted, regardless of their financial condition. If any question comes up at any time as to a man's responsibility to pay the bill——

Q. What did you say about that?

A. If a patient comes to the hospital it is the policy of the hospital never to ask the question as to his responsibility, that is my opinion.

Q. That is your opinion?

A. Yes, sir.

Q. That has been your idea all along?

A. All the time.

Q. But you say you have no personal knowledge of your own that that actually is carried out in the institution?

A. Yes, sir, I have.

Q. How do you know?

A. Well, there was a case up here in Richmond last November where a woman got her back broke and the doctor came along there and picked her up and put her in there, and they attended her and no bill was rendered at all until after she was well, then we rendered a bill, so she was accepted." (Tr. 115-116.)

The foregoing statement and the quotations from the record correctly sets forth the use made of the hospital property and particularly the use made of it in the year 1928.

During the course of the trial appellant offered in evidence the Articles of Incorporation of the respondent company, which were at first excluded, and later, over respondent's objection, admitted in evidence, and respondent, after the articles had been admitted, offered an amendment to said articles.

Upon such a state of the record the question is: Was the property of the respondent, during the year 1928, used exclusively for charitable purposes?

The appellant makes a point on this appeal that the court erred in not throwing the case open for evidence, with respect to the operation of the hospital for the entire period since 1914, when respondent company was organized, because he contends: (1) That such issue

was presented by the complaint itself; (2) that the issue is presented by the affirmative answer, which respondent did not move to strike, but which it denied by its reply. As to appellant's assigned errors, based on the refusal of the court to permit evidence as to conditions during years prior to 1928, we have to say, that nothing was or is involved in this case except the respondent's exemption from the taxes of 1928. Respondent paid the taxes for years prior and no matter how the property was used during those years, such use is immaterial, for, if the hospital property was not used exclusively for hospital purposes and the taxes have been paid, then they have been justly paid. If the hospital property during those years was used exclusively for charitable purposes, it is of no importance, for we are not asking for a return of any taxes for any of those years. Consequently the one matter in issue was and is the right of the respondent to enjoin the collection of this particular tax, based upon the use of this property for the year 1928. Paragraph IV of the complaint cannot be reasonably construed to open the door to the introduction of proof as to conditions prior to 1928. It reads:

“That the occupation, use and maintenance of said property for the aforesaid purposes is the sole and only business of plaintiff, and plaintiff at no time *during the year* 1928 operated, nor was said property or any part thereof, at any time, *during said year*, used for the gain or profit of the stockholders of the plaintiff, but said property,



and the whole thereof, has at all times been and now is used exclusively for charitable purposes."

The words "has at all times," of course, must have reference to the year 1928, which was the limited period twice before specified in that particular paragraph. We endeavored to avoid any question of construction by asking permission to amend the complaint which the court did not consider was necessary.

The mere fact that we did not ask to have the affirmative defense stricken is no reason why it was competent to admit any proof under such defense. These affirmative allegations presented immaterial issues, and while it is quite proper to move to strike immaterial allegations, the failure to make such a motion does not make competent proof offered in support thereof.

In the case of *Graham vs. Coos Bay, etc., Co.* (Ore.) 139 Pac. 337, it is held:

"Where no motion is made to strike out irrelevant matter in a pleading, it should be disregarded at the trial.

"A denial of an immaterial allegation raises no issue; does not preclude the person making the denial from insisting at the trial that the allegation denied is immaterial, nor prevent the trial court from excluding evidence in support thereof."

In the case of *Ramaswamy vs. Hammond Lum. Co.* (Ore.) 152 Pac. 223, it is held that the denial of an immaterial allegation raises no issue.

Securities Acceptance Corporation vs. Kane,  
196 N. Y. S. 519.

Neis vs. Whitaker (Ore.) 84 Pac. 699.

Specht vs. Spangenberg (Iowa), 30 N. W. 875.  
Ency. of Plead. & Prac., Vol. 21, page 256.

In the Specht-Spangenberg case the court declares:

“An affirmation, irrelevant when made, does not become relevant when denied.”

In Encyclopedia of Pleading & Practice, supra, it is said:

“In most code states irrelevant or redundant matter goes for nothing at the trial, whether contradicted or disregarded in the pleadings.”

Much is made in appellant's brief as to the character of the respondent organization, as shown by its articles, and it is contended that the amendment to the articles is of no effect because not properly adopted. We contend that a discussion of the character of the respondent organization is absolutely beside the question for consideration here. It makes not the slightest difference for what purpose respondent was organized as shown by its articles, the sole question being: Was the property taxed used exclusively for charitable purposes during the year 1928?

In Parker vs. Quinn, 23 Utah 332, the L. D. S. Relief Society owned certain property in Salt Lake City. It used the upstairs portion of the building for relief society

purposes and rented the downstairs part to a mercantile establishment, but used the fund derived as rental for the purposes of the society. Held:

“That the portion of the building used by the society was exempt from taxation, but the part used for mercantile pursuits was subject to taxation.”

If the character of the organization is to determine whether or not the property is taxable, then, as it must be conceded, the L. D. S. Relief Society is a charitable organization, any property held by it should be exempt, but this court said, in effect, that the purpose for which the organization is formed is immaterial, the question is: What use was made of the property? That portion of it used for the society purposes was held to be exempt, but that portion not used for the society was held to be subject to taxation.

In the case of *Elks vs. Grover*, 40 Utah 1, 120 Pac. 192, the court held that property owned by the Elks Lodge was used for charitable purposes and exempt from taxation and in its discussion uses this language:

“While the statutes exempting private property from taxation will usually be strictly construed, those statutes exempting property used for educational, religious and charitable purposes should, just as those providing for poor relief, receive liberal construction, for both are based on motives of humanity and mercy, and hence Constitution, Article 13, Section 3, exempting property used exclusively for charitable purposes from taxation, should be liberally construed.”

In *Odd Fellows vs. Naylor*, 53 Utah 111, 177 Pac. 214, a building owned by the Odd Fellows Lodge was in part rented out to stores, the rental income being used to keep the building in repair and for charitable and benevolent purposes. Notwithstanding the character of the organization, the court held that the rented part of the building was not exempt; that the character of the organization does not determine the question as to the taxability of the property.

So we contend that it is immaterial what the articles of incorporation provide, for if the articles did, without question, provide that the organization is a charitable institution, that fact would not be important in determining whether or not the property was taxable in 1928. Consequently if the question of the character of this organization is not effective to exempt it from taxation, the character of the organization is not effective to make its property subject to taxation. It is the use which is made of the property, and not how or by whom it is held, and the articles of incorporation are not material evidence on the issue before the court.

In the *Odd Fellows-Naylor* case, *supra*, the court declares:

“To begin with it must be conceded that the owners of property to be exempted, within the purview of the Constitution, *are not limited to ecclesiastical or charitable organizations, but the exemption privilege is extended to the owners of the property mentioned, without regard to the character of its owner.* The owner may be a

church organization, a charitable or fraternal organization, or it may be a private individual, or a corporation."

A very interesting discussion of the test to be applied in determining whether property is exempt from taxation under constitutional and statutory provisions similar to our own, is the case of Reynolds Memorial Hospital vs. Marshall County Court (W. Va.) 90 S. E. 238. The real estate involved consisted of eighteen lots. The title to six of the lots was in the Reynolds Memorial Hospital Training School for Nurses, a corporation; the legal title to seven was held by B. M. Spurr and Isabelle Spurr, Trustees for the Trinity Parish of Moundsville, West Virginia, and the title to the other five lots was in B. M. Spurr individually. The opinion recites:

"The Reynolds Memorial Hospital is not an incorporated institution and there are no trustees, board of visiting physicians or surgeons, or other persons having the care, management and control of said institution, other than B. M. Spurr, who has control and management of the same. The Reynolds Memorial Hospital owns no part of the property mentioned and described in the petition. The training school for nurses holds title to the lots mentioned therein, but no buildings are erected on it, but they are used for the benefit of the hospital. The lots owned by B. M. Spurr individually are vacant. The record fails to disclose that Trinity Parish, a church organization at Moundsville, receives any benefit from the property conveyed to B. M. Spurr and Isabelle Spurr, Trustees for such organization. *It is ad-*

*mitted in the record that the Reynolds Memorial Hospital is a private institution. None of the property is vested in trustees, in trust for charitable purposes."*

In discussing the evidence under which the legal title to the property was held the court declares:

"These conveyances do not limit or in any wise control the grantees in the use of the property. It may be used for any lawful purposes. The mere fact that the property is used for hospital purposes is not sufficient to exempt it from taxation. Hospitals are not among the property named in the constitution as exempt. It may, however, be exempt, if it comes within the property used for charitable purposes."

Further on the court declares:

"It is most strenuously insisted by counsel for appellant that this is not a charitable institution, for the reason, among others, 'that there is no valid trust devoting the property sought to be taxed to any charitable use, or to any use whatsoever.' This is true, as we have seen that the conveyances under which the property is held do not limit or in any way control the grantees in the use to be made of the property \* \* \*

"The purpose for which the property is to be used is not specified in the conveyances. Is this necessary? Can there be any charitable use without a trust, that is to say, without a trust requiring the property to be used for that purpose? The applicants do not seek exemption from taxation on account of the title by which they hold

the property, *nor the character of the authority to control it*, but for the reason that it is property used for 'charitable purposes,' and by the constitution of the state may be exempt from taxation. It is the use to which the property is to be applied that determines whether or not it may be exempt from taxation. That is the language of the constitution— 'property used for charitable purposes.' If property used for charitable purposes, and for that reason exempt from taxation, should cease to be used for that or other purposes exempting it from taxation, it would at once become liable for taxation, without any change of ownership."

In the case of *Lacy vs. Davis* (Iowa) 83 N. W. 784, the Knights Templar claimed certain property to be exempt under a statutory provision exempting "all grounds and buildings used for charitable, benevolent or religious institutions and societies, devoted solely to the appropriate object of these institutions \* \* \* and not leased or otherwise used with a view to pecuniary profit." The court held that the property was not exempt and uses this language:

*"Whether the Grand Commandry belongs to the class that may claim the exemption we do not find it necessary to determine; for conceding it to belong to the class it must appear that the property is devoted solely to the appropriate objects of such institution. It is only when the property is directly used for charitable, benevolent or religious purposes that it is exempt from taxation."*

Here the court clearly indicates that the question of the character of the institution is altogether immaterial.

It was not necessary for the court to determine what its character was.

In *Bishop and Chapter of Cathedral of St. John vs. Treasurer* (Colo.) 86 Pac. 1022, in a suit involving the exemption of the plaintiff's property, it appeared that Rev. Oaks, the superintendent of the institution, had issued a prospectus concerning the work and progress of the institution, in which it was stated that the home was not a charitable institution. The defendant attempted to introduce this statement as tending to show the character of the institution claiming the exemption of its property. The defendant also attempted to show that Oaks had made oral statements to the same effect as his written statement. The court held that the objection to this offered evidence was properly sustained, and that the question was whether the property was, as a matter of fact, being used for charitable purposes in contemplation of law.

We consider that the foregoing decisions, including the Utah cases heretofore cited, dispose of the contention that the character of the corporation owning the property (that is, whether the corporation was or was not organized for charitable purposes) is a material element in determining whether property owned or used by it should be taxed. Whether the property is owned by a charitable organization or a non-charitable organization, or whether it is owned by an individual, is altogether immaterial. In the case of *Reynolds Memorial Hospital vs. Marshall*



County Court, *supra*, it will be recalled that some of the property was owned by B. M. Spurr individually, and if he was like most other humans it would not be contended that he was a charitable organization, yet the property was held to be exempt from taxation. In the case of *Parker vs. Quinn*, *supra*, and the Odd Fellows case, the organizations owning the property were charitable, but that fact did not exempt the property from taxation. So all discussion as to the nature and character of respondent, and as to what it has power to do under its original articles, is of no consequence and should not influence the decision herein.

Even if, as a matter of legal construction, respondent, under its original articles of incorporation, had power to declare dividends its business was never carried on for the purpose of pecuniary profit or gain, and the amendment to its articles, even though it may be claimed that there were fatal defects in the proceedings for its adoption, indicates a formal declaration of the corporation's policy, to continue as it had theretofore operated, that is to continue to do business without pecuniary profit to any of its stockholders, and without any intention to declare dividends. Throughout the entire fourteen years of its existence none were declared which is the best kind of proof as to the institution's policy. We contend that it is not necessary for the court to pass upon the legality of the proceedings for the adoption of the amendment, or to pass upon the question of the character of

the institution, as determined from its original articles. The only question in which the court is interested is as to the purpose for which the property was used in 1928.

Now let us determine whether respondent's property was used, during 1928, for charitable purposes. We shall call attention to a number of authorities and as we proceed will discuss the evidence in this case, as shown by the record.

In the case of Nuns of St. Dominic vs. Younkin, 235 Pac. 869, the facts were very similar to the facts in the case at bar. The hospital was erected at a cost of \$200,000.00, but at the time of the trial it had reduced its indebtedness to \$130,000.00, by the earnings of the institution and by certain donations. The hospital consisted of rooms for patients, laboratories and operating rooms, X-ray room and equipment for scientific tests. The building was used also for rooms for student nurses and rooms for other nurses and persons in charge of the institution. It received all persons not suffering from contagious diseases. Its schedule for rooms was from \$14.00 to \$35.00 per week. A number of patients were treated that were sent by the county organizations, for which the county, under an agreement, paid a certain agreed sum. The following is a quotation from the facts found:

*"The patients received at the hospital are charged on the books of the plaintiff with the full amount of the services rendered to them. The evidence disclosed that in the case of county patients the difference between the full charge for the*

services performed and the amount paid to the plaintiff by the county was credited on the books of the plaintiff as charitable work, and this difference thus denominated, amounted to something over two thousand dollars for the past year. The total amount of money received by the hospital was about \$32,000.00 for the past year."

*"There was no evidence introduced to establish the fact that the plaintiff had ever received a patient at its hospital, with the understanding at the time it received such patient, that care and treatment would be given without pay, except to relatives of the sisters of the order and sisters of other orders and the clergy, who received services at said hospital without charge. \* \* \**"

"The moneys which have been received by the plaintiff, either by gifts, legacies or from moneys received from patients, have been used in maintaining the hospital and to pay interest on indebtedness, and figuring depreciation on the building and equipment, there has been no surplus earned over and above the cost of maintenance."

"The hospital is recognized by the Federal Government as a scientific and charitable institution, and as such is permitted to withdraw alcohol from the bonded warehouse, free of all tax."

"The plaintiff was also excused from making income tax return to the Collector of Internal Revenue."

Later in the opinion the court uses this language:

*"The fact that it charges and receives pay from patients able to pay, does not detract from the charitable nature of the services rendered. In Hospital Association vs. Baker, supra, ninety-five*

per cent of the patients were pay patients. In *City of Antonio vs. Santa Rosa Infirmary*, supra, eighty-seven and a half per cent were pay patients. In *St. Elizabeth Hospital vs. Lancaster County*, supra, only a small per cent did not pay. In *Hospital vs. County Court*, supra, about forty per cent paid. *Neither does the fact that the hospital has been able to increase the value of the plant, from money received from pay patients and donations, detract from its charitable purpose. The St. Elizabeth Hospital, at Lincoln, Nebraska, began with donations aggregating twenty thousand dollars, and in thirty years increased the value of its property to five hundred thousand dollars. St. Elizabeth Hospital vs. Lancaster County, supra. The Santa Rosa Infirmary of San Antonio, was able to pay an indebtedness of one hundred twenty-five thousand dollars in about three years. City of San Antonio vs. Santa Rosa Infirmary, supra."*

In *St. Elizabeth Hospital vs. Lancaster County* (Neb.) 189 N. W. 981, it was shown, as stated in the case of *Nuns of St. Dominic*, supra, that the property in thirty years had increased from twenty thousand dollars to five hundred thousand dollars, and as stated in the opinion the hospital had a surplus of forty thousand dollars. The court uses this language:

"No individual, society or corporation receives any pecuniary profit from hospital property, funds or earnings. Surplus and donations are used to enlarge buildings and to improve hospital facilities, equipment and service. The institution is open alike to charity patients and others, without regard to race or religious beliefs. Reasonable compensa-

tion is required from those who are able to pay it. Only a small percentage of those who seek rooms in and hospital care, however, can be considered charity patients, *but this does not change the charitable purposes for which the property is used, where no one receives any pecuniary profit from any source.*"

In the case at bar it is shown by the record that in fourteen years the respondent accumulated thirty-one thousand dollars surplus, and that its net earnings for the year 1928 were something over five thousand dollars, but it also appears that all this money was put back into the institution, to improve its facilities.

Counsel argues (App. Br. p. 39) that "the merchant, the cobbler, the baker, the manufacturer" could argue that if they had more money to put back into their business institutions to make improvements and enlargements they could better serve their patrons but that this should furnish no reason why their property should be exempt. Of course not, because even though these business men might put some of their income back into the business there is a part of it which they use as profits, and the business they do and the use they make of their property is for the sole and only purpose of pecuniary gain to themselves. If counsel will give these suggestions careful consideration they will probably discover some slight difference between the use made by a business man of a mercantile establishment and the use made of hospital property. In the cases we have

just cited the hospitals made large net earnings but as those earnings were invested in the plant, the use made of the property was held to be charitable.

In *City of Dayton vs. Trustees of Speers Hospital* (Ken.) 176 S. W. 361, Annot. Cases 1917 B 275, the following is the syllabus:

“The testatrix gave property to three persons, in trust for the establishment of a hospital; the trustees to report annually to the chancery court in the county, and such court to fill all vacancies in the office of trustee. The hospital received private pay patients; public patients coming there of their own accord or sent there by the county and certain nearby cities, including the city in which the hospital was located, and which was seeking to subject the hospital to taxation. *No patients were kept without charge*, but some of those who came of their own accord failed to pay, and no one has ever been turned away for inability to pay. The county and such cities compensated the hospital as to patients sent by them, but in a sum less than the actual cost. The operation of the hospital resulted, in the different years, either in a deficit or in a very small gain. There was no provision for reversion in the will. The trustees served without pay and it did not appear that it was ever intended that any private gain should result. The profit from private patients, who paid for their care and treatment, went into the general fund of the hospital and was used for maintaining it. It is held that the hospital property was exempt from taxation as a public charity, since whatever is done or given gratuitously, in relief of the public burdens or for the advancement of public good, is a public charity, and an institu-

tion founded and endowed as a public charity thereby does not lose its character as such under the tax laws, *if it receives a revenue from the recipients of its bounty sufficient to keep it in operation.* Or, applying another test, if the object for which an institution is founded is the general public good, and not private gain, and it is so conducted that the public receives all the benefits of it, it is purely a public charity."

In its opinion the court declares:

"The fact that the institution receives a revenue from the recipients of its bounty sufficient to keep it in operation, does not take from it its character as a public charity, where it was founded and endowed as such, and when all of the receipts go to providing for the purposes for which it was erected and maintained. The municipalities and county itself, in which the institution is located, and whose duty it is to care for the indigent sick of each of them respectively, have by its use been saved the burden of erecting an institution of the kind of their own, or otherwise caring for such sick."

Under our law it is the duty of the county to care for its indigent sick (See Sec. 1400x40, Compiled Laws of Utah, 1917). Far better that it should be able to care for them by paying reasonable hospital charges than to build a hospital of its own.

The above quotation suggests an element for consideration, which is often disregarded. It seemed to be the attitude of counsel at the trial, and from his brief he

does not seem to have changed his conception, that in order to prove that hospital property is used exclusively for charitable purposes, it must appear that the people may apply for treatment, without being obliged to pay for the services rendered. Undoubtedly a hospital thus using its property would be using it for charitable purposes, but it is likewise used for such purposes if patients pay for such service, if it is operated and conducted for public good and not for private gain. Let us assume that there was no hospital in the City of Logan; that the citizens of that community, under proper legal authority, determined to establish a hospital; that to provide for such institution they issued bonds of the city, which were sold and the proceeds used for the construction and equipment of the institution. Let us further assume that the city should receive all persons who applied for treatment and made no charge for hospital services and treatment. It is obvious that there would be only one way by which that institution could possibly exist. All the people of the city would have to be taxed, not only to pay the interest on the bonds, but to pay for the maintenance, upkeep and cost of operation. All the people within the corporate limits, whether or not they had occasion to use the hospital at any time, would be obliged to help maintain it. Now let us further suppose that in this institution established by the city any doctor licensed to practice in the State of Utah might take his patients to the institution, perform any operation, whether of minor or major surgery that he considered necessary,



or prescribe any other treatment. Counsel will say that such an institution is, of course, a charitable organization; that the property of such institution would, under such conditions, be used for charitable purposes. All right, let us concede that fact. In what respects does the respondent hospital differ? William Budge Memorial Hospital was established by the voluntary contributions of its stockholders, who, as shown by the record, paid for their stock and have never, at any time, received a dividend or any other financial return. They put up the money instead of it being provided by the city. To the institution which they established all may come for treatment, except those afflicted with contagious diseases or insanity. The corporation asks no donations from the city, county or state. It asks nothing from anyone who does not use the hospital, but those who apply for the benefit of its facilities are charged reasonable rates. This is the practice observed by all hospitals, with one possible exception. (Abs. 29.) The rates charged are lower than the rates of other hospitals, according to the testimony of Dr. Budge (Sub. Abs. 10), and generally lower than in other hospitals, as testified by Mr. Rawson (Abs. 43). Is this charge made to benefit the stockholders? Is it made to benefit the officers of the corporation? No. It is made simply to permit the institution to exist and carry on its work, to improve its facilities and enlarge its accommodations. In short, to keep this institution in a condition so that it can be used to best advantage for the benefit of those who are suffering from

injuries or disease. Instead of all taxpayers paying the cost of operation, those who receive the immediate benefits pay such cost. Is it not as much a charitable organization as a hospital built by the city would be?

But appellant contends that the patients in the William Budge Memorial Hospital are taken there by members of the medical staff. We grant that this generally is the case, although it appears from the testimony of Superintendent Larsen (Abs. 36) and others, that the hospital is open to all who desire to be admitted, and that organizations of different kinds send patients to the institution; so that the institution is open to the entire public. There is no restriction to prevent any person from enjoying its benefits. Whoever enters the institution will have a charge made against him for the hospital fees, and the hospital will request payment of all who can pay. "But," it is insisted, "every doctor cannot take his patients to the hospital, because every doctor is not permitted to perform major surgical operations, or to use the X-ray, and that as limitations are placed upon the right of doctors to operate and to use the X-ray, such regulation virtually excludes the patients of doctors who are not members of the medical staff; that because of this condition the hospital is really not open to the public generally." Such reasoning is pure falacy. The limitation is not in any sense a restriction on the public right of entrance to the institution, but only on the physician or surgeon. It might as well be contended that a public school is not open to the public, because each pupil has not the right

to have a teacher of his own selection. Every well regulated institution must have rules and regulations for the conduct of its business. One of the rules which this and other hospitals have adopted is that it will exclude patients suffering from contagious diseases and from insanity. That, of course, must be conceded to be a reasonable regulation. Other regulations are those with reference to patients' diet, hours for visitors, treatment and attention by nurses, rather than by relatives or friends, etc., etc. These regulations are not questioned; they are for the good of the patient; but a rule which, for the good of the patient so ill as to require a major surgical operation or technical X-ray treatment, forbids such service, except at the hands of a member of the staff, who by experience is able to render the best service, is termed a regulation which excludes the general public. It no more excludes the public than any of the other regulations. All are welcome, but all must conform to the rules and regulations of the institution which are not novel or even unusual. They are in effect in all well regulated hospitals, and what is called the "closed staff" system is in effect in most hospitals, particularly in the East. (Abs. 30.) As stated by Dr. Budge:

"There are three kinds of staffs, a closed staff, a mixed staff and an open staff, and most of the hospitals in the United States, particularly throughout the East, are exactly like ours. (Tr. 84.)

Q. It is of more benefit to you to have a rule like that, is it not?

A. Yes, I make more, but it is an advantage to the patient, absolutely.

Q. Well, it would be an advantage to the patient if you are a better surgeon than the other man, you mean?

A. Yes, by reason of my experience I would be worth more to the patient?

Q. Yes, I understand that you take that for granted that you would be?

A. I just happened to have been put in that position. I think from my experience and all—I try to do my level best. But that would apply to any doctor. Experience is what counts in major surgery. I would like to make it clear that our hospital is not different from most other hospitals in the United States in surgery.

Q. Well I don't know about that.

A. I do.

Q. I thought possibly if you knew about them all in the United States you would know something about the other one here in Logan.

A. There isn't a hospital in the United States, of any size, that I can't tell you about." (Tr. 84-85.)

So, as before stated, as an incident in the management and method of operation of the Budge Memorial Hospital, the medical director and his assistant perform all major surgical operations, but they could do all such surgical operations, if the patients desired it, in any other hospital that is open to doctors generally. The fact that other doctors are excluded from that particular work, may be displeasing to one or two ambitious young doctors, but the regulation does not prevent all members

of the general public, who desire hospital service, from receiving the benefits of the hospital facilities.

In the case of *Sisters of St. Francis vs. Board of Review* (Ill.) 83 N. E. 272, a similar question was raised and answered by the court as follows:

"It is then urged that the institution is, in effect, being conducted and its property used for the benefit of certain physicians in the City of Peoria. This contention is based upon the fact that the board of managers of the corporation has established certain rules of government, by one of which rules no physicians are permitted to practice in the hospital, except such as subscribe to and are governed by the principles of medical ethics promulgated by the American Medical Association. It does not appear from this record what percentage of the physicians present in the City of Peoria would be eligible under this rule. It does appear, however, from the testimony of these sisters, who are in actual management of the hospital, that they understand the rule permits all reputable physicians to doctor patients in the institution, and that but few physicians present in Peoria are excluded. The sisterhood does not provide medical attention. The patient is permitted to call in the physician or surgeon he desires, *who is not excluded by the rule in question.* When the patient is unable to pay for medical care he is treated free of charge by the members of the medical profession in the hospital. *The question whether or not this is an institution of public charity depends not at all upon what class of physicians are permitted to practice there, so long as the institution is not conducted for the purpose of benefiting the physicians of that class.*

*A hospital is primarily for the benefit of the patients, and not the physicians. Whether or not it is a charity is to be determined by the treatment which the patients receive at the hands of those in charge of the hospital."*

No proof was offered to show that any physician in Cache County feels aggrieved because of the rule of the respondent relating to major surgery except Dr. Hansen, who at the time he discussed the matter with Dr. Budge, had been out of school one year and two months (Tr. 186), and who in 1928 had access to another hospital for his work.

In the case of *New England Sanitarium vs. Stoneham* (Mass.) 91 N. E. 385, the institution had a regulation that those who applied for treatment should not be admitted until a committee had passed upon the character and financial standing of the applicant, and yet the court held that the institution was operated for charitable purposes. In discussing the facts the court has this to say:

*"If those who applied for treatment or for a reduction from the regular rates were not admitted until a committee had passed upon the character and financial standing of the applicant, a regulation of this nature was not only reasonable, but necessary, to prevent imposition."*

In *McDonald vs. Mass. General Hospital*, 21 American Reports, 529, it is held:

*"The fact that a corporation, established for the maintenance of a public hospital, by its articles requires of its patients payment for their care, ac-*

according to their circumstances and the accommodations they receive, and that no person has individually a right to demand admission, and that the trustees of the hospital determine who are to be received does not render it the less a public charity."

In *Gouch vs. Association, etc.*, 109 Mass. 558, it is said:

"A corporation established for the support of poor old women, which devotes all of its funds to the support of such women in its home, and is no source of profit to its members, is a charitable corporation, although it requires a payment of money as a requisite for admitting the women into its home."

Is it unreasonable for an institution seeking the best results for its patients to prescribe a rule that major operations—those operations which are of serious import—shall be performed only by the medical director or his assistant, who are constantly engaged in that particular class of work? Or that the X-ray work shall be performed by a specialist employed by the institution for that purpose? Or that the special laboratory work shall be done only by an expert technician? Logan is a small community and the number of major surgical operations are comparatively few; that is, few in comparison with the number performed in large hospitals in large cities. And such is also true of the number of patients who need X-ray treatment, and for whom special labora-

tory work is necessary. Surgeons, who do all the major surgical work, are bound to become more expert in it, and the results for the public are better than to have patients operated on by every doctor, irrespective of whether he has had experience or not—perhaps out of college only a year or two—and who, earnest and careful as he might try to be, is not competent to assume the responsibility of serious operations. Likewise with the X-ray and special laboratory work. These regulations are established for the benefit of all who come to receive treatment in that institution.

Our friends are unkind enough to say that these restrictions upon the performance of major surgical operations, and with respect to X-ray and laboratory work, are placed for the benefit of the Budge Clinic. We beg to differ with counsel. It is merely incidental that members of the Budge Clinic happen to do the major surgery, and they receive no greater or different compensation than if they performed the operation at the patient's home or elsewhere. If there were a public hospital in Logan in which members of the Budge Clinic had made no investment (they contributed at least one-half of the original investment in this hospital) they would be privileged to take every operative case to such an institution, with all the privileges in the performance of their work which they enjoy in this institution. (Abs. 29.) Furthermore the Budge Clinic has never received a dime from this institution, except the seventy-five per cent charged for X-ray and laboratory work performed by a member



of that clinic, expert in that work. The seventy-five per cent commission was paid as any other hospital expense, and, as testified, by Mr. Rawson, is an expense recognized in sixty per cent of the smaller hospitals, including the Dee Hospital at Ogden, of which Mr. Rawson is superintendent, up to the time that his hospital considered the work of the institution justified the employment of a full time radiologist. To quote from his testimony:

“Q. Calling your attention particularly to the use of the X-ray and the scientific part of the laboratory work that is required to be done by a physician, I will ask you whether or not the use of the X-ray, in the manner in which it was testified here, that is to say, the employment by the hospital of some one or some technician, or more than one technician, to operate and interpret the X-ray and do this scientific laboratory work, is a use of hospital property that is common to hospitals throughout the country, reputable hospitals, on a percentage basis to the operator.

A. I should like to make just a little explanation. There is a difference between a technician and a radiologist. A technician is employed to take pictures. A radiologist understands and is employed as an expert to interpret the pictures, as Dr. Budge testified here yesterday. My investigation was throughout the United States, and in fact an inquiry was sent out by the American Hospital Association, and they found that the smaller hospitals, over sixty per cent of them, were employing such people on a commission basis. I also talked to a number of hospitals individually, because we are in the same position as a small hospital, and I talked to them for the purpose of ascertain-

ing what was the best to do. I found that a commission was paid, from sixty to eighty per cent to the radiologist for interpreting these pictures. Getting this information—the reason for giving a commission was this: That the hospitals are not in a position to employ a full time radiologist, because they would have to specify certain hours for them to be there, but by placing them on a commission basis it was to the interests of the radiologist to come any time that he might be needed. In our own hospital we have employed up to the first of the year a man who had absolute charge of the X-ray. We gave him seventy-five per cent; however, in this case he furnished his own supplies. There is one hospital in Salt Lake City that is paying eighty per cent.” (Tr. 118-121.)

On cross-examination he testified:

“Q. What hospitals do you have in mind in the State of Utah where a commission of sixty per cent or over that is paid to the man who interprets these pictures, the radiologist, is that right?

A. The Holy Cross Hospital in Salt Lake City, and the L. D. S. Hospital, up until some time last year, when they made a change on the salary basis.

Q. And what is the Holy Cross Hospital—what do they pay in percentage?

A. They advised me they were paying eighty per cent. (Tr. 122.)

Q. Do you mean to testify also that you have been told at the Holy Cross Hospital that fees are collected as hospital fees?

A. Yes, sir.

Q. And turned over to this radiologist?"

A. Eighty per cent."

It is true that Mr. Rawson testified that in the Dee Hospital, an institution of one hundred eighty-five beds (Tr. 118) the radiologist furnished his own supplies on a commission charge of seventy-five per cent (Tr. 121), but the witness did not know that such was the case with the Holy Cross Hospital, which paid eighty per cent commission, although he says that that hospital does provide the machine (Tr. 122). It may well be that a commission of seventy-five per cent is reasonable in a hospital of only fifty beds even though the radiologist did not furnish his own supplies. There is nothing in the record to show that such an arrangement was unfair in any particular. Counsel's attempt to make capital out of this element of the case (App. Br. 23) indicates a disposition to criticize for the sake of criticizing. If the institution was well managed for the benefit of the institution, as counsel admits, is it not reasonable to assume that it made only such arrangement as was fair and reasonable in agreeing to pay a seventy-five per cent commission and to furnish the supplies to the radiologist, bearing in mind that the hospital is small and that perhaps only a small percentage of its patients require X-ray work.

This hospital, so far as the use of its property is concerned, is no different from the Holy Cross, St. Marks, L. D. S., Dee Hospital in Ogden, or any other Class A

hospital in the intermountain region. It receives, without discrimination, all persons who desire the benefit of its facilities; it charges all patients and collects from those who are able to pay; it gives all patients the same character of attention and care; it pays, in addition to its other overhead expense, a commission to a radiologist, and for special laboratory work; it charges indigent patients and receives pay from the county; it charges patients sent by Rotary Clubs and other organizations and receives pay from such organizations; it pays no dividends or compensation to its stockholders, officers or directors; it devotes all its net income to maintaining the institution, enlarging and improving its facilities, and in liquidating its indebtedness. It is clear from the testimony of Dr. Budge and Mr. Rawson that the hospital of the respondent is operated under the same sort of rules and regulations and under the same policy as other hospitals.

Dr. Budge testified, in referring to the surgical work done by him in the hospital:

“Q. The fact is there is no charge made to you, isn’t it, by the hospital?

A. No.

Q. You mean that isn’t a fact, or is it?

A. The hospital doesn’t charge me for anything.

Q. You get everything free?

A. I take my patients there in the operating room.

Q. The hospital furnishes you with the gloves, do they not?

A. Yes, that is true at all hospitals.

Q. Yes, you doctors, I suppose, make these rules for all the hospitals, do you?

A. No, sir, the other hospitals make the rules and we follow them.

Q. Is that the reason you think you are charitable?

A. Yes, sir, we are the same as every other hospital in the United States, with one exception. They all charge their patients, every one of them, exactly the same as we do.

Q. They all charge their patients?

A. Yes, sir.

Q. Do they for the Children's Memorial Hospital in Salt Lake—do they do that?

A. That may be the exception. They charge whenever they can pay.

Q. Yes, they have a tendency to do that.

A. Every hospital in the land.

Q. Now, how about the instruments, the surgical instruments the hospital always takes care of keeping up the instruments, does it?

A. Yes, that is true at all hospitals.

Q. You are right in line there?

A. Yes." (Tr. 80-81.)

Mr. Rawson testified:

"Q. Now, Mr. Rawson, from your experience as a manager and from your information as to the conduct of hospitals, what is the practice of hospitals in the collection of hospital fees from patients?

A. My experience with all hospitals that I have come in contact with is that they have practically the same problems that we have here in Utah. Hospitals are either built by some church, or by some private people, cities or counties, and

where they do not collect their bills they either have to have endowments or donations or collections from some one to maintain the institution. In our various conventions the subject is always brought up for the purpose of bettering the hospitals, that they may render more efficient service to the communities which they serve, and it has been the unanimous opinion that they should endeavor to collect all that is possible to maintain these institutions, in view of the fact that there is only about seventy per cent of the beds which are filled all the time, and then they have their overhead expense, whether all the beds are filled or not, and in many instances they have people who are unable to pay, although they have to take care of them, and for that reason it is recommended that the prices charged should be based on the conditions of each locality, and place the prices at a figure at which they can maintain their hospitals.

Q. Including the necessary improvements?

A. Including the necessary improvements.

Q. So it is your opinion that they all, so far as you know, collect, as far as possible?

A. Yes, sir." (Tr. 121-122.)

On cross-examination he testified:

"Q. Do you know whether hospitals pay their own way, as a general rule?

A. I know they do not.

Q. You know they do not?

A. Yes, sir, the majority of them.

Q. Does yours run behind?

A. Whenever we make improvements we have to have donations from the church."

Again on redirect examination he stated:

"Q. Mr. Rawson, how do these rates here that have been testified to, compare with the rates elsewhere?

A. Well, in some respects the rates are higher elsewhere.

Q. Generally speaking?

A. The rates here are lower than they are in most places." (Tr. 127.)

So that if this hospital property is taxable, the property of all Utah hospitals is taxable, whether they declare dividends or not, and notwithstanding the fact that they are not operated for profit or gain, and that none of the income of the institution is used or devoted to the enrichment or advantage of any individual. Of course, any institution which uses its property for any non-charitable purpose should pay taxes, but it has been universally held, as we have shown by the authorities, that property used as respondent uses its property is used exclusively for charitable purposes within the meaning of the constitution and statute.

Counsel attempts to make a point that the institution is not using its property for charitable purposes because, they claim, poor patients have been held in the institution until hospital charges were paid. The contention, of course, in the light of the facts, is wholly without foundation in fact. There is no evidence at all of any such case in 1928, or at any other time. A man named Schanke testified that when his wife was ready to leave the hospital they would not let her go until they called

him up and had him come up and pay the bill. That was in 1926. The only conclusion deducible from Schanke's testimony is that a nurse at the hospital requested that payment be made before the patient left the hospital and that Schanke went up and paid the bill and took her away. It was not shown that any officer of the institution had any knowledge of the matter, or that the nurse was following instructions of the hospital authorities. In reply to counsel for appellant Dr. Budge testified:

"Q. If a patient said he wanted to go, irrespective of what you would say, would you tell him to stay around or let him go?

A. We don't compel anybody to stay, and we have no authority to do so, as I understand it."  
(Tr. 138.)

If it were the policy of the hospital to imprison or encage (to use counsel's language) all who do not pay, how does it come that according to the records (Exhibit 14) there were twenty-three patients in 1927 and twenty-one patients in 1928, who have not yet paid their bills, and whom we assume counsel do not claim are held as prisoners in the institution? This hospital exercises proper precautions to see to it that people pay their accounts, and that is the reason why it has been able to keep in operation and provide necessary additional facilities. Should it be penalized by a tax because it is carefully managed, when it charges less than other good hospitals and puts all net income back into the institution?

From appellant's brief we discover that by oft reiteration counsel base their contention that respondent's



property is subject to tax upon the claim that respondent is not a charitable institution. They assert this to be the question for determination for they say:

"These matters thus put in issue all go to the one big and controlling question before the court in this case: Is the plaintiff a charitable institution and is its property used exclusively for charitable purposes." (App. Br. p. 15.)

Then they declare:

"From the admissions made and conceded by the plaintiff in its pleadings, it affirmatively appears that the plaintiff is not a charitable institution," etc. (App. Br. p. 15.)

This statement is repeated on page 16; again on page 36; once more on page 37 and again on page 44.

We have shown that the character of the organization is not material in determining whether its property is subject to taxation. The Gitzhoffen case, 32 Utah 46, 88 Pac. 691, cited by counsel, has no application here. While it did determine that the Sisters of Holy Cross Hospital Association, organized with a capital stock, etc., was one organized for pecuniary profit and gain, so as to render it liable for negligence of its employees, and that the articles were the only competent evidence of its character, the question of the taxation of its property was not involved. It was not a question as to the character of the use of its property but simply a question of the classification into which the institution should be placed from a reading of its articles so as to determine the rule of liability for negligence.

Counsel attempts to bring respondent within the rule of the Parker-Quinn and Odd Fellows cases by suggesting that as, in those cases, property from which rental was derived was held to be taxable, hospital property should be taxed because the fees charged are comparable to rental (App. Br. p. 36). There is no merit in such argument for the reason that the hospital charges are not rental. They are for rooms, food, nursing, supplies and for all hospital service, and these rates are not charged to derive income from the property apart from the charitable use of the property itself, as was the case in Parker vs. Quinn and Odd Fellows vs. Naylor. The charges are income from the operation of the hospital but they are not rental for the use of the property.

We again remind the court that in applying the constitutional and statutory provisions, the rule of strict construction does not obtain as intimated by counsel (App. Br. p. 25). The statement in the Judge-Spencer case, 15 Utah 242, is not applicable to the constitutional and statutory provision here involved. As stated in the case of Elk's Lodge vs. Grover, 40 Utah 1, 120 Pac. 192, these provisions are to be liberally construed. A reasonable analysis of the evidence makes it quite apparent that respondent's property during 1928 was used exclusively for charitable purposes and that the judgment should be affirmed.

Respectfully submitted,

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