

lieved it an aid to public health and the courts have held it to be constitutional because of its relation to public health. The benefit was intended for the public not the optometrist. Otherwise the statute would have been unconstitutional. The Legislature did not deem it necessary to create a professional optometrist monopoly. Poverty or the lack of ability to pay has relation to public health and the Legislature may well have believed that competition between optometrist and store would make for more reasonable prices and profits, and that public health would be benefited thereby and could not suffer with an eye specialist present in the store at the place of sale. Unless some constitutional right is invaded, the clear intent of the Legislature should be given effect."

The Court of Appeals, as noted, affirmed the mandamus order (273 N.Y. 72).

The plaintiff relies principally upon the decision of this court in *Dickstein v. Optical Serv.* (19 Misc. 2d 495). In the *Dickstein* case the court was not asked to summarily enjoin and annul the charter of a corporation. There was involved but a motion to dismiss a complaint under rule 106 of the Rules of Civil Practice, which motion was decided upon the ground that the complaint stated a cause of action for a declaratory judgment. Moreover, the complaint there alleged that the defendant, through its employees, provided the totality of the optometrist's services and functions, including "ocular exercises" for the eyes of the customer. Thus the complaint averred that the optometrists employed by the corporation rendered services that had nothing whatever to do with the sale of eyeglasses. On the motion, of course, the court assumed the truth of the allegations of fact stated in the complaint. The court is advised that the *Dickstein* action was discontinued by stipulation between the parties.

Here we are not concerned with the sale of an optometrist's functions, but with the sale of eyeglasses. The court, it must be emphasized, does not question that optometry is a personal profession and that a corporation cannot practice it. It must hold, nevertheless, that while section 7109 orders that a corporation must employ an optometrist in connection with the sale of self-prescription glasses, the law of this State does not confine an optometrist in the employ of a corporation to the simple determination as to whether the customer should select ready-made glasses. Such a limitation bears no relation to the protection of the health, welfare or safety of the public. The public requires the same protection whether the eyeglasses are ready-made or assembled to order, and the optometrist must exercise his art in both instances to the same extent and for the same purpose, that is, to examine eyes to determine the proper prescription required to correct the vision. The public is not better protected if the sale of eyeglasses is confined to optometrists and denied to corporations which employ optometrists to perform exactly the same function in connection with the retail sale of eyeglasses that an optometrist would perform as a storekeeper (*Matter of Dickson v. Flynn, supra*, p. 344). The plaintiff may not, in the guise of subjecting a profession to its responsibilities, arbitrarily interfere with private business. As one may select the savings of having a prescription filled in a drug chain store, another may insist on the individual attention of a neighborhood pharmacist; so, too, if a member of the public desires the attention of an individual optometrist, that is still his privilege. The circumstance that the defendant has been successful in its business may be said to indicate that in fact the public is being better served. Indeed, although the corporate employment of optometrists has existed for over half a century in this State, no instance has been cited where such employment caused injury to the public. The court finds that the defendant is not prohibited from employing licensed optometrists for the limited purpose of examining the eyes of its customers in connection with the sale of eyeglasses at retail and for this purpose to utilize their skill to determine the need for glasses and the prescription to meet any such need.

What has been said with regard to the defendant's employment of optometrists applies as well to the defendant's hiring of ophthalmic dispensers. It was not until 1946 (L. 1946, ch. 697) that the Legislature enacted a statute requiring the certification of ophthalmic dispensers (now Education Law, § 7120 *et seq.*). In the defendant's case, the optometrist employed by it writes a prescription, which is then given by the customer to the ophthalmic dispenser, or optician, as he is popularly called, who reads it, selects the lens to conform with it, and adapts the eyeglasses to the customer's face. Neither section 7109 of the Education Law nor any other statute of this State prohibits corporations from employing optometrists and opticians and utilizing their services in the manner of defendant. The primary purpose of the statutes passed with respect to optometrists and opticians was to insure that their skills would be rendered by competent