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1. SOLDIERS' MEMORIAL ASSOCIATIONS OR MONUMENTAL BUILDING ASSOCIATIONS—WHERE REAL ESTATE AND BUILDING PARTIALLY OCCUPIED BY SUCH ASSOCIATIONS ANY PART LEASED TO PRIVATE ENTERPRISE FOR COMMERCIAL PURPOSE, SUCH AS MOTION PICTURE THEATRE, SUCH PROPERTY NOT EXCLUSIVELY USED FOR CHARITABLE PURPOSES—NOT ENTITLED TO BE EXEMPT FROM TAXATION.
2. SOLDIERS' AND SAILORS' MEMORIAL BUILDING—PUBLIC LIBRARY—NOT RELIEVED FROM LEVY, SPECIAL ASSESSMENT, SECTIONS 5362, 5353 G. C.—CITY MUST BEAR SHARE, COST AND IMPROVEMENT WHERE LIBRARY MUNICIPALLY OWNED—STATUTORY EXEMPTIONS ARE FROM TAXATION AS DISTINGUISHED FROM LOCAL SPECIAL ASSESSMENTS.

SYLLABUS:

1. *When real estate is held, and the building thereon partially occupied by an association or corporation organized or incorporated under the laws of this state relative to soldiers' memorial associations or monumental building associations and the remainder of such building is leased by the trustees of such association to a private enterprise for a commercial purpose such as the operating of a motion picture theatre, such property is not used exclusively for charitable purposes and the property is not entitled to be exempt from taxation.*

2. *Neither a soldiers' and sailors' memorial building nor a public library is relieved from the levy of special assessments by the provisions of Sections 5362 and 5353, General Code. Even if the library is municipally owned, the city must bear its share of the cost of the improvement. The exemptions authorized by Sections 5362 and 5353, General Code, are exemptions from taxation as distinguished from local special assessments.*

Columbus, Ohio, December 28, 1940.

Hon. G. W. Marriott, Prosecuting Attorney,
Mansfield, Ohio.

Dear Sir:

This will acknowledge receipt of an inquiry from your office in the first part of which it is stated that the trustees of Madison Township Soldiers' and Sailors' Memorial Building own a memorial building in the city of Mansfield. In this building it is stated there are some social or club rooms used by veteran groups and a relatively large hall or auditorium which has been leased to a private corporation for use as a motion picture theatre. Under this state of facts inquiry is made as to whether all or any portion of the property including the memorial building is subject to real property taxes.

Section 2 of Article XII of the Constitution provides that all land and improvements thereon shall be taxed by uniform rule according to its value. It also provides that general laws may be passed to exempt from taxation institutions used exclusively for charitable purposes and public property used exclusively for any public purpose. I understand that claim is made that the memorial building is exempt from taxation under assumed authority of Section 5362, General Code, which is as follows:

“Real estate held or occupied by an association or corporation, organized or incorporated under the laws of this state, relative to soldiers (?) memorial associations, monumental building associations, or cemetery associations or corporations, which in the opinion of the trustees, directors or managers thereof, is necessary and proper to carry out the object intended for such association or corporation, shall be exempt from taxation.”

If there be any ambiguity in the meaning of this section, then that interpretation must be adopted which is in harmony with the limitations found in Section 2, Article XII of the Constitution. See *Board of Health v. Greenville*, 86 O. S., 1, at page 20. In the case of *Watterson v. Halliday*, 77 O. S., 150, Judge Price said, as shown at page 170:

“There is no presumption of exemption from taxation because the institution claiming it is of a religious or charitable nature, for it is perfectly competent for such institutions to own property clearly subject to taxation.”

Furthermore it was held in the first branch of the syllabus in *Cullitan v. Sanitarium*, 134 O. S., 99, that:

“There is no presumption favorable to the exemption of property from taxation. An exemption from taxation must be clearly and expressly stated in the statute and must be such only as is authorized by the Constitution.”

Applying these principles to the situation you have presented, it appears that since the memorial building is used partly for the operation of a motion picture theatre, it is to that extent being used for a purpose other than that which is necessary and proper to carry out the objects intended for the Memorial Association and a use which is not exclusively for charitable purposes. Hence the property is not entitled to be exempted from taxation.

It might be contended that although the use of the auditorium for private purposes is not in accord with the exemption section, yet the rentals from the amusement corporation are paid to and used by the Memorial Association trustees in a manner “necessary and proper to carry out the object intended for such association.” The same contention was made in the case of *Rose Institute v. Myers, Treasurer*, 92 O. S., 252, in answer to which the court held:

“The real estate belonging to an institution of purely public charity is exempt from taxation only when used exclusively for charitable purposes, and if such real estate is rented for commercial and residence purposes it is not exempt, although the income arising from such use is devoted wholly to the purpose of the charity.”

It is further suggested that a question has been raised as to whether the whole building should be taxed or only that portion thereof which is used for commercial purposes. This question is probably prompted by the decisions interpreting former enactments of Section 2732, R. S., wherein it was provided in substance that the assessment should be made upon all property belonging to institutions of purely public charity, together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit. Under this and similar sections it was held that the leased parts of the building which were used for commercial purposes should be separately valued and taxed. *Library Association v. Pelton*, 36 O. S., 253; *Cincinnati College v. Yeatman*, 30 O. S., 276; and *Scott, Treasurer, v. Village of Athens*, 1 O. N. P., 94.

The language of Section 5353, General Code, formerly Section 2732, R. S., has been changed by successive amendments so that the section now

provides for the exemption of "property belonging to institutions used exclusively for charitable purposes." Such language no longer permits the use of a property to be partly charitable and partly commercial. Either it is exclusively used for charitable purposes or it is subject to taxation. To entitle soldiers' memorial buildings to exemption under authority of Section 5362, General Code, the use must be such as "is necessary and proper to carry out the object intended for such association or corporation." While the necessary and proper uses have not been categorically enumerated, it is certain that they do not include the operation of a motion picture theatre, a purely commercial enterprise. Any other construction placed on Section 5362, General Code, would be in violation of Section 2, Article XII of the Constitution, which requires the use to be "exclusively for charitable purposes." A statute must, if possible, be given a construction that is constitutional. This was held in the case of *Rose Institute v. Myers*, Treasurer, 92 O. S., 252, wherein Nichols, C. J., said on page 269:

"Making use of the choice of two possible constructions, we prefer the interpretation that will permit the act to survive, relying in this connection upon the well-established rule of interpretation that, as between two possible interpretations of a provision which is on its face doubtful, that one which will result in sustaining the law as against a constitutional objection will be followed, to the exclusion of another the effect of which would be to render the law unconstitutional."

In considering the question of whether or not there may be an apportionment of the valuation, I have examined the opinion of the former Attorney General reported in *Opinions of the Attorney General for 1937*, page 2535, wherein it was held that when part of a public building was rented for private business purposes its value should be apportioned, and the valuation of that part rented to private business should be entered on the tax list and duplicate and assessments made thereon. The partial exemption therein authorized was based upon the provisions of Section 5356, General Code, which reads:

"Market houses, public squares, or other public grounds of a city, village or township, houses or halls used exclusively for public purposes or erected by taxation for such purposes, notwithstanding that parts thereof may be lawfully leased, and property belonging to park districts, created pursuant to the provisions of section 2976-1 et seq. of the General Code, shall be exempt from taxation."

While it does not appear that the constitutionality of Section 5356, General Code, has ever been challenged, it is obvious that if the Section be

valid it must meet the limitations of Section 2 of Article XII of the Constitution, that is, the exemptions of public property are authorized only when the property is used exclusively for public purposes. It should be noted, however, that the question discussed in the 1937 opinion involved claimed exemption under Section 5356, General Code, with which section we are not here concerned, and it is therefore unnecessary to further consider the constitutionality of Section 5356, General Code, and the correctness of the former opinion.

In answer to the first question of your office, I must therefore conclude that when real estate is held, and the building thereon partially occupied by an association or corporation organized or incorporated under the laws of this state relative to soldiers' memorial associations or monumental building associations and the remainder of such building is leased by the trustees of such association to a private enterprise for a commercial purpose such as the operating of a motion picture theatre, such property is not used exclusively for charitable purposes and the property is not entitled to be exempt from taxation.

The second and third questions of your office relate to the right, if any, of the Memorial Association and a public library to exemptions from special assessments levied by the city of Mansfield. Section 5362, General Code, quoted in full in the first branch of this opinion, defines the conditions upon which memorial associations shall be exempt from taxation. Public libraries, when classified as being institutions used exclusively for charitable purposes, are exempt from taxation under the provisions of Section 5353, General Code, which reads as follows:

“Lands, houses and other buildings belonging to a county, township, city, or village, used exclusively for the accommodation or support of the poor, or leased to the state or any political subdivision thereof for public purposes, and property belonging to institutions used exclusively for charitable purposes, shall be exempt from taxation.”

If either of these institutions is to be relieved of the burden of paying public assessments, Sections 5362 and 5353, General Code, must furnish the authority for such exemptions. These sections, however, provide only for exemptions from taxation and make no mention of assessments. While assessments have many of the characteristics of taxes and in a general sense are regarded as forms of taxation, there is a distinction recognized both by the Constitution and the legislature. The same rule of strict construction

applies to exemptions from assessments as is applied to exemptions from taxation. See 36 O. Jur., 957, section 34. In 38 O. Jur., 853, section 114, it is said:

“* * * to have an effective exemption it must be expressed in clear and unmistakable terms, or at least with reasonable certainty, as the laws relating to exemption from taxation, being in derogation of equal rights, are strictly construed as against such exemption and in favor of the taxing authorities. * * *”

The legislature having chosen to grant exemptions from taxation without mentioning assessments, it must be assumed under the rule of strict construction that assessments were intentionally omitted. This was the conclusion of the Supreme Court in *Lima v. Cemetery Association*, 42 O. S., 128, wherein the third branch of the syllabus reads:

“An incorporated cemetery association is not relieved from an assessment for a street improvement by a statutory provision exempting its lands from taxation, such exemption being regarded as confined to taxes as distinguished from local assessments.”

The case of *Lima v. Cemetery Association* was followed with approval in *Board of Education v. Toledo*, 9 C. D., 305, and in *Jackson, Treasurer, v. Board of Education*, 115 O. S., 368, wherein it was held that property belonging to a board of education was not exempt from the levy of a special assessment for street improvements, the first branch of the syllabus holds that:

“Section 3812, General Code, confers upon a municipality general authority to levy assessments for street improvements against property within such corporation belonging to a board of education and being used for school purposes, and no provision exists in the General Code of Ohio exempting such property from that general authority.”

Section 3812, General Code, referred to in the syllabus, provides:

“Each municipal corporation shall have special power to levy and collect special assessments, to be exercised in the manner provided by law. The council of any municipal corporation may assess upon the abutting, adjacent and contiguous or other specially benefited lots or lands in the corporation, any part of the entire cost and expense connected with the improvement of any street, alley, dock, wharf, pier, public road, or place by grading, draining, curbing, paving, repaving, repairing, constructing sidewalks, piers, wharves, docks, retaining walls, sewers, drains, watercourses, water mains or laying of water pipe and any part of the cost of lighting, sprinkling, sweeping, cleaning or planting shade trees thereupon, and

any part of the cost and expense connected with or made for changing the channel of, or narrowing, widening, dredging, deepening or improving any stream or watercourse, and for constructing or improving any levee or levees, or boulevards thereon, or along or about the same, together with any retaining wall, or riprap protection, bulkhead, culverts, approaches, flood gates, or water ways or drains incidental thereto, or making any other improvement of any river front or lake front (whether such river front or lake front be privately or publicly owned), which the council may declare conducive to the public health, convenience or welfare, by any of the following methods.

First: By a percentage of the tax value of the property assessed.

Second: In proportion to the benefits which may result from the improvement, or

Third: By the foot front of the property bounding and abutting upon the improvement."

While the letter of inquiry from your office does not disclose the nature of the ownership of the public library even if it be owned and operated by the city of Mansfield, it seems that since Section 3812, General Code, furnishes authority for the levying of assessments against property of cemetery associations and boards of education, it also furnishes authority for the levying of special assessments against property of municipal corporations. Further authority is found in Section 3837, General Code, which reads:

"When the whole or any portion of an improvement authorized by this title passes by or through a public wharf, market space, park, cemetery, structure for the fire department, waterworks, school building, infirmary, market building, workhouse, hospital, house of refuge, gas works, public prison, or any other public structure or public grounds within and belonging to the corporation, the council may authorize the proper proportion of the estimated cost and expenses of the improvement to be certified by the auditor or clerk of the corporation to the county auditor, and entered upon the tax list of all taxable real and personal property in the corporation, and they shall be collected as other taxes."

In the case of *Dick v. City of Toledo*, 50 C. D., 157, 11 O. C. C., 349, the Court of Appeals held in the second branch of the syllabus:

"In the construction of street improvement the property of the city, whether public grounds or street intersections, should bear its share of the expense of the improvement."

In *Close v. Parker*, 20 O. C. D., 384, 11 O. C. C. (N. S.), 85 aff., 79 O. S., 444, the right of a municipality to levy special assessments against a city park seems to have been conceded, the issue being whether the particular improvement, in the words of the statute, passed "by or through" the

park. In any event, it seems obvious that even if the public library is municipally owned and operated, the city can not escape its share of the cost of the improvement and if owned privately or by any political entity other than the city of Mansfield, the library property is subject to assessments in the same manner as any other property by or through which the improvement passes.

In specific answer to the second and third questions, it is my opinion that neither a soldiers' and sailors' memorial building nor a public library is relieved from the levy of special assessments by the provisions of Sections 5362 and 5353, General Code. Even if the library is municipally owned, the city must bear its share of the cost of the improvement. The exemptions authorized by Sections 5362 and 5353, General Code, are exemptions from taxation as distinguished from local special assessments.

Respectfully,

THOMAS J. HERBERT,
Attorney General.