1024.

INSTITUTIONS LIKE Y. M. C. A. RENDERING MEDICAL SERVICE, OPERATING CAFETERIAS, AND FURNISHING LODGING FOR PAY—EXEMPT UNDER UNEMPLOYMENT INSURANCE ACT.

SYLLABUS:

The mere fact that institutions such as hospitals, Y. M. C. A., Y. W. C. A., Salvation Army, and others, render medical service, operate cafeterias, furnish lodging for pay, does not remove them from the exemption provided in Section 1345-1 (*c*) (*E*) (8) *of the Unemployment Insurance Act. (Opinions of the Attorney General for* 1930, *Vol.* II, *page* 1371, *approved and followed).*

COLUMBUS, OHIO, August 18, 1937.

Unemployment Compensation Commission, Columbus, Ohio.

GENTLEMEN: I am in receipt of your recent letter which reads as follows:

> "Section 1345-1 (c) (E) (8) provides as follows:
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> 'The term employment shall not include service performed in the employ of a corporation, community chest, fund or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual.'
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> The Commission has asked me to submit the following question for your opinion: Are non-profit organizations such as hospitals, Y. M. C. A., Y. W. C. A., Salvation Army and others, who are engaged in private business, rendering medical service, operating cafeterias and furnishing lodging for a fee, but no part of the earnings inures to the benefit of any private shareholder, member or individual, exempt under this section?"

Whereas no opinions have been rendered by this office on the construction of this portion of the Unemployment Insurance Act, similar language in other statutes has been considered both by the courts and by former Attorneys General. The Constitution of the State of Ohio in Article XII, Section 2, provides inter alia that the

Legislature may pass laws exempting institutions used exclusively for charitable purposes from property taxes. In Section 5353 the Legislature made use of the aforementioned constitutional grant of power 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 properly belonging to institutions used exclusively for charitable purposes, shall be exempt from taxation."

The interpretation of "institutions used exclusively for charitable purposes" was considered in an opinion appearing in Opinions of the Attorney General for 1930, Volume II, page 1371. That opinion contains a scholarly discussion of the subject and I concur in the conclusion stated in the third syllabus as follows:

> "In construing the phrase 'used exclusively for charitable purposes' a common sense demarcation is to be made between uses for a dominant purpose and uses which are only incidental or sporadic in their nature. An incidental use or an occasional isolated use for a purpose which is not strictly charitable does not destroy the right of exemption."

The following passage from page 1388 contains the basis for this conclusion:

> "I shall now address myself to a consideration of the important phrase 'used exclusively for charitable purposes.' This term is found frequently in constitutional and statutory provisions relating to tax exemption, and has been the subject of not infrequent construction by courts.
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> "Obviously the use of the word 'exclusively' circumscribes narrowly the category of property which is exempted. Thus, Zellman says in his treatise on the American Law of Charities, page 473, Section 706:
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> 'Used or occupied or Exclusively Used or Occupied. The word "used" plainly makes the use of the property, not its ownership, the criterion. The use of the word "exclusive" in connection with it, of course, is not unimportant. Property or a building might actually be used for school purposes, and yet not be used exclusively * * *. In every case it is the use,

not the title, which is decisive. The mere ownership of land by a charitable institution will, therefore, not exempt it. The exemption depends upon its actual devotion to the work of the institution.'

Similarly, the Supreme Court of Ohio said in Jones, Treasurer, vs. Conn, 116 O. S. 1, at page 10:

'Furthermore, when the amendment employed the word "exclusively," it placed as narrow construction upon the meaning of the cause as was possible; for * * * "Property or buildings might actually be used for charitable purposes and yet not be used exclusively." '

However, the Supreme Court by its pronouncement, did not say, nor did it mean, nor did the Constitution contemplate that the most rigorous and inexorable exactitude of literal construction possible must be used here. If that were true then no property in the State would ever be exempt from taxation, for in the most rigid, precise, absolute sense no property is used exclusively for no other than charitable purposes. And certainly, to the framers of the Constitution cannot be imputed the bootless position of enacting fundamental law in reference to a situation which is only theoretical and non-existent. Here, the rule of common sense, already alluded to, must be applied.

Very sagaciously, the authorities, in dealing with the phrase 'used exclusively for charitable purposes,' have drawn a line of demarcation between uses for a dominant purpose and uses which are only incidental or sporadic in their nature. Kollmann's American Law of Charities, Section 719.

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Illinois, whose provisions for the exemption from taxation of property used exclusively for charitable purposes is practically identical to ours, has had several illuminative remarks on this topic by its Supreme Court. In People v. Withers Home, 312 Ill. 136 (1924), the court said at page 139:

'It is the primary use to which the property is put which determines the question whether it is exempt from taxation. If it is devoted primarily to the religious or charitable purposes which exempt from taxation, an incidental use for another purpose will not destroy the exemption.'

Again, in *People* vs. *Muldoon,* 306 Ill. 234, 238, the court stated:

'In determining whether property falls within the terms of the exemption, the primary use will control and not a

> secondary or incidental use * * *. The primary use of a school house is for education, and the occasional use for a lecture or social affair will not destroy the exemption. Primary use of a church building is public worship, and its occasional use for some other purpose or a minor use for social functions will not render it liable to taxation.'"

The above opinion was concerned with property owned and used by the American Legion and in it the particular purposes as stated in the charter and the constitution of the American Legion were discussed. The words "charity" and "charitable" have a much broader meaning in legal contemplation than is generally attached to them in every day speech. 7 O. Jur. 112.

"Charity has been defined as:

> "Charity is not strained, is unlimited, is not alone aid to the needy, is rather, broad; means love, the brotherhood of man, and embraces, includes, all which aids mankind and betters his condition. Profanely, the chief end of man is a sound mind in a sound body. The one depends upon the other—can not survive without the other. Therefore everything which tends to produce this end aids mankind, is love, brotherhood—charity."

The primary purposes of some of the institutions mentioned in your letter, namely, the Y. M. C. A., the Y. W. C. A., the Salvation Army, and hospitals, are well known and it is safe to say that in general they fall within the legal definition of charitable purposes. This is important for here lies the distinction between these institutions and the one considered in the case of *Wilson* vs. *Licking Acric,* 104 O. S. 137. In that case the court considered the question of whether a fraternal order came within the exemption granted in Section 5353 of the General Code, and the court in its decision pointed out that the testimony at the trial indicated that the main purposes of the organization were not charitable and that the social functions and secret fraternal activities were of equal importance.

The question of whether or not a Y. M. C. A., which engaged in the activities mentioned in your letter contained was within the provisions of Section 5353, General Code, was answered in an opinion reported in Opinions of the Attorney General for 1928, Vol. II, page 463, the first two branches of the syllabus of which read as follows:

> "1. The amendment of Section 5353, General Code (110 O. L. 77) does not require a modification in any way

of the general conclusions arrived at in the opinion rendered by this department in 1916, Vol. II, page 1640, and such conclusions are still controlling.

2. The fact that the rooms in a building owned by the Y. M. C. A. when not occupied by members of said association are rented to the public to the extent that said rooms are not occupied by members of said association, does not classify said rooms as property leased for a profit so as to subject them to taxation."

The following quotation from *O'Brien* vs. *Hospital Association,* 96 O. S. page 1, at page 6, although concerned with hospitals, is applicable to the other institutions mentioned in your letter as well:

"Nor does the fact that a public charitable hospital receives pay from a patient for lodging and care affect its character as a charitable institution. *Taylor, Adma.,* vs. *The Protestant Hospital Association,* 85 Ohio St., 90."

Inasmuch as the subject has been thoroughly examined in opinions of previous Attorneys General which I have cited above, I see no need to pursue this subject further. In conclusion, therefore, it is my opinion that the mere fact that hospitals, Y. M. C. A., Y. W. C. A. and the Salvation Army render medical services, operate cafeterias, furnish lodging for pay, does not remove them from the exemption provided by Section 1345-1 (c) (E) (8) of the General Code. It should be clearly understood, however, that whether or not a particular hospital or institution comes within this exemption would depend upon the primary purposes of each institution.

Respectfully,

HERBERT S. DUFFY,

Attorney General.