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broad discretion in the hands of the trial court to distinguish certain fact situations has resulted in a greater degree of justice than could be achieved by the rigid application of a simple rule.

CONCLUSIONS

The rule of *Carson v. Beatley*, limiting the physician-patient privilege to conditions related to the particular ailment for which the patient sought or was being given treatment, is a far too narrow interpretation of the statute enacting the physician-patient privilege. The position of the majority of the courts which hold all facts to be privileged if discovered by examination is sound because such information is confidential, and is a normal consequence of an examination which is ordinarily necessary or useful for treatment.

The Ohio rule is correct, however, in holding that facts merely "observed" are not privileged. Such facts are not confidential communications, and there is no reason to exclude the doctor's testimony as to them.

Moses Krislov

**Tax Exemptions to Charities in Ohio**

The Constitution of Ohio declares that statutes may be enacted to exempt from taxation "institutions used exclusively for charitable purposes."\(^1\) Pursuant to this authorization, Ohio General Code Section 5353 provides that "... Real and tangible personal property belonging to institutions used exclusively for charitable purposes, shall be exempt from taxation."\(^2\) It is settled in Ohio

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\(^1\) Ohio Const. Art. XII, § 2: "... general laws may be passed to exempt burying grounds, public school houses, houses used exclusively for public worship, institutions used exclusively for charitable purposes, and public property used exclusively for any public purpose ... ."

\(^2\) For other general exemption statutes see: Ohio Gen. Code § 5350 (burying grounds); id. § 5349 (school houses, churches, and colleges); id. § 5351 (public property). See also Ohio Gen. Code § 5328-1a which provides for exemption of intangible personal property. It should be noted that although the exemption of property owned by charitable institutions is sanctioned by long usage, some writers have challenged its validity, principally from the standpoint of tax economics. See Killough, *Exemptions to Educational, Philanthropic and Religious Organizations in Tax Exemptions* 25 (1939); Stimson, *The Exemption of Property from Taxation in the United States*, 18 Minn. L. Rev. 411 (1934). For a good historical approach to the problem of tax exemption in Ohio, see Heisel, *Exemption from Taxation of Property Used for Religious, Educational, and Charitable Pur-
that exemption statutes must be strictly construed in accordance with the general principle that all property should be uniformly taxed. In the light of this policy of strict construction, do the constitutional and statutory provisions, taken together, mean that any property held by a charitable institution is exempt, or only such property as is used exclusively for charitable purposes?

In *Wehrle Foundation v. Evatt*, the plaintiff contended that because it was admittedly a charitable institution, its property, for that reason alone, was exempt. The court conceded that the constitution does authorize the General Assembly to exempt *institutions* used exclusively for charitable purposes, but held that Section 5353 as it now stands exempts not the institution but its *property* and only if such property is used exclusively for charitable purposes.

Several important requirements must be met before the court will find that property is "used exclusively for charitable purposes."

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3 Ohio Const. Art. XII § 2: "Land and improvements thereon shall be taxed by uniform rule according to value." Welfare Federation v. Glander, 146 Ohio St. 146, 64 N.E.2d 813 (1945); Columbus Metropolitan Housing Authority v. Thatcher, 140 Ohio St. 38, 42 N.E.2d 437 (1942). Note that, as a result of this rule of strict construction, the meaning of "charity" is more restricted in the field of taxation than in other fields of law. See Restatement, Trusts § 368 (1934), where, after a listing of certain specific purposes, it is stated in subsection (f) that charitable purposes include "other purposes the accomplishment of which is beneficial to the community." Courts are also liberal in finding that an institution is charitable where it is sued in a tort action. See Prosser, Torts § 108(d) (1941).

4 141 Ohio St. 467, 49 N.E.2d 52 (1943). Plaintiff relied on American Issue Publishing Co. v. Evatt, 137 Ohio St. 264, 266, 28 N.E.2d 613, 615 (1940), where the court referred to the applicant as "an institution used exclusively for charitable purposes within the contemplation of the Constitution and the Statute" and exempted property of the institution used for the printing of temperance literature distributed at a profit. The *Wehrle* court dismissed it as a "border-line" case which must be confined to its facts.

5 But see Benjamin Rose Institute v. Myers, 92 Ohio St. 252, 271, 110 N.E. 924, 929 (1915).

6 There is an exception to this rule. The property of an institution incorporated in Ohio before 1851 and whose charter grants it exemption may not be taxable though not used exclusively for charitable purposes. New Orphans' Asylum of Colored Children v. Board of Tax Appeals, 150 Ohio St. 219, 80 N.E.2d 761 (1948). If certain conditions are present the exemption granted to such institution will be considered a contractual right irrevocable under the doctrine of Trustees of Dartmouth College v. Woodward, 4 Wheat. (17 U.S.) 518 (1819). See Lattin, A Primer of Fundamental Corporate Changes, 1 Western Reserve Law Review 1, 25 (1949).
Prior to its amendment in 1912, Article XII, Section 2, of the Ohio Constitution employed the phrase, "institutions of purely public charity," in place of the present, "institutions used exclusively for charitable purposes." The former wording was also embodied in Section 5353 but was correspondingly changed by re-enactment of that statute in 1923. The rule that property, in order to be exempt, must be available, in theory at least, to the use of every member of the public was established under the older provisions. And this view still prevails. It is difficult to understand how this interpretation survived the constitutional and statutory revisions—especially so, in view of the dicta of the Supreme Court in *Benjamin Rose Institute v. Myers*, where the court, in discussing the significance of the 1912 amendment, said:

On the other hand, the view in effect is that . . . the intention was to grant to the Legislature the permissive power to extend exemptions to the property of associations which were not institutions of 'purely public' charity, but which nevertheless devoted themselves 'exclusively to charitable purposes,' such as the great fraternal organizations which provide and maintain homes in Ohio for their aged and infirm members, their widows and orphan children. Much of the charitable work of these organizations would have to be done by the state itself but for them.

This view is also supported by a consideration of the debates of the constitutional convention concerning this change.

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7 110 Ohio Laws 77. Section 5353 was also amended in 1913, but the only change then made was the omission of "purely" from the phrase, "institutions of purely public charity." 103 Ohio Laws 548.

8 Gerke v. Purcell, 25 Ohio St. 229 (1874), is the leading case.

9 Society of the Precious Blood v. Board of Tax Appeals, 149 Ohio St. 62, 77 N.E.2d 459 (1948); American Comm. of Rabbinical College v. Board of Tax Appeals, 148 Ohio St. 654, 76 N.E.2d 719 (1947); Bloch v. Board of Tax Appeals, 144 Ohio St. 414, 59 N.E.2d 145 (1945); East Cleveland Post, V.F.W. v. Board of Tax Appeals, 139 Ohio St. 554, 41 N.E.2d 242 (1942).

The rule is not so absolute as to require in every case that the property be available for actual physical use by the public. See Battelle Memorial Institute v. Dunn, 148 Ohio St. 53, 73 N.E.2d 88 (1947), where the court denied exemption on the ground that part of the work done by plaintiff, a non-profit corporation which operated a scientific research laboratory, was of a commercial nature and primarily benefited private industry, but indicated that if its work had benefited the public generally, the property would have been entitled to tax exemption.

10 92 Ohio St. 238, 251, 110 N.E. 929, 933 (1915). Note that there are two *Rose Institute* cases. See note 5 supra.

11 For a statement to the same effect, see Jones v. Conn, 116 Ohio St. 1, 9, 155 N.E. 791, 793 (1927).
The question of the proper interpretation of these constitutional and statutory provisions was raised with peculiar consequences in the recent case of *Cleveland Bible College v. Board of Tax Appeals*. Two members of the court thought the applicant entitled to tax exemption on the ground that its educational facilities were open to the public; two others, Judges Taft and Stewart, concurred in the judgment but contended that Article XII, Section 2 of the Ohio Constitution, and Section 5353 of the General Code do not require the charity to be "public" in nature in order to qualify for tax exemption; the remaining members of the court dissented on the ground that the college's educational facilities, in fact, were available only to followers of the Christian religion. The dissent pointed out that the effect of the decision is to place "in the discard" the earlier cases on the same question.

If the Taft-Stewart view should be accepted, much property now taxed would be removed from the tax duplicate. The result might well be that the drop in the state's revenue would require a reapportionment of the tax burden. However, the fact that five of the seven judges on the present court apparently favor the "public charity" test for tax exemption supports the prediction that the Taft-Stewart position will not soon be adopted.

*In Cleveland Library Ass'n v. Pelton*, decided in 1880, the question before the court was whether a charity which rents out a part of the building which it owns and occupies may nevertheless be given exemption for the entire premises. The Supreme Court would not permit total exemption, but held only that part of the plaintiff's building which was being used *exclusively* for carrying on its charitable activity entitled to exemption.

This case represented the rule in Ohio until 1945, when the court reconsidered the problem of partial exemption in *Welfare*
Federation v. Glander. The result was a flat refusal to follow the older decision. It was held that notwithstanding the occupancy by Community Fund agencies of nine floors of an eleven-story building, of which the Welfare Federation, itself a charity, was the leasehold owner, the entire property was taxable because the first two floors were leased to commercial corporations. Judge Turner, who wrote the majority opinion, concluded that the Library Ass’n case was incompatible with the policy of strict construction to which the court was committed by its more recent decisions. More specifically, the court interpreted the phrase “used exclusively” to mean that the whole property must be used for charitable purposes.

An indication of the significance of the newly adopted view is found in the provocative observation made by Judge Williams, dissenting:

The implications of the pronouncements in the majority opinion are far-reaching. By virtue thereof a charitable institution owning a building several stories high might find that it needed the entire building for its charitable purposes except the first story, but was unable to rent the unneeded part for as much as the taxes resulting from loss of exemption would be on the whole building. Therefore money would be saved by allowing the first floor to remain idle. Such a result would be anomalous if not grotesque.

The Welfare Federation doctrine was followed in Mussio v. Glander, where the court affirmed the Board of Tax Appeals in its finding that a three-story building was not used exclusively for charitable purposes because the second floor was, for the most part, used to provide living quarters for a priest and office space in connection with the publication of a religious newspaper. It was admitted that the remainder of the building was exclusively used for charitable purposes. So, even where the charitable institution is the sole occupant, if the court finds the use not exclusively charitable, apparently no exemption whatsoever will be allowed.

18 146 Ohio St. 146, 64 N.E.2d 813 (1945).

19 The court quoted a statement which the Chief Justice made in an earlier case: “Obviously ‘used exclusively’ does not mean ‘used in part.’” Pfeiffer v. Jenkins, 141 Ohio St. 66, 69, 46 N.E.2d 767, 768 (1943).

20 Welfare Federation of Cleveland v. Glander, 146 Ohio St. 146, 183, 64 N.E.2d 813, 829 (1945). For a well-reasoned recent case from another jurisdiction allowing partial exemption under a statute similar to Ohio’s, see Christian Business Men’s Comm. v. State, 38 N.W.2d 803 (Minn. 1949).

21 149 Ohio St. 423, 79 N.E.2d 233 (1948).
A case decided in the January Term of this year, In re Bond Hill-Roselawn Hebrew School, 22 relented somewhat from the very narrow construction placed upon the word "exclusively" in the Mussio case. The court on this more recent occasion reversed the Board's decision disqualifying the applicant for tax exemption on the ground that residence of a caretaker and his family in the upper part of a one-and-a-half-story structure rendered the use of the property not exclusively charitable. In order to reach the desired result, Judge Taft, writing the opinion of the court, said that Mussio v. Glander was distinguishable because the use in that case was not primarily charitable while in the Roselawn case the contrary was true.

As pointed out above, it is settled that the use of property, not its ownership, is the test of exemption. The cases support this principle in its application to the problem raised by commercial property held by charitable organizations. 23 The leading case on the question is Benjamin Rose Institute v. Myers. 24 The Institute owned property which it leased for profit. The proceeds, however, were ultimately used in promotion of its charitable work. Its claim of exemption of the property from taxation was rejected in these terms:

Property used to produce income to be expended in charity is too remote from the ultimate charitable object to be exempt. If property is allowed to be used as taxed property, it also is to be taxed. If it competes, in the common business and occupations of life, with the property of other owners, it must bear the tax which theirs bears. 25

In view of the important questions of policy involved, it is interesting to note that a different position has been taken by the federal courts with respect to corporate income taxation of commercial property held by charitable institutions. 26

22 151 Ohio St. 70, 84 N.E.2d 270 (1949) (decided under Ohio General Code § 5349 which provides for exemption of "houses used exclusively for public worship.")

23 New Orphans' Asylum of Colored Children v. Board of Tax Appeals, 150 Ohio St. 219, 80 N.E.2d 761 (1948); Burns v. Glander, 146 Ohio St. 198, 64 N.E.2d 678 (1945); Incorporated Trustees of the Gospel Workers' Society v. Evatt, 140 Ohio St. 185, 42 N.E.2d 900 (1942); Benjamin Rose Institute v. Myers, 92 Ohio St. 252, 110 N.E. 924 (1915). American Issue Publishing Co. v. Evatt, 137 Ohio St. 264, 28 N.E.2d 613 (1940), represents a possible exception. See note 4 supra.

24 92 Ohio St. 252, 110 N.E. 924 (1915).

25 Id. at 265, 110 N.E. at 927 (1915) quoting Academy of Richmond County v. Bohler, 80 Ga. 159, 164, 7 S.E. 633, 635 (1887).

26 Int. Rev. Code § 101(6) is the applicable statute. For discussion of cases see 6 Mertens, Law of Federal Income Taxation § 34.14 et seq. (1948 rev.).
The Ohio Supreme Court has recently ruled in *Beerman Foundation, Inc. v. Board of Tax Appeals*\(^{27}\) that apartment houses owned by a non-profit corporation and occupied by disabled war veterans’ families who pay rents fixed well below the market value were properly taxed. The court admitted that no element of private gain appeared in the facts. It denied the exemption largely on the ground that each and every occupant was required to pay for accommodations.\(^{28}\) Several other decisions support the rule that a use is not exclusively charitable unless some service is rendered free to those unable to pay.\(^{29}\) So a building used as a dormitory for nurses who pay low rents was held taxable;\(^{30}\) and a hospital insurance association was held to be actually engaged in a “business” mainly because it furnished no services to the needy without payment.\(^{31}\) On the other hand, a nurses’ dormitory was held exempt where no charge for either room or board was made;\(^{32}\) and the Board of Tax Appeals recently granted exemption to a hospital which estimated that four and one-half per cent of its patients were “charity” cases.\(^{33}\)

The position of the court on the general question of what constitutes an operation for profit is not entirely clear unless the broad language used in *Youngstown Metropolitan Housing Authority v. Evatt*\(^{34}\) may be accepted as formulating a rule not limited to the facts of that case:

Property comprising the project here in question is purely a commercial operation wherein a sufficient rental is charged not only to pay maintenance and repairs but to provide a reserve fund to pay the interest and retire the bonds. As has been pointed out $100,000 of the bonds have been retired before maturity during 1942.

This project is being operated for profit and the profit

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\(^{27}\) 152 Ohio St. 179, 87 N.E.2d 474 (1949).

\(^{28}\) The opinion indicates that the court, in reaching its decision, also considered plaintiff’s failure to show that disabled veterans are proper objects of charity.

\(^{29}\) For a good discussion of this question, see Fredericka Home for the Aged v San Diego County, 206 P.2d 931 (Cal. Ct. App. 1949) (exemption allowed).

\(^{30}\) Cleveland Branch of Guild of St. Barnabas v. Board of Tax Appeals, 150 Ohio St. 484, 83 N.E.2d 229 (1948).

\(^{31}\) Hospital Service Ass’n of Toledo v. Evatt, 144 Ohio St. 179, 57 N.E.2d 928 (1944).

\(^{32}\) Aultman Hospital Ass’n v. Evatt, 140 Ohio St. 114, 42 N.E.2d 646 (1942).

\(^{33}\) Application of Cleveland Memorial Medical Foundation, 54 Ohio L. Abs. 88, 83 N.E.2d 829 (Ohio B.T.A. 1948).

\(^{34}\) 143 Ohio St. 268, 55 N.E.2d 122 (1944).
is being used to pay the principal and interest on the outstanding bonds.\textsuperscript{35}

From the accountant's point of view, perhaps, the court is correct. A business which has enough money left after interest payments to reduce its long-term indebtedness may be said to be operating at a profit, but so technical an argument would seem likely to discourage any effort by an institution to become self-supporting through fear of losing its exempt status.\textsuperscript{36}

The cases make it clear that there can be no exclusively charitable use if the property was not yet in actual use during the time for which exemption is claimed. Mere preparations made in anticipation of such use are not enough. An institution holding a vacant lot on which it intends to build a school as soon as sufficient funds are raised fails the test.\textsuperscript{37} Similarly, the funds of an endowment or trust are not exempt from the personal property tax prior to the time charity is actually dispensed by the trustees.\textsuperscript{38} The fact that construction of a home for aged women is delayed by material shortages caused by war does not take the case outside the rule that the property must be presently used for charitable purposes.\textsuperscript{39} That any stronger evidence could be found to show that this rule is subject to few, if any, exceptions seems doubtful.\textsuperscript{40}

\textsuperscript{35}Id. at 281, 55 N.E.2d at 128 (1944). The Authority's chief contention was that its property was exempt under Ohio General Code § 5351 as public property used exclusively for a public purpose. The court held that the project had no characteristics of public property and went on to consider the claim of exemption under § 5353. But cf. Krause v. Peoria Housing Authority, 370 Ill. 356, 19 N.E.2d 193 (1939), where it was held that its object of slum clearance brought the Authority within the exempting statute as a public charity.\textsuperscript{36}

See Note, Tax Status of Municipally Owned Transit System, 1 West. Res. L. Rev. 84 (1949). In Cullen v. Schmit, 139 Ohio St. 194, 39 N.E.2d 146 (1942), (suit to recover damages for tortious injury), the court held that a church does not lose its charitable character by selling small religious articles and using any difference between cost and selling price for religious purposes.\textsuperscript{37}

\textsuperscript{38}Ursuline Academy v. Board of Tax Appeals, 141 Ohio St. 563, 49 N.E.2d 674 (1943).\textsuperscript{39}In re Judson Palmer Home, 44 Ohio L. Abs. 267, 16 Ohio Supp. (63 N.E.2d) 166 (Ohio B.T.A. 1945).\textsuperscript{40}

In Board of Education of Cincinnati v. Board of Tax Appeals, 149 Ohio St. 564, 80 N.E.2d 156 (1948), the court, by a four to three margin, held that a vacant lot on which the applicant intended to build a schoolhouse was exempt. The majority held Ohio General Code § 4835-16 ("Real and personal property vested in any board of education shall be exempt from taxation") decisive. The dissenting judges, on the other hand, thought the words of the statute limited by Article XII, § 2 of the constitution and that consequently only property presently in use could be exempted.
It is obvious from the foregoing survey that the Supreme Court of Ohio applies the rule of strict construction to Section 5353 with a vengeance. In so doing its chief concern, apparently, is the danger of overburdening the general taxpaying community—a danger which it feels would necessarily be realized by adoption, on its part, of a more liberal attitude toward awarding exemptions. A statement by the Board of Tax Appeals quoted by the court in the *Beerman* case,\(^41\) unmistakably reflects this fear:

> Every property removed from the tax duplicate increases the tax burden on other property. If applicant desires to dispense a charity it ought to do so without forced contribution from other taxpayers.\(^42\)

Although the policy of equal distribution of the tax burden requires that all exemptions be strictly controlled, it is also in the public interest that the state give proper recognition to the value of the work done by private charitable organizations. From an examination of the cases, it seems fair to say that the court has at times been over-zealous in its efforts to avoid "forced contribution from other taxpayers."

— **LAD J. ROTH**

\(^{41}\) *Beerman Foundation, Inc. v. Board of Tax Appeals*, 152 Ohio St. 179, 87 N.E.2d 474 (1949).

\(^{42}\) *Id.* at 181, 87 N.E.2d at 475 (1949). Taken literally, this statement suggests a rule of thumb—applicable to all tax exemption cases—which would, in a simple fashion, solve all the existing problems in this field.