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NOTICE OF MOTION AND AFFIDAVIT.

Filed August 23, 1934.

New Jersey Supreme Court

MONMOUTH COUNTY.

ISABELLE MARTIN and ISABELLE M. MARTIN, as Executrix &c. of William B. Martin, deceased, *Plaintiff,* *vs.* CITY OF ASBURY PARK, a municipal corporation, *Defendant.*	*Action at Law.* *Notice of Motion and Affidavit.*

To Francis A. Gordon, Esquire.

Dear Sir:

PLEASE TAKE NOTICE that on Saturday, the eighteenth day of August, 1934, at eleven o'clock in the forenoon (Daylight Saving Time) or as soon thereafter as counsel can be heard, at Chambers in the Guarantee Trust Building in the City of Atlantic City, New Jersey, I shall apply to his Honor, Joseph B. Perskie, Supreme Court Justice, for an order to set aside a certain levy made in the above entitled matter by virtue of a writ of execution issued out of our Supreme Court, on the sixteenth day of October, 1933, and directed to the Sheriff of the County of Monmouth, which levy was made upon ALL that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being

in the City of Asbury Park, County of Monmouth and State of New Jersey. Beginning at a point in the easterly line of Ocean Ave. 85.2′ northerly from a point where the center line of Seventh Ave. intersects the easterly line of Ocean Ave.; thence S 72 degrees 30 minutes E 89.2′; to the westerly side of Boardwalk; thence along the westerly line of the Boardwalk N 17 degrees 30 minutes E 277.75′; thence N 72 degrees 30′ W 89.2′ to the easterly line of Ocean Avenue; thence along said easterly line of Ocean Ave. S 17 degrees 30′ W 277.75′ to the place of Beginning, including all appurtenances thereunto and all under-pass rights under the Boardwalk the entire length of building. Seized as the property of City of Asbury Park (a municipal corporation) taken in execution at the suit of Isabelle Martin and Isabelle M. Martin, as Execx. &c. of William B. Martin, deceased, and to be sold by Howard Height, Sheriff, for the reason that such levy was improperly made in that the property levied upon was acquired pursuant to authority granted by Pamphlet Laws of 1900, page 285, which authorizes the acquisition of such properties for public purposes, and therefore, was acquired and used for public purposes, and as such are not subject to levy.

Dated August 10th, 1934.

BNJ. C. VAN TINE,
Attorney for the City of Asbury Park,
a Municipal Corporation.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

ISABELLE MARTIN and ISABELLE M. MARTIN, as Executrix &c. of William B. Martin, deceased, *Plaintiff,* *vs.* CITY OF ASBURY PARK, a municipal corporation, *Defendant.*	*Action at Law.* *Affidavit.*

STATE OF NEW JERSEY, }
COUNTY OF MONMOUTH. } SS.:

CARL H. BISCHOFF, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the City Manager of the City of Asbury Park, a Municipal Corporation.

2. Supervision of the operation of City owned beachfront properties is among my duties.

3. Asbury Park owns all of the beachfront property east of the east curb of Ocean avenue which was acquired pursuant to authority granted to the City by an Act of the Legislature, entitled, "An Act to authorize cities bordering on the Atlantic Ocean to purchase the lands in any such city bordering on the ocean and adjacent lands thereto in such city for public purposes and to improve the same, and to issue bonds for such purposes."

4. The operation of the beachfront in the City of Asbury Park is the major part of the business of the City of Asbury Park.

5. There are outstanding at present obligations in the amount of $6,729,660.60 covering the acquisitions of the beachfront and the various improvements, including the Casino, Convention Hall, Boardwalk, Stores, Natatoriums, bath houses, theatre and other general beachfront improvements all of which are in the area east of the east curb of Ocean avenue.

6. The total amount of the capital debt of the city is $10,538,944.12.

7. The Budget for 1934 shows a revenue item of beach surplus of $76,673.33. This was a transfer made necessary for the following reasons; the said amount had been carried as a reserve for debt service on temporary indebtedness. When the State Auditor attempted to check this amount out, he could not find that the amount was due, and in order to balance out the account it was necessary to transfer this reserve fund as a revenue item for the year 1934, which was done at the request of the State Auditor.

8. The true picture of beachfront operations for the year 1934 is shown in the Budget by an item of $211,514.55, which is the estimated deficit for 1934 beachfront operations, and as such was set up in the Budget for 1934 as a mandatory item as required by Statute.

9. From present indications, the deficit for 1934 will be in excess of the estimated amount of $211,514.55.

10. On October 27, 1933 by virtue of a writ of execution issued out of our Supreme Court on October 16, 1933, addressed to the Sheriff of the

County of Monmouth, a levy was made upon the following property:

All that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Asbury Park, County of Monmouth and State of New Jersey.

Beginning at a point in the easterly line of Ocean Ave. 85.2′ northerly from a point where the center line of Seventh Ave. intersects the easterly line of Ocean Ave.: Thence S 72 degrees 30 minutes E 89.2′; to the westerly side of Boardwalk; thence along the westerly line of the Boardwalk N 17 degrees 30 minutes E 277.75′; thence E 72 degrees 30′ W 89.2′ to the easterly line of Ocean Ave.; thence along said easterly line of Ocean Ave. S 17 degrees 30′ W 277.75′ to the place of Beginning. Including all appurtenances thereunto and all underpass rights under the Boardwalk the entire length of building.

Seized as the property of City of Asbury Park (a municipal corporation) taken in execution at the suit of Isabelle Martin and Isabelle M. Martin, as Execx. &c. of William B. Martin, deceased, and to be sold by Howard Height, Sheriff.

11. When the City of Asbury Park received notice of the issuance of the writ, by a Resolution of October 24, 1933, Minute Book, paragraph 18, pages 446 and 447, it was resolved that an item sufficient to cover a judgment of Isabelle Martin, et als., should be placed in the 1934 Budget.

12. Among the mandatory items in the 1934 Budget appears the following: Judgment—Isabelle Martin case—$18,073.97. An amount sufficient to cover this amount was provided in the amount to be raised by taxation.

13. There has been a very considerable portion of the revenues and taxes anticipated for 1934 remaining uncollected, and due to this fact the officers and employees of the City of Asbury Park have been paid in scrip since May.

14. It is the purpose of the City to pay the amount of $18,073.97 as soon as funds are available.

15. The whole future of beachfront operations in the City of Asbury Park would be jeopardized if any of the projects were taken from the control of the City of Asbury Park, and the general scheme of municipal developments of beachfront properties would be ruined.

CARL H. BISCHOFF.

Subscribed and sworn to before me
this 10th day of August, 1934.

MABEL M. HAIGHT,
A Notary Public of New Jersey.
(SEAL)

Service of the within Notice of Motion and Affidavit is hereby acknowledged this 10th day of August, 1934.

FRANCIS A. GORDON,
Attorney for Plaintiff.

ORDER.

Filed August 23, 1934.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

ISABELLE MARTIN and ISABELLE M. MARTIN, as Executrix &c. of William B. Martin, deceased, *Plaintiff,* *vs.* CITY OF ASBURY PARK, a municipal corporation, *Defendant.*	*Action at Law.* *Order.*

The defendant in the above entitled cause having made an application for an order to set aside a levy, and all parties being represented, and it appearing that by virtue of a certain execution issued out of our Supreme Court on the Sixteenth day of October, 1933, and directed to the Sheriff of the County of Monmouth, that a levy was made on Octozer 27, 1933, upon ALL that certain lot, tract or parcel of land and premises hereinafter particularly described, situate, lying and being in the City of Asbury Park, County of Monmouth and State of New Jersey. Beginning at a point in the easterly line of Ocean Ave. 85.2′ northerly from a point where the center line of Seventh Ave. intersects the easterly line of Ocean Ave.: Thence S 72 degrees 30 minutes E 89.2′; to the westerly side of Boardwalk; thence along the westerly line of the Board-

walk N 17 degrees 30 minutes E 277.75′; thence N 72 degrees 30′ W. 89.2′ to the easterly line of Ocean Ave.; thence along said easterly line of Ocean Ave. S 17 degrees 30′ W 277.75′ to the place of Beginning. Including all appurtenances thereunto and all under-pass rights under the Boardwalk the entire length of building. Seized as the property of City of Asbury Park (a municipal corporation). And it further appearing that such levy was improperly made because the property in question was acquired pursuant to an act of the Legislature allowing certain cities to acquire such property for public purposes;

It is on this 18th day of August, 1934, ORDERED that the levy made by virtue of said writ of execution issued out of our Supreme Court on October 16, 1933, by the Sheriff of the County of Monmouth is hereby set aside.

It is further ORDERED that the service of a copy of this Order upon the Sheriff of the County of Monmouth shall be sufficient notice to him that said levy has been set aside.

JOSEPH B. PERSKIE,
J. S. C.

NOTICE OF APPEAL.

Filed September 5, 1934.

NEW JERSEY SUPREME COURT.

MONMOUTH COUNTY.

ISABELLE MARTIN and ISABELLE M. MARTIN, as Executrix &c. of William B. Martin, deceased, *Plaintiff,* *vs.* CITY OF ASBURY PARK, a municipal corporation, *Defendant.*	*Action at Law.* *Notice of Appeal.*

To Benj. C. Van Tine, Esq., attorney of defendant, 501 Grand avenue, Asbury Park, N. J.

Sir:

PLEASE TAKE NOTICE, that the plaintiff appeals to the New Jersey Court of Errors and Appeals in the last resort in all causes from the whole of the Order entered in the Court August 23rd, 1934, which ordered that the levy made by virtue of the writ of execution issued out of said Court on October 16th, 1933, by the Sheriff of the County of Monmouth, be set aside.

Dated August 31st, 1934.

Yours respectfully,

FRANCIS A. GORDON,
Attorney of Plaintiff.

Ground of Appeal.

Service of the within Notice of Appeal is hereby acknowledged this 1st day of September, 1934.

BENJ. C. VAN TINE,
Attorney for Defendant.

GROUND OF APPEAL.

Filed September 20, 1934.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ISABELLE MARTIN and ISABELLE M. MARTIN, as Executrix &c. of William B. Martin, deceased,
Plaintiff-Appellant,
vs.
CITY OF ASBURY PARK, a municipal corporation,
Defendant-Respondent.

On Appeal.
Ground of Appeal.

To Benj. C. Van Tine, Esq., attorney for defendant-respondent, 501 Grand avenue, Asbury Park, New Jersey.

Sir:

PLEASE TAKE NOTICE that the following is the ground of appeal which the plaintiff-appellant will urge why the order heretofore entered in the above entitled cause by the New Jersey Supreme Court, setting aside the levy made by the Sheriff of the County of Monmouth, pursuant to a writ

Ground of Appeal.

of execution issued out of the said Supreme Court on October 16th, 1933, should be reversed, set aside and for nothing holden:

1. Because the New Jersey Supreme Court erroneously set aside the levy made by the Sheriff of the County of Monmouth, which levy was made by virtue of a writ of execution duly issued out of said Supreme Court on October 16th, 1933, upon the ground that the property levied upon had been acquired pursuant to an act of the Legislature allowing certain cities to acquire such property for public purposes, whereas it should have decided that the said property was used for private and proprietary purposes and that the said levy under the said writ of execution was proper.

Dated September 10th, 1934.

FRANCIS A. GORDON,
Attorney for Plaintiff-Appellant.

Service of the within is hereby acknowledged this 17th day of September, 1934.

DONALD M. WAESCHE,
Attorney for Defendant-Respondent.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

ISABELLE MARTIN and ISABELLE M. MARTIN, as Executrix &c. of William B. Martin, deceased, *Plaintiff-Appellant,* *vs.* CITY OF ASBURY PARK, a municipal corporation, *Defendant-Respondent.*	*Action at Law.* *On Appeal from Order of New Jersey Supreme Court Setting Aside Levy.*

BRIEF OF APPELLANT.

Statement.

Plaintiff, Isabelle Martin and her late husband, William B. Martin, sued defendant, City of Asbury Park, and Edward T. Mitchell, trading under the name and style of Asbury Park Bathing System, on account of serious and permanent injuries sustained by Mrs. Martin on July 27th, 1929, as a result of slipping and falling while ascending a stairway at bathhouse group No. 8, situated on the Boardwalk between Seventh and Eighth avenues, Asbury Park, New Jersey. The bathing pavilion of which the stairs were a part was constructed and owned by the City of Asbury Park, and leased by it to said Mitchell.

The late Col. William B. Martin originally joined with Mrs. Martin for the loss of consortium and services, and also for the money expenditures and losses suffered by him. After suit was started, he departed this life and Mrs. Martin, as executrix of his last will and testament, prosecuted such claim.

The trial before Hon. Frank L. Cleary, Judge, and a jury, at the Union Circuit, held on June 21st, 22nd, 23rd and 24th, 1932, resulted in a verdict in favor of Mrs. Martin personally in the sum of $23,000.00 and in favor of the estate in the sum of $532.18, against City of Asbury Park, and as to Mitchell, the jury returned a verdict of "No Cause of Action." The learned trial court reduced the verdict of Mrs. Martin to $18,000.00 and she accepted such reduction and judgment was entered accordingly. The City of Asbury Park appealed from said judgment to this Honorable Court, which sustained the judgment.

The case being duly remitted, a writ of execution was issued out of the New Jersey Supreme Court on October 16th, 1933, directed to the Sheriff of the County of Monmouth, who levied upon the bathhouse group at which Mrs. Martin sustained her injuries.

August 18th, 1934, Justice Perskie, on application by the City of Asbury Park, ordered that the levy made by virtue of said writ of execution, be set aside. From this order, plaintiff appeals.

Facts.

At the hearing of the argument before Justice Perskie, plaintiff offered an affidavit, showing that the property upon which the levy in question was made was the identical property upon which plaintiff sustained her injuries.

It was agreed, however, that such proof was unnecessary, in view of the fact that the record of the two cases indicates that the same property was involved in each, and the attorney for the

City agreed that this would be conceded both for the purpose of the argument then at hand and for the purpose of appeal. The affidavit was accordingly withdrawn.

The City of Asbury Park based its entire argument upon the contention that the property levied upon was acquired pursuant to authority granted by Pamph. L. 1900, page 285, which authorizes the acquisition of such properties for public purposes, that it therefore was acquired and used for public purposes, and as such is not subject to levy. No technical objections or questions were raised with respect to the issuance of the writ or the details with respect to the manner of the levy. The City, both in its moving papers and before Justice Perskie, confined itself to the arguments that the properties were such as could not be levied upon and the levy was therefore invalid, regardless of whether its form and manner were technically in accordance with the manner prescribed by law for making a levy upon real estate.

The record of the previous appeal in this case, which was before this Honorable Court as appeal No. 25 of the May Term, 1933, and of which the court can therefore take judicial notice, reveals that, in that appeal, the City of Asbury Park urged as its fourth ground of appeal that "The defendant is a municipal corporation and not liable for the legal exercise of a strictly governmental function, nor was this defendant liable for breach or neglect of a public duty affecting the public at large, even though individuals may sustain injury."

Under this ground of appeal, the City urged that, under the authority of various cases cited by it, the ownership and maintenance of the bath-

house group in question was part of a governmental function, and that the City was therefore not liable because there was no active wrongdoing or neglect by it or its agents.

In answer, the plaintiff (respondent in said appeal) argued from the facts in the record which revealed that the property in question was a public bathhouse and a group of stores, that it was leased to private individuals to be used for the sole purpose of making a private profit, and it was further argued that, under the authorities and under previous decisions affecting the City of Asbury Park and its beachfront property, that property which was leased by it to private individuals for the obvious purpose of obtaining a revenue should be distinguished from those portions of the beach front property which were still maintained and operated by it for non-revenue purposes.

This Honorable Court, in its decision rendered September 27th, 1933 and reported in 111 N. J. L. 364, at page 368, examined the authorities submitted by both sides and then said, in answer to the question as to whether the occurrence arose out of a governmental or proprietary and business function:

> "The answer in the case before us measured by the foregoing authorities is that the alleged injury arose out of the exercise of a proprietary or business function of the City."

At the suggestion of the learned court, it was agreed by the counsel for the respective parties before Justice Perskie that no technical objection be made as to the procedure adopted by the City in attempting to set the levy aside, nor to the question of whether the facts were properly presented to the Court to enable it to act, it being

generally agreed that all technicalities would be waived in order to effect a prompt disposition of the matter on its merits. It was further agreed that this same spirit would be observed on any appeal taken by the plaintiff and that neither party would question the order as to its being based upon a valid procedure; or whether it is a valid final order from which an appeal might be taken.

ARGUMENT.

POINT I.

The court below erred in setting aside the levy.

The property levied upon was not used for governmental purposes and was subject to levy under a writ of execution.

From the moving papers, it would appear that the sole ground of the motion of the City of Asbury Park to set aside the levy, was that the property in question was acquired and used for public purposes. In view of the fact that, during the course of the argument below, both counsel for the City and the learned Court questioned whether the property would be subject to levy even if used for private purposes, appellant also presents its argument on the latter question, namely, whether property used in a private or proprietary capacity, and not in connection with a public or governmental function, is subject to levy under a writ of execution.

Appellant wishes to point out at the outset, however, that the latter point did not appear in the moving papers, they being based upon the sole ground that the property in question was public property, nor does the Order rest upon any ground other than that the property

was acquired for public purposes. Appellant does not, by arguing the second point, waive its contention that the Court below had before it and set aside the levy upon one ground, namely, that the property was used for public purposes, but argues same at this time and makes this statement because it has reason to believe that the respondent will endeavor to argue the other point, and is hereby attempting to avoid the necessity of filing a reply brief by anticipating such argument.

I.

The property in question was not used for a public or governmental function of the City, but was used in the exercise of a proprietary or business function.

It was contended that "the property levied upon was acquired pursuant to authority granted by Pamphlet Laws of 1900, page 285, which authorizes the acquisition of such properties for public purposes, and therefore was acquired and used for public purposes, and as such, are not subject to levy" (Case p. 2).

Appellant never questioned that the property was acquired pursuant to said statute and its amendments, as the Supreme Court specifically so held in the case of *Reade* v. *Asbury Park,* 101 N. J. L. 319, which holding was affirmed by this Honorable Court in *102 N. J. L. 221.*

It should be noted, however, that this statute, although its title authorized the purchase of lands for public purposes, was amended by Chapter 252 of the Laws of 1919, and Section 4, as amended, authorized the commissioners "to lease, rent or hire for any special term not ex-

ceding five years any part of the property so acquired *for any purpose not inconsistent with the laws governing such city, as in their judgment they may deem proper for the improvement of the place and for such rental or return as they may deem for the best interests of the city.*"

It is therefore clear that despite the title of the act and regardless of the purposes for which the property may have been *acquired,* authority was given by this statute to *lease* the properties acquired for *any lawful purpose.* The record in this case in the previous appeal indicates that the property in question consists of a bathhouse and stores, which have been leased to private individuals for commercial purposes.

In the *Reade* case, *supra,* the City of Asbury Park itself urged that its property was divided into two classes—that which was leased and devoted to private uses under the management of the public authorities for revenue producing purposes, as distinguished from the governmental purposes, and that which was not leased and which remained as part of the public park system of the City. In its brief in that case, which is a record of this Honorable Court and of which the Court may take judicial notice, the City of Asbury Park said the following (pp. 13-14):

> "* * * The Act of 1900, while in its title and enactments calls the purposes which it authorizes 'public purposes,' authorizes the city to devote these lands to uses which are not in their true or legal sense 'public purposes,' for the simple and very good reason that they are devoted to private uses under the management of the public authorities for revenue producing purposes, as distinguished from governmen-

> tal uses. *The purposes authorized in this bath house privilege differs substantially from the purpose of other property in this same locality which is maintained by the city as public parks, and from which the city derives no direct revenue.*"

This distinction drawn by the City is based on good authority, for in the case of *Bisbing* v. *Asbury Park,* 80 N. J. L. 416, this Honorable Court in an action for personal injuries received while walking over a brick walk leading at right angles from the Boardwalk, made this very distinction and pointed out that the beach front property of the City fell under two classes: (1) that held in the discharge of a strictly public duty, and (2) that dealt with as its own and for its own benefit by receiving income therefrom, just as a private owner would lease his property and receive the rents therefrom. The Court based its opinion that the place where the plaintiff was injured was on property used for strictly governmental purposes upon the express ground that it was that portion of the property which was *not leased,* stating at page 424:

> "It is perfectly apparent that the condition was in nowise consequent upon the renting, that it arose quite independently thereof, and upon lands which, under the powers granted by the act, has been reserved from the leased portions of the tract, or, more properly speaking, that *the rented portions had been set apart from the public park.*
>
> "Nor did the condition result from any act performed or omitted in connection with the properties thus separated and rented.
>
> "In *Oliver* v. *Worcester, supra,* the plaintiff was walking in a foot path within the public common in the city of Worcester and fell into an excavation which had been caused in the course of the reparation of a building

standing in the common which the city *had leased and was receiving rent for.* The court said:

" 'If, in the course of repairing this building, the servants of the city negligently suffered the adjoining land within its control to be in a dangerous condition, the city was responsible.'

"It will be perceived that the negligence there grew out of the control of the property actually in use by the city in its private capacity. It arose directly from the management of the rented premises, a condition of affairs clearly distinguishable from this case.

"Neither the grass plot nor the way upon which it bordered produced revenue to the city. They still remained to serve the public uses humanely and beneficiently made possible by the law givers, to promote the health and recreation of all citizens.

"In keeping up the public grounds, the agents of the city were fulfilling a corporate duty imposed by law, from which the city derived no benefit in its corporate capacity. This was a governmental act, and not the exercise of a power conferred for its own benefit."

Not only does the *Bisbing* case pass upon the very question that was raised before the Court below, and distinguish between the leased portions of the City's property from those not leased, but this Honorable Court, on the appeal from Mrs. Martin's judgment, passed upon this very question with respect to property in question, and held that same was owned by the City in a proprietary or business function, as pointed out *supra*, page 4.

The property levied upon and advertised for sale is the identical property upon which Mrs. Martin received her original injury, it being what was described in the bill of complaint as

"bathhouse group No. 8, situated at and between Seventh and Eighth avenues and the beachfront, bordering on the Atlantic Ocean, in the City of Asbury Park, Monmouth County, New Jersey." It is respectfully submitted, therefore, that the decision of this Honorable Court, that the property in question was used in a private and proprietary capacity given in this case between the same parties and involving the determination of the identical material fact, was *res adjudicata* and could not be re-opened for re-argument by the Court below.

On the prior appeal, this Honorable Court cited as its first authority the case of *Bisbing* v. *Asbury Park,* thereby indicating its concurrence with the argument made by the plaintiff at that time and repeated here now, that the Bisbing case is direct authority, that such property of the City along the beach front as is leased by it to private persons is no longer used by the City in connection with a governmental function, but is held by it in the exercise of a proprietary or business function.

It is not deemed necessary to go into the various authorities cited to this Honorable Court in the previous appeal to substantiate the contention that this property is owned in connection with a private and proprietary function, as these authorities were all considered by this Honorable Court, and some of them are cited in its opinion in the previous appeal herein, which is not only *res adjudicata* as to the particular property in question, but, as a matter of law, is the final and binding statement of our highest Court as to the law on the subject, and therefore also governs, as the law of this State on the point in question.

Appellant respectfully submits that, in ruling that the property in question was acquired and used for public purposes, the learned Court below committed error in that it ignored the previous decision of this Honorable Court, which is *res adjudicata* on the issue, as well as the established law of the decisions affecting this and similar properties.

II.

Property owned and operated by a municipal corporation in connection with a proprietary and business function is subject to levy and sale under a writ of execution.

The learned Court below was of the opinion that the case of *First National Bank of Bound Brook* v. *Lavalette,* 10 N. J. Misc. Rep. 1023, pointed out the *exclusive* method of proceeding against a municipal corporation upon an unsatisfied judgment and that no levy could be made upon property belonging to a municipal corporation, even though it admittedly be held in a private or propriety capacity, but that a creditor must apply for a writ of mandamus to compel the proper municipal officers to take proper steps to raise by taxation, the amount of the unsatisfied judgment.

Appellant respectfully submits that not only is the procedure by writ of mandamus not the exclusive method of collecting against a municipal corporation upon a judgment, but levy may be made directly upon property owned by the City and used for a private and proprietary purpose and that, under our law, the judgment creditor must *first* exhaust the remedy of proceeding against all property held in a private or

proprietary capacity before he is entitled to apply for a writ of mandamus.

Section 34 of the Executions Act (2 Comp. Stat. 1910, pp. 2255-2256) provides that in cases against municipal corporations, an execution may issue to the officer authorized to execute the same and he may be required to serve a copy of the same upon a collector and assessor of the municipal corporation, requiring the assessment and levy of additional taxes to raise the amount due upon the execution where:

> "there shall be no property belonging to such town, township, borough or other municipal corporation sufficient to satisfy the same *whereon to levy.*"

This language clearly indicates that the procedure of compelling the collector and assessor to assess and collect taxes *cannot* be exercised so long as there remains property belonging to the municipal corporation upon which a levy may be made, and obviously also indicates that there are some types of property belonging to a municipal corporation upon which levy may be made.

In *Rahway* v. *Munday*, 44 N. J. L. 395, at page 414, this Honorable Court recognized the validity of seizure under execution on leviable property belonging to a city, and further, stated that the validity of this procedure had in no way been affected by legislative enactments providing additional methods, saying:

> "It thus appears that at the point of time at which the defendant in error became the creditor of the city, his remedies, in default of payment of his debt, were these: *first, seizure under execution on leviable property belonging to the city;* second, service of a copy of his execution on the collector of the city, and payment out of the first corporate

moneys coming to his hands; *third,* in case the city counsel refused to impose a tax in order to raise money to pay the judgment, *an application to the Supreme Court for a mandamus.*

"As the first and second of these remedies have not in anywise been disturbed or affected by legislative interference, and as they are entirely inefficacious in the present instance, they will be laid out of the discussion. It is the third mode of redress, the municipal power of taxation enforceable by mandamus, which exclusively demands our attention."

It will be noted that in the case of *Lyon* v. *City of Elizabeth,* 43 N. J. L. 158, which may be cited as authority for the proposition that the only method of collecting a judgment against the city is to proceed by mandamus, the Court, although specifically holding that properties purchased for schoolhouse purposes or purchased at tax sales are properties held by the city for public purposes and are immune from execution under a judgment against the city, and although raising doubt as to whether execution could be issued on any judgment arising from a liability incurred in a *governmental* function, still conceded that where the judgment has been obtained upon a liability arising from a private or proprietary function, execution may issue upon such judgment and levy be made upon property held in the private capacity of a city. In the Lyon case, the learned Court therefore conceded that in a case such as the instant case, where the judgment has arisen from a liability incurred by the City while engaged in a purely private or proprietary function and execution has been issued on such judgment, that levy may be made upon property owned by the City, but used by it for purely private or proprietary purposes. It is

obvious that the reasoning which prompts the courts, as in the Lyon case, to protect the city from levy upon property used in connection with governmental functions, in no way applies to properties used for purely private purposes.

Property and money used in connection with purely governmental purposes are protected against levy to prevent a creditor from impairing or obstructing a governmental function by levy on the assets used in connection therewith. It would indeed be highly dangerous to encourage a municipal corporation to unduly expand into private functions and involve itself in financial difficulties as a result of such undue expansion, as did the respondent herein, by offering it immunity from execution on property used for private purposes under a judgment arising in connection with such functions.

The general rule is very clearly stated in Corpus Juris and Ruling Case Law.

23 Corpus Juris, pages 355-356:

> "Where property of a municipal or other public corporation is sought to be subjected to execution to satisfy judgments recovered against such corporation, the question as to whether such property is leviable or not is to be determined by the usage and purposes for which it is held. The rule is that property held for public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire engines, hose and hose carriages, engine houses, public markets, hospitals, cemeteries, and generally everything held for governmental purposes, is not subject to levy and sale under execution against such corporation. The rule also applies to funds in the hands of a public officer. Likewise it has been held that taxes due to a municipal corporation or county cannot be seized under execution

by a creditor of such corporation. But where a municipal corporation or county owns in its proprietary, as distinguished from its public or governmental capacity, property not useful or used for a public purpose but for quasi private purposes, *the general rule is that such property may be seized and sold under execution against the corporation, precisely as similar property of individuals is seized and sold.*"

19 Ruling Case Law, Secs. 339-340, pp. 1050 and 1051:

"It is well settled that when a creditor has secured judgment against a municipal corporation, and take out execution, he cannot levy upon property of the corporation which is devoted to public uses, such as public buildings, streets, squares, parks, promenades, wharves, landing places, fire engines, hose and hose carriages, engine houses, engineering instruments and generally everything held for governmental purposes or upon the general revenues of the corporation or upon funds devoted to any of the foregoing purposes. This rule is based upon obvious principles of public policy, and is not a peculiar or special privilege of municipal corporation, *and consequently does not extend to property of a muncipal corporation which is held by the corporation in its private or proprietary capacity and is not devoted to any public use.*"

It is therefore submitted that the learned Court below erred in concluding that levy could not be made on property owned by a municipal corporation and used by it in connection with a private or proprietary function, under a writ of execution.

The defendant laid stress upon the fact that "the operation of the beach front in the City of Asbury Park is the major part of the business of Asbury Park," which appears as paragraph 4

of the affidavit of the City Manager (Case p. 3). It then proceeded to point out that the greater part of the City's bonded indebtedness represents money raised for the purpose of improving the beach front, constructing various improvements thereon, including the Casino, Convention Hall, Boardwalk, stores, natatoriums, bathhouses, theatre and other general beach front improvements and states that these are being operated at a loss (Case p. 4).

The City also emphasized the fact that on October 24th, 1933, it, by resolution, included in the 1934 budget as a mandatory item, the sum of $18,073.97, which was stated to be an amount sufficient to cover the judgment.

These facts were placed before and deemed material by the Court below, not as indicating that the property in question was used for a public purpose rather than a private purpose (for the question of how much the City spent on a given project and whether it is endeavoring to meet a judgment obtained in connection with same, obviously in no way affects the question of whether that project is governmental or private and proprietary in its nature), but on the issue of whether or not sale of the property under the levy in question would not create disorder and confusion in the City, and whether the levy should not be set aside on that ground in view of the fact that the City has taken all steps possible to meet the judgment.

(At this point it should be noted, although appellant feels that the entire argument is immaterial, that the amount appropriated by the City is merely the face amount of Mrs. Martin's personal judgment and does not include her judgment as administratrix or the interest and

costs on same, all of which amount to several thousand dollars more than the City appropriated.)

Reference was made by the Court below to the cases of *First National Bank* v. *Esterline,* 11 N. J. Misc. R. 655; *Oak Securities Co.* v. *Township of North Bergen* and *Hourigan* v. *Township of North Bergen,* 11 N. J. Misc. R. 194, and other recent cases in which the Supreme Court has indicated that where the municipal finance commission is functioning in a city, it will not issue a writ of mandamus to compel the collection and raising of funds to pay a judgment, as that would tend to give a preference to one creditor over others and to raise confusion in the financial affairs of the township.

It will readily be noted that the cases referred to are not at all analagous to the situation at bar in two very vital respects. In the first place, the application there was for the prerogative writ of mandamus, which is allowed by the Court in its discretion, whereas the appellant here was not *making* an application for such a *prerogative writ,* but was *resisting* an application to set aside a *levy* made in proper form under a writ already issued by the Supreme Court. In the second place, the cases referred to are cases of an insolvent City placed in the hands of the municipal finance commission. It is true that the City in this case has urged its inability to pay the judgment, but it is respectfully submitted that a court of law should not consider this as a reason for setting aside a levy under a writ of execution.

Despite the affidavit of its City Manager, the fact remains that this municipal corporation has not formally declared itself insolvent, nor been

so declared. It is not functioning under the municipal finance commission, but is still operating as a solvent municipal corporation. Appellant submits that if this City is actually insolvent and unable to pay the judgment in question and prevent sale under this levy, its remedy is to place itself in the hands of the municipal finance commission and obtain the protection that it will then receive against individual creditors, but it should not be permitted to continue to operate as a solvent municipal corporation daily incurring new liabilities, and yet, when faced with an attempt by a judgment creditor to collect upon its judgment, to attempt to set aside the levy upon the ground of its inability to pay the judgment. While the defendant is entitled to sympathy because of its financial difficulties, the plaintiff herein, who has been determined to have been permanently crippled as a result of the defendant's negligence, and who is rapidly approaching destitution, is certainly entitled to greater sympathy and consideration.

Moreover, it should be borne in mind that appellant has had a judgment since June 1932 upon which there has been no stay of execution, since the City was unable to post an appeal bond, and that she generously waited until the appeal was over before proceeding. Even after the appeal was decided in her favor, she hesitated in levying execution until it was apparent that no effort had been made, or was being made, to pay the judgment. Again, after the levy in October 1933 she withheld action until the time was drawing close when the period of one year after the levy would have expired. Appellant does not want the bathhouse, nor does she seek to embarrass the City, but feels that she must, and is entitled to protect her levy.

In setting aside the levy made under the writ of execution upon such grounds and on such authority, the Court below erroneously not only gave the defendant municipal corporation protection under the authority of cases which apply only to municipalities operating under the municipal finance commission, but gave affirmative relief of an equitable nature upon the authority of cases which only involve the refusal to grant a prerogative writ.

It is respectfully submitted that the learned Court below was in error in setting aside the levy in question upon the ground that the property levied upon was acquired and used by the City of Asbury Park for public purposes and as such, was not subject to levy under a writ of execution.

POINT II.

The order of the Court below should be vacated and the levy therein set aside be reinstated as of August 18th, 1934.

Respectfully submitted,

Francis A. Gordon

FRANCIS A. GORDON,
Attorney for and of Counsel
with Plaintiff Appellant.

JOHN M. MACKENZIE,
Of Counsel.

New Jersey Court of Errors and Appeals

ISABELLE MARTIN and ISABELLE M. MARTIN, as Executrix &c. of William B. Martin, deceased, Plaintiff-Appellant, *vs.* CITY OF ASBURY PARK, a municipal corporation, Defendant-Respondent.	Action at Law. On Appeal from Order of New Jersey Supreme Court Setting Aside Levy.

BRIEF OF RESPONDENT.

The Facts.

The plaintiff-appellant, Isabelle Martin, holds a judgment in the sum of $18,000.00 against the defendant-respondent, City of Asbury Park, and as executrix of the Estate of William B. Martin, deceased, she holds another judgment in the sum of $532.18 against the said city. Neither judgment has been paid to her and on October 16th, 1933, a writ of execution thereon was issued out of the Supreme Court directed to the Sheriff of Monmouth County.

The Sheriff of Monmouth, acting under the authority of the writ, levied upon certain land and a bathing pavilion owned and held by the defendant-respondent, City of Asbury Park, under an act of the legislature entitled "An act to authorize cities bordering on the Atlantic Ocean to purchase the land in such city bordering on the ocean and adjacent lands thereto in such city for public purposes and to improve the same, and to issue bonds

for such purposes'' with its amendments and supplements. P. L. 1900, p. 285; 1 C. S. 1080. The property upon which the levy was made is the same property in which plaintiff sustained the injuries, to recover damages for which she instituted suit in tort and obtained the judgments. The verdict in the tort case was affirmed on appeal to this honorable Court.

Thereafter, upon application of the defendant-respondent, City of Asbury Park, and after argument, Honorable Justice Perskie, on August 18th, 1934, ordered that the levy made by virtue of said writ be set aside. From this order the plaintiff has taken this appeal.

Answering Appellant's Brief.

In the brief filed by the appellant it is contended that the decision of this honorable Court in the main cause, 111 N. J. L. 364, to which this case is a sequence, is *res adjudicata* on the point that the bathing pavilion in which she was injured, and upon which she attempted to levy, is not used by the City for public purposes but is private property of the City. The respondent maintains that the decision is not *res adjudicata* on the question of whether or not the bathing pavilion is such property as may be reached on execution.

The decision of this Court which appellant quotes in her brief is that

> ''the alleged injury *arose out of the exercise of a proprietary or business function* of the City.''

The respondent contends that this is a very different thing than deciding that the bathing pavilion in which appellant was injured was not used for public purposes. A conception of a public building used for both governmental and pro-

prietary business at the same time does not require any stretch of the imagination. In any event, respondent maintains that all this honorable Court decided in this case, as reported in 111 N. J. L. 364, was that the plaintiff's injury arose out of the exercise of a proprietary or business function of the City. The Court did not decide that the building in which plaintiff was injured was not used for any public purposes and was such a piece of public property as could be sold on execution. The decision is therefore not *res adjudicata* in this case. In other words, the respondent contends that an adjudication that a City is carrying on a proprietary or business function so as to make it responsible in a tort action for damages, is not an adjudication that the building in which the function is carried on, is not used for any public purpose and is such a piece of public property as can be sold on execution.

The rule of law which appellant contends should permit the bathing pavilion to be sold in execution is quoted at page 15 of appellant's brief in excerpts from *Corpus Juris* (23 *C. J.* 355-356) and Ruling Case Law (19 R. C. L. 1050-1051). The general rule as there set out is, briefly, that property of a municipal corporation held for public uses is not subject to levy and sale. But as the quoted paragraph from R. C. L. says, "This rule is based upon obvious principles of public policy and is not a peculiar or special privilege of municipal corporation and consequently does not extend to property of a municipal corporation which is held by the corporation in its private or proprietary capacity *and is not devoted to any public use.*" The paragraph from *Corpus Juris* says: "But where a municipal corporation or county owns in its proprietary, as distinguished from its public or govern-

mental capacity, *property not useful or used for a public purpose,* the general rule is that such property may be seized and sold under execution against the corporation."

In Vol. III Dillon on Municipal Corp., Sec. 992, page 1586, the author states it thus:

> "the judgment should be enforceable by execution against the *strictly private property* of the corporation *but not against property owned or used* by the corporation *for public purposes.*"

The respondent will argue in this brief that the property upon which levy was attempted is held by City for public purposes and is used for a place of public resort and recreation, and is not strictly private property, as appellant contends, in order to bring it within the exception to the general rule.

POINT I.

Property of a municipal corporation used or held for any public purpose is not subject to levy and execution.

It is a fundamental principle that a municipality is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government. "The government exercised by a municipal corporation is exercised as an agency of the whole public, and for all the people of the state." (43 *C. J.* 70, Sec. 5.)

In the case of *Chicago* vs. *Tribune Company,* 307 Ill. 595, 139 N. E. 86, 28 A. L. R. 1368, the Supreme Court of Illinois said:

> "The government consists of associated persons representing the sovereign, who make, interpret, and enforce the laws. The

American system of government is founded upon the fundamental principle that the citizen is the fountain of all authority. Under our system this sovereign citizen has conferred certain authority upon his servants,—officers of the law commissioned for a fixed time to discharge specific duties. In order to serve their needs the citizens of Illinois, acting through the State government erected by them, have authorized the organization of City governments. The persons living within the corporate limits of these cities select officers who constitute the City government. The activities of these governments are limited by the needs of the people. All organized governments own and operate more or less property, and certain proprietary rights have long been recognized as necessary for the welfare of the inhabitants of the municipality. Municipal corporation, however, exists primarily for governmental purposes, and they are permitted to enter the commercial field solely for the purpose of subserving the interests of the public which they represent. A city is no less a government because it owns and operates its own water system, its own gas and electric system, and its own transportation system. In Byrne *vs.* Chicago General R. Co., 169 Ill. 75; 48 N. E. 703, this Court said: 'The city is but an agency of the State and governs within its sphere, for the State. . . . The government exercised by the City is exercised as an agency of the whole public, and for all the people of the State.' ''

In the case of *Trenton* vs. *New Jersey,* 262 U. S. 182; 67 L. Ed. 937, the United States Supreme Court, in its opinion, said at page 941:

"As by this Court speaking through Mr. Justice Moody, in Hunder *v.* Pittsburgh, 207 U. S. 161, 178, 179, 52 L. ed. 151, 159, 160, 28 Sup. Court Rep. 40:

'The number, nature, and duration of the powers conferred upon these corporations

> and the territory over which they shall be exercised rests in the absolute discretion of the State. Neither their charters nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within the meaning of the Federal Constitution. The state, therefore, at its pleasure, may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter, and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects, the state is supreme; and its legislative body, confirming its action to the state Constitution may do so at will, unrestrained by any provision of the Constitution of the United States. . . . The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.' ''

In the case of Attorney-General *v.* McGuinness, 78 N. J. L. 346, the Court of Errors and Appeals said, at page 354:

> ''Our municipalities are not *imperia in imperio;* they are but agencies of the state erected in and for limited parts of its territory, whose governments are established by the State for limited purposes that are of particular concern to the immediate inhabitants, but at the same time are of concern to the people at large.
>
> ''Being a creature of the state, a municipal corporation possesses such power and such only as the state confers upon it.''

43 C. J. 176, Sec. 174; 43 C. J. 186, Sec. 185;
Meday v. *Rutherford,* 65 N. J. L. 645;
Kosich v. *Township Committee of Dover Tp., et al.,* 112 N. J. L. 281; 170 Atl. Rep. 248.

Since the municipality is merely an agent of the State government and limited to only such activities as are conferred upon it by the State, the purposes, duties, powers and responsibilities of the State government must be determined in order to understand the duties, powers and responsibilities conferred by the State on the municipality. The Constitution of the State of New Jersey says that:

> "Government is instituted for the protection, security and benefit of the people" (Art. 1, Par. 2, Const. of N. J.).

In construing the language of the Constitution, the words and terms used are to be interpreted and understood in their most natural and obvious meaning (12 C. J. 705, sec. 48). See also *U. S.* v. *Sprague,* 282 U. S. 716; 75 L. ed. 640; *Peo.* v. *New York Cent. R. Co.,* 24 N. Y. 485, 486.

Webster's New International Dictionary defines the word BENEFIT as "Whatever promotes prosperity and personal happiness; advantage; profit; good."

The governing body of the State of New Jersey is therefore charged by the Constitution with the responsibility, duty and obligation of promoting the welfare, health, happiness and benefit of the people of this State. In order to carry out these objects of government the State has created local governments and delegated to such agencies the power and authority to perform such governmental functions as the legislature wishes the municipality to carry out.

> "Governmental functions are those conferred or imposed upon the municipality as a local agency of limited and prescribed jurisdiction, to be employed in administering the affairs of the State, and promoting the public welfare generally". 43 C. J. 182, Sec. 179; Loeb *v.* City of Jacksonville, 143 So. Rep. 205.

In addition to the usual functions of government municipalities of this State have provided under the authority of the Legislature playgrounds, parks, swimming pools, hospitals, civic centers and other projects for the health, recreation, happiness, advantage and benefit of the people of this State.

Under an act entitled "An Act to authorize cities bordering on the Atlantic Ocean to purchase the land in any such city bordering on the ocean and adjacent land thereto in such city for public purposes and to improve the same and to issue bonds for such purposes", the Legislature of this State has authorized the City of Asbury Park to purchase the land bordering upon the ocean and adjacent thereto "for public purposes and for places of resort for public health and for recreation and to improve the same". In order to obtain the money necessary to carry out the aforesaid purposes the City is authorized to issue bonds to an amount not exceeding the sum of $250,000 which may be in excess of the limit of bonded indebtedness. 1 C. S. 1080, Sec. 1767. The following section, to wit, Sec. 1768, permits the City to issue bonds to an amount not exceeding the sum of $400,000 which may be in excess of the limit of the bonded indebtedness for the purpose aforesaid. This is an amendment to Section 1767.

Section 1771, C. S. 1082, authorizes the City "to erect public buildings on said ground."

Section 1772 of the Act aforesaid, as amended by P. L. 1919, Chap. 252, p. 604 authorizes the

City "for the purpose of paying the principal of said bonds as the same shall fall due and for the purpose of erecting, constructing and maintaining buildings, pavilions, roadways, walks and for the general improvement of said public park and places of public resort, said Commissioners of said city, or the duly authorized officers now or hereafter performing the duties of said Commissioners, are hereby authorized to lease, rent or hire for any special term, not exceeding five years, any part of the property so acquired for any purpose not inconsistent with the laws governing such city as in their judgment they may deem proper for the improvement of the place and for such rentals or return as they may deem for the best interest of said city, that the money received for such lease and privilege shall first be applied to the payment of such necessary repairs and improvements in said public park as the said Commissioners may make upon such lands from time to time, and the balance shall be applied to the payment of the interest and principal of said bonds as they become due. 1911-1924 Cum. Supp., C. S. 38-1772.

It therefore seems apparent that the State of New Jersey in order to provide for its people a place on the seashore for their recreation, health and happiness have authorized and empowered the City of Asbury Park to so improve the seashore within its boundary so that the people of the State of New Jersey may enjoy and be benefited thereby. The Legislature has recognized municipalities bordering on the seashore as places where the people from other parts of the State would go for their health, recreation and happiness. It is for their benefit as much as for the benefit of the people residing in the seashore municipalities that such power to improve the seashore property has been given. The Legislature

recognized that the cost of such improvement would be greater than the municipalities themselves could bear and therefore authorized the municipalities to lease the improvements made under the authority of the Legislature for the purpose of paying the principal of the bonds as they fall due, which were issued to make the improvements. The money derived from the improvements under the statute *can only be used to keep the improvements in repair, to erect new buildings and to pay the debt that was created in making the original improvement,* and for no other purpose. The municipalities cannot be benefited by the rentals.

In the case of *Bisbing* v. *Asbury Park,* 80 N. J. L. 416, the Court of Errors and Appeals held at page 419 that certain land bordering on the Atlantic Ocean was acquired by the City by specific legislative sanction *for public purposes and for a place of resort for public health and recreation.* On page 422 the Court said:

> "It cannot be doubted that the Act was designed primarily to create a public park."

From what has been said thus far, the defendant-respondent contends that the Legislature, under the mandate contained in the Constitution to provide for the benefit of the people, did delegate to its subordinate, the City of Asbury Park the duty of maintaining the land bordering upon the ocean and adjacent thereto for the benefit of the public and for public purposes. Such land should not be subject to levy for the reasons following:

In the case of *Lyons* v. *City of Elizabeth,* 43 N. J. L. 158, the Supreme Court set aside a levy made upon real estate of that City under a *fi. fa.* The decision in that case has often been cited with approval by this Court (see *Piscataway Township* v. *First National Bank of Dunellen,* 111 N. J. L.

412; *Vanderpoel* vs. *Mount Ephrain,* 111 N. J. L. 423).

Quoting from the opinion in *Lyons* vs. *City of Elizabeth,* 43 N. J. L., at pages 160 and 161:

> "It seems to be clear, also, that a *fi. fa.* against the public property of a municipal corporation is unknown to the common law. The reason why, in the absence of express legislative sanction, these political divisions of the State cannot be subjected to such process, is obvious."
>
> "Municipal corporations are erected for political purposes only, and are merely instrumentalities through which the legislature administers the civil policy of the State."
>
> * * * * * *
>
> "Their control of property is intended only for corporate purposes, and is to be applied only to promote the objects for which they are erected into governments."
>
> * * * * * *
>
> "The municipality cannot, in the absence of express legislation, be deprived of the means indispensible to the exercise of the functions with which it is charged."

It is respectfully submitted that this quoted language of the Court exactly fits this case. The Legislature in administering the civil policy of the State passed "An Act to authorize Cities bordering on the Atlantic Ocean to purchase the land in such City bordering on the Ocean and adjacent land thereto in such City for public purposes and to improve the same and to issue bonds for such purposes." P. L. 1900, p. 285; 1 C. S. 1080. Under this Act the Legislature authorized the City of Asbury Park to purchase the land bordering upon the Ocean "for public purposes and for places of resort for public health and for recreation and to improve the same" and "to erect public buildings on said ground."

The plaintiff-appellant in this case attempted to levy upon land and a public building which was erected "for public purposes and for places of resort for public health and for recreation." If the levy were allowed to stand and the property sold the effect would be to permit the plaintiff-appellant to thwart the intention and act of the Legislature. Also it would violate the rule set down in the case of *Lyons* vs. *City of Elizabeth, supra,* that "A municipality cannot * * * be deprived of the means indispensible to the exercise of the functions with which it is charged," in that the City of Asbury Park is charged by the Legislature with the function of maintaining said lands and buildings for public purposes and for places of resort for public health and for recreation.

In Vol. III Dillon on Municipal Corporation, Section 992, page 1586, that author sets down the rule to be:

> "On principle, in the absence of statutable provision, or Legislative policy in the particular State, it would seem to be a sound view to hold that the right to contract and the power to be sued gives to the creditor the right to recover judgment; that judgments should be enforceable by execution against the strictly private property of the corporation, but not any against property owned or used by the corporation for public purposes, such as public buildings, hospitals and cemeteries, fire engines and apparatus, water works and the like; and that judgment should not be deemed liens upon real property except when it may be taken in execution."

In support of that statement, the author cites many cases. In one of those cited, *Meriwether* vs. *Garrett,* 102 U. S. 472, 26 L. Ed. 197, the Supreme Court held:

> "Property held for public uses such as public buildings, streets, squares, parks,

> promenades, wharves, landing places, fire engines, engineering instruments and generally everything held for governmental purposes, cannot be held for payment of the debts of the City. Its public character forbids such an appropriation. Upon the repeal of the charter of the City, such property passed under the immediate control of the State, the power once delegated to the City, in that behalf having been withdrawn."

In another case cited, *City of New Orleans* vs. *Louisiana Construction Company,* 140 U. S. 654, 35 L. Ed. 556, the Supreme Court held that a public levee or quarry in New Orleans did not cease to be *locus publicus,* and become private property because it is leased by the public authorities for a purpose subservient to the public use, and that the lease

> "In no way affected the character of the spaces in question as *locus publicus,* and that the City held no such private interest in those spaces or in the sheds built upon them as could be seized and sold on execution for the debts of the City."

It is therefore submitted that the property upon which levy was attempted is and was held for public purposes and is therefore not subject to levy and sale under execution.

POINT II.

To permit the levy to stand would be contrary to public policy.

The property upon which the levy was attempted is held by the City of Asbury Park to serve certain public purposes as set out in the Legislative Act under which it holds. Whether that holding by the Municipal Corporation is gov-

ernmental or proprietary, within the rule applied in a tort case to make a municipal corporation liable in damages, is beside the argument under this point. The object here is to show that the property of a corporation, municipal or private, which has been charged by the Legislature to serve public purposes is exempt from execution and levy.

The rule is stated in 26 C. J. 356, Sec. 106, thus:

> "Except where it is otherwise provided by Statute or constitutional provision in case of corporations such as railroads, bridge companies, or the like, which, although not strictly public corporations, are created to serve public purposes and are charged with public duties, such property as is necessary to enable them to discharge their duties to the public and effectuate the objects of their incorporation, is not, according to the weight of authority, apart from statutory provision, subject to execution at law."

The rule is also stated in Vol. 10, Fletcher Cyclopedia Corporations (Chap. 52, Sec. 4776), page 102, where it is said:

> "The property of railroads and other public service corporations, required for the proper performance of their functions is generally exempt from seizure under attachment or execution.
>
> "They are granted franchises and are charged with duties which the public has an interest in having properly performed. The rights of individual creditors of such corporations must yield to the paramount interest of the whole public. And so where there is no statutory provision to the contrary a creditor of such corporation cannot subject to attachment, execution or other legal process such of its property as it needs in the performance of its corporate functions, and in carrying out its franchise obligations towards the public.

This exemption rests on consideration of public policy rather than on grounds of any prerogative or immunity enjoyed by the corporation itself, for, as stated in earlier chapters the corporation itself cannot by alienation or lease of its property incapacitate itself to fulfill its public obligations. It is immaterial to the exemption whether the property was acquired by condemnation, purchase, donation or otherwise. The essential thing is that the property sought to be seized be such as is reasonably necessary to enable the corporation to fulfill the purposes of public service and to exercise properly the franchise given to it," (Cases cited):

Hart v. *Burnett,* 15 Cal. 590;
Borough of Mount Union v. *Kunz,* 290 Pa. 356; 139 Atl. 118;
Indianapolis & C. Gravel Road Co. v. *State,* 105 Ind. 37, 4 N. E. 316;
McColgan v. *Baltimore Belt R. Co.,* 85 Md. 519, 36 Atl. 1026;
Eldredge v. *Mill Ditch Co.,* 90 Ore. 590, 177 Pac. 939;
Palestine v. *Barnes,* 50 Tex. 538;
McNulty Bros. v. *Penn R. Co.,* 272 Pa. 442, 116 Atl. 362.

In New Jersey it has been held that a franchise granted to a *quasi* public corporation by an act of the Legislature is not subject to execution. In *Randolph* v. *Larned,* 27 N. J. Eq. 557, the Court of Errors and Appeals held:

"Although, technically speaking, franchises are property, they are property of a peculiar character, arising only from legislative grant, and are not, in ordinary cases, subject to execution or to sale and transfer, even in payment of the debts of the corporation, without the assent or authority of the legislature."

This case has been followed in later New Jersey cases. See *McCarter* v. *Vineland Light & Power Co.*, 72 N. J. Eq. 703, and *Hart* v. *Seacoast Credit Corporation,* 115 N. J. Eq. 29.

In *Margo* v. *Penn. R. R. Co.,* 213 Pa. 468; 62 Atl. 1081, the Supreme Court of Pennsylvania held that:

> "On grounds of public policy the law does not permit the seizure and sale on execution of the property of a railroad company necessary to enable it to perform its duties to the public."

This rule is still followed in the State of Pennsylvania. See *Borough of Mt. Union* v. *Kunz,* 290 Pa. 356, 139 Atl. 118.

In the Maryland case of *McColgan* v. *Baltimore Belt. R. Co.,* 85 Md. 519; 36 Atl. Rep. 1026, the Maryland Court of Appeals held that:

> "The franchises of a railroad company and corporate property essential to the enjoyment of the franchise are not subject to sale on execution unless the legislature authorizes or assents to the transfer."

The Court further on in that case, says:

> "The rule * * * does not rest upon any corporate immunity nor was it adopted to afford any particular protection to corporations generally. This doctrine is applicable only to *quasi* public corporations, and, since the state has charged them with a duty towards the public, it is against its policy to allow such corporations to be so crippled that the duty cannot be performed. In the case of Railroad Co. *v.* Colwell, 39 Pa. St. 337, Judge Woodward thus states the doctrine: 'As to land which has been appropriated to corporate objects, and is necessary for the full enjoyment and exercise of any franchise of the company, whether acquired by purchase or by exercise of the delegated power of emi-

> nent domain, the company held it entirely exempt from levy and sale; and this is on no ground of prerogative or corporate immunity, for the company can no more alien or transfer such land by their own act than can a creditor by legal process; but the exemption rests on the public interests involved in the corporation. Though the corporation, in respect to its capital is private, yet it was created to accomplish objects in which the public have a direct interest, and its authority to hold lands was conferred that these objects might be worked out. They shall not be balked therefore, by either the act of the company itself or its creditors."

It is submitted that this rule has a direct application to the case at bar. The plaintiff-appellant tried to levy upon a beach front property held by the City under an act of the legislature which requires the City to hold the property "for public purposes and for places of resort for public health and for recreation." P. L. 1900, p. 285 with amendments; 1 C. S. 1080, Sec. 1767. The City itself cannot sell the land since the act under which it acquired the same contains no authority to sell. On the right to sell, in a similar case the New Jersey Supreme Court in construing an act of the Legislature in the case of *McGuire* v. *Atlantic City,* 63 N. J. L. 91 said:

> "But in this case a special power is conferred for a specified purpose and its exercise must be kept within the limits of the grant. It is a power to purchase for one object and not a power to buy and sell."

Furthermore, the general act of 1920, Chap. 81 entitled "An Act to authorize cities in this State to sell and convey certain lands acquired for use as a public park, which are not needed or desirable for public park purposes." 1 Cum. Supp. C. S. 2334; *136-3651A (1) specifically excludes from

its operation "lands * * * located on the beach front of the Atlantic Ocean."

It is therefore submitted that the city holds the property upon which levy was attempted charged with a public interest and the rights of an individual creditor, on consideration of public policy must yield to the paramount interest of the whole public. In addition it is suggested that the Court should not permit the plaintiff-appellant to do by indirection (*i. e.*, accomplish the sale of the property under the levy) the very thing that the Legislature has forbidden the City to do directly.

POINT III.

To permit the execution to stand would seriously affect the credit of the municipality and would result in certain creditors of the municipality gaining a preference over other creditors.

The defendant-respondent, City of Asbury Park, is at present in debt to the extent of $10,538,944.12 (State of Case, p. 4), some $6,700,000.00 of which was incurred in acquiring beach front property (State of Case, p. 4) under "An Act to authorize cities bordering on the Atlantic Ocean to purchase the land in any such city bordering on the Ocean and adjacent lands thereto in such City for public purposes and to improve the same and to issue bonds for such purposes." P. L. 1900, 285. This same law restricts and limits the City of Asbury Park in the use to be made of any income from the land so acquired. See P. L. 1919, Ch. 252, p. 604; Cum. Supp. C. S. 38-1772.

The plaintiff-appellant in this case attempted to levy upon and sell property of the City of

Asbury Park held by said City under the authority of the above Act with its amendments and supplements. To permit this to be done would seriously affect the credit of Asbury Park and perhaps, by establishing a precedent, other Cities as well.

As is pointed out elsewhere in this brief, Municipal Corporations "Are but agencies of the State erected in and for limited parts of its territory." The credit of municipalities generally is a matter of public concern, and the Legislature has by law placed restrictions and limits upon the amount which municipalities may borrow. It was once claimed in *Hackettstown* v. *Swackhamer,* 37 N. J. L. 191, that the charter of the municipality impliedly granted unlimited power to borrow money. Chief Justice Beasley, in speaking of that claim, said in that case that if such were so

> "All the usual enterprises and improvements could be undertaken on a basis of a credit, and annual taxation, instead of being made the basis and measure of annual expenditure, could readily be converted into a subordinate auxiliary to an extended system of loan. It is plain that such a power would be full of peril to the owners of City property, and the widest door would thus be thrown open to extravagance, recklessness and fraud."

As was pointed out in Point II of this brief, the City of Asbury Park cannot itself sell the property upon which the levy was attempted.

A fuller discussion might be set forth herein and more citations given, but it appears to be sufficiently manifest that the power of a Municipal Corporation to deal with its property, credits and assets is a limited power and is radically different to the power which private corporations and individuals enjoy with reference to their property and credit.

This Court has recently considered attempted levies upon municipal property in two cases. In the case of *Piscataway Township* vs. *First National Bank of Dunellen,* 111 N. J. L. 412, at 414, the Court said:

> "The general scheme of municipal finance is to raise in a given year as little by taxation as possible, and to borrow all the bankers will lend upon pledge of future revenue. The result is that the fixed debt upon which interest must be paid has become larger each year and since returns from taxation have diminished, temporary financing becomes of necessity permanent. However bad the result, the necessity that a municipality function transcends all private inconvenience.
>
> "It would be manifestly contrary to the theory upon which a part of the sovereignty of the State is delegated to local governments to concede to an individual the rights to arrest their operations. The unrestricted right in the creditor to pursue the corporation by execution could, for all practical purposes, as effectually annul a city charter as its absolute repeal." Lyon *vs.* City of Elizabeth, 43 N. J. L. 161.

In the case *sub judice,* the unrestricted right in the plaintiff-appellant to pursue the City of Asbury Park could, for all practical purpose, as effectually annul the act of the Legislature under which the City holds the property, as its absolute repeal, and likewise impair the security of the bonds issued under authority of that act.

Further down in the opinion in the *Piscataway* case (111 N. J. L. at bottom 414) the Court said:

> "The safety and health of the citizen are of prime importance and neither can be endangered because a creditor wants his due. The municipality can no more carry on without its general funds than it could without any other particular piece of property dedi-

> cated to public use. The creditors of a municipality must wait till their debt is raised by taxation."

In the case of *Vanderpoel* vs. *Mount Ephrain,* 111 N. J. L. 423 at 425 in speaking about the credit of municipalities this Court said:

> "It is essential to the beneficial exercise of granted powers that a municipality be able to secure advances upon its credit. Even though it failed in meeting its obligations when due because too much has been extended upon the hope that its inhabitants could earn money sufficient to pay taxes, still it is essential that the municipality deal justly with its creditors, and preferences, however secured, are not to be so regarded.
>
> Construing the Execution Act strictly as we must, we can find nothing in it which gives one creditor a right to take public property in satisfaction of a judgment even though it be money, part of which may have been set aside to satisfy his claim.
>
> The remedies of the municipal creditor are, as they always have been, by mandamus (2 Comp. Stat., p. 2255), or under the act concerning municipal finance (P. L. 1931, ch. 340) as amended. The immunities of sovereignty shield public funds of every kind as well as the public buildings. The one is as essential to government as the other."

The City of Asbury Park is now in debt to creditors to the extent of $10,538,944.12 (State of Case, p. 4). An amount sufficient to pay the judgment of the plaintiff-appellant was included in the mandatory items in the 1934 budget (State of Case, p. 6), to be raised by taxation. To permit the plaintiff-appellant to execute her judgment by levy and sale of a public building would permit her to gain a preference over other creditors of the City who will have to wait until the money to pay their claims is raised by taxation.

Conclusion.

It is respectfully submitted that the order of the Honorable Justice Perskie in the Supreme Court, dated August 18th, 1934, vacating and setting aside the levy herein was right and in consonance with law and should be affirmed by this Honorable Court.

Respectfully submitted,

Donald M. Waesche,
Attorney for and of Counsel with
Defendant-Respondent.

(9802) Pandick Press, Inc., 22 Thames St., New York, U. S. A.