

lands not common to the public, such school lands were not appurtenant to the lands of the abutting owner and did not pass to him upon their abandonment for school purposes. *Stevens v. Shannon*, 6 O. C. C. 142.

Respectfully,
GILBERT BETTMAN,
Attorney General.

2874.

JUDGMENT—OBTAINED AGAINST MUNICIPALITY FOR WRONGFUL DEATH—MUNICIPAL LIGHT PLANT PROPERTY NOT SUBJECT TO BEING LEVIED UPON.

SYLLABUS:

Where a municipality owns a municipal light plant which is being operated by it, the property so held is not subject to being levied upon in pursuance of a judgment against said municipality for wrongful death.

COLUMBUS, OHIO, January 27, 1931.

HON. RAYMOND E. LADD, *Prosecuting Attorney, Bowling Green, Ohio.*

DEAR SIR:—Acknowledgment is made of your recent communication, which reads:

“I wish an opinion as to whether a sheriff has the right to levy on the poles, wires, transformers, meters, and all other electrical appliances and equipment pertaining to and used in connection with a municipally owned electric light plant?

Our local sheriff has received an execution against the Village of Pemberville on a judgment rendered against said village in a wrongful death action. The attorneys for the plaintiff directing him to levy on the electric light fixtures, etc., as hereinbefore described. The sheriff asked me for a written opinion and I replied that it was my opinion that the plaintiff would have to rely on his remedy of mandamus, as provided in *State ex rel Turner vs. Village of Bremen*, 117 O. S. 186, and further as the Legislature has provided in Section 2293-13, G. C. for a judgment fund, and Section 5625-8 for the certificate of the fiscal officer to the taxing authority of the subdivision for the amount necessary for the payment of final judgments, and Section 2293-3 provides for the issuance of bonds for the payment of a judgment if such funds are not available.

I further find that Volume 10 R. C. L. page 1222, Section 9, provides as a general rule an execution cannot issue against municipal corporations.

Plaintiff's attorneys rely on 23 Corpus Juris, Page 356, which is in effect that property owned by a municipality in its proprietary, as distinguished from its public or governmental capacity, but for quasi private purposes, is liable to be seized and sold under execution, the same as any other property of an individual or private corporation is seized and sold.

Plaintiff's attorneys further rely on the case of *Travelers Ins. Co. vs. Village of Wadsworth*, 109 O. S. 440, which holds that a municipally owned light and power plant in Ohio is a proprietary power and that the City may ex-

ercise the same right as an individual or private corporation. They contend, therefore, that if the corporation has a proprietary power in reference to its electric light plant, to contract the same as a private individual the property which it thus owns is subject to execution, the same as a private individual.

I have checked the section of Corpus Juris and find that it applies only where the property is not useful, or used for a public purpose. The Ohio Constitution gives a municipality the right to own an electric light plant and it is a public utility and is therefore of public use to the inhabitants of such municipality.

I have been unable to find any case where an execution has been allowed against a municipally owned public utility.

In 3rd Dec. Digest on the topic of Municipal Corporations, Section 1038, I found several cases holding that an execution could not be issued against a municipal corporation:

- 39 N. E. 484 (an Illinois case)
- 63 N. E. 642 (Also an Illinois case)
- 93 S. E. 238 (Georgia case)

holding a mandamus is the only remedy, and 193 Pac. 294, a California case, which I believe is in point and holds that an execution is not authorized against a municipally owned water works, although it is a proprietary power of said village.

Neither the plaintiff's attorneys nor myself have been able to find an Ohio case in point and they are strenuously insisting that the sheriff levy on the electric light fixtures belonging to the village, against which their client has a judgment.

I wish to further state that the village does not manufacture its own electricity, but buys it from a power company and distributes it to its patrons, owning the transformers, lines, poles, meters, etc."

The question as to the power to levy upon property owned by a municipal corporation as suggested in your communication is one that has been much debated. Without undertaking to review the many decisions of various jurisdictions upon the subject, it may be stated as a general proposition of law that the courts have held against the power to issue execution against municipalities which was acquired or held by such municipalities for public purposes. There are two cases in Ohio which deal with the subject.

In the case of *Cincinnati v. Cameron*, 6 O. D. Reprint 727, the Hamilton County District Court in 1879 held that ground purchased by the City of Cincinnati under an act of the legislature authorizing the issuance of bonds for the purchase of ground whereon to erect public buildings was exempt from levy by a judgment creditor of the city. The opinion in this case is well considered. It points out that some states have denied the power to issue execution against municipal corporations, citing 25 Ill. 595, 20 Pa. St. 207. Said opinion further points out "But the better opinion is that the right to recover a judgment carries with it the right to the ordinary process to enforce judgment", citing Dillon on "Municipal Corporations", Section 446.

However, the opinion turns upon the proposition that property which cannot be taken without interfering with the discharge of public functions of the municipality is not subject to seizure. The opinion further states that:

"There may be property of the city held by it for income or for the purposes of sale or not connected with the discharge of municipal functions that may be subject to levy, but certainly a lot or parcel of ground held for the purpose of erecting public buildings is not property of that character."

It was further pointed out in said opinion that:

“Trust property generally is not subject to seizure at the instance of a creditor of a trustee and where the trust is so connected with the use of property that taking the property extinguishes the trust, the property will be exempt.”

The opinion last above mentioned states that the legislature in a number of instances has expressly provided that certain property shall be exempt from execution, such as fire engines, belonging to cities, etc., and school houses, but the court said that notwithstanding these provisions the inference did not lie that all other municipally owned property was subject to levy.

The same court in the case of *City of Cincinnati v. Frost, Stearns and Co.*, 8 O. D. Reprint 107, held as disclosed by the headnotes that:

“A building erected by the city of Cincinnati, and used for a long time as a fire engine house, but from which the engine company had been removed to another locality by the board of fire commissioners, was rented by them for the purposes of revenue to the fire department, but without any act of the city council authorizing it: *Held*, that the property did not, thereby, become subject to levy under a judgment against the city.”

In the body of the opinion last mentioned the court points out that in its former opinion it was indicated that:

“Property of a municipal corporation, held for private purposes, might be subject to levy. * * * The distinction contemplated was between the public or governmental character of a municipality, and its mere character, as a corporation, having capacity to acquire and hold property.”

A careful analysis of the cases hereinbefore mentioned will disclose that where property is acquired for a definite public use, the weight of authority is against permitting a levy to be made thereon to satisfy a judgment such as the one under consideration. It is true that some confusion has arisen by reason of the conclusions of the Supreme Court in the *Travelers Insurance* case, *supra*. In other words, it is not wholly illogical to argue that inasmuch as the Supreme Court has said that, in the operation of a public utility, a municipality exercises proprietary functions and may do anything that a private corporation or individual may do, the property used by it is held in a private capacity to the end that a levy may be made to satisfy a judgment.

However, it is believed that there is a well recognized distinction between the operation of a plant and the holding of the property. In other words, insofar as the rights and liabilities of a municipal corporation in the operation of a public utility are concerned the power is regarded as proprietary. On the other hand, the acquiring and the holding of the property which is used might perhaps be regarded as a governmental function. In any event it is property held for a public purpose.

Section 4 of Article XVIII of the Ohio Constitution authorizes the acquiring of a public utility. Section 3615 of the General Code authorizes municipalities, among other things, to acquire property for any municipal purpose and to hold, manage and control it.

It is evident that in the case under consideration the property was acquired for a municipal purpose. Therefore, it is fundamental that the municipality holds the property in trust for the benefit of the public interest. While the municipality may

act in its proprietary capacity in the operation of such a utility, it nevertheless may not be denied that the property is acquired for and held for a municipal use.

In the case of *State, ex rel. v. Shriver*, 113 O. S. 171, a question was presented with reference to the power of a municipality to sell a municipal light plant. Council had apparently authorized the sale which had been approved by the board of public affairs as required by statute, which board had later disapproved of the procedure. An action in mandamus was instituted to require the contract to be executed. The court expressly pointed out in denying the writ that:

“Before the municipal authorities are authorized, much less required to sell, any property belonging to a municipality, it must appear that such property is not needed for any municipal purpose. There is no such averment in the petition.”

From the foregoing, it will be observed that notwithstanding the Travelers Ins. Co. case, supra, the court adheres to the proposition that the property in connection with a municipal light plant is held for a municipal use or purpose, which must be protected. In the case you mention as pointed out by you, there are a number of sections which provide ample authority for the payment of a judgment. This special provision made for the benefit of judgment creditors of a municipal corporation which is not provided in connection with judgments against private corporations, is another argument against the levy. In other words, where the general law provides for the collection of a judgment by means of a levy and further provides a special method whereby judgments against municipalities may be collected, it may well be argued that the legislature having provided a special method for the payment of judgments against municipalities, other methods are not available. If no method had been provided for the payment of such judgments and the property under consideration was no longer needed for municipal purposes, it is probable that a levy could be made. However, in the case under consideration the property is used for municipal purposes. There is already, as hereinbefore indicated, a method provided for the payment of judgments and it is against public policy to undertake to levy upon the property.

In specific answer to your inquiry, it is my opinion that where a municipality owns a municipal light plant which is being operated by it, the property so held is not subject to being levied upon in pursuance of a judgment against said municipality for wrongful death.

Respectfully,

GILBERT BETTMAN,
Attorney General.

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2875.

APPROVAL, BONDS OF VILLAGE CEDARVILLE, GREENE COUNTY, OHIO
—\$50,000.00.

COLUMBUS, OHIO, January 27, 1931.

Industrial Commission of Ohio, Columbus, Ohio.