COUNTY:) (1) The question of whether property owned by the county is subject to execution is a question of fact in view of Section 1161, R. S. 1929.
TAXATION AND REVENUE:) (2) County Treasurer may make partial payment on warrant "next in line for payment" provided he can give proper credit and adjust his own records.

December 16, 1937.

12-30

FILED
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Honorable B. G. Dilworth
Prosecuting Attorney
Dent County
Salem, Missouri

Dear Sir:

This Department acknowledges receipt of your letter of December 11th, wherein you make the following inquiry:

I.

"At the November, 1937, term of Dent County Circuit Court, Security State Bank, plaintiff, a Missouri banking corporation, obtained judgment against Dent County, Missouri, defendant, in the total sum, including interest, of $6101.73, said judgment being based on 1933 County Warrants of Dent County.

"Judgment provided for execution to issue thereon. Within the past week plaintiff's attorney has made a levy under said execution on a town lot described as 67 feet of the east side of lots one and four of block twelve, original town site of Salem, Missouri. This lot was purchased several years ago by the County Court out of general revenue funds and has since that time stood vacant and unoccupied of any building of any kind or description. It has at present, and before the rendition of this judgment, some very crude hitch-racks, which are composed

> of posts and cross-bars. Although the record of the County Court does not show the fact, this lot was originally purchased with the idea in mind of at some future time, erecting a jail building thereon. This was never done nor even started.
>
> "The County Court are very insistent that I, the Prosecuting Attorney, proceed in some manner to quash this execution and levy at the return term, which is the April, 1938 term of our Circuit Court. I have made as thorough a search of the law as my library facilities will permit and am unable to find any statute or case which, under the circumstances as above stated, would prevent levy or sale of this lot. The only statute which I find applicable is Section 1161, R. S. Mo., 1929, which provides only that 'Courthouses, Jails, Clerk's Offices and other buildings owned by any county * * * shall be exempted from taxes and execution.'
>
> "I would appreciate your opinion as to what possible grounds the County would have for quashing the above mentioned execution and levy."

The general rule with respect to county, municipal or public property being subject to execution, and the exceptions thereto, is contained in 23 Corpus Juris, page 355, paragraph 105:

> "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. But property held for public purposes is not subject to execution merely because it is temporarily used for private purposes, although if the public use is wholly abandoned it becomes subject to execution. Whether or not property held as public property is necessary for the public use is a political, rather than a judicial question."

The question as to the liability of the property of a public corporation held for public uses and governmental purposes to levy and sale under an execution, is discussed in the case of Snower v. Hope Drainage District, 2 Fed. Sup. 931, l. c. 933:

"The writ of garnishment which has heretofore been issued cannot be enforced against the deposit in the Pattonsburg Bank. The Hope drainage district is a municipal corporation. State ex rel. v. Drainage District (Supreme Court of Missouri) 49 S. W. (2d) 121, 125. It is elementary in the law that the property of a public corporation held for public uses and governmental purposes is not subject to levy and sale under execution against the corporation. 23 Corpus Juris, 355. Plaintiff makes no question of this general rule, but suggests that the money which has been collected by the drainage district for the payment of bonds issued against the district, and which is now held for the district, is not property held for public uses but is private property of the district and, therefore, is subject to seizure under execution. The suggestion is untenable. Certainly what has been collected by a municipal corporation to pay the principal and interest of bonds issued by it isheld for a public use. If the fund which has been collected by the drainage district is private as distinguished from public property, then it is subject to execution in favor of any judgment creditor whatsoever; for if property is private it is not private as to some and public as to others. If one judgment creditor can seize it, so can another. But it would hardly be contended that any creditor of the drainage district having a judgment against it as, for example, some engineer it may have employed and failed to pay, could seize a fund which had been collected by taxation for the specific purpose of paying bonds or the interest thereon. So far then as the motion to quash the writ of garnishment is concerned, that motion should be sustained."

In the decision of Catron v. Lafayette Co., 125 Mo., l. c. 72, the court held to the effect that a levy and an execution could not be made against the poor-house and farm of a county. In the decision of Allen v. Trustees of School District, 23 Mo. 418, the court held that the property held for the use of a school district was not liable to execution. In the year of 1850 certain swamp lands were donated to the State of Missouri and in the year of 1868 the said lands were donated in turn to the several counties of the State and it was held by the court in the case of State ex rel. v. The County of New Madrid, 51 Mo. 82, that the said swamp lands were exempt from any ordinary liability for county indebtedness. It was held in the case of State to the Use of Board of Education v. Tiedemann, 69 Mo. 306, that a school district, being a public corporation, was not subject to the process of execution as far as the school building or school property was concerned.

The provisions of Section 1161, R. S. Mo. 1929, are as follows:

> "All courthouses, jails, clerks', offices and other buildings owned by any county or municipality, and the lots on which they stand, and all burial grounds, shall be exempt from attachment and execution."

By a strict construction of the section and on the bare facts as you present them the lot in question would appear to be subject to execution. The decisions which we have quoted herein bear directly and indirectly on the general rule to the effect that property held for public purposes and generally everything held for governmental purposes is not subject to levy but where the municipality or the county owns property in its proprietary, as distinguished from its public or governmental, capacity that said property is subject to be seized and sold under an execution.

The most exhaustive discussion of the question is contained in 17 Ruling Case Law, paragraph 43, page 145, as follows:

"As a general proposition an execution cannot be levied against the property of a county, state, or municipal organization, in the absence of a statute expressly granting such right in express terms. Even where such a right is granted, however, it is a general rule that an execution cannot be levied on any property held by a municipal or other public corporation for public purposes such as public buildings, schoolhouses, streets, alleys and public squares, parks, promenades, waterworks, wharves and landing places, fire-engines, hose and hose carriages, engine-houses and engineering instruments, the principle being that title to such property is held in trust for the public, and hence can no more be sold to satisfy the debts of a city or other political subdivision than can any other trust property be sold to satisfy the individual debts of any other trustee. Similarly, on the ground of public policy, an ordinary execution cannot be levied on any of the general revenues of a county or city, either before or after they are collected. Moreover, it has been held that liquors held by a town for the purpose of carrying on a dispensary under legislative authority stand in the same position as other property used by the town in the administration of its government, and, accordingly, are exempt from the levy of an execution on a judgment against it. It frequently happens, however, that a city or other municipality is possessed of property, both real and personal, which is not, and never can be, needed for municipal use, the appropriation of which to the payment

> of the city's debts could not in any way affect the public. Such property, by the great weight of authority, is treated as the private assets of the municipality, and may be levied on and sold under an ordinary execution. For instance, residence property conveyed to and received by a city from its tax collector as a settlement of taxes collected by him and not paid over, such property not being adapted to or used by the city for any public purpose, is not exempt from levy and sale under execution. However, a public quay in a city, dedicated to public use, does not cease to be locus publicus, and become leviable as private property, because it is leased by the public authorities for a purpose subservient to the public use. The question as to whether property is reasonably necessary for public use must ultimately be determined by the court. Presumptively, however, all property of every kind held by a municipality is for the public use, and the onus of overcoming such presumption rests on the plaintiff in execution. In case of doubt, therefore, the question will always be resolved in favor of the city, the interests of the individual being of necessity subservient to the due and proper administration of government, or, in other words, as the revenues of a city must, in a large measure, be raised by taxation, the creditor will be required to wait for payment rather than be permitted to embarrass the corporation by selling property needed for the public welfare."

The manner in which the county now holds the lot in question, or uses the same, is a question of fact which the court will have to determine. As stated in Corpus Juris, supra, "Whether or not property held as public property is necessary for the public use is a political, rather than a judicial question."

It appears to be a matter which is governed largely by the facts and on which you can only present your own and the views as herein expressed to the court.

II.

Your letter contains an additional paragraph, which is as follows:

> "There is also in the hands of the Treasurer of Dent County, some money of 1933 revenue, accruing from payment of back taxes. This sum on hands is not sufficient to pay one warrant which stands registered and next in line for payment. This particular warrant which is next in line is one of the warrants sued on, upon which judgment was returned as above stated. Is it proper, assuming the Security State Bank will accept the sum, for the County Treasurer to pay over such funds as are on hand in partial payment of this one warrant, where credit is made on the back of said warrant and partial satisfaction of the above judgment is made on the Judgment Records of the Circuit Clerk's office?"

The method of paying warrants without referring to the statutes and the authority to apply a surplus to outstanding warrants is contained in the decision of State ex rel. v. Johnson, 162 Mo. 621, as follows:

> "A county warrant valid when issued is not rendered invalid because the revenue provided to pay it is not collected during the year in which it was issued, or is misappropriated by the officers of the county for whose act the holder of the warrant is not responsible. On the contrary,

> the surplus county revenue remaining after the payment of all current expenses of every kind for the year for which such revenue was levied and collected, may be used in the payment of outstanding valid unpaid county warrants for previous years. Such warrants are to be paid in the order of their presentation and registration, and are not payable pro tanto if there is not a sufficient fund to pay all. Where such surplus is applicable to the payment of the warrants of previous years in the order of their registration, it is the duty of the county treasurer to pay them without waiting for an order of the county court distributing such surplus among the various county funds. No further appropriation or order by the court is necessary. The warrant itself is the voucher the law recognizes as the treasurer's authority for paying it."

In view of the above decision we think it is proper to pay the warrant mentioned in the above paragraph, it being, as you state, "next in line for payment," in the manner as contained in your letter, provided the county treasurer can give to all concerned proper credit and especially can adjust his own records.

Respectfully submitted,

OLLIVER W. NOLEN
Assistant Attorney-General

APPROVED:

J. E. TAYLOR
(Acting) Attorney-General

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