RECENT CASES

INSURANCE — PERMANENT DISABILITY — PRESUMPTION OF PERMANENCY.—The plaintiff held a life insurance policy, containing a provision for disability benefits, in the defendant company. The policy was to compensate only for total and permanent disability but provided that if due proof of total disability existing for a period of 90 days were furnished, the disability would be presumed to be permanent and benefits would be paid during the continuance of such total disability. The plaintiff was totally disabled for 90 days and upon his recovery presented a claim for benefits, which the company refused to pay. *Held,* no recovery since plaintiff's own proof rebutted the presumption that the disability was permanent. *Thorne v. State Mutual Life Ass. Co.,* 13 N.J.Misc. 271 (Sup. Ct. 1935).

This case differs sharply in result from *Clott v. Prudential Ins. Co.,* 114 N.J.L. 18 (Sup. Ct. 1934) where an action was brought on a similar policy. There plaintiff presented a claim for total and permanent disability benefits while still totally disabled. At the trial his proof showed that he had recovered and hence that his disability had not been permanent. A verdict for plaintiff was affirmed. Courts find policies of this type extremely troublesome and it is impossible to reconcile the conflicting decisions on the basis of different language being involved. In *Penn Mutual Life Ins. Co. v. Wilton,* 160 Ga. 168, 127 S.E. 140 (1925), a recovery was permitted for 16 months of "permanent" disability, though the insured was completely well at the time of trial. Cases reaching similar results are *Kurth v. Continental Life Ins. Co.,* 234 N.W. 201, (Iowa 1931); *Adamson v. Metropolitan Life Ins. Co.,* 157 S.E. 104 (Ga. 1930); *Eastep v. Northwestern National Ins. Co.,* 208 N.W. 632 (Neb. 1926); *Bagnall v. Travelers Ins. Co.,* 296 Pac. 106 (Cal. 1931). These cases proceed on the theory that the clause containing the presumption of permanence contemplated payments for *total temporary* disability and that it is immaterial that plaintiff be recovered at the time of trial. Heading the authorities adopting a contrary view is *Ginell v. Prudential Ins. Co.,* 200 N.Y.S. 261, *rev'd.* on dissenting opinion, 237 N.Y. 554 (1923) where any corruption of the ordinary meaning of permanent was emphatically refused. Courts refusing recovery have considered that the presumption of permanence clause was inserted because of the recognized difficulty of proving a state of permanence with any certainty, giving the insured the benefit of the doubt while his condition is apparently permanent. But while the company contemplates that it may make payments which will later turn out to have been for a temporary disability, it never intends to begin payments for a disability which has already terminated. *Brod v. Detroit Life Ins. Co.,* 235 N.W. 248 (Mich. 1931); *Hawkins v. John Hancock Mutual Life Ins. Co.,* 218 N.W. 313 (Iowa 1928); *Conley v. Pacific Mutual Life Ins.*

Co., 8 Tenn. App. 405; *Shipp v. Metropolitan Life Insurance Co.*, 111 So. 453 (Miss. 1927). The two groups of cases differ basically on the question of whether an ambiguity is raised as to the meaning of "permanent" by other clauses in the policy. The *Ginell* case, and those which follow it, hold not and ascribe to the word its ordinary meaning. The *Wilton* case and others hold in the affirmative, and, following well recognized principles of construction, resolve the ambiguity against the insurer. *Harris v. Ins Co.*, 83 N.J.L. 641 (E. & A. 1912); *Ins. Co. v. Maackens*, 38 N.J.L. 564 (E. & A. 1876); *Gans v. Ins. Co.*, 99 N.J.L. 44 (Sup. Ct. 1924).

Despite the apparent conflict in doctrine in the *Thorne* and *Clott* cases, it is submitted that they are distinguishable. In the former no proof of disability was furnished until the condition had terminated, while in the latter the proof of claim was made at a time when the disability was presumptively permanent. In the *Thorne* case, then, no cause of action ever accrued, in the *Clott* case a cause of action became established, but according to the company's contention, was lost by subsequent developments. This construction would place a premium on dilatoriness in the company's allowing benefits under the presumption of permanence clause. The distinction in the two cases is supported by the two Iowa cases. *Hawkins v. Ins. Co., supra,* and *Kurth v. Ins. Co., supra,* and they appear properly decided on their facts.

MUNICIPAL CORPORATIONS—EXECUTION—LIABILITY OF PROPERTY OWNED BY A MUNICIPALITY TO EXECUTION—The City of Asbury Park was authorized by statute to purchase lands bordering on the ocean for public purposes, to improve the same, and to issue bonds in payment therefor. The statute also provided that the city might lease the lands to raise money to pay the principal and interest on the bonds. In pursuance of authority given, the city erected a bathing pavilion which it leased to an individual. In a suit for damages for injuries sustained, a patron of the pavilion recovered a judgment against the city on the finding that the city was negligent and the operation of the bathing establishment was a proprietary business. *Martin v. Asbury Park,* 111 N.J.L. 364 (E. & A. 1933). The plaintiff of that suit caused the lands upon which the pavilion stood to be levied upon under an execution issued upon the judgment. The Supreme Court set aside the levy and the plaintiff appealed. *Held,* that the land levied upon was purchased for a public purpose and, as such, was not liable to execution. The court reasoned that the finding in the negligence suit as to *use* was not a finding as to *purpose;* and that because the private use under the lease was only in order to make the public purpose self-supporting, the underlying public character and nature of the property was not changed. *Martin v. Asbury Park,* 114 N.J.L. 298 (E. & A. 1935).

It is an unassailable rule in this state, as in other jurisdictions,

that property used by a municipal corporation in its governmental functions cannot be taken in execution upon a judgment against the corporate body. *Lyon v. City of Elizabeth,* 43 N.J.L. 158 (Sup. Ct. 1881); *Darlington v. New York,* 31 N.Y. 164, 88 Am. Dec. 248 (1865); *Ranson v. Boal,* 29 Ia. 68, 4 Am. Rep. 195 (1870); *Curry v. Savannah,* 64 Ga. 290, 37 Am. Rep. 74 (1879); *State v. Tiedemann,* 64 Mo. 306, 33 Am. Rep. 498 (1879); *Meriwether v. Garrett,* 102 U.S. 472, 26 L. Ed. 197 (1880); *Emery County v. Burrenson,* 14 Utah 328, 37 L.R.A. 732 (1896); *Ellis v. Pratt City,* 111 Ala. 629, 33 L.R.A. 264 (1896). As a municipality is a mere instrumentality through which the legislature administers the civil policy of the state, it cannot in the absence of express legislation be deprived of property indispensable to the exercise of its functions. To allow an individual to hinder the operations of a soverignty would be against public policy and a constant menace to the very existence of the body corporate. An analagous rule protects quasi-public corporations from levy of execution in certain types of property. In *Margo v. Penna. R.R. Co.,* 213 Pa. 468, 62 Atl. 1081 (1906), a levy was made on railroad ties, rails and lumber used by the company for emergency purposes. On the grounds of public policy, seizure of property necessary to the performance of its duties to the public was not permitted. See also *McColgan v. Baltimore Belt R. Co.,* 85 Md. 519, 36 Atl. 1026 (1897).

Conversely, it is a general rule that property of a municipality used for private or proprietary benefit, rather than for governmental or public reasons may be levied upon to satisfy execution. As the taking of such property does not hamper the exercise of the functions of government, the reason for the immunity is gone and the municipality may be treated as an artificial person like any private corporation. See *Darlington v. New York,* 31 N.Y. 164, 88 Am. Dec. 248 (1865); *Sherman v. William,* 84 Tex. 421, 19 S.W. 606 (1892); *State v. Buckles,* 8 Ind. App. 282, 35 N.E. 846 (1893); *Beadles v. Fry,* 15 Okla. 428, 82 Pac. 1041, 2 L.R.A. (N.S.) 855 (1906).

At first glance, one is inclined to think that the court in the principal case is quibbling to find a distinction between the meaning of the word *use* and the words *purpose of the use.* A more careful analysis reveals that there are substantial reasons for the distinction on the facts of this case, that the court is not just skillfully evading an undesirable result by a play upon words. By legislative declaration the statute under which this land was acquired authorized a purchase for public purpose only. By expressly providing for a letting of the lands, the legislature necessarily gave its consent to the city's using the lands in a proprietary manner. However, the income derived from the leases was to be dedicated to repairs and improvements on the property and to paying the interest and principal of the bonds as they became due. The purchasing of the lands, the erecting of bathing pavilions, and the leasing were all component parts of the one public purpose, to give the municipality control over the riparian lands so

that it might extend the benefits of the ocean and beach to all. The finding that the incidental leasing was proprietary cannot of itself change the whole purpose of the act.

The plaintiff's rights are not impaired by the setting aside of the levy. She may resort to the usual method of obtaining satisfaction of a judgment against a municipality by a *mandamus* proceeding. See *Rahway v. Munday,* 44 N.J.L. 395 (E. & A. 1882).

To allow the plaintiff to seize upon this land and defeat the legislative purpose of offering the natural advantages of the beach to the public at large would be against reason and sound public policy.

MUNICIPAL CORPORATIONS—TORT LIABILITY FOR INJURIES SUSTAINED IN PUBLIC BUILDINGS. — Defendant municipality owned a borough hall which was divided into three sections. The middle part was used for the borough hall and offices, the west wing was given over to the use of the police department, and the east wing was rented out to the Federal government as a post office. In this wing was also located a toll telephone, from which the city received a small revenue. Each wing had its own separate entrance, and the east wing was closed off from the rest of the building. Plaintiff was guided through an entrance in the back yard into the police station, and upon finishing his business there, left alone by the same route. While making his way through the back yard to a roadway at the west end of the building, plaintiff fell into an unguarded, sunken ramp, and was injured. *Held,* that there was no liability on the municipality, since the post office and telephone booth were as effectively set off from the rest of the building as though they were in a separate building, and since the plaintiff's business had nothing to do with either the post office or telephone booth. *Allas v. Rumson,* 114 N.J.L. 227 (Sup. Ct. 1935).

The general rule as to buildings owned by a municipal corporation in its governmental capacity is that it is not, in general, liable for injuries sustained by an individual who has sustained a special damage through the neglect of the municipal corporation to perform a public duty, unless the right of action is conferred by statute. *Watkins v. Freeholders of Atlantic,* 73 N.J.L. 213 (Sup. Ct. 1906); *Johnson v. Bd. of Ed. of Wildwood,* 102 N.J.L. 606 (E. & A. 1926). Likewise, it is equally well settled that with regard to property owned by a municipal corporation in a private or proprietary capacity, it is liable to the same extent as a private owner. *Ketcham v. Newark,* 3 N.J. Misc. 399 (Sup. Ct. 1925) (city market); *Zboyan v. City of Newark,* 104 N.J.L. 258 (Sup. Ct. 1928) (city market); *Martin v. Asbury Park,* 111 N.J.L. 364 (E. & A. 1933) (bathing pavilion); *Buckelew v. City of New Brunswick,* 113 N.J.L. 338 (E. & A. 1934) (city market). But it is considered that where a municipality lets a portion of a municipal building for hire, it is liable for injuries caused by a defect or want of repair, or for the negligence of its agents and servants in the management of the building, and this rule applies even where the

building was erected for governmental purposes. Perhaps the first case in this country dealing with this situation is that of *Oliver v. Worcester,* 102 Mass. 489 (1869). In that case the city of Worcester owned a city hall, part of which was rented out by it. The building was situated on a public common, crossed by footpaths cared for by the city and used by the public for more than twenty years. Servants of the city, acting by its authority, made an excavation for the purpose of introducing steam works into the hall. This excavation was left open and unguarded, and the court held that a person who, walking on one of the paths with due care, and coming there rightfully under an implied invitation and license, and who fell into the open hole, might maintain a common law action for the injuries received. Then, in *Larrabee v. Peabody,* 128 Mass. 561 (1880), the plaintiff sought to hold the town liable for injuries sustained by him by falling into a trench near a path leading into a town-house and school house, on the theory of the *Worcester* case. The plaintiff, it appeared, visited the town-house to attend an entertainment given by a temperance society, which on this occasion, as at previous times in the past, had the gratuitious use of the hall. The town received no compensation or profit from the use. The court held that the case was not, therefore, within the reason of the rule relied upon by the plaintiff. *Worden v. New Bedford,* 131 Mass. 23 (1881), was a case in which the defendant let its city hall, for profit, to a poultry association. The sum paid by the association included compensation for lighting and heating and for the services of the city's janitor, who had charge of the hall. Plaintiff, while rightfully in the rooms and using due care, was injured by the carelessness of the janitor in his management of the building. The court held that the city was dealing with the city hall, not in the discharge of a public duty, but for its own benefit and gain in a private enterprise, in the same way as a private owner might, and was liable for negligence in the management of the property to the same extent as such private owner would be. See also *Little v. Holyoke,* 177 Mass. 114, 58 N.E. 170 (1900). Outside of Massachusetts, there have been but a few isolated cases involving this question. One is *Lowe v. Salt Lake City,* 13 Utah 91, 44 Pac. 1050 (1896), where the city rented a floor of its city hall to the legislature, and received rent therefor. Plaintiff was a member of the legislature, and was attending session. There was a yard in back of the hall, in which there was an unguarded hatchway. Plaintiff had occasion to go into the dark yard in search of an outhouse, fell into the hatchway, and was injured. The court held that, in the absence of any restriction, plaintiff had the right to use the yard, and held the city liable. In *Chafor v. Long Beach,* 174 Cal. 478, 163 Pac. 670 (1917), the city owned a wharf or pier, on the outer end of which it had constructed an auditorium, with a platform leading into it. The platform broke from the weight of the people using it, and the plaintiff was thrown onto the sand and injured. *Held,* that although the building had been erected for the public, it was not

in a governmental capacity, that the general purpose differed not a bit from ordinary privately owned property, since the city could rent it; the fact that on this occasion it received no rent was not decisive. The city was therefore liable. A more recent case is that of *Douglas v. Hollis,* 172 Atl. (N.H.) 433 (1934). Here the town leased the third floor of its hall to a lodge, and retained control of the premises. The plaintiff was a guest at a meeting of the lodge. When the meeting was over, plaintiff walked through the yard where cars were parked, and fell into an unguarded cellarway. The court held the city liable, there being a duty on a landloard city to keep reasonably safe the portion of leased premises retained in its possession or held open by it for the use of its tenant and tenant's invitees. It is evident from a reading of the cases that each one must stand on its own facts. It must be first found that the municipality is dealing with a public building in a private or proprietary capacity in giving over a part thereof to the use of another, and when that has been affrmatively determined, the ordinary rules of negligence applicable to a landlord and tenant relationship will decide the ultimate liability of a municipality for injuries resulting from such use. The instant case appears to have been rightly decided on its particular set of facts.

NEGOTIABLE INSTRUMENTS—SIGNATURE IN UNUSUAL PLACE.—Defendants' signatures to a promissory note were in the upper left hand corner of an ordinary printed form, and it was contended that by virtue of the provisions of §63 and §17 of the NEGOTIABLE INSTRUMENTS ACT, the signers were endorsers rather than makers, in which capacity they were sued. If endorsers, they would not have been liable since they had not received notice of presentment and dishonor. *Held,* that while the signatures were not in the usual place on the note, they clearly imported an intention to be bound thereby, and since there were no other makers, the signatures must have been as makers, otherwise the note would not have been an obligation at all. *Field v. Lukowiak,* 114 N.J.L. 268 (E. & A. 1935).

Section 17 (6) of the N.I.L. provides "Where a signature is so placed upon the instrument that it is not clear in what capacity the person making the same intended to sign, he is to be deemed to be an indorser." Section 63 is to substantially the same effect. However, the place of signature is not controlling as to whether a signer is a maker. *Kistner v. Peters,* 223 Ill. 607, 79 N.E. 311 (1906). Thus, the signature of a person on the back of a note may constitute him a maker where apparently so intended. *Nussear v. Hazard,* 148 Md. 345, 129 Atl. 506 (1925). It may be written across the face of the instrument. *Patillo v. Mayer,* 70 Ga. 715 (1883). Or the signature may appear in the body of the bill or note. *Armstrong v. Kirkpatrick,* 79 Ind. 527 (1881). In fact, the signature as maker may be placed on any part of the paper. *Hunt v. Adams,* 5 Mass. 358 (1809); *Kistner v. Peters, supra.* The principal effect of the maker's signing

in an unusual place is in changing the burden of proof. Where the signature is in the usual place for the signature of a maker or drawer, a presumption arises that the signature is in that capacity. *Camden v. McCoy,* 4 Ill. 437, 38 Am. Dec. 91 (1842); *Kirpner v. Lincoln,* 54 Ill. App. 675 (1894). But where the signature is in an unusual place, proof that the party sought to be held as maker signed in that capacity must be offered. *Miers v. Coates,* 57 Ill. App. 216 (1894); *Knox v. Rivers Bros.,* 88 So. 33 (Ala. 1920). In the instant case, no proof was offered as to the capacity in which the defendants had signed. The court evidently drew an inference from the absence of a signature in the place designated for the maker that defendants had signed as such. It would seem that a motion for non-suit was properly denied, since that inference would entitle plaintiff to go to the jury.

SEPARATE MAINTENANCE—HUSBAND'S DUTY TO SUPPORT WHERE WIFE GUILTY OF MARITAL MISCONDUCT.—Petitioner filed her bill for separate maintenance, alleging extreme cruelty, abandonment and refusal of defendant to support her and her child. In a previous action and cross-action for divorce, both parties had been adjudged guilty of adultery and both petitions dismissed. *Held,* that the husband's refusal to support her was justified by petitioner's marital misconduct. *Piper v. Piper,* 13 N.J.Misc. 68 (Ch. 1934).

At first blush, the result seems harsh in equity because the wife can get neither a divorce nor support; she must remain tied to her husband but he has no duty toward her. Further the case looks unsound since the common law obligation of support resting upon a husband is a dual obligation owed to the wife and to society and continues unless and until the husband divorces her. *Bates v. Bates,* 2 N.J.Misc. 400 (Ch. 1924). However, jurisdiction of the court to grant support is purely statutory. *Baumgarten v. Baumgarten,* 151 Atl. 606 (Ch. 1930). The statute applies only where the husband without any justifiable cause has abandoned or separated himself from the wife and refused or neglected to support her. 2 C.S. 1910, p. 2038, Sec. 26 (P.L. 1907, p. 482). The only justifiable cause for abandoning or separating from a wife and refusing to provide for her is an offense on her part entitling the husband to a divorce. *Bradbury v. Bradbury,* 74 Atl. 150 (Ch. 1909). Justifiable causes for desertion are adultery or extreme cruelty. *Howey v. Howey,* 77 N.J.Eq. 591, 78 Atl. 696 (Ch. 1910). Adultery by the wife is a good defense to a suit for maintenance. *Sabbarese v. Sabbarese,* 104 N.J.Eq. 600, 146 Atl. 592 (Ch. 1929), *aff'd* 107 N.J.Eq. 184, 152 Atl. 920 (E. & A. 1930). But the wife's adultery, committed with the collusion or consent of the husband, is not a justifiable cause relieving him from the duty of supporting her. *White v. White,* 87 N.J.Eq. 354, 100 Atl. 235, L.R.A. 1917 D 639 (E. & A. 1917). In the instant case petitioner's adultery was not committed with the collusion or consent of defendant, and was accordingly a justifiable cause under the statute. Unless, there-

fore, the husband's own misconduct can be set off against that of the wife, the result in this case must be regarded as sound. The court definitely rejected the proposition that a court of equity could balance against each other, in an action for maintenance, the mutual misconduct of husband and wife so as to leave her with all her original marital rights unimpaired. This view, as well as the result, finds support in *Hawkins v. Hawkins,* 193 N.Y. 409, 86 N.E. 468, 19 L.R.A. (N.S.) 468, where a similar statute was applied to a similar state of facts; as well as in the English cases. In *Govier v. Hancock,* 6 T.R. 603, the wife's adultery was held to excuse the husband from supporting her, even though he had first committed a similar act. *Stimpson v. Wood,* 57 L.J.Q.B. (N.S.) 485 held, in effect, that a wife living in adultery lost all right of support, although her husband was doing the same thing. In *Hope v. Hope,* 1 Swabey & T. 94, a contention that, the guilt of each party being the same, their mutual delinquencies were thereby compensated, was rejected. See also *Culley v. Charman,* L.R. 7 Q.B. Div. 89; *Drummond v. Drummond,* 2 Swabey & T. 274; and *Otway v. Otway,* L.R. 13 Prob. Div. 141. The result of the instant case therefore seems sound and the wife can get no support from the husband until her offense has been condoned. However, if the wife is in danger of becoming a public charge, the husband can be compelled to support her under the Act for the Settlement and Relief of the Poor, P.L. 1931, Chap. 373, Sec. 60; the Disorderly Persons Act, P.L. 1930, Chap. 110, Sec. 17; or the Juvenile and Domestic Relations Courts Act, P.L. 1929, Chap. 157, Sec. 2.