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Enforcement of Judgments against Municipal Corporations

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LEGAL literature contains the fruits of a vast amount of careful research analyzing and discussing the contractual, quasi-contractual, and tort liability of municipal corporations of all types under a wide variety of situations. One who scans the voluminous material on this general subject will doubtless find refreshment in the extent to which governmental agencies are compelled in a democratic society to assume the responsibilities which are imposed upon individuals and private business organizations in their manifold relationships. The lowly street vendor who recovers a judgment against a great metropolitan city for personal injuries sustained as a result of the negligent operation of a motor vehicle used by some municipally owned utility contributes to the folklore on this engrossing subject. Certainly such an event would seem to be strong evidence of the inherent justice embodied in democratic institutions. The lawyer will readily note that this street vendor was fortunate in getting hit by a waterworks or light plant truck instead of by a police wagon, since in the latter event the city would have been engaged in a "governmental" instead of a "proprietary" function and would have enjoyed complete immunity from all liability. We are not, however, presently concerned with the imbroglio suggested by this unpleasant possibility. The purpose of our discussion is to focus a little light upon the word "recover" so often used in references to the termination of a law suit adversely to a municipal corporation, and to analyze some of the means by which creditors of municipalities can compel payment of their claims. The limitations upon the various collection devices will also be treated in some detail.

Two fundamental concepts underlying the law of municipal corporations must be kept clearly in mind in the consideration of this general problem. The first is the well established principle that municipal corporations are crea-
tures of the state, have no inherent powers, and derive all their authority from the state.\(^1\) However, approximately one-third of the states have adopted constitutional amendments granting to municipalities the right to frame their own charters and to determine the extent of their powers in so far as purely local affairs are concerned and in such jurisdictions municipal corporations are unquestionably something more than administrative arms of the state.\(^2\) The second basic principle is the division of all municipal functions into two classes: those which are public or governmental and those which are private or proprietary in character. The limitations imposed by the application of these two principles will serve to explain, if not to justify, many of the peculiar problems underlying the legal relationships between municipalities and their creditors.

The remedies most appropriate for use in connection with attempts to enforce payment by municipal corporations of their obligations would seem to be execution and levy upon corporate property, attachment, garnishment, creditor's bill, mechanics' lien proceedings, and mandamus. Only the first and last of these possible procedures will be theoretically available in all cases. The other remedies will be available, if at all, in particular situations.

The idea that a creditor of a municipality may reduce his claim to judgment, secure execution thereon and levy upon the judgment debtor's property will doubtless startle many practitioners. It must be admitted that this procedure is rarely employed, apparently because of the general impression that judgment liens cannot attach to municipal property on account of some supposedly fixed principle of absolute immunity extended by the law in order to protect the essential functions of municipal corporations from the disruptions which might be incident to this remedial process. But a municipality today may own a considerable amount of prop-

\(^1\) For a complete discussion of the relationship between municipalities and the state see William B. Munro, Municipal Government and Administration (1925 ed.), chapters 1-5 and 8.

\(^2\) The following states have constitutional provisions for local self-government adopted in the years shown: Missouri (1875), California (1879), Washington (1889), Minnesota (1896), Colorado (1901), Oregon (1906), Oklahoma (1907), Michigan (1908), Texas (1909), Arizona (1910), Nebraska (1912), Ohio (1912), Maryland (1915), Pennsylvania (1922), New York (1923), Wisconsin (1924).
ertainty of a private or proprietary character which is not indispensable to the fulfillment of the public functions for which such municipality was created. Is there any reason why such property should not be subjected to the payment of creditor’s claims? Many courts have evidently thought not. In a substantial number of jurisdictions the courts have been unwilling to exempt the private property of municipal corporations from seizure by judgment creditors in satisfaction of claims, recognizing that payment of just obligations is itself one of the highest duties owed by municipalities to their inhabitants. If this view is sound, then it is certainly fatuous reasoning to say that the common law remedy of execution and levy, if allowed, would hinder and embarrass a municipality in the performance of its corporate functions, since one of those corporate obligations is to be enforced by the process. Whatever validity there may be to the case against making the public property of municipalities subject to execution and levy, little if anything can be said for the extension of this protection to the property which is held in a private or proprietary capacity. However, some courts have apparently proceeded upon the theory that such private property should also be exempt where it is revenue producing, since the revenues received may be used and may be necessary to finance the essential obliga-

3 In the following cases municipal property held for purposes not connected with any public function was held to be subject to levy under execution: City of Sanford v. Dofnos Corporation, 115 Fla. 795, 156 So. 142 (1934), involving property acquired under tax foreclosure proceedings; City of Bradenton v. Fusillo, 184 So. 234 (Fla., 1938); Southern Railway Co. v. Hartshorne, 150 Ala. 217, 43 So. 583 (1907), involving vacant land which the municipality had attempted to donate to a railroad company; Murphree v. City of Mobile, 108 Ala. 663, 18 So. 740 (1895), involving proceeds from sale of land not held for governmental purposes; Murphree v. City of Mobile, 104 Ala. 532, 16 So. 544 (1894), where land was held for a burial ground and was not used; C. J. Kubach Company v. City of Long Beach, 3 Cal. App. (2d) 567, 48 P. (2d) 181 (1935), involving an oil lease on subsurface of property used for waterworks; Beadles v. Fry, 15 Okla. 428, 82 P. 1041 (1905); Gordon v. Thorp, 53 S. W. 357 (Tex., 1899); State ex rel. Courter v. Buckles, 8 Ind. App. 282, 35 N. E. 846 (1893); City of New Orleans v. Home Mutual Ins. Co., 23 La. Ann. 61 (1871), involving bonds issued by a private company and owned by city; Doyle v. City of Astoria, Or., 262 N.Y.S. 572 (1932), allowing attachment of funds in bank derived from operation of waterworks system; Harman v. City of Fort Lauderdale, 234 N.Y.S. 196 (1929), involving bonds and certificates of indebtedness of port authority owned by city; Shamrock Towing Co. v. City of New York, 20 F. (2d) 444 (1927); Hart v. City of New Orleans, 12 F. 292 (1882).

4 Dillon, Municipal Corporations (5th ed., 1911), § 992. Execution against public property which is essential for the rendition of vital public services, cannot, of course, be defended.
tions of the municipality. Hence, indirectly, according to this argument, a sale upon execution of municipal property held in a proprietary capacity would be just as detrimental as a judicial sale of property held for strictly public purposes. A further and logical extension of this same argument, however, would lead to the absurd conclusion that the payment of accrued claims against a municipality should never be enforced when all revenues received by the municipality could be used to furnish public services more necessary and beneficial than those which gave rise to the accrued claim. The compulsory payment of any accrued debt even by judicially sanctioned and legislatively approved mandamus proceedings will, of course, result in the “loss” of funds which would otherwise be available to finance new services for the benefit of the public. However, the most ardent advocates of complete immunity would probably not be willing to maintain that a municipality should be able to spend all of its income in the performance of current functions to the exclusion of its accrued debts. Some functions, such as the efficient maintenance of adequate fire-fighting resources, law enforcement facilities, water supply, and sewage systems, are doubtless entitled to priority over the payment of accrued obligations, but there is no virtue in a policy which would recognize the right of a municipality to expand its services and embark upon improvements not indispensable, while creditors of the corporation with claims overdue are compelled to trust in a more favorable financial position on the part of the municipality in the uncertain future.

The case against the allowance of the writ of fieri facias against municipal corporations was vigorously and fully presented by the Illinois Supreme Court in an early case raising this issue as a matter of first impression. In reaching the conclusion that the ordinary writ of fieri facias could not legally be issued against a municipal corporation the court observed as follows:

There can be no doubt that the property of a private corporation may be seized and sold under a *fi. fa.* for the payment of its debts, as in the case of an individual, such corporation being bound to provide for its just debts,

5 City of Chicago v. Hasley, 25 Ill. 595 (1861).
whether payment is made by a forced sale of its property for that purpose, or with money from its safe.

The nature, objects and liabilities of political, municipal or public corporations, we think stand on different grounds. These corporations signify a community, and are clothed with very extensive civil authority and political power. All municipal corporations are both public and political bodies. They are the embodiment of so much political power, as may be adjudged necessary, by the legislature granting the charter, for the proper government of the people within the limits of the city or town incorporated, and for the due and efficient administration of their local affairs. For these purposes, the authorities can raise revenue by taxation, make public improvements, and defray the expenses thereof by taxation, exercise certain judicial powers, and generally act within their limited spheres, as any other political body, restrained only by the charters creating them—beyond them, they cannot go. This power of taxation is plenary, and furnishes, ordinarily, the only means such corporations possess, by which to pay their debts. They cannot be said to possess property liable to execution, in the sense an individual owns property so subject, for they have the control of the corporate property only for corporate purposes, and to be used and disposed of to promote such purposes, and such only. Levying on and selling such property, and removing it, would work the most serious injury in any city. Many of our cities, Chicago especially, have costly water works, indispensable to the lives and health of the citizens. These works are as much the property of the city as any other it may control, and, in appellee's view, liable to be seized and sold on execution, to the great discomfort and probable ruin of the inhabitants. Fire engines are also indispensable; they too can be seized and sold, and a great city exposed to the ravages of fire, and all this to enable one or more creditors of the city to obtain the fruits of judgments against the city, which, by another process, not producing any of these destructive inconveniences, they could fully obtain. The money raised by taxation could also be levied upon, and the whole business of the city be broken up and deranged. Its offices and office furniture, its jails, hospitals and other public buildings, taken from the corporate authorities, and sold to strangers, who would have a right to the exclusive possession of them, if not redeemed. In the absence of an express statute authorizing a proceeding, fraught with such consequences, we must hold, that a fi. fa. cannot issue against the city of Chicago. 6

6 The majority opinion elaborates further: "Before we can assent to the proposition that political corporations, clothed with so many important powers of government, and so essential to be sustained in the exercise of all their rights and privileges, and be secured in their property and means by which their functions can be properly exercised for the benefit of the citizen, we must see some positive act of the legislature authorizing the issuing of such writ. The property of such corporations, and the taxes collected by them for public purposes, are a constituent part, and a necessary ingredient of their public power, and are no more liable to seizure and sale than the whole power itself would be. If not so, a party obtaining a judgment against the city would be able to do indirectly what no power short of the legislature can do—destroy the corporate powers and franchises by taking away the aliment which sustains them. Under our constitution it cannot be admitted that any power or any individual possesses, directly or indirectly, such an overwhelming influence over other powers as would enable either of them to put an end to their functions, and thus disorganize the government. It cannot be so. The power, if conceded, to seize the property
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One of the justices, however, was unpersuaded by the reasoning of the majority and in a vigorous dissenting opinion denied that there was any adequate basis either in precedent, in statutory provisions, or in the inherent nature of municipal corporations which called for a judicial determination to the effect that municipal property is exempt from execution and levy. In his dissenting opinion the justice stated:

As municipal corporations are created alone for public and not for private benefit, it may constitute a cogent reason why the legislature should exempt their property from sale on execution, or that such process should not issue against them, but does not, as I conceive, create the exemption. If such an exemption exists, I feel confident that it is not by the common law. After a careful search of all the elementary books and reports of adjudged cases which have come within my reach, I am unable to find that such a rule has ever been announced. I find at the common law they were liable to be sued, and judgment rendered against them precisely as if they were corporations created for private purposes. When it is remembered that the execution is the fruit of the judgment, if such an important exception existed, it would certainly have been announced either in Great Britain or some of the States of the Union. To my mind the fact that the question has never arisen, is conclusive that such an exception does not exist at the common law.

It will be conceded that this city is a body politic or corporate, as its charter has in terms declared that it shall be a "corporation by the name of the city of Chicago," and by that name may sue and be sued, complain and defend in any court. Nor does the charter exempt the city from having its property sold on execution. It would also seem that when the general assembly provided that the corporation might be sued, that as they failed to relieve it from the effects and consequences of a recovery in ordinary cases, that it must have been the design of the law-making power to leave them in precisely the same situation as individuals, or private corporations.

It will be noted that the Illinois court did not expressly distinguish between the property of a municipal corporation held for public purposes and property held in a private or proprietary capacity for revenue producing purposes. While it unquestionably is true that no satisfactory distinction can
be made between the two classes of corporate property in many instances, still cases frequently arise where the differentiation can be made with complete unanimity in the result, as where property acquired for corporate uses has ceased to be needed for the purposes intended and is vacant or leased to private individuals or concerns. As to such property, the writ of fieri facias can hardly be said to be more disruptive of municipal administration than the approved remedy of mandamus which may and often does divert revenues from useful public projects.

Nevertheless, the decision in City of Chicago v. Hasley has been scrupulously followed by the Illinois courts without question or qualification. It would seem that, if the courts so desired, they could interpret that case as denying the

7 For a representative and scholarly discussion of the difficulties inherent in a division of municipal functions into two general classes, governmental and proprietary, for the purpose of determining liability in tort, see Professor E. M. Borchard's exhaustive series of articles in 34 Yale L. J. 1, 129, 229; 36 Yale L. J. 1, 737, 1039; 28 Col. L. Rev. 577, 794.

As suggested elsewhere in this article, the classification of municipal activities on the basis of their governmental or proprietary character, for the purpose of deciding tort liability, is not followed in determining what corporate property may be seized to satisfy the claims of creditors. The private property of public bodies which may be seized upon execution is much more limited in scope than might be suggested by the usual classification where the pertinent question to be considered is one of tort liability. For example the following cases held that property which would normally be regarded as related to the private or proprietary functions of a municipality if a question of tort liability were involved, was not subject to execution: Mayor of City of Monroe v. Johnston, 106 La. 350, 30 So. 840 (1901), involving a gravel pit furnishing gravel for streets; Brockenborough v. Board of Water Commissioners, 134 N. C. 1, 46 S. E. 28 (1903), waterworks; Marin Water and Power Co. v. Town of Sausalito, 49 Cal. App. 78, 193 P. 294 (1920), waterworks; United Taxpayers' Co. v. City and County of San Francisco, 202 Cal. 264, 259 P. 1101 (1927), involving a jail building leased to private concern; C. J. Kubach Co. v. City of Long Beach, 8 Cal. App. (2d) 567, 48 P. (2d) 181 (1935); Eastern Union Co. of Delaware v. Moffet Tunnel Improvement District, 6 Harr. (Del.) 488, 178 A. 864 (1935), rental revenues; Board of Councilmen of City of Frankfort v. White, 224 Ky. 570, 6 S. W. (2d) 699 (1928), revenues from lease of opera house; Martin v. City of Asbury Park, 114 N. J. L. 298, 176 A. 172 (1935), land leased to private persons for a public bathing beach; City of Coral Gables v. Hepkins, 107 Fla. 777, 144 So. 365 (1932), golf course leased to private concern; Equitable Loan & Security Company v. Town of Edwardsville, 143 Ala. 182, 38 So. 1016 (1905), stock of liquors in municipal liquor dispensary.

8 See the following cases; Elrod v. Town of Bernardotte, 53 Ill. 368 (1870); Board of Trustees v. Schroeder et ux., 58 Ill. 353 (1871); City of Kinmundy v. Mahan, 72 Ill. 462 (1874); City of Bloomington v. Brokaw & Co., 77 Ill. 194 (1875); City of Elgin v. Eaton, 83 Ill. 535 (1876); Village of Kansas v. Junting, 84 Ill. 360 (1877); City of Paris v. Cracraft, 85 Ill. 294 (1877); City of Morrison v. Hinkson, 87 Ill. 587 (1877); City of Flora v. Nancy, 136 Ill. 45, 26 N. E. 645 (1891); Village of Dolton v. Dolton, 196 Ill. 154, 63 N. E. 642 (1902); Farrow v. Eldred Drainage District, 359 Ill. 347, 194 N. E. 515 (1935).
right of execution only against municipal property held in trust for essential public purposes. Such a limitation, however, would likely afford only a very limited extension of the opportunities available for the collection of creditors' claims, since the division of corporate functions into governmental and private for the purpose of determining tort liability would probably not be followed in classifying municipal property with reference to its exemption or non-exemption from execution. Municipalities are not authorized, ordinarily, to engage in operations of a strictly private nature and consequently the property which will normally be held for purely commercial purposes will never be very extensive. If municipal creditors are to be adequately protected, therefore, any extension in the use of the writ of execution will leave us far from a complete solution.

From an examination of the limitations upon the use of the writ of fieri facias we turn to a consideration of the writs of attachment and garnishment as instruments for the collection of municipal debts. Logically we should expect the same judicial attitudes with reference to these remedies as those which have been expressed in connection with the use of the common law writ of execution, and the cases reflect this parallelism. The funds of a municipality as well as its real and personal property may be essential to maintain necessary governmental functions, and public policy should prevent the subordination of public interests to the demands of creditors. The test here, as in other creditor's actions should be the extent to which the assets pursued are vital to the efficient rendition of basic public services. The source of the revenues involved in an attachment action should be immaterial, since the municipality may well have computed the income to be derived from proprietary operations and property as well as the income from public or governmental sources in drawing the annual appropriation ordinance providing for essential municipal functions. Some courts have not recognized this test, but it is submitted that no other approach to the problem is feasible under the present status of the law on this subject.

Incidentally, it should be noted that in general the courts have also held municipal corporations exempt from garnishment process in suits where third persons are the principal debtors. While the problems presented in such cases are essentially different from those involved in actions where the municipalities are themselves the principal debtors, the same solicitude for safeguarding the interests of the public is manifested. It is questionable, however, whether the disruption of municipal administration envisioned by the courts, if such actions were tolerated, is a necessary consequence. There is some reason to believe that the self-interests of municipal creditors would have a strong tendency to forestall wholesale garnishment suits, and that the expense of defending such suits as were filed would not be especially burdensome particularly where liability was not contested. Moreover, private organizations are not visibly burdened by the liability to garnishment process. Nevertheless, where this judicial hostility to the subjection of municipal corporations to garnishment suits exists, there is little that can be expected in the way of relaxation of the exemption protecting municipal property against judgment executions.

Occasionally statutory provisions have definitely set to rest any questions which might otherwise have arisen with reference to the possibility of issuing executions against the property of public corporations. For example, an Illinois statute expressly prohibits the issuance of executions against the lands or other property of a county. Such public quasi-corporations, however, have quite uniformly been regarded as distinct from municipal bodies possessing extensive and more or less complete powers of local self-


12 Ill. Rev. Stat. 1937, Ch. 24, § 34.
government. Counties, townships, school districts, park districts, and the like, generally possess only very limited powers and are organized for specialized purposes as arms of the state government. The functions which they perform are functions of the state and governmental in character. Cities and villages, on the other hand, are organized to exercise a wide range of powers many of which are indistinguishable from the activities of private concerns, and such municipal corporations serve local needs primarily. It is improper, therefore, to analogize as to the legislative policy with reference to the issuance of executions against city or village property from the statutory provisions on this subject enacted with reference to political subdivisions of a quite distinct type. Moreover, we have already indicated that the property of a municipality which is held solely for governmental purposes should be exempt from seizure by its creditors. This exemption would necessarily extend to all of the property of such public quasi-corporations as those mentioned, since they are presumed to be exclusively engaged in governmental as distinguished from proprietary functions. Finally it is idle to speculate as to the significance which should be attached to a legislative expression on this question in the case of one type of municipality when no specific provision has been made in other instances. It would be no more logical to assume a general legislative policy opposed to the awarding of executions against all the property of all municipal corporations than it would to presume a policy permitting such process in all instances where no express prohibition was declared. Such speculations may afford a basis for argument but they can scarcely lead to any intelligent conclusion.

In some of the New England states a peculiar doctrine with reference to municipal indebtedness prevails either by statute or by immemorial usage. According to this doctrine the property of the inhabitants of a municipality may be seized and applied against corporate obligations in the event that the corporation is unable to pay its debts. This unique

13 See note 4 supra.

14 Rev. Stat. Maine 1930, Ch. 98, § 30, and Ch. 56, § 116; Public Laws of N. H. 1926, II, Ch. 346, § 8; Public Laws of Vt. 1933, § 2253. This latter section reads as follows: "When judgment is rendered against a county, town, village, school, or fire district, execution shall issue against the goods or chattels of the inhabi-
and drastic remedy does not seem to have been adopted elsewhere in the United States and has in fact been expressly repudiated upon occasion. In the states where this remedy is available, however, a high level of municipal credit prevails and few defaults on municipal obligations have occurred, and these conditions may be attributable, at least in part, to the restraining effect of such a weapon in the hands of creditors.

Where attempts have been made to avoid the judicial or legislative restrictions upon the use of the writ of fieri facias against the property of municipal corporations by resort to the equitable creditor's bill, the courts have extended the doctrine of immunity to cover this action as well. In the case of Addyston Pipe Company v. City of Chicago, 7 Illinois court held that essentially a creditor's bill seeking to reach moneys in the hands of a municipality held for payment to a third person and to subject the same to the payment of the creditor's judgment against such third person was very similar to a garnishment proceeding and that the same arguments applicable to the use of the latter process were applicable to the use of a creditor's bill. Obviously there can be little dispute as to the soundness of this position. Whatever the merits in the reasoning may be, the same

tants of such county, town, village, school or fire district, and may be levied or collected of the same."

In Connecticut and Massachusetts the property of inhabitants has been subjected to executions to satisfy judgments against municipalities by immemorial usage. Atwater v. Inhabitants of Woodbridge, 6 Conn. 223, 16 Am. Dec. 46 (1828); McLoud v. Selby, 10 Conn. 390, 27 Am. Dec. 689 (1835); Beardsley v. Smith, 16 Conn. 368, 41 Am. Dec. 148 (1844); Nichols v. City of Ansonia, 81 Conn. 229, 70 A. 636 (1906); Hawkes v. Inhabitants of Kennebec, 7 Mass. 461 (1811); Chase v. Merrimack Bank, 19 Pick. (Mass.) 564 (1837); Gaskill v. Dudley, 6 Met. (Mass.) 546 (1843); Bloomfield v. Charter Oak Nat. Bank, 121 U. S. 121, 7 S. Ct. 865, 30 L. Ed. 923 (1887).

In jurisdictions outside New England there are numerous constitutional and statutory provisions directed specifically against the subjection of private property to the payment of judgments against municipal corporations: Iowa Code (1935), § 11771; Montana Constitution, Art. XII, § 8; Comp. Laws of N. D. (1913), I, § 3251; Comp. Laws of S. D. (1897), § 5792. This procedure has been repudiated elsewhere by judicial decision. Horner v. Coffey, 25 Miss. 434 (1853); Lyon v. City of Elizabeth, 43 N. J. L. 158 (1881).


17 170 Ill. 580, 48 N. E. 967 (1897). See also Lamb v. Lamb, 256 Ill. App. 226 (1930).
case can be made against both procedures. A different situation is presented where the municipality is the principal debtor, but the objections to a creditor's bill or to garnishment to reach assets of a municipal corporation in the hands of third persons would be even stronger.\textsuperscript{18}

Creditors of municipal corporations whose claims arise out of labor performed or materials furnished in connection with the construction of public works and buildings, may have a lien upon such property under mechanics' lien statutes unless excluded by express limitations therein or judicial pronouncements of public policy. The Illinois Mechanics' Lien Act, like that of many other states, gives a lien to "any person" furnishing labor or materials to the owner of a tract of land in various types of construction work and such lien attaches, when appropriate steps have been taken, to the land improved by such labor or materials.\textsuperscript{19} Subcontractors, in the case of public improvements, are given a lien on the money due the principal contractor, provided that a written notice of claim is presented to the disbursing officers of the public body and proceedings are brought for an accounting within sixty days after the filing of the claim.\textsuperscript{20} There is no express exemption of municipal property from the operation of this statutory lien and no particular reason to assume that the lien given subcontractors on public funds is exclusive of all other remedies. However, the Illinois court had occasion to consider the interpretation of similar language under an earlier statute and reached the conclusion that "the Mechanics' Lien Law is framed with reference to such property as is subject to be sold under execution" and that property essential to the performance of governmental functions, such as a schoolhouse or a courthouse, could not be made the subject of a lien.\textsuperscript{21} Under this construction of the statute the word "owner" as used by the legislature does not include public bodies or political subdi-

\textsuperscript{18} 28 C. J. 168.  
\textsuperscript{19} Ill. Rev. Stat. 1937, Ch. 82, § 1.  
\textsuperscript{20} Ill. Rev. Stat. 1937, Ch. 82, § 23.  
\textsuperscript{21} Bouton v. McDonough County, 84 Ill. 384 (1877). The leading Illinois case on this point is Board of Education v. Neidenberger, 78 Ill. 58 (1875). The court there held that the mechanic's lien "proceeding is restrictive of the common law power to issue a fieri facias to collect the judgment" and that an action of mandamus to compel the payment of the claim or the levying of sufficient taxes for its payment was a "sure and complete remedy." Accord: McMillan v. Joseph P. Casey Co., 311 Ill. 584, 143 N. E. 468 (1924).
visions. The only remedy available to the contractor who is not paid presumably is by mandamus, and the subcontractor must look to the principal contractor for payment or seek to enforce a lien on any funds which may be due to him or sue on the contractor's statutory bond.

The decisions on this subject are quite uniformly opposed to the allowance of mechanics' liens on public property and the reason generally stated is that such liens would be contrary to public policy, since the ordinary method of enforcing a lien is by a sale of the lien property and this would result, in the case of public agencies, in the impairment or destruction of necessary governmental functions. The public policy involved in this situation is the same as that discussed previously in connection with executions against municipal property.

The generally approved device for the collection of claims against municipal debtors that neglect or refuse to honor their obligations is mandamus, a legal action with equitable implications. In many jurisdictions this is said to be the only remedy available either because of specific statutory provisions or because of a judicially determined public policy. It is therefore important to observe the possibilities and limitations involved in the use of this proceeding.

While it has been said that the writ of mandamus is a prerogative writ granted upon equitable considerations in the discretion of the court, it is not generally true today that this remedy can be arbitrarily withheld where a petitioner presents facts clearly indicating a legal claim against the party sought to be coerced which cannot be adequately satisfied by any other legal process. Statutes have been generally adopted establishing the action of mandamus as an appropriate remedy in certain cases, and the courts have

22 Ill. Rev. Stat. 1937, Ch. 82, § 23.
23 Ill. Rev. Stat. 1937, Ch. 29, § 16.
24 The following cases are representative: Wilkinson v. Hoffman, 61 Wis. 637, 21 N. W. 816 (1884); Boise-Payette L. Co. v. Challis Independent School District No. 1, 46 Ida. 403, 268 P. 26 (1928). See also cases cited in note 20, Supra.
not hesitated to allow the action when it appeared that other remedies were inadequate or less effective and that mandamus would afford a convenient, practical, and effective method for the protection of the petitioner's rights. The discretionary character of the writ is similar to the discretionary character of any equitable relief. In situations where it appears that a petitioner has not conclusively established that his claim is founded upon unimpeachable principles of justice or that ordinary legal processes will not sufficiently protect his interests, doubtless a court may grant or withhold equitable relief as its discretion may dictate in the light of all the facts presented to it. However, a petitioner who has clearly brought himself within bounds of well-recognized rules controlling the granting of such relief, cannot arbitrarily be deprived of the aid of equitable remedies. It is not strange to find the courts in considerable confusion in the phrasing of such an elusive rule. The prevalence of the notion that no one can have an absolute right to equitable and extraordinary remedies has probably led to the denial of relief in many cases where the court has, largely upon subjective analysis, determined that the applications for equitable aid did not indicate extreme situations involving a shocking need for an effective legal remedy. That such a test is entirely too strict, and not in accord with modern conceptions of the judicial process seems undeniable. The honest claims of litigants should not be exposed to the hazards and uncertainties of this sort of erratic treatment. Recent judicial utterances indicate, however, that the court's discretion in granting the writ of mandamus cannot be exercised arbitrarily where an applicant for the writ shows a clear legal right to its issuance. The importance of this principle will be readily apparent from a study of the rules and cases to be discussed in the following pages.

Since the writ of mandamus will not lie to compel the performance of discretionary duties, a municipal creditor


29 City of East St. Louis v. United States ex rel. Zebley, 110 U. S. 321, 4 S. Ct. 21, 28 L. Ed. 162 (1884); People ex rel. German Insurance Co. v. Getzendaner,
cannot establish a legal right to the writ until his claim has been liquidated by a proper audit and certification for payment or by a reduction to judgment. The duty to pay remains discretionary until statutory prerequisites in the form of an administrative review of the validity of a claim have been observed, or until it has been judicially determined to be a legal obligation of the municipality. These preliminary procedural reviews to place a claim in order for payment can of course be compelled by mandamus if the proper municipal officers fail or refuse to act upon it.\textsuperscript{30} Payment, however, cannot be enforced, until the claim has been audited and approved by the officers designated for this function, since the disbursing officer’s duty to pay is not clear and nondiscretionary until such steps have been taken. As long as the municipality has an opportunity to assert defenses to the validity of the claim, the duty to pay the same is discretionary and not ministerial.

It follows from what has been said above that it is incumbent upon a petitioner for the writ of mandamus to place the municipality in default by making demand upon its officers for recognition and payment of his claim.\textsuperscript{31} It has been stated, however, that a formal demand is not necessary when it sufficiently appears that the agents of the municipality have already conclusively indicated a determination not to honor the claim.\textsuperscript{32} Likewise, a demand is held not to be essential when a writ is sought to compel the performance

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\item \textsuperscript{30} United States ex rel. Portsmouth Sav. Bank v. Board of Auditors of the Town of Ottawa, 28 F. 407 (1886); Town of Lyons v. Cooledge, 89 Ill. 529 (1878), mandamus to compel audit of claim; People ex rel. Mosby v. Stevenson, 272 Ill. 215, 111 N. E. 595 (1916), issuance, signing, and countersigning of warrant; People ex rel. Northup v. Cook County, 274 Ill. 158, 113 N. E. 58 (1916).
\item \textsuperscript{31} People ex rel. Rinard v. Town of Mt. Morris, 137 Ill. 578, 27 N. E. 757 (1891); State Board of Equalization v. People ex rel. Goggin, 191 Ill. 528, 61 N. E. 339 (1901); City of Cairo v. Everett, 107 Ill. 75 (1883); City of Olney v. Harvey, 50 Ill. 453 (1869); People ex rel. Thatcher v. Village of Hyde Park, 117 Ill. 462, 6 N. E. 33 (1886).
\item \textsuperscript{32} The court held in United States ex rel. The Aetna Ins. Co. v. Auditors of the Town of Brooklyn, 8 F. 473 (1881), that a demand upon officers to pay a judgment was unnecessary where the officers knew of the judgment and failed to pay. The court recognized that a formal demand would, in such a case, be entirely futile.
\end{itemize}
of duties owed to the public generally as distinguished from private obligations.\textsuperscript{33}

The municipal creditor who has reduced his claim to judgment and who has made demand for payment, may find it necessary in some jurisdictions to have execution issued upon his judgment and the same returned nulla bona, in order to establish the inadequacy of remedies other than mandamus.\textsuperscript{34} In jurisdictions allowing execution against municipal property held for proprietary use, there may be some justification for this requirement, but it would be an empty and senseless gesture to establish such a requirement in a jurisdiction not allowing execution against any public property.

Assuming that a creditor has met the usual requirements for bringing an action of mandamus, what defenses are commonly available to defeat the relief sought? If the record shows that there is an unqualified duty to pay and that sufficient funds are available from which payment can legally and properly be made, a peremptory writ should issue. However, suppose the municipality alleges that there are no funds on hand with which the claim can legally be paid or that all the revenues of the corporation are necessary for the support of essential functions of the government. Certainly it would seem that the courts should not attempt to compel public officers to do that which is impossible or to violate the law by diverting money from funds created by specific appropriation.\textsuperscript{35} Unless a specific appropriation has

\textsuperscript{33} City of East St. Louis v. United States ex rel. Zebley, 110 U. S. 321, 4 S. Ct. 21, 28 L. Ed. 162 (1884); People ex rel. German Insurance Co. v. Getzendaner, 137 Ill. 234, 34 N. E. 297 (1891); People ex rel. Bartlett v. Dunne, 219 Ill. 346, 76 N. E. 570 (1906); People ex rel. McCormick v. Western Cold Storage Co., 287 Ill. 612, 123 N. E. 43 (1919); People ex rel. Blome v. Nudelman, 371 Ill. 30, 19 N. E. (2d) 933 (1939).

\textsuperscript{34} This seems to be an unnecessarily burdensome procedure in view of the general acceptance of mandamus as the most appropriate remedy for the enforcement of private claims against municipalities. The requirement is criticized by Dillon, Municipal Corporations (5th ed.), § 1510. It is recognized by a New York Court in Shamrock Towing Co. v. City of New York, 20 F. (2d) 444 (1927).

\textsuperscript{35} Actual want of funds has always been a good defense to an application for a writ of mandamus to compel immediate payment, but this argument has become so standard that many courts require a detailed account of fiscal administration before denying relief. If there are no available funds out of which payment of the claim can legally be made, there is still room, of course, for a writ to compel the appropriation and levy of sufficient taxes to discharge it. De Wolf v. Bowley, 355 Ill. 530, 189 N. E. 893 (1934); People ex rel.
been made for the payment of the claim in question there is not much likelihood that any "free" funds will be available out of which the claim can be paid. This problem is acute in all claims not founded upon direct contractual relations and may exist even in the latter situations when the governing body of a municipality has been delinquent in the performance of its duties and has neglected to include in the annual appropriation ordinance provisions covering all express and contingent liabilities. If an appropriation has been made and taxes levied and collected for purposes which include the creditor's particular claim, the exhaustion of available funds even by diversion into improper uses may constitute a defense to an application for a writ of mandamus or render the writ futile if granted.

It may thus be incumbent upon the individual creditor, availing himself of the use of mandamus as a remedy, to bring successive actions to achieve a desired result. If there are no funds presently available for the payment of his claim, and if the governing body of the municipality refuses to take the necessary action to provide a fund for the payment of the claim, then the creditor must petition for a writ of mandamus to compel the appropriation and levy of a sum sufficient to discharge his claim. But the officers of the municipality may and probably will neglect or refuse to pay over the taxes collected on account of the obligation unless


People ex rel. Bunge v. Downers Grove Sanitary District, 281 Ill. App. 426 (1935). The court, in Board of Supervisors v. People ex rel. Ashbrook, 226 Ill. 576, 80 N. E. 1066 (1907), held that by adjournment without having included the payment of any outstanding judgments after demand had been made among the purposes of its tax levy, a county board could not escape its duties and that mandamus would lie to compel the board to reconvene and provide for the payment of such claims.

Galena v. United States ex rel. Amy, 72 U. S. 705, 18 L. Ed. 560 (1867); German Insurance Co. v. Getzendaner, 137 Ill. 234, 34 N. E. 297 (1891); The People ex rel. Fox Howard & Co. v. City of Cairo, 50 Ill. 154 (1869). The latter case illustrates an intelligent attitude toward the interests of all parties concerned. The court ordered the municipality to levy the maximum tax allowed by statute and to pay over to the judgment creditor a sufficient sum to discharge his claim after providing for the most economical expenses of the city. The city was not required to issue bonds because of the poor market for its securities and because of the discretion involved in such a procedure.
compelled to act by another writ. This condition necessitates a constant and careful study of municipal financial operations in order to forestall any attempted diversion of tax moneys which should be segregated for the satisfaction of the claim. Presumably a court to which application has been made for a writ of mandamus to compel the payment of a claim might issue a writ directing the performance of all the successive acts necessary to effect an actual liquidation of the account and retain jurisdiction for the purpose of supervising the performance directed, although this procedure does not appear to be commonly employed. Formerly, an additional hazard had to be met. Municipal officers, whose acts were necessary to effect a payment of municipal indebtedness, could forestall relief to creditors indefinitely by resigning in the face of mandamus process. According to one writer\[^8\] this practice became so common that it was necessary for candidates who aspired to appropriating and disbursing offices to promise to resign if mandamus proceedings to compel the payment of certain obligations were instituted. Modern statutes have made this easy form of repudiation impossible by permitting the writ to be directed against the municipality generally or against the offices concerned with payment. The writ, under such procedure, does not abate upon the death or resignation of particular officers but continues against their successors.\[^9\]

The above comments, tacitly assume that the municipality's refusal to pay legal claims asserted against it is due to a wilful repudiation and not to physical impossibility of performance. However, the latter may well be the case. Mounting costs and falling revenues may have combined to make it impossible to discharge all obligations in full as they accrue. Constitutional and statutory debt and tax limitations fix definite bounds to the revenue producing power of most municipalities, and tax delinquencies may reduce actual collections far below the theoretical maximum. While ordinarily courts should and do direct the levying of taxes up to the limits set by law, where a municipal creditor shows that existing revenues are insufficient to discharge his claim

\[^8\] Dillon Municipal Corporations (5th ed., 1911), § 1520 et seq.

and that a reserve of taxing power is available, still it does not follow that this procedure will be productive of satisfactory results either from the standpoint of the petitioning creditor, the tax-bearing public, or other creditors. During periods of economic depression, low property values and reduced incomes may establish a point of diminishing tax returns short of constitutional or statutory tax limitations. If taxes become too burdensome, many taxpayers may conclude that efforts to keep their property free from tax liens are futile and financially unjustifiable. Moreover, other creditors spurred on by the prospect of having all the municipal debtor's resources exhausted in the process of meeting one creditor's obligations in full, may be prompted to make more diligent efforts to collect their claims without loss of priority. If the sum total of all unsatisfied outstanding obligations is beyond the practical power of the municipality to pay, the net result will necessarily be a large amount of litigation costly both to the creditors and to the municipality whose energies and finances will be diverted from more useful purposes into a defense against this mass assault upon its revenues. This sort of a "trial by battle" may be a happy condition for a few lawyers in a position to exact fat fees as a result of the turmoil, but it cannot be productive of any equitable results to the municipality, its creditors, or its taxpayers.  

Furthermore, practical difficulties confront the creditor and the court in the use of mandamus to compel a municipality to use its taxing powers. The writ commonly takes the form of an order directing the municipal debtor through its proper officers to levy the maximum rate permitted by law and to pay over to the judgment creditor the amount of his claim out of any surplus that may remain after provision has been made for the most economical administration of the affairs of the municipality. This sort of an order has a pleasing sound but the creditor beneficiary is still a long way

40 For a good description of an actual litigation record involving creditors' fruitless suits against an insolvent municipality see the article by Edward J. Dimock, "Legal Problems of Financially Embarrassed Municipalities," 22 Va. L. Rev. 39 at 41-42.

41 The People ex rel. Fox Howard & Co. v. City of Cairo, 50 Ill. 154 (1869); People ex rel. Anderson v. Village of Bradley, 367 Ill. 301, 11 N. E. (2d) 415 (1937).
from the cash payment of his claim. Even granting that the court may be willing to retain jurisdiction for the purpose of compelling the production of detailed and itemized accounts of municipal expenditures in order to determine whether there has been a bona fide attempt at compliance with the writ, it is still primarily a legislative and not a judicial function to determine the ordinary and minimum public functions which should not be sacrificed in order to provide funds for individual creditors.\footnote{City of East St. Louis v. United States ex rel. Zebley, 110 U. S. 321, 4 S. Ct. 21, 28 L. Ed. 162 (1884). But where a municipality alleged that its revenues were insufficient to meet current expenses, it was held that the burden was upon such public body to establish this fact by the submission of figures upon receipts and operating costs. People ex rel. Bunge v. Downers Grove Sanitary District, 281 Ill. App. 426 (1935).} The courts have repeatedly held that a receiver cannot be appointed to take over in whole or in part the management of municipal affairs in order to make certain that revenues will be set aside for the payment of the claims of judgment creditors.\footnote{Rees v. Watertown, 88 U. S. 107, 22 L. Ed. 72 (1874); Meriwether v. Garrett, 102 U. S. 472, 26 L. Ed. 197 (1880), which held that a court cannot levy and collect taxes through its own marshal.} Even if such a procedure did not involve an infringement of the fundamental principle of separation of powers, the practical difficulties would still be almost insurmountable. Under the present volume of municipal indebtedness in default, the administrative and supervisory burden would undoubtedly so tax the facilities and time of the courts as to make effective and efficient results virtually impossible, to say nothing of the neglect which must perforce befall the business of other litigants.

We need not therefore be surprised at the fact that, while the city of Chicago has outstanding and unpaid judgments standing against it to an amount in excess of six million dollars,\footnote{People ex rel. Krajci v. Kelly, 279 Ill. App. 22 (1935).} with the total mounting yearly, it nevertheless finds itself able to carry out a costly system of public improvements involving the beautification of lake front property, the construction of subways and numerous other projects. We do not wish to be understood as taking a stand upon the morality of this procedure but only as suggesting that the creditor's ability to secure an effective use of his municipal debtor's taxing power for his benefit is narrowly circumscribed.
The city of Chicago has found another convenient and effective device to block mandamus-seeking creditors who hope to secure payment of their claims out of funds derived or to be derived from a special judgment tax authorized by statute. According to the statute and an ordinance of the city passed pursuant thereto, judgments must be paid out of the fund "in the order in which same were obtained." Under this provision a petitioner for a writ of mandamus to compel the payment of a judgment out of the judgment tax fund must allege and prove, according to one decision, that his judgment is first in order of unpaid judgments against the city. Over six million dollars in unpaid judgments are outstanding and apparently the want of diligence on the part of the holder of an early judgment would block holders of subsequent judgments from any right to participate in the proceeds of the tax fund if this ruling stands. It would appear that a few early judgments placed in sympathetic hands might constitute a perfect protection against creditors' attacks through this inviting but deceptive hole in the municipality's defense armor.

While courts will not issue peremptory writs of mandamus to compel the levy and collection of taxes in excess of statutory or constitutional limitations, it is nevertheless frequently possible to stay within these limitations if the levy is directed to be spread over successive years so as to produce only a portion of the amount of the judgment in any one given year. This procedure, moreover, in cases when the ratio of the judgment to the total appropriation for the taxing district is large, avoids the dangers of a tax strike inherent in any excessive levy. With this flexible arrangement avail-

46 See People ex rel. Krajci v. Kelly, 279 Ill. App. 22 (1935). The Illinois Supreme Court, however, has indicated that the constitutional provision that compensation must be made for private property taken for public use cannot be impaired by statute or ordinance and that a judgment for such taking or damage must be paid, if funds are available and if there is no showing that creditors with prior rights are actually claiming such funds. People ex rel. John V. Farwell Co. v. Kelly, 361 Ill. 54, 196 N. E. 795 (1935); People ex rel. John V. Farwell v. Kelly, 367 Ill. 616, 12 N. E. (2d) 612 (1937).
47 United States v. County Court of Macon County, 99 U. S. 582, 25 L. Ed. 331 (1879); Clay County v. United States ex rel. McAleer, 115 U. S. 616, 29 L. Ed. 482 (1885); City of East St. Louis v. People ex rel. Seim, 6 Ill. App. 76 (1880); City of East St. Louis v. Board of Trustees, 6 Ill. App. 130 (1880).
48 This procedure was employed in People ex rel. Euziere v. Rice, 290 Ill. App. 514, 8 N. E. (2d) 683 (1937).
able there is seldom any occasion warranting the use of a mandamus writ to compel the issuance and sale of bonds for the purpose of raising money with which to pay a petitioner's claim. This probably accounts for the fact that there are very few cases in which mandamus has been used for such a purpose. There are to be considered in this connection also statutory limitations upon the purposes for which bonds may be issued. Obviously, however, a municipality seeking to defeat the granting of a mandamus writ on the ground of lack of funds and the necessity of using all its taxing power to raise revenues for necessary current operations, should be required to establish its good faith by submitting detailed figures and estimates showing with considerable exactitude its financial needs. It will then be incumbent upon the court to determine whether the awarding of the writ will be likely to produce funds for the payment of the creditor's judgment without undue embarrassment to the fiscal administration of the municipality. If it appears that the awarding of the writ may create confusion and disorder in the management of municipal affairs to the serious detriment of the inhabitants, the remedy should, of course, be withheld. Although there may be strong objections to a judicial determination upon political or legislative matters, this condition is apparently inescapable in meeting the problem presented with a proper regard for the various interests at stake. Moreover, no realistic person will any longer main-

49 The court held in People ex rel. Euziere v. Rice, 290 Ill. App. 514, 8 N. E. (2d) 683 (1937), and in People ex rel. Bunge v. Downers Grove Sanitary District, 281 Ill. App. 426 (1935), that a municipality must do more than merely allege the inadequacy of existing revenues to meet the expenses of maintaining essential governmental functions. Presumably the courts will make some sort of independent determination of the need for the application of the full revenue raising power to meet the economical administrative requirements of the municipality. People ex rel. Fox Howard & Co. v. City of Cairo, 50 Ill. 154 (1869).

The court, in Cunningham v. City of Cleveland, 98 F. 657 (1899), held that after a writ of mandamus has issued directing a municipality to levy the maximum tax rate permitted by law, the city could not expend a portion of the taxes so levied for the purpose of erecting school buildings. This was not an ordinary current expense to which the revenues of the city could be applied while it owed money on a judgment for a debt incurred as a current expense, the court held. The municipality could and should have paid for the buildings out of the proceeds of a bond issue authorized by its charter.

In Maryland Casualty Co. v. Leland, 214 N. C. 235, 199 S. E. 7 (1938), the court said, "We have no definite classification as to the kind of service a municipality may furnish its citizens to the postponement or defeat of its obligations to creditors." It was indicated, however, that the court would not be governed by an arbitrary classification.
tain that a clear cut separation of legislative and judicial functions is observed under the political and constitutional systems as they are now operating. Lip service is still paid to the time worn apothegm that the courts are not and cannot be concerned with the wisdom of legislative practices and policies, but judicial decisions are nevertheless constantly being based upon the reasonableness or unreasonableness of legislative action. This process of necessity involves some degree of substitution of judicial predilection for legislative determinations. Hence, judicial scrutiny of municipal expenses for the purpose of determining the feasibility of issuing a writ of mandamus is not only a conventional process but an appropriate and even necessary operation if the judicial discretion involved in the awarding of the writ is to be wisely exercised.

The above discussion leads inevitably to the conclusion that the usual legal remedies available to enforce the payment of creditors' claims against municipal corporations and quasi-corporations are oftentimes inadequate and unscientific when viewed in the light of the wider interests involved. A realistic appraisal of the situation can be made only in the light of the magnitude of the problem involved and the alternative solutions which may be evolved within the framework of our present legal structure. A recent study made by the Securities and Exchange Commission states that there are approximately 175,000 taxing units in the United States and that between two and three thousand of these taxing districts were in default in 1933 upon an estimated $1,200,000,000 out of a gross municipal bonded indebtedness of $18,500,000,000. Many more municipalities not actually in default were reported as being unable to meet their current expenses except by resort to dubious schemes of financial jugglery. While these figures apply to funded indebtedness they nevertheless indicate the almost hopeless situation confronting the ordinary judgment creditor in many areas. Approved legal remedies will not produce funds for the satisfaction of a creditor's claim when the municipal debtor has no property or income subject to execution and its taxing and debt incurring power has been exhausted. The available data with reference to local governmental indebt-

50 See note 15, supra.
edness strongly indicates that a considerable volume of municipal obligations will not be honored in full under present conditions. What, then, can be suggested as a sane and practical approach to the problem?

Fundamentally, of course, some thorough-going revision in archaic tax levies may be necessary as well as state administrative control over expenditures of local taxing units. Scientific application of new mechanical techniques will not produce milk from a dry cow. However, if the cow is not dry, but can't be milked because too many opposing and insistent milkers are vying with one another for a chance to do the job, then it may be necessary to give the beast a little air and compromise these claims upon her resources. The evidence available shows that many taxing units have tapped all their resources without producing sufficient revenues to meet their obligations and that a breathing spell will not solve the problem. In such cases it is difficult to see any solution other than a compromising of creditors' claims through some sort of voluntary agreement or through resort to municipal bankruptcy proceedings.

We have already seen that municipal creditors cannot accomplish much toward the satisfaction of their claims through such legal remedies as judgment levies and executions, garnishment and attachment, creditors' bills, and mechanics' lien proceedings, and that the effectiveness of mandamus depends upon the existence of funds or taxing power which may be used to effect a payment of such claims. In some cases statutory or constitutional increases in the taxing and debt incurring power might afford partial relief. Special judgment taxes or bonds might be authorized with the provisions that they should not be considered in computing the maximum tax or debt limits fixed by law.\(^5\) This procedure has found some support and undoubtedly has considerable merit when considered upon moral grounds. If coupled with some sort of state administrative control over

\(^5\) The Ohio Gen. Code 1930, §§2293-3, 2293-13, authorizes municipalities to issue bonds to pay judgments for personal injuries and other non-contractual obligations and provides that such bonds shall not be included in the net indebtedness of the issuing bodies.

The Illinois statutes (Ill. Rev. Stat. 1937, Ch. 24, § 65.5) give cities and villages the power to issue bonds for the purpose of paying or funding judgment debts, but such bonds would be included in the constitutional and statutory limitations upon indebtedness.
municipal expenditures it might go far toward achieving an equitable result in the case of municipalities whose operating expenses are not grossly disproportionate to the reasonable value of their assessed property. Some restraint upon outlays for ordinary current expenses seems inevitable if creditors' claims are not to be generally postponed or defeated by the exhaustion of municipal revenues and revenue producing powers upon such operating costs. Presumably this restraint would require the creation of a state board with general and extensive control over the budgets of all taxing districts. The adoption of such a plan admittedly would necessitate the overcoming of strong prejudices in favor of the sanctity of local self-government and the supposedly inherent right of local inhabitants to control local affairs. However, the history of the past few years should have sufficiently demonstrated that responsible and intelligent management of the functions and fiscal policies of local taxing districts cannot always be expected. The reasons, which are to be found primarily in the inexperience of underpaid officials, are not of primary importance in the search for an immediate and practical method by which improvements may be effected.

Where municipalities are actually insolvent, the immediate problem obviously must involve some scaling down of the total indebtedness either by voluntary agreements or by proceedings under the municipal debt readjustment act. Voluntary compositions by creditors are difficult to work out and afford many opportunities for the pursuit of policies which do not accord equitable treatment of the rights of all the parties concerned. Unless all creditors cooperate in the composition preferences will result either from voluntary treatment or from individual coercive measures such as mandamus actions. In most cases it will be difficult, if not impossible, to work out a debt adjustment plan which will command a one hundred per cent indorsement. Proceedings under the Federal bankruptcy statutes will, therefore, be

52 For an excellent study of the subject of state administrative control over municipal indebtedness see Stason, "State Administrative Supervision of Municipal Indebtedness," 30 Mich. L. Rev. 833.

53 11 U. S. C. A. §§ 401 et seq. The first municipal debt readjustment act was held unconstitutional as an impairment of the sovereignty of the states. Ashton v. Cameron County Water Improvement Dist. No. 1, 298 U. S. 513, 56 S. Ct. 892,
the preferable, if not the only solution, in cases involving insolvent municipal corporations.

It is to be hoped that the various state legislatures will recognize in the near future the seriousness of the municipal debt problem and will undertake careful studies of the matter in all its aspects to the end that some permanent improvement in conditions may be forthcoming. As indicated in these pages, any real solution must go farther than merely to perfect and enlarge present legal remedies available to creditors but must recognize the necessity for a re-establishment of municipal credit and solvency by the adoption of measures designed to facilitate the liquidation of hopelessly excessive debt burdens, to improve the tax structure both as to the subject matter of taxation and the methods of collection, and to extend state administrative supervision over municipal budgetary operations. Authorization of additional taxes and bond issues for debt service should be considered as a part of a complete program of credit reconstruction but with an intelligent understanding of the limited scope of the relief involved in this process alone. A thorough analysis of municipal indebtedness might even disclose that our system of local taxing units enjoying large measures of autonomy is obsolescent and unsuited to present-day social, economic, and political needs. Only harm can come from an ostrich-like habit of refusing to face the dangers involved in the continued growth of local indebtedness with mounting defaults.

80 L. Ed. 1309 (1936). Justice Cardozo in a dissenting opinion remarked, "If voluntary bankruptcies are anathema for governmental units, municipalities and creditors have been caught in a vise from which it is impossible to let them out. Experience makes it certain that generally there will be at least a small minority of creditors who will resist a composition, however fair and reasonable, if the law does not subject them to pressure to obey the general will."

A revised edition of the same statute was upheld in United States v. Bekins, 304 U. S. 27, 58 S. Ct. 811, 82 L. Ed. 1137 (1938).

State legislation is advisable, if not necessary, to supplement the Federal statute in order to establish the consent to municipal bankruptcy procedure required by the statute. For an example of such legislation see Mason's Minn. Stats. 1938 Supp., Ch. 10, §§ 1938-23, 24.