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Municipal Corporations - Implied Contracts - Liability of the Municipality Thereon

of migratory waterfowl.[46] But it has been suggested that the Federal Government could again gain the cooperation of the states in respect to fair resident and nonresident hunting privilege laws by denying to noncooperating states the right to share in the distribution of Pittman-Robertson funds,[47] much as the Federal Government administers federal grants for the construction of state highways. Since Pittman-Robertson funds are derived from the sale of federal migratory waterfowl hunting stamps and from excise taxes on hunting arms and ammunition, the Federal Government may justifiably feel that to deny to nonresident hunters the right to shoot waterfowl in those states particularly fortunate in being located in favorable flyways would be unjust and therefore a reason to withhold distribution of such funds.

MUNICIPAL CORPORATIONS — IMPLIED CONTRACTS — LIABILITY OF THE MUNICIPALITY THEREON

THE EXTENT to which a public corporation may be held on an improperly executed contract was recently considered by the North Dakota Supreme Court in *Northwestern Sheet & Iron Works v. Sioux County*,[1] which placed squarely before

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[46] See, *e.g.*, Carey v. South Dakota, 250 U.S. 118 (1918); Geer v. Connecticut, 161 U.S. 519 (1896). *Contra*: State of Kansas v. Saunders, 19 Kan. 127 (1877). See Corwin, *Game Protection and the Constitution*, 14 Mich. L. Rev. 613, 619 (1916): "Suppose, therefore, we concede the proprietorship of the state in its wild game to the fullest extent, what then is the legal character of the migration of game from one state to another, considered in their aspect of successive proprietors of such game? Obviously it is that of transfer of property across state lines from one legal person to another, that is, 'Commerce.' True, the transfer is not by contract between the legal persons involved, but rather by the operation of a kind of legal prescription; yet it is none the less a legal transfer, and it is 'among states.' Nor is it a mere casual occurence, as for instance where a dog might elect to change masters, but it is a regularly recurrent, seasonal and predictable process, which, even though not susceptible of 'regulation' in many senses of the word, certainly ought to be capable of being protected by the government of the larger community which is benefitted by it."

[47] 50 Stat. 917 (1937), 16 U.S.C. §§669-669J (1940).

[1] 36 N.W. 2d 605 (N.D. 1949). The county contended that it was not bound by orders of the county commissioners made in their individual capacity before the advertisements were even made. They further contended that notice for bids was not published the required length of time, nor was there compliance with the lowest bid statute. The plaintiff pleaded estoppel and ratification, commingling two theories of recovery, and claimed the "agreed and reasonable value," but the defendant made no motion for election of theories. The county unsuccessfully tried to distinguish between the case of Stark County v. City of Dickinson, 56 N.D. 371, 217 N.W. 525 (1928), which allowed assumpsit, and Backhaus v. Lee, 49 N.D. 821, 194 N.W. 887 (1923), a case in equity.

the court the question of recovery on implied contract. In the district court, recovery was denied after the court expressly found that the contract was illegal and void due to the county's failure to advertise for bids for the required statutory period,[2] before letting the contract to the plaintiff. On appeal to the supreme court it was *held* that the decision below be reversed and recovery allowed despite the defective execution of the contract. The court indicated that a substantial and good faith attempt had been made by the board of county commissioners to comply with the statutory requirements for the advertisements of bids even though the bids were actually advertised for only 17 days instead of the 30 days required by statute, *i.e.*, that the defect was merely one of procedure. The court found that since the county had the power to contract and had received the materials for a lawful purpose and did not contend that the goods were not worth the amount agreed, then in "equity and good conscience" the county must pay the reasonable value of the goods.

The result is in undoubted accord with the trend of recent decisions elsewhere, yet the opinion fails to make clear the contractual basis of recovery — that is, whether recovery was allowed on the express contract, on a contract implied in fact, or in quasi contract — an omission found in many of the decisions which have been concerned with this question. After examining express and implied in fact contract recovery, the court declared that ". . . equity and good conscience require that the county pay the reasonable value . . ." in language connotative of quasi contractual recovery.[3]

Contracts to which municipal corporations are a party are governed by the same rules of contract law that apply to any other contract. Yet the municipalities are creatures of the state, and their ability to bind themselves in contracts is limited by the necessity that the contracts must be in pursuance of either the powers expressly granted to them by

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[2] Sections 24-0504, 24-0509 and 11-1126, N.D. Rev. Code (1943) require advertisement for bids for four successive weeks and that the first advertisement shall have been published at least thirty days before the opening of the bids. Sioux County advertised for only three weeks and the first publication was only seventeen days before the letting of the contract.

[3] The overworked phrase of "equity and good conscience" has seen long service in the opinions and just what it signifies is not clear. The courts find use for it when denying and allowing recovery. The defendant in the *Sioux County* case on petition for rehearing inquired why "equity and good conscience" did not require that the taxpayer get protection from *ultra vires* contracts.

legislative or constitutional provisions, those implied from the powers expressly granted, and those essential to the carrying out of the declared objects and purposes of the corporation.[4] Municipal corporations can act only within the scope of the powers expressly granted them and those powers necessarily implied therefrom,[5] and it is a familiar rule of construction that the legislative enactments granting such powers are construed strictly against the municipality.[6]

Where a contract is truly *ultra vires*, the municipality having absolutely no power to make such a contract, nearly all jurisdictions agree that there can be no recovery on either the theory of express or implied contract.[7] In *Williams v.*

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[4] Minot Special School Dist. v. Olsness, 53 N.D. 683, 208 N.W. 968 (1926); Village of Ashley v. Ashley Lumber Co., 40 N.D. 515, 169 N.W. 87 (1918); Stern v. City of Fargo, 18 N.D. 289, 122 N.W. 403 (1909); 2 McQuillen, Municipal Corporations 592 *et. seq.* (3d ed. 1949). For collections of cases on municipal liability on implied contracts, see notes 154 A.L.R. 356 (1945), 110 A.L.R. 154 (1937), 84 A.L.R. 937 (1933).

[5] Arms v. Chicago, 314 Ill. 316, 145 N.E. 407 (1924); Village of Carthage v. Frederick, 122 N.Y. 268, 25 N.E. 480 (1890). The powers implied must be indispensable to the declared purposes and objects of the corporation and not simply convenient. *See* Stern v. City of Fargo, 18 N.D. 289, 296, 122 N.W. 403, 406 (1909).

[6] Barnard v. Chicago, 316 Ill. 519, 147 N.E. 384 (1925); *see* Lang v. City of Cavalier, 59 N.D. 75, 84, 228 N.W. 819, 822 (1930) (ambiguities resolved against the municipality); North Fargo v. City of Fargo, 49 N.D. 597, 192 N.W. 977 (1923). North Dakota has indicated that county commissioners must act in a formal manner to bind the county and cannot do so by individual action. Rollette State Bank v. Rollette County, 56 N.D. 571, 218 N.W. 637 (1928); 2 Dillon, Municipal Corporations §788 (5th ed. 1911). The term municipal corporation embraces cities and villages, *see* North Fargo v. City of Fargo, 49 N.D. 597, 601, 192 N.W. 977, 978 (1923), while counties are properly quasi public corporations, yet the law of municipal corporations applies equally to the latter. Some authorities describe the county as a municipal corporation. *See* People v. Board of Sup'rs, 101 App. Div. 327, 91 N.Y. Supp. 948, 949 (1905); Restatement, Restitution §75, comment *b* (1937).

[7] City of Phoenix v. Kidd, 54 Ariz. 75, 92 P.2d 513 (1939); City of Oakland v. Key System, 64 Cal. App. 2d 427, 149 P.2d 195 (1944); Columbia Insurance Co. v. Board of Educ., 185 Okla. 292, 91 P.2d 736 (1939); See Notes, 21 Neb. L. Bull. 54 (1942), 10 N.Y.U.L.Q. Rev. 64 (1932). *Contra*: Womack Rayburn Co. v. Town of Worthington, 262 Ky. 710, 91 S.W.2d 13 (1936), 25 Geo. L. J. 758 (1937) (court declared that to refuse recovery would be to confess impotency of the law to evert the city's wrongful conversion). Strictly speaking a contract is *ultra vires* when it is substantively outside the scope of the corporate power. Cooley, Municipal Corporations 248, 249 (1914), and in fact an *ultra vires* contract is no contract at all. Westminister Water Co. v. City of Westminister, 98 Md. 551, 56 Atl. 990 (1904). The doctrine of *ultra vires* applies more strictly to public than private corporations. *See* Baird v. Divide County, 58 N.D. 867, 877-78, 228 N.W. 226, 230 (1929). For discussion of the *ultra vires* doctrine, see Stevens, *A Proposal as to the Codification and Restatement of the Ultra Vires Doctrine*, 36 Yale L.J. 297 (1927). Some jurisdictions, including North Dakota, distinguish between contracts which are *ultra vires* in the primary and those in the secondary sense, Kotschevar v. North Fork Twp., 39 N.W.2d 107 (Minn. 1949) (quasi contract allowed on *ultra vires* contract in the secondary sense though the dissent urged that the competitive bid requirment was mandatory

City of Fargo,[8] the court in discussing void contracts, cogently summarized the effect of *ultra vires* on implied contractual recovery in declaring:

"A contract of the municipal corporation is *ultra vires* when the corporation has no power under existing law under any circumstances to enter into such a contract. An *ultra vires* contract is wholly void and no recovery can be had against the municipality thereon. The municipality cannot be estopped to deny the validity of the contract, and no recovery can be had on implied contract." [9]

The recurring difficulty arises, however, where the municipality has the power to make the contract but fails to conform to constitutional or legislative requirements in entering into the agreement. Generally under such circumstances, recovery on the basis of an implied contract is sought against the municipal corporation. There is a wide split of authority on municipal implied *ex contractu* liability where statutory compliance is lacking, and as early as 1860 the chief justice

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and the contract was thus *ultra vires* in the primary sense); Backhaus v. Lee, 49 N.D. 821, 194 N.W. 887 (1923). A contract primarily *ultra vires* is one which is not within the scope of the powers of the corporation to make under any circumstances or for any purpose and a contract secondarily *ultra vires* is a contract which the corporation had the right to execute, but with respect to which there has been some irregularity or defect in the actual exercise of the power, *i.e.*, *intra vires*. Mares v. Janutka, 196 Minn. 87, 264 N.W. 222, 20 Minn. L. Rev. 564 (1936). It has been said that there are really three kinds of *ultra vires* municipal contracts: (1) those prohibited, (2) those where the power to make the contract is lacking, (3) those where statutory formalities are not complied with. 16 Va. L. Rev. 628 (1936). Some authorities discuss recovery in terms of substantial compliance, as did the North Dakota court in Northwestern Sheet & Iron Works v. Sioux County, *supra*. People v. McDonough, 173 N.Y. 181, 65 N.E. 963 (1903). *But see* Peoples Bank v. School Dist., 3 N.D. 496, 57 N.W. 787 (1893) (the court here thought that the statute should be strictly followed and said that "If the question is to depend upon the magnitude of the departure from the statutory requirement it will be impossible to know where to draw the line.") In North Dakota's initial case on the topic, Goose River Bank v. Willow Lake School Twp., 1 N.D. 26, 44 N.W. 1002 (1890), it was held that where a contract is expressly prohibited or declared void by statute one rendering services pursuant to such contract cannot recover from the municipality under the contract or on quantum meruit. *Accord*: Hosmer v. Sheldon School Dist., 4 N.D. 197, 59 N.W. 1035 (1894); Capital Bank of St. Paul v. School Dist., 1 N.D. 479, 48 N.W. 363 (1890).

[8] 63 N.D. 183, 247 N.W. 46 (1933). The doctrine of implied contract is not applicable to fasten liability upon a municipality for purely personal services. Hailey v. King County, 21 Wash.2d 53, 149 P.2d 823 (1944), see note, 154 A.L.R. 356 (1945).

[9] *Id.* at 202, 247 N.W. at 53. Yet, if the *ultra vires* contract has been fully executed then *ultra vires* will constitute no defense, at least in "liberal" jurisdictions such as Minnesota. State v. Clark, 116 Minn. 500, 134 N.W. 129 (1912); Bell v. Kirkland, 102 Minn. 213, 113 N.W. 271 (1907). *But cf.* Hosmer v. Sheldon School Dist., 4 N.D. 197, 59 N.W. 1035 (1894); Goose River Bank v. Willow Lake School Twp., 1 N.D. 26, 44 N.W. 1002 (1890); Capital Bank of St. Paul v. School Dist., 1 N.D. 479, 48 N.W. 363 (1890).

of the California Supreme Court described the decisions without exaggeration as a "tangled web of contradictions, and it is difficult to assert any proposition . . . for which adjudications on both sides may not be cited." [10]

RECOVERY ON CONTRACTS IMPLIED IN FACT

A large number of courts have failed as did the court in the *Sioux County* case, to make the proper technical distinction between contracts implied in fact and contracts implied in law. The later type of contract is properly conterminous with quasi contracts,[11] and the failure of the courts to so distinguish has greatly added to the lack of judicial clarity.

Of great importance is the distinction made in most jurisdictions between mandatory and directory statutory requirements. Where the statutory provision is a comparatively unimportant precautionary measure and can be construed to be merely directory then there is no objection to allowing recovery. But where the provision is mandatory in nature and is not complied with in forming the contract, the majority of courts will deny recovery,[12] though there is irreconcilable dis-

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[10] Field, C. J., in Argenti v. San Francisco, 16 Cal. 255, 284 (1860). Three early California cases have had controlling influences on municipal corporation law and today form the basis of implied contractual liability of the municipality. San Francisco Gas Co. v. San Francisco, 9 Cal. 452 (1858); Argenti v. San Francisco, *supra;* and Zottman v. San Francisco, 20 Cal. 97 (1862). These cases have been cited in a large number of subsequent decisions, including North Dakota opinions, and in many instances improperly, this being due to the broad assertions in *San Francisco Gas Co. v. San Francisco, supra,* to the effect that a municipality is bound in contract on the same principles as an individual or private corporation. However, this was modified by the *Argenti* case and overruled in effect in the *Zottman* case. While the *Zottman* case represents the majority view, Tooke, *Liability of Municipal Corporations,* 47 Harv. L. Rev. 1143 (1943), most courts manage to reach a result in accord with the more liberal view expressed in the *Argenti* case. For a review of the *Argenti* and *Zottman* cases, see Tooke, *op. cit. supra,* and Note, 21 Neb. L. Bull. 54 (1942). The split of authority is between the more strict view adopted by California, Ohio and New York, and the liberal view expressed by the Minnesota, Nebraska, and Texas courts.

[11] For the distinction between contracts implied in fact and those implied in law, see American La France Engine Co. v. Borough of Shenandoah, 115 F.2d 866 (3d Cir. 1940); Mathie v. Hancock, 78 Vt. 414, 63 Atl. 143 (1906). For an example of the confusion on implied contract see Ohio Oil Co. v. Michigan City, 117 F.2d 391, 393 (7th Cir. 1941).

[12] Bartlett v. City of Lowell, 201 Mass. 151, 87 N.E. 195 (1909) (recovery denied since to allow it would be to put "the seal of law upon a plain evasion . . ."); Bluthenthal v. Town of Headland, 132 Ala. 249, 31 So. 87 (1901). Where the contract is by an officer without authority there will be no implied recovery, 17 Harv. L. Rev. 343 (1904). Distinctions are sometimes made between proprietary and governmental types of contracts. Eau Claire Dells Improvement Co. v. Eau Claire, 172 Wis. 240, 179 N.W. 2 (1920).

agreement as to which statutes are directory and which are mandatory.

Where the statute has been directed toward the form of the contract, such as the requirement that the contract be in writing, recovery has been permitted despite lack of compliance,[13] and also where a required resolution was not passed,[14] or where proper publication of an ordinance was not made,[15] or a contract was not made in duplicate as required.[16] However, the failure to authorize a contract by ordinance where required by statute is generally regarded as mandatory,[17] as are competitive bids,[18] the requirement of a prior appropriation,[19] the conformance with constitutional debt limits,[20] and the inability of city officials to have an interest in the contract.[21]

The basis for this conflicting maze of decisions is traceable to the application of two different doctrines of public policy. The courts denying recovery on implied contract proceed on the theory that a statutory requirement when not complied with negatives validity, and the allowance of recovery would indirectly allow that which by statute cannot be done directly. This view tends to support all regulations created to afford the taxpayer protection.

The decisional results of the other type of cases indicate that public policy requires the use of quasi contractual principles

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[13] Gas Light Co. v. Memphis, 93 Tenn. 612, 30 S.W. 25 (1894). It seems, however, that the requirement of writing was intended to be as much a safeguard as competitive bidding. See Note, 10 N.Y.U.L.Q. Rev. 64, 70 (1932).

[14] Forest City v. Orgill Bros., 87 Ark. 389, 112 S.W. 891 (1908).

[15] Moore v. City of New York, 75 N.Y. 238 (1878).

[16] Saleno v. City of Neosho, 127 Mo. 627, 30 S.W. 190 (1895).

[17] Moseley Hospital v. Hall, 207 Ky. 644, 269 S.W. 1004 (1925); Bosard v. City of Grand Forks, 13 N.D. 587, 102 N.W. 164 (1904) (held no implied contract since it would override the law and destroy strongest safeguards of public funds); Note, 21 Ky. L. Rev. 489, 490 (1933) (great weight declared to be that no implied contract proper where there is failure to authorize by required ordinance and procure sealed bids as well). *Contra*: Ward v. Town of Forest Grove, 20 Ore. 355, 25 Pac. 1020 (1891); Sluder v. City of San Antonio, 2 S.W.2d 841 (Tex. Comm. App. 1928) 7 Texas L. Rev. 172 (1928) (recovery allowed in face of express restriction).

[18] Johnson County Savings Bank v. City of Creston, 212 Iowa 929, 231 N.W. 705 (1930); Restatement, Restitution §62 comment b (1937).

[19] Empire Voting Mach. Co. v. Chicago, 267 Fed. 162 (7th Cir. 1921), 34 Harv. L. Rev. 439 (1921); Roberts v. City of Fargo, 10 N.D. 230, 86 N.W. 726 (1901). *Contra*: Houston v. Finn. 149 S.W.2d 1000 (Tex. Crim. App.) 20 Tex. L. Rev. 109 (1941).

[20] Bartelson v. Int'l School Dist., 43 N.D. 253, 174 N.W. 78 (1919) (dissent thought result served to "sustain plunder and theft.")

[21] City of Bristol v. Dominion Nat. Bank, 153 Va. 71, 149 S.E. 632 (1929) 16 Va. L. Rev. 628 (1930). *Contra*: Grand Island Gas Co. v. West, 28 Neb. 852, 45 N.W. 242 (1890).

and recovery on a quantum meruit basis when the subject matter of the contract is proper and the taxpayer is still given reasonable protection.

A harsh rule often invoked against recovery is that an individual contracts with the municipality at his own peril and is conclusively presumed (*i.e.* a rule of law) to know the limitations upon its power, and also upon the authority of its officers in making them.[22] However, there evists an ameliorative presumption of validity of the contract and that all things required for its validity have been performed.[23] Occasionally the defense that the parties are in *pari delicto* is interposed, but the courts ordinarily give it slight recognition.[24]

Municipalities are generally held liable on the theory of ratification provided the contract was within general corporate powers, although it was in some way defective due to irregular execution,[25] or because the officer or agent who executed it on behalf of the corporation had not the requisite authority.[26] Thus the courts will allow ratification of the contract if it is of a proper nature and the ratification is formally made,[27] but generally ratification will not be implied.[28] Contracts wholly beyond the power of the municipality, *i.e.* those *ultra vires* are never ratifiable.[29] North Dakota has expressly

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[22] Reams v. Cooley, 171 Cal. 510, 152 Pac. 293 (1915), 1 Corn. L. Q. 311 (1916); Williams v. Fargo, 63 N.D. 183, 247 N.W. 46 (1933); Peoples Bank v. School Dist. No. 52, 3 N.D. 496, 57 N.W. 787 (1893); Roberts v. City of Fargo, 10 N.D. 230, 86 N.W. 726 (1901); 2 Dillon, Municipal Corporations §777 (5th ed. 1911). The maxim that every man is presumed to know the law, *ignorantia juris non excusat*, has been criticized and instead it has been argued that one should have only to look to the ostensible power to make the contract. Wentink v. Passaic County, 66 N.J. 65, 48 Atl. 609 (1901), nor should an individual be expected to "study a treatise on the law of corporations." Bissel v. Michigan Ry., 22 N.Y. 258, 281 (1860).

[23] Johnson County Savings Bank v. City of Creston, 212 Iowa 929, 231 N.W. 705 (1930); Missoula Street Ry. v. City of Missoula, 47 Mont. 85, 130 Pac. 771 (1913). A distinction between executory and executed contracts is sometimes made. San Francisco Gas Co. v. San Francisco, 9 Cal. 453 (1858).

[24] *See* St. Paul v. Dual Parking Meter Co., 39 N.W.2d 174 (Minn. 1949) for a successful application of the defense.

[25] 2 Dillon, Municipal Corporations 1154, n.2 (5th ed. 1911). A contract to violate the charter or to bargain or restrict the free exercise of legislative discretion vested in the municipality or its officers is void.

[26] Everts v. Rose Grove Twp., 77 Iowa 37, 41 N.W. 478 (1889); New Haven v. Weston, 87 Vt. 7, 86 Atl. 996 (1914).

[27] Shulse v. City of Mayville, 283 Wis. 624, 271 N.W. 642 (1937).

[28] Note, 34 Minn. L. Rev. 46, 54 (1950).

[29] *See* Gosserand v. City of Gretna, 9 La. App. 544, 121 So. 208, 211 (1928). Some courts confuse ratification with quasi contracts. Note, 36 Mich. L. Rev. 855 (1938).

recognized ratification as an accepted mode of making good a contract that has only some secondary defect.[30]

CONTRACTS IMPLIED IN LAW: QUASI CONTRACTUAL RECOVERY

The task of reconciling the cases concerned with quasi contractual liability of the municipal or public corporation has been described as completely hopeless by one authority.[31] However the courts are in agreement that where the contractual irregularity deprives the municipality of a protection or safeguard there can be no recovery,[32] nor can there be quasi contractual recovery where the restrictions are mandatory.[33] Like contracts implied in fact, recovery for benefits conferred is permissible where the contract was made in good faith and was within the power of the municipality and the failure of the agreement was only due to non-compliance with directory provisions.[34] It is essential to quasi contract recovery that the plaintiff show that the defendant municipality has acquired tangible benefits in the form of money, services, or materials, and that it would be inequitable not to compensate the plaintiff.[35] Where a statute has forbidden any "contract, agreement or obligation" to be entered into except by ordinance, it

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[30] Stark County v. City of Dickinson, 56 N.D. 371, 17 N.W. 525 (1928); Gillespie v. Common School Dist. No. 8, 56 N.D. 194, 216 N.W. 564 (1927) (ratification need not be alleged in complaint).

[31] Knowlton, *The Quasi-Contractual Obligation of Municipal Corporations*, 9 Mich. L. Rev. 671 (1911). A quasi contract is really no contract at all. The very liberal allowances of quasi contract recovery in Minnesota is traced in Kotschevar v. North Fork Twp., 39 N.W.2d 107 (Minn. 1949) and criticized in an erudite dissent.

[32] Woodward, The Law of Quasi Contracts §161 (1913). *Accord*: Probst v. City of Menasha, 245 Wis. 90, 13 N.W.2d 504 (1944). Exceptional circumstances may admit a circumvention of the statute. See Note, 31 Yale L. J. 779 (1922), sharply criticizing the case of Pyrene Mfg. Co. v. Atlanta, 27 Ga. App. 643, 110 S.E. 408 (1922).

[33] Where the municipality has the power to so contract and has paid, then no action will lie to recover back the money expended. *See* Federal Paving Corp. v. City of Wauwatosa, 231 Wis. 658, 286 N.W. 546, 547 (1939).

[34] American La France Inc. v. City of Philadelphia, 183 Miss. 207, 184 So. 620 (1938), 16 N.Y.U.L.Q. Rev. 494 (1939); Harm v. School Dist. No. 2, 139 Neb. 714, 298 N.W. 549 (1941).

[35] Shulse v. City of Mayville, 283 Wis. 624, 271 N.W. 642 (1937); Appalachian Electric Power Co. v. City of Huntington, 115 W. Va. 588, 177 S.E. 431 (1934). That there is a duty on the municipality to do equity, *see* Ogren v. Chrystal Springs School Dist. No. 29, 52 N.D. 455,462, 203 N.W. 324, 326 (1925). If the proceeds of a void contract can be traced or identified, the plaintiff may recover by means of a constructive trust or an equitable lien. Floyd County v. Owego Bridge Co., 143 Ky. 693, 137 S.W. 237 (1911) (plaintiff allowed to remove bridge under void contract); Note, 24 Minn. L. Rev. 578 (1940).

has been held that the restriction applied equally to quasi contracts.[36]

Violations of statutory requirements which have been held to forbid recovery in quasi contract include: failure to post a contractor's bond,[37] failure to put the contract in writing,[38] and failure to pass an ordinance authorizing the contract.[39] Failure to comply with the lowest bid statute has in some cases been considered only malum prohibitum and not prohibitive of quasi contract recovery,[40] as has a statute requiring that a record of yeas and nays be maintained.[41] It is fundamental that rules of equity will be applied where the municipality is sought to be bound by a contract entered into in an informal manner.

The confusion manifest in municipal quasi contracts has prompted the view that implied ratification and equitable estoppel should be eliminated from the law of municipal corporations and that quasi contract should be the exclusive remedy in such cases.[42]

SUMMARY

The general reason advanced for refusing recovery is that protection of the taxpayer is foregone in allowing such recovery. This public policy argument that the taxpayer is entitled to the protection of the constitutional and statutory restrictions should not be lost sight of, yet in the light of expanding municipal business activities, the business man who deals with the municipality should not be made a contributor to the corporation's unjust enrichment. Where there is a contravention of mandatory statutes, recovery would have the effect of allowing the corporation to do indirectly that which it

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[36] City of Wellston v. Morgan, 65 Ohio 219, 62 N.E. 127 (1901). Minnesota has adopted the liberal view that recovery may be allowed though competitive bidding requirements are not complied with. Note, 34 Minn. L. Rev. 45 (1950).

[37] Mackey v. Columbus Twp., 71 Mich. 227, 38 N.W. 899 (1888).

[38] Leland v. School Dist. No. 28, 77 Minn. 469, 80 N.W. 354 (1899). *Contra*: Gas Light Co. v. Memphis, 93 Tenn. 612, 30 S.W. 25 (1894).

[39] Paul v. Seattle, 40 Wash. 294, 82 Pac. 601 (1905). *Contra*: McGuire v. Rapid City, 6 Dak. 346, 43 N.W. 706 (1889).

[40] Smith v. Town of Vinton, 43 So.2d 18 (La.1949).

[41] Logansport v. Dykeman, 116 Ind. 15, 17 N.E. 587 (1888).

[42] 34 Minn. L. Rev. 46, 56 (1950). This article attacks the mandatory and directory and governmental and proprietary distinctions and argues that the question is really one of the relative weights of interest of the public and the injustice of non-recovery.

cannot do directly.[43] Thus there has been the counterplay of the two interests, namely, that of safeguarding the taxpayer from the costs of improper municipal contracts, as opposed to the inequities of a municipality being enriched at another's expense.[44]

The majority of decisions place the municipality under the same obligation to do justice as a private corporation where there is not an abrogation of a public safeguard and hold that wherever possible restitution in value should be made.[45] Under this principle municipal corporations, in part to protect the credit of the municipality, like a private corporation or individual, should be compelled to do justice and equity,[46] but only within the bounds established to protect the municipality.

OIL AND GAS — SURVEY OF RIGHTS UNDER OIL AND GAS LEASES

THE EXCEPTIONAL physical properties of oil and gas are reflected in the manner in which courts have created the law which governs them. Recent developments in the search of oil and gas in North Dakota and the resultant leasing of oil, gas and mineral rights in much of the state's real property have led many property owners to attempt to classify the legal rights of the parties arising under this special type of lease.

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[43] Barnard v. Chicago, 316 Ill. 519, 147 N.E. 384 (1925) (protection of taxpayers demanded strict construction); McCurdy v. Shiawassee County, 154 Mich. 550, 118 N.W. 625 (1908). See Village of Harvey v. Wilson, 78 Ill. App. 544 (1898) for an example of a statutory safeguard made meaningless.

[44] The trend is toward allowance of quasi contract recovery in a greater number of situations. See Note, 36 Mich. L. Rev. 855, 858 (1938).

[45] First Nat. Bank of Goodhue v. Village of Goodhue, 120 Minn. 362, 139 N.W. 599 (1913) (criticized in 16 Va. L. Rv. 628, 635 (1930) for allowing recovery when loan was made without prior voter authorization required and also where the president of the council was an official in the loaning bank). "As against individuals the law implies a promise to pay in such cases and the implication extends equally to corporations." San Francisco Gas Co. v. San Francisco, 9 Cal. 453 (1858).

[46] "Equity properly recognizes that a municipal corporation should not be permitted to take the property of another, and receive the benefits thereof, and thus be enriched through the loss of another without compensation." Bartelson v. International School Dist., 43 N.D. 253, 256, 174 N.W. 78, 79 (1919). *Accord*: Pimentel v. City of San Francisco, 21 Cal. 351 (1863) ("The city is not excepted from the common obligation to do justice which binds individuals"); Iverson v. Williams School Dist., 42 N.D. 622, 172 N.W. 818 (1919).