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Municipal Liability Upon Improperly Executed Contracts

COMMENTS

MUNICIPAL LIABILITY UPON IMPROPERLY EXECUTED CONTRACTS

INTRODUCTION

Can a municipality be liable in quasi contract? What recourse is available to the individual or corporation whose contract with a municipality does not comply with the specific statutory requirements prescribed by the legislature? This comment will attempt to examine these two problems, investigate the many circumstances where they may arise and analyze the rational of the courts in permitting or denying recovery. In the light of the vast number of municipalities existing in Pennsylvania, particular attention will be directed to that state.[1]

GENERAL PRINCIPLES

The type of a statute involved in this discussion provides generally that, "all contracts, or purchases made by any [municipality] involving the expenditure of over $500 (or any given amount) shall be in writing . . . . Any contract made in violation of the provisions hereof shall be void. . . ."[2]

Recognizing that a municipality exists by will of the legislature and is subject to the regulations and control of that body, most jurisdictions perceive these statutory provisions as mandatory and not merely directory.[3] This being so, the courts will not assist a claimant to circumvent the mandate of the statute by permitting a recovery upon a quantum meruit basis.[4]

1. It has been estimated that there are approximately from 150,000 to 200,000 local governmental units in the United States. 1 MCQUILLIN, MUNICIPAL CORPORATIONS, 286, § 1.83 (3d ed. 1949).

2. Township Act of July 18, 1935, P.L. 1176, as amended, § 1802, PA. STAT. ANN. tit. 53, § 56802.

3. Yoder v. Luzerne Twp. School Dist., 399 Pa. 425, 160 A.2d 419 (1960); Harris v. Philadelphia, 283 Pa. 496, 129 Atl. 460 (1925).

4. Willis Bancroft, Inc. v. Millcreek Twp., 335 Pa. 529, 6 A.2d 916 (1939), sewer system installed under an oral contract; Morgan v. Johnstown, 306 Pa. 456,

Before detailing the reason underlying the general rule, the exception to it, and the opposing view, an attempt should be made to dispel some of the confusion that exists concerning the distinction between contracts implied in fact and contracts implied in law, which are more frequently termed quasi contracts. Judge Maris of the Court of Appeals for the Third Circuit has very capably pointed out this distinction. "A quasi contract . . . is not to be confused with a contract implied in fact, which is an actual contract, and which arises where the parties agree upon the obligations to be incurred,. . . . Quasi contracts . . . are not based on the apparent intention of the parties to undertake the performances in question, nor are they promises. They are obligations created by law for reasons of justice."[5]

Quasi contractual recovery rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the ex-

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160 Atl. 696 (1931); Reilly v. Philadelphia, 60 Pa. 467 (1869); Hague v. City of Philadelphia, 48 Pa. 527 (1865); Newhurd v. North Union Twp. School Dist., 170 Pa. Super. 477, 87 A.2d 98 (1952); Price v. Taylor Borough School Dist., 157 Pa. Super. 188, 42 A.2d 99 (1945); *In re* Sykesville Borough, 91 Pa. Super. 335 (1927).

Other cases in which recovery was denied either on the express contract or upon a quasi contractual basis are:

Carnegie Natural Gas Co. v. Allegheny County, 406 Pa. 134, 176 A.2d 630 (1962), contract to replace gas lines which was not properly approved; Patterson v. Delaware County, 404 Pa. 5, 171 A.2d 47 (1961), contract to rent excavating equipment to county; Maryland Casualty Co. v. Darby Twp., 20 Pa. D. & C. 2d 543 (1959), aff'd per curiam at 399 Pa. 492, 160 A.2d 706 (1960); Commonwealth v. Seagram Distillers Corp., 379 Pa. 411, 109 A.2d 184 (1954), contract to transport whiskey not properly executed; Coyle v. Pittsburgh, 344 Pa. 426, 25 A.2d 707 (1942), real estate broker employed under an oral contract to appraise certain property; Charleroi Lumber Co. v. Bentleyville Borough School Dist., 334 Pa. 424, 6 A.2d 88 (1939), the cost of building a school was considerably higher than the amount authorized by the electors; Luzerne Twp. v. Fayette County, 330 Pa. 247, 199 Atl. 327 (1938); Kuhn v. Commonwealth, 291 Pa. 497, 140 Atl. 527 (1928); Commonwealth ex rel. v. Jones, 283 Pa. 582, 129 Atl. 635 (1925).

Nuebling v. Topton Borough, 323 Pa. 154, 185 Atl. 725 (1936), contract to design borough water plants; Wilkes-Barre Connecting R.R. v. Kingston Borough, 319 Pa. 471, 181 Atl. 564 (1935), contract for the installation of a sewer line; Union Paving Co. v. City of Philadelphia, 263 Pa. 577, 107 Atl. 370 (1919); Trevorton Water Supply Co. v. Zerbe Twp., 259 Pa. 31, 102 Atl. 328 (1917), installation of fire hydrants; Philadelphia Co. v. City of Pittsburgh, 253 Pa. 147, 97 Atl. 1083 (1916), contract to supply gas; Miller v. Philadelphia, 231 Pa. 196, 80 Atl. 68 (1911); Smart v. Philadelphia, 205 Pa. 329, 54 Atl. 1025 (1903), contract to repair a street; J. A. Kreis & Co. v. City of Knoxville, 145 Tenn. 297, 237 S.W. 55 (1921), oral alteration of a contract; Watterson v. Mayor, etc., of City of Nashville, 106 Tenn. 410, 61 S.W. 782 (1901).

5. American LaFrance Fire Engine Co. v. Borough of Shenandoah, 115 F.2d 866 (3rd Cir. 1940), at 867.

pense of another.[6] Payment should be made for benefits received or these benefits should be returned. This doctrine, however, does not apply to a municipality.[7]

A municipality is not liable for the benefit of services received under an invalid contract when these benefits cannot be surrendered, and the retention of them is therefore involuntary.[8] There cannot be an implied obligation on the part of the municipality to make payments for the benefits received because such a recovery would defeat the purpose of the statute.[9]

Statutes which prescribe the form and method of contracts for municipal governments are intended as safeguards to protect the citizenry from fraud and dishonesty. They serve as barricades to raids upon the public funds. To allow a quasi contractual recovery to "circumvent" these statutes would defeat the very purpose of their enactment. The Restatement of Restitution indicates that such a recovery "would seriously impair the protection intended to be afforded by . . . [the] statute."[10]

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6. Miller v. Schloss, 218 N.Y. 400, 113 N.E. 337 (1916).

7. 6 WILLISTON ON CONTRACTS (rev. ed. 1938), § 1786A.

8. Montgomery v. Philadelphia, 391 Pa. 607, 139 A.2d 347 (1958), cited in 20 U. PITT L. REV. 253 & 310; Commonwealth v. Seagrams Distillers Corp., *supra* note 4; Coyle v. Pittsburgh, *supra* note 4; Charleroi Lumber Co. v. Bentleyville Borough School Dist., *supra* note 3; Luzerne Twp. v. Fayette County, *supra* note 4.

9. Hague v. City of Philadelphia, *supra* note 4; McDonald v. New York, 68 N.Y. 23, 28 (1876).

10. Section 62. TRANSFEREE PROTECTED BY PUBLIC POLICY.

Comment b: Thus an infant to whom a person has transferred a non-necessary in the course of a contract is not under a duty of restitution to the transferor upon failure to pay for it, if the subject matter or its product is not available at the time when restitution is sought. The rule may also apply in the protection of the citizens of a community where a contract which is contrary to the provisions of a statute has been made by its officers on its account . . . . [A] person who renders services to a municipality under a contract violating the terms of such a statute is not entitled to receive either the contract price or the reasonable value of his services.

In Illustration 2, the Restatement provides the reader with an example of such a contract:

> In state X a statute provides that no contract for work to be done for a municipality where the contract price exceeds $10,000 shall be made unless it has been passed upon at a regular session of the municipal council duly called. A [a construction outfit], contracts with the city of Y for dredging for the price of $50,000, the contract being approved only by the municipal officers. Upon completion of the work, A is not entitled to reasonable compensation from Y although he believed that the council had approved the contract or although he did not know of the statute.

It is the obligation of the person dealing with the municipality to protect himself by securing a written contract complying with the terms of the statute.[11] "He who deals with a municipality must recognize that it can contract only upon such terms as the legislature has seen fit to prescribe."[12] This person also has the burden to inquire into the authority of public officers to bind the government they represent.[13]

> Full force has been given to restrictive statutes of the state, and implied liability denied, and the doctrine established that public officers can incur obligations against those for whom they act, only in pursuance of the provisions of the statutes, and that they cannot deal upon the quantum meruit or reasonable value plan . . . . A strict adherence to the provisions of the restrictive statutes of the state will be for the general good, and it devolves upon those who deal with public officers to see for themselves that the statutes have been complied with . . . . There being no implied municipal liability in cases ex contractu . . ., it follows that to state a good cause of action against a municipality in such cases, the petition must declare upon a contract, . . . made and entered into according to statute. A petition on an account merely, or quantum meruit, in such cases, is not sufficient. . . .[14]

CASES IN WHICH A QUASI CONTRACTUAL RECOVERY IS ALLOWED

a. *The Object Received by the Municipality is Returnable*

The earlier judicial decisions expressed the view that recovery could not be had against municipalities even though money or property received was still held by the municipality in specie.[15] Gradually, however, the courts realized that certain inequities could and should be remedied and created exceptions to this firmly entrenched rule of law. Where restitution could be made in specie, the court imposed an implied obligation on the municipality to restore the other party to the status quo.[16] This, they said, would in no way defeat the protection of the statute.

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11. Willis Bancroft, Inc. v. Millcreek Twp., *supra* note 4.

12. Commonwealth ex rel. v. Jones, *supra* note 4.

13. Willis v. York County Directors of the Poor, 284 Pa. 138, 130 Atl. 401 (1925); Commonwealth v. Sanderson, 40 Pa. Super. 416 (1909); McGovern v. City of Boston, 229 Mass. 394, 118 N.E. 667 (1918).

14. City of Wellston v. Morgan, 65 Ohio 219, 62 N.E. 127 (1901).

15. Buchanan v. City of Litchfield, Illinois, 102 U.S. 278 (1880).

16. RESTATEMENT, RESTITUTION, § 62, Comment b. "Likewise where a statute provides a debt limit beyond which it is illegal . . . to go, a person lending money

This exception has been invoked where money has been paid or lent to a governmental body under either an invalid or procedurally defective contract.[17] "Where a municipality issues an express contract or formal obligation which is void because of the failure of its authorities to comply with the constitutional and statutory requirements, an action for money had and received by the lender of the money will lie."[18]

The courts reason that the benefits of this transaction can be surrendered and restitution will not violate the fundamental policy underlying the statute.[19]

This exception is also applicable when taxes have been wrongfully collected by the governmental body,[20] or where the particular subject matter of the contract can be returned in specie.[21]

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to a municipality in excess of such limit may not be entitled to restitution. In cases of this type, however, if restitution can be granted without harm to the persons protected, it will not be denied. . . . [W]here a municipality has received money in excess of the debt limit, restitution may be granted if the money has not been used; [or] if the money has been expended in the reduction of the lawful debts of the town . . . . [T]his would not violate the fundamental purpose of the statute."

17. McGregor Estate v. Young Twp., 350 Pa. 93, 38 A.2d 313 (1944); Ohlinger v. Maidencreek Twp., 312 Pa. 289, 167 Atl. 882 (1933); Long v. Lemoyne Borough, 222 Pa. 311, 71 Atl. 211 (1908); First National Bank of Monongahela City v. Carroll Twp., 150 Pa. Super. 241, 27 A.2d 527 (1942); Greenwich Bank v. Commercial Banking Corp., 85 Pa. Super. 159 (1925); McAvoy & McMichael, Ltd. v. Commonwealth Title Insurance & Trust Co., 27 Pa. Super. 271 (1905); Paul v. City of Kenosha, 22 Wis. 256 (1867).

18. Cameron Bank v. Aleppo Twp., 338 Pa. 300, 303, 13 A.2d 40 (1940). The township borrowed money but it did not comply with article IX, §10 of the Pennsylvania Constitution which requires that when a debt is incurred, an annual tax must be provided which is sufficient to pay the interest and principal within 30 years.

19. 38 AM. JUR., *Municipal Corporations*, § 521.

20. Bank of Holyrood v. Kottmann, 132 Kan. 593, 296 Pac. 357 (1931); Fox Valley Canning Co. v. Village of Hortonville, 207 Wis. 502, 242 N.W. 142 (1932); Carolina & N.W. Ry. Co. v. Town of Clover, S.C., 46 F.2d 395 (4th Cir. 1931); Quick Service Tire Co. v. Smith, 156 Tenn. 96, 299 S.W. 807 (1927); Gould v. Board of Comm'rs of Hennepin County, 76 Minn. 379, 79 N.W. 530 (1899). However, some authorities say that in order for recovery to be granted, the plaintiff must have registered a protest at the time payment was made. They reason that if the taxpayer did not make a protest at the time of payment, the payment was not involuntary and there can be no recovery. This conclusion is based upon the reasoning that a person may not recover something which he voluntarily surrendered. In the absence of a registered complaint or protest, it can be said that the payment was voluntary and therefore, recovery should be denied. General Discount Corp. v. City of Detroit, 306 Mich. 458, 11 N.W. 2d 203 (1943). See also 17 MCQUILLIN, MUNICIPAL CORPORATIONS §§ 49.62 and 49.63 (3d ed. 1950).

21. Hale v. Borough of Ashland, 260 Pa. 547, 103 Atl. 1018 (1918).

The Restatement of Restitution indicated the rational for this exception, but notes that unless the money has been expended to extinguish a properly incurred municipal indebtedness, restitution would violate the fundamental purpose of the statute.[22] What is the result where the money has not been spent for a proper municipal purpose, and is no longer in the treasury? Do we still require the city to repay the money? Such a situation would be extremely rare and this issue has not confronted any court; although, if such a situation were presented, reason might dictate no recovery.

With the exception of the "emergency situations" which will be discussed infra,[23] these are the only instances in which Pennsylvania will permit a recovery on a quasi contractual basis.[24]

b. *Minority View*

As has been pointed out, the Pennsylvania courts will allow a plaintiff to recover if the benefit received by the municipality can be surrendered. The Third Circuit, however, in *American LaFrance Fire Engine Co. v. Borough of Shenandoah,*[25] permitted a recovery on quasi contractual principles for the reasonable rental value of fire apparatus which was in the possession of the municipality under an invalid contract. Apparently, the court in this case misinterpreted the existing Pennsylvania law. The benefit received by the borough could not be surrendered. The precedents cited by the *American LaFrance* court as a basis for its holding had allowed a quasi contractual remedy *solely* because the benefits received by the municipalities could be returned.[26]

While we have seen that Pennsylvania permits this very limited quasi contractual recovery, this has not been the view taken by other courts. These opposing states have held that where a governmental body receives substantial benefits under a contract which it was authorized to make, but which was void because irregularly

22. Section 62, Comment b. See illustrations 3 and 4:

In State X, municipalities are forbidden to borrow more than $100 per capita. The city of Y, having reached its debt limit of $2,000,000, borrows $1,000,000 from A. If the money is still in the bank to the credit of the city, or if the money is used to extinguish an equal amount of Y's properly incurred indebtedness, the total debt of the city after the payment being less than $2,000,000 including A's claim, in either situation, A may recover.

23. See text at notes 34-36, *infra.*

24. Luzerne Twp. v. Fayette County, *supra* note 4.

25. *Supra* note 5.

26. The cases cited as authority for the court's action were: Cameron Bank v. Aleppo Twp., *supra* note 18, and Luzerne Twp. v. Fayette County, *supra* note 4.

executed, it is liable in an action brought to recover the reasonable value of the benefits received.[27]

In two states attorneys were permitted to recover the reasonable value of their services.[28] In still another case, a plaintiff was allowed a recovery for the value of the benefit received by a city when it used the plaintiff's asphalt plant in making asphalt for repairs on its streets.[29] These courts expressed the liberal view that recovery may be had whether one furnished money, property, or personal services and this principle applies with equal force to each.[30]

In states which have granted relief on this liberal theory,[31] recovery is allowed even though the statutory requirements are not complied with. This result is reached by concluding that the statutory requirements are merely directive and not mandatory.[32] They conclude that the legislature only intended to prohibit recoveries of the contract price, but did not intend to bar an action based on reasonable value.[33]

OTHER CASES IN WHICH RECOVERY IS PERMITTED

The courts in many circumstances will allow recovery upon what they term "quasi contract," when in reality, they are misconstruing the term and are actually granting recovery upon contracts implied-in-fact rather than contracts implied-in-law. This indicates the courts' willingness to permit a recoupment of losses by deserving

27. Nebraska Bitulithic Co. v. City of Omaha, 84 Neb. 375, 121 N.W. 443 (1909).

28. Sluder v. City of San Antonio, 2 S.W.2d 841 (Tex. 1928). Vernon v. Board of Comm'rs of Edwards County, 132 Kan. 119, 294 Pac. 871 (1931).

29. Nebraska Bitulithic Co. v. City of Omaha, *supra* note 27. See also, Wakely v. County of St. Louis, 184 Minn. 613, 240 N.W. 103 (1931). It was held that the plaintiff was entitled to recover in quasi contract an amount equal to the benefits that the county received from the purchase of clay and sand from the plaintiff that were then used in improving a highway.

30. Sluder v. City of San Antonio, *supra* note 28.

31. Cases in accord with this view are: Salt Lake City v. Smith, 104 Fed. 457 (8th Cir. 1900); Pimental v. San Francisco, 21 Cal. 351, 362 (1863); Argenti v. San Francisco, 16 Cal. 256 (1860); Wheeler v. City of Chicago, 24 Ill. 105, 107 (1860); Norway v. Clear Lake, 11 Iowa 506, 508 (1861); Knowlton v. Plantation, 14 Me. 20 (1836); Atkins v. Barnstable, 97 Mass. 428, 429 (1867); Clark v. Board of County Comm'rs of Saline County, 9 Neb. 516 (1880); Wait v. Ormsby County, 1 Nev. 370; Armitage v. Essex Constr. Co., 88 N.J.L. 640, 96 Atl. 889 (1916); Ephrata Water Co. v. Ephrata Borough, 16 Pa. Super. 484 (1901).

32. See Note, 10 N.Y.U. L.Q. REV. 64, 68 (1932).

33. Fargo Foundry Co. v. Village of Calloway, 148 Minn. 273, 181 N.W. 584 (1921). See also, WINFIELD, THE LAW OF QUASI CONTRACTS, 136 (1952), citing WOODWARD, THE LAW OF QUASI CONTRACTS (1913).

plaintiffs. The following subsections can be classed as a breakaway from the firmly entrenched general principle.

a. *Emergency Situations*

In some instances the courts will allow recovery even though services were performed under oral contracts. The most common of these situations is when municipal policemen transport ill and wounded indigent persons to hospitals for treatment.[34] Claims are then made against the municipality to pay for the medical services received by the indigent persons who are unable to pay the hospital for the medical services rendered. The courts will usually allow recovery by the hospitals and will not require that formal express contracts be executed between the hospitals and the policemen because of the emergency situations that existed at the time the services were rendered. This holding is usually based upon the reasoning that the hospital performed a duty that belonged to the municipality under the principle of *parens patriae,* namely, the duty of rendering medical services to persons within its boundaries.[35]

The courts have utilized the emergency doctrine in cases where a plaintiff performed services for a municipality under an oral contract, which services would protect, insure or promote the health or safety of the residents of the community.[36]

b. *Fraud or Duress*

Whenever fraud[37] or duress[38] is involved on the part of a municipal official in inducing an innocent party to enter into an improperly executed contract, the plaintiff will usually be permitted to recover even though the statutory procedure has not been followed. The

34. Mercy Hosp. v. City of Pittsburgh, 15 Pa. D. & C. 2d 603 (Pa. Com. Pl. 1957).

35. County of McLean v. Humphreys, 104 Ill. 378, (1882); Crouse Irving Hosp. v. City of Syracuse, 128 N.Y.S. 2d 433 (1954), aff'd. 308 N.Y. 844, 126 N.E. 2d 179 (1955). *But see,* Mandan Deaconess Hosp. v. Sioux County, 63 N.D. 538, 248 N.W. 924 (1933) where it was held that in the absence of statute, a municipality is not required to pay for the support of its indigent residents and a hospital which rendered services to such poor persons could not recover.

36. Maguire v. Philadelphia, 66 Pa. Super. 300 (1917), garbage collection involving public health; Los Angeles Dredging Co. v. City of Long Beach, 210 Cal. 348, 291 Pac. 839 (1930), the hauling away of dredged materials in order to protect public health; North River Elec. Light & Power Co. v. City of New York, 48 App. Div. 14, 62 N.Y.S. 726 (1900), oral contract for the installation of street lights; Automatic Voting Mach. Corp. v. Witkins, 64 Pa. D. & C, 171 (1948); Upper Darby Twp. v. Ramsdell Constr. Co., 51 Pa. D. & C. 246 (1943).

37. Teall v. City of Syracuse, 120 N.Y. 184, 24 N.E. 450 (1890).

38. Mee v. Town of Montclair, 83 N.J.L. 274, 83 Atl. 764 (1912).

municipality will be held chargeable with knowledge of the unlawful proceedings of its officers.

c. *Ratification and Estoppel*

The courts on rare occasions resort to the measures of ratification[39] and estoppel[40] in order to permit a plaintiff to recover so as to relieve the hardships that would otherwise result. The concept of ratification is brought into effect in one of two ways: (1) an express, formal affirmance of the contract in the manner prescribed by statute;[41] or (2) an implied affirmance through conduct which indicates an acceptance of the contract.[42] While an implied ratification is often discussed, the courts generally require that the ratification comply with all the formalities required by law in the first instances.[43]

In order for a court to invoke the doctrine of estoppel, gross inequities must exist whereby the result would be extremely unfair if the plaintiff was denied recovery.[44] It is generally held that a municipality will not be estopped by reason of its acceptance and retention of the benefits of the contract.[45]

In cases in which estoppel is applied, the municipal officers must act with knowledge of the material facts and the plaintiff must justifiably rely upon the officers' actions and be induced to change his position.[46] The city will then not be permitted to present the

39. Webb v. Wakefield Twp., 239 Mich. 521, 215 N.W. 43 (1927); Rogers v. City of Omaha, 76 Neb. 187, 107 N.W. 214 (1906); New Jersey Car-Spring & Rubber Co. v. City of Jersey City, 64 N.J.L. 544, 46 Atl. 649 (1900); City of Logansport v. Dykeman, 116 Ind. 15, 17 N.E. 587 (1888).

40. Aspinwall-Delafield Co. v. Borough of Aspinwall, 229 Pa. 13, 77 Atl. 1098 (1910); Peterson v. City of Ionia, 152 Mich. 678, 116 N.W. 562 (1908).

41. Cole v. Burton, 313 Ky. 557, 232 S.W.2d 838 (1950).

42. City of Denver v. Webber, 15 Colo. App. 511, 63 Pac. 804 (1900); Johnson v. Hospital Service Plan of N. J., 25 N.J. 134, 135 A.2d 483 (1957); Bock v. Reading, 120 Pa. Super. 468, 182 Atl. 732 (1936). See also, 10 MCQUILLIN, MUNICIPAL CORPORATIONS, § 29.106 (3d ed. 1949).

43. Ballagh Realty Co. v. Borough of Dumont, 111 N.J.L. 32, 166 Atl. 491 (1933); Caterpillar Tractor Co. v. Detman Twp., 62 N.D. 465, 244 N.W. 876 (1932).

44. Aebli v. Board of Education of City and County of San Francisco, 62 Cal. App. 2d 706, 145 P. 2d 601 (1944), citing 19 AM. JUR., Estoppel 818, § 166. See also, McGee v. Los Angeles, 51 P.2d 1109 (Cal. App. 1936), rev'd. on other grounds 6 Cal.2d 390, 57 P.2d 925 (1936).

45. Charleroi Lumber Co. v. Bentleyville Borough School Dist., *supra* note 4.

46. Denver & S. L. Ry. v. Moffat Tunnel Improvement Dist., 35 F.2d 365 (D. Colo. 1929).

contention that the contract was improperly executed or that the municipal officers failed to formally ratify the contract. Since the municipality has received the benefits of the contract, arguments such as these will not be permitted to prevail.[47]

SUMMARY AND CONCLUSION

It can be generally stated that a quasi contractual recovery against municipalities will not be permitted. Pennsylvania, along with a majority of her sister states follows the general rule. This is based upon the reasoning that the legislative requirements are mandatory and not merely directive. The requirements prescribed by statute are conditions precedent to recovery. A recoupment through quasi contract can only defeat the public policy behind these statutes, and therefore, will generally not be allowed.

Exceptions to this general rule are made in the so called "emergency situations" where the plaintiff rendered his services in the performance of a function designed to protect the health or safety of the inhabitants of the community. Recovery is also allowed when money or property received by the municipality can be returned in specie or it has been used to extinguish a properly incurred indebtedness of the governmental body.

The minority view allows a quasi contractual recovery in all instances in which the municipality has been unjustly enriched. It considers the statute merely as a limiting factor governing the aspect of damages.

It is questionable whether the majority view is based upon sound judicial reasoning. This principle arose many years ago when municipal bodies were small and funds were limited. The courts, in an attempt to protect the little country village, established this doctrine so as to insure the body politic adequate protection against the dishonesty or lack of wisdom of the town officers. It is possible to compare this contractual immunity with other antiquated doctrines that have not yet been abolished, *i.e.,* charitable immunity and the requirement of privity in a breach of warranty action. Municipalities, like hospitals, have grown from struggling, young organizations into "big businesses." If we can accept the last statement, then the question presented is: Does the *need* for municipal contractual immunity

47. See Mt. Vernon v. State, 71 Ohio St. 428, 73 N.E. 515 (1905), where at 519, the court said that a municipal contract which is neither ultra vires, illegal, nor *malum prohibitum* will be enforced against the municipal corporation and the municipality will be estopped from setting up a defense, if the facts are such as would estop an individual from making such a defense.

still exist? Unfortunately, the courts answer this question in the affirmative.

In conclusion, it should be pointed out that any person performing services for a municipality should take precautions to adhere to the prescribed statutory procedure lest he endanger his possibility of recovery.

THE PERMISSIVE AREA OF STATE ANTI-DISCRIMINATION ACTS

INTRODUCTION

Since the *"Civil Rights Cases"*[1] many states have passed legislation proscribing discrimination in various areas, including public accommodations, employment, and housing. The courts have coped with various arguments, both ingenious and ingenuous, attacking the validity of State "Fair Practices" Acts, but generally have sustained the legislation.

However, increasing concern is being voiced by the proponents of such state legislation in reaction to constitutional grounds raised in two recent cases to be discussed later in this comment. The arguments raised have been stated within the framework of the well-known and settled doctrines of "federal pre-emption," and the "negative implication doctrine," drawn from the plenary power of Congress in the area of interstate commerce. But in reality the *ratio decidendi* of these cases is the extent of permissible state action in areas where the federal government has previously acted.

Although on the surface it would seem that the relation of these doctrines to "Fair Practices" legislation of the states has been thoroughly delineated by the Supreme Court in *Bob-Lo Excursion Company v. Michigan*,[2] the recent decision of the Colorado Supreme Court, *Colorado Anti-Discrimination Commission and Marlon D. Green v. Continental Air Lines, Inc.*[3] has again brought the problem to the front.

The Civil Rights Act of 1875[4] generally declared that all persons were to be entitled to the full and equal enjoyment of the accommo-

1. 109 U.S. 3 (1883).

2. 333 U.S. 28 (1948).

3. (—Colo.—) 368 P.2d 970 (1962) *petition for cert granted,* No. 146 and No. 68, 10/8/62, Docket No. 146.

4. 18 Stat. 335.