RELIEF UNDER A DEFECTIVE MUNICIPAL CONTRACT IN OHIO

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Introduction

The rapidly increasing tempo of concern for urban problems is giving rise to an ever-expanding range of literature devoted to their possible solution. Even in what might be considered a backwater of interest, the problems of municipal contracting, periodic examinations have taken place. Unfortunately, these have been undertaken almost exclusively by legal commentators, as most courts have been reluctant to make reassessments in a field in which the law at best must be considered to be largely an outgrowth of nineteenth century problems, thinking, and decisions. A recent case decided by the Ohio Supreme court, Pincelli v. Ohio Bridge Corp., invites renewed attention to this subject in Ohio—more particularly, to the problem of the availability of remedies under defective municipal contracts in the broader context of public contracts; for the difficulties are essentially the same at all levels of government. This case illustrates the necessity for legislative action if the needs of both municipal corporations and their contractors are to be adequately served in modern society, since it evidences continued judicial failure to respond to changed conditions in this field.

I.

Contractors' Relief When Statutory Prescribed Mode of Contracting Is Not Followed

It has been said that quasi-contractual relief was thought to be unavailable against an Ohio municipal corporation by virtue of the statement of the Ohio Supreme Court in the early case of City of Wellston v. Morgan:

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1 5 Ohio St. 2d 41, 213 N.E.2d 356 (1966).
2 1 C. Antieau, Municipal Corporation Law § 10.07 at 695-96 (1968).
There has been no common law implied municipal liability in this state since the passage of the act of April 8, 1876, amending Section 97 of the Municipal Code, 73 O. L. 125, and carried into the Revised Statutes as section 1693, . . . 4

However, this is clearly a misleading interpretation, as the principle of restitution or unjust enrichment based on the value of the benefit received has been repeatedly applied to Ohio public corporations in a variety of circumstances—for example, when a taxpayer has made payment to the wrong taxing unit,5 and when impossibility has prevented performance of a county contract.6 It has been suggested as being applicable if a corporate duty was performed by one other than a volunteer.7

Another possible meaning of the Supreme Court's statement, and the one the Court itself suggested in a later case,8 is that the application of quasi-contract was to be ruled out in situations where there had been a failure to follow statutory requirements for contracting. This narrower interpretation was based, as noted, primarily on the provisions of § 1693, Ohio Revised Statutes, which provided in part:

- no contract, agreement, or obligation shall be entered into except by an ordinance or resolution of the council, . . .
- and every contract, agreement, or obligation, . . . made contrary to the provisions of this section shall be void as against the corporation, but binding on the person or persons making it. . . 9 (Emphasis added.)

But even this construction of the statute was not a necessary one, as the requirement that municipal contracts be based on ordinance might have meant that the legislature desired only that a municipality act by express contracts and not by contracts implied-in-fact. Since implied-in-law, or quasi-contracts, are not contracts at all but merely a remedy device,10 such relief may not have been in the legislative mind when § 1693 was passed. The court's holding in Morgan, however, is not consistent with

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4 65 Ohio St. 219, 228, 62 N.E. 127, 128 (1901).
5 Village of Indian Hill v. Atkins, 153 Ohio St. 562, 93 N.E.2d 22 (1950).
8 Village of Indian Hill v. Atkins, 153 Ohio St. 562, 93 N.E.2d 22 (1950).
9 77 Ohio L. 34 (1880).
10 For an explanation of the historical development of the quasi-contract remedy see, Restatement of Restitution, Introductory Note 4-9 (1937).
this even more limited interpretation. The court was faced with a claim for quasi-contractual relief in a situation where there had been an express contract for the supply of light for 99 years, which contract had previously\textsuperscript{11} been refused enforcement, because of its violation of a ten-year statutory limit. Moreover, the court cited with approval earlier cases\textsuperscript{12} in which various remedies had been denied the contractor because of a failure to abide by statutory requirements concerning advertising for bids, certification of availability of funds, and similar matters. The court said:

the doctrine (is) established that public officers incur obligations against those for whom they act, only in pursuance of the provisions of the statutes, and that they cannot deal with the quantum meruit, or reasonable value plan. With these holdings we are content.\textsuperscript{13}

And so the court denied the availability of quasi-contract as a remedy (and not just implied-in-fact contracts) partly by reaffirmation of precedent on the theory that it would be destructive of restrictive statutes to do otherwise, but primarily on the basis of broadly interpreting §1693 as a legislative directive against such relief.

This holding put beyond the reach of future courts the flexibility of relief afforded by the principle of quasi-contract. It also opened the court of criticism for its failure to take into consideration the differences in language which might appear in the various restrictive statutes, as well as the legislative intent that motivated their passage. If the court did not wish its holding to be so broadly applied, but intended that it should be limited to the particular statute before it, or to those enactments involved in the precedent cited, its statements were definitely misleading, a fact that is made evident in subsequent cases.

The question of whether relief is obtainable under a defective municipal contract is, of course, not limited to the issue of unjust enrichment. Rather, there is the threshold question of whether the defect is of such a nature as to require that the contract's enforcement by either specific performance or a dam-

\textsuperscript{11} City of Wellston v. Morgan, 59 Ohio St. 147, 52 N.E. 127 (1898).
\textsuperscript{12} McCloud & Geigle v. City of Columbus, 54 Ohio St. 439, 44 N.E. 95 (1896); City of Lancaster v. Miller, 58 Ohio St. 558, 51 N.E. 52 (1898); Buchanan Bridge Co. v. Campbell, 60 Ohio St. 406, 54 N.E. 372 (1899); Comstock v. Village of Nelsonville, 61 Ohio St. 288, 56 N.E. 15 (1899).
\textsuperscript{13} City of Wellston v. Morgan, 65 Ohio St. 219, 229, 62 N.E. 127, 128-29 (1901).
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age award be denied. Another issue is the willingness of a court to enjoin a municipality from making payments under such a contract. The applicability of the principles of estoppel and ratification against a municipal corporation and the possibility of obtaining specific restitution, or return in kind, of property delivered to the municipality also need to be considered, as does the power of the municipal corporation to recover what it has paid, with or without the duty to restore to the contractor what it has received. Finally, there is the possibility of applying the theory of conversion against the municipal corporation.

Adding to the varigated picture created by the different forms or theories of potential relief is the wide range of requirements that statutes may impose. These include, to mention only the more common ones: prior authorization for a contract, or subsequent approval; detailed plans and specifications; advertisement for bids; appropriation of money for the intended purpose; and a certificate of the availability of funds to meet the payments to come due under the contract. With each statutory requirement there is, of necessity, the further problem of determining the legislative intent behind it, for it is the legislative purpose which ought to be of crucial importance in the judicial determination of what, if any relief, should be granted when a requirement is violated. This is the theory under which the authors of the Restatement of Restitution view the availability of quasi-contractual relief.  

As mentioned, the court in Morgan was influenced and aided by four decisions it had recently made on the general question of municipal contract remedies. These, with several others decided in the years following the Morgan case, serve as the formative basis for the law in Ohio on this subject.

The first was McCloud & Geigle v. City of Columbus. This involved a claim by McCloud for his expected profits under a contract to construct an improvement even though the city had only defectively complied with statutory provisions. (It failed to advertise for bids for the length of time required.)

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14 § 62 (1937).
15 54 Ohio St. 439, 44 N.E. 95 (1896).
16 "When the corporation makes an improvement or repair provided for in this chapter, the cost of which will exceed five hundred dollars, it shall proceed as follows:

First. It shall advertise for bids for the period of two weeks, or if the
The assessment against property owners for the contract price had previously been set aside, but under statutory authority McCloud had recovered his actual costs. Further relief was denied because the court felt that to grant it would amount to permitting indirect recovery from the general property owners of the city for a benefit conferred on specific property owners. In reaching this conclusion the court emphasized the need to advance the purpose of the statute as a safeguard for taxpayers, who were less able to look out after their interests than a municipal contractor was able to protect his.17

Two years later the court was faced with a case, City of Lancaster v. Miller,18 in which there had been a total lack of compliance with the provisions of three statutes (dealing with formal advertising,19 contracting by ordinance,20 and certification of availability of funds21). The suit was for the balance due on the contract, but the contractor proposed an alternative by also seeking the value of the labor and materials supplied on the basis of quantum meruit. The court conceded for argument that a subsequent appropriation of funds might serve to ratify the contract22 and thus correct the lack of an ordinance to

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estimated costs exceed five thousand dollars, four weeks, in two newspapers published in the corporation, or one newspaper, if only one is published therein; or by posting advertisements in three public places in the corporation, if no newspaper is published therein." 86 Ohio L. 341 (1889), Ohio Rev. Stats. § 2303.

17 McCloud & Geigle v. City of Columbus, 54 Ohio St. 439, 453, 44 N.E. 95, 96 (1896).
18 58 Ohio St. 558, 51 N.E. 52 (1898).
19 86 Ohio L. 341 (1889), Ohio Rev. Stats. § 2303, the statute involved in the McCloud case and quoted in note 16 supra.
20 77 Ohio L. 34 (1880), Ohio Rev. Stats. § 1693, the statute involved in the Morgan case, supra note 13 and text accompanying same.
21 "No contract, agreement or other obligation involving the expenditure of money shall be entered into, nor shall any ordinance, resolution or order for the appropriation or expenditure of money, be passed by the council or by any board or officer of a municipal corporation, unless the auditor of the corporation, and if there is no auditor, the clerk thereof, shall first certify that the money required for the contract, agreement or other obligation, or to pay the appropriation or expenditure, is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purposes. . . .; and all contracts, agreements or other obligations, and all ordinances, resolutions and orders entered into or passed, contrary to the provisions of this section shall be void; . . ." (Emphasis added.) 86 Ohio L. 392 (1889), Ohio Rev. Stats. § 2702.
22 "[A]ny contract that an individual, or body corporate or politic, may lawfully make, they may lawfully ratify and adopt, when made in their name without authority; and when adopted, it has its effect from the time it was made, and the same effect as though no agent had intervened." State v. Buttles, 3 Ohio St. 309, 323 (1854).
enter into it, but it found the contract invalid and denied all relief because of the failure to meet the requirements of the remaining two statutes. The court again stressed the need to further the statutory motive of protecting the taxpayer and the propriety of leaving the risk of possible loss upon the contractor. In reaching this result, the court rejected the contractor's claim of estoppel against the city with these words:

The corporation should not be estopped by the acts of its officers to set up these statutes in defense to contracts made in disregard of them. It would be idle to enact these statutes, and afterwards permit their practical abrogation by neglect or other misconduct of the officers of the municipality.

In Buchanan Bridge Co. v. Campbell the court was concerned with a county contract in which the provisions of a number of code sections were violated (in that no plans or estimates were drawn, no advertising for proposals was done, and no approval was obtained from the designated officers). An injunction against payments under this contract had been previously granted, and the contractor now sued for the value of his work plus interest, or in the alternative, for the value of the use of the bridge, or the return of the bridge. The court, seeking to prevent the evils which caused the enactment of these statutes, held that these defects were fatal to the validity of the contract. It found that the commissioners neither had the power to make the contract in the way they did nor to bind the county by way of quasi-contract, and that the contractor had notice of this lack of power. In language appropriate for a finding of illegality the court stated:

In this case both parties have acted in disregard of the statute, and the court will leave them where they have placed themselves, and refuse to aid either.

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23 City of Lancaster v. Miller, 58 Ohio St. 558, 575, 576, 51 N.E. 52, 55 (1898).
24 City of Lancaster v. Miller, 58 Ohio St. 558, 575, 51 N.E. 52, 55 (1898). Estoppel prevents the responsible party from asserting the truth of a statement or existence of a fact. It is based on conduct, intended to induce reliance, which presents a material fact known to the acting party, but the truth of which is unknown to the other party who relies on it, so that, if he is compelled to alter what he has done, he will suffer a loss. Kilko v. City of Cleveland, 60 Ohio L. Abs. 561, 102 N.E.2d 476 (Ct. App. 1951).
25 60 Ohio St. 406, 54 N.E. 372 (1899).
26 66 Ohio L. 54, 55 § 8, § 10 (1869), as amended; 68 Ohio L. 20 § 7, 103 § 9 (1871), as amended, Ohio Rev. Stats. §§ 795-99. Only in the last section were the terms "null and void" used.
27 Buchanan Bridge Co. v. Campbell, 60 Ohio St. 406, 426, 54 N.E. 372, 376 (1899).
A failure to abide by statutory certification requirements\textsuperscript{28} for a contract for improvements was again before the court in Comstock \textit{v. Village of Nelsonville}.\textsuperscript{29} Here an injunction was sought against the levy of a tax or an assessment upon the property in the village, the payment of the certificates and notes issued, and any further depletion of the street fund to pay for the improvement. The court granted the injunction on the authority of the three above cases after refusing to invoke an estoppel against the city.

In such cases the contract as well as what is done thereunder, is void as against the municipality.\textsuperscript{30}

In \textit{State, ex rel. Hunt v. Fronizer},\textsuperscript{31} which was decided after the Morgan case, there was again a failure to meet certification requirements.\textsuperscript{32} However, in this case the prosecutor on behalf of the county sought under statutory authority\textsuperscript{33} to recover back from the agent of the contractor county funds allegedly illegally spent under the contract. The court acknowledged the invalidity of the contract and the authority to recover illegally spent funds but concluded that the statute was not intended to change the common law rule requiring the county to restore the property it had obtained before it could recover what it had spent.\textsuperscript{34} Of course, before this requirement can apply the county must have received something of value from the contractor. In this case

\textsuperscript{28} 86 Ohio L. 392 (1889), Ohio Rev. Stats. § 2702, the statute involved in the Miller case and quoted in note 21 supra.

\textsuperscript{29} 61 Ohio St. 288, 56 N.E. 15 (1899).


\textsuperscript{31} 77 Ohio St. 7, 82 N.E. 518 (1907).

\textsuperscript{32} "The commissioners of any county, the trustees of any township and the board of education of any school district, . . ., shall enter into no contract, agreement, or obligation involving the expenditure of money, nor shall any resolution or order for the appropriation or expenditure of money, be passed by any board of county commissioners, township trustees or board of education, . . ., unless the auditor or clerk thereof shall first certify that the money required for the payment of such obligation or appropriation is in the treasury to the credit of the fund from which it is to be drawn, or has been levied and placed on the duplicate and in process of collection and not appropriated for any other purpose: . . . and all contracts, agreements or obligations, and all orders or resolutions, entered into or passed contrary to the provisions of this section shall be void. . ." (Emphasis added.) 93 Ohio L. 218 (1898), Ohio Rev. Stats. § 28341 (analogous section now Ohio Rev. Code § 5705.41 (1953)).

\textsuperscript{33} Predecessor of Ohio Rev. Code § 309.12 (1953).

\textsuperscript{34} \textit{State, ex rel. Hunt v. Fronizer}, 77 Ohio St. 7, 16, 82 N.E.518, 521 (1907).
the property (a bridge) was apparently returnable. If it had not been, it is unclear whether this would have precluded recovery, would have caused a waiver of the requirement, or would have induced the court to make the county pay for the reasonable value of the property it retained.

In *McCormick v. City of Niles* the contractor sued on an account for his services in publishing legal notices “at the request of said city, by its auditor and clerk of council, and approved by its city solicitor, . . .” The court, on the authority of *Morgan*, concluded that since there was no real allegation of an express contract (as none of the named officials had the power to contract for the city), there could be no recovery.

In *Frisbie Co. v. City of East Cleveland* lack of advertising for bids as required by statute for a contract between a land developer and the city proved fatal to recovery from the city of the amount due on a contract to install water lines:

It is well settled in this state that where the statute prescribes the mode by which the power therein conferred upon a municipal body shall be exercised, the mode specified is likewise the measure of the power granted, and that a contract made otherwise than as expressly prescribed and limited by statute is not binding or obligatory as a contract.

The court also rejected on the authority of earlier cases the idea that there could be implied liability by acceptance of the improvement or estoppel from acts of the officers of the city. The court further refused to rule that the city’s use of the pipe amounted to conversion, declaring that a mere breach of contract does not give rise to a conversion.

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35 The circuit court assumed that it was. *State, ex rel. Hunt v. Fronizer*, 8 Ohio C.C.R. (n.s.) 216 (Cir. Ct. 1906).
36 81 Ohio St. 246, 90 N.E. 803 (1909).
37 *McCormick v. City of Niles*, 81 Ohio St. 246, 252, 90 N.E. 803, 804 (1909).
38 98 Ohio St. 266, 120 N.E. 309 (1918).
39 “The trustee or board, before entering into any contract for work to be done, the estimated cost of which exceeds five hundred dollars, shall cause at least two weeks’ notice to be given, in one or more daily newspapers of general circulation in the corporation, that proposals will be received by the trustees, for performing of the work specified in such notice; and the trustees shall contract with the lowest bidder, if in their opinion he can be depended on to do the work with ability, promptness, and fidelity; and if such be not the case, the trustees may award the contract to the next lowest bidder or decline to contract, and advertise again.” 66 Ohio L. 207 § 346 (1869), Ohio Rev. Stats. § 2419.
40 *Frisbie Co. v. City of East Cleveland*, 98 Ohio St. 266, 273-74, 120 N.E. 309, 311 (1918).
Failure to obtain authorization by council and to advertise for bids as required by statute\textsuperscript{41} constituted the defects in the contract involved in \textit{Ludwig Hommel & Co. v. Village of Woodsfield}.\textsuperscript{42} The contractor was to furnish supplies to the village and to purchase some used meters from it. One was to be credited against the other. The contractor sued on the contract for the balance. The court found the contract void and denied relief under it. It also found estoppel was not applicable against the city, relying on the authority of the \textit{Miller} case. However, the court added that title to the meters supplied by the plaintiff had not passed to the village and that the law would in a proper suit compel their restitution (or compensation from the village), as the contract did not offend public policy and was not malum in se.\textsuperscript{43} In a second suit\textsuperscript{44} brought by the contractor on the theory of conversion the court retreated from its dictum that compensation was available by stating that only specific restitution of identified meters could be had. The difficulty of identifying particular meters for the purpose of obtaining their return was not permitted to provide an excuse for allowing the recovery of their value through an action in conversion which, it was emphasized, was essentially the relief denied in the first action.

\textsuperscript{41}"The director of public service may make any contract or purchase supplies or material or provide labor for any work under the supervision of that department not involving more than five hundred dollars. When an expenditure within the department, other than the compensation of persons employed therein, exceeds five hundred dollars, such expenditure shall first be authorized and directed by ordinance of council. When so authorized and directed, the director of public service shall make a written contract with the lowest and best bidder after advertisement for not less than two nor more than four consecutive weeks in a newspaper of general circulation within the city." 96 Ohio L. 67 § 143 (1902), Ohio Gen. Code § 4328 (now Ohio Rev. Code § 735.05 (Supp. 1967)). "The board of trustees of public affairs shall have the same powers and perform the same duties as are possessed by, and are incumbent upon, the director of public services as provided in sections . . . 4328, . . . General Code, . . ." 96 Ohio L. 85, § 205 (1902), Ohio Gen. Code § 4361 (now Ohio Rev. Code § 735.29 (1953)).

\textsuperscript{42}115 Ohio St. 675, 155 N.E. 386 (1927).

\textsuperscript{43} The court relied on \textit{Hill County v. Shaw & Borden Co.}, 225 Fed. 475 (9th Cir. 1915), for this proposition. There recovery was permitted against a county on the theory of conversion of property that could not be returned when the contract was found to be invalid for violating an implied statutory prohibition. In dictum the court also intimated that recovery on quantum meruit would be available.

\textsuperscript{44} \textit{Ludwig Hommel & Co. v. Village of Woodsfield}, 122 Ohio St. 148, 171 N.E. 23 (1930).
In summary, these cases uniformly held that defective contracts were completely invalid and that no relief was obtainable on them. Theories of quasi-contract, estoppel, and conversion were rejected because they were regarded as amounting to indirect methods of enforcement and therefore as being incompatible with the purposes of the statutes. All quasi-contractual relief was ruled out where there was a failure to follow a restrictive statute. However, the possibility of a limited application of the doctrine of ratification was left open, and a suggestion was made that specific restitution of property to the contractor would be available in an appropriate case. Finally, the court held that the power of a public body to recover funds expended under an invalid contract was conditioned upon the making of an offer to restore the property it had acquired by means of such a contract.

It may be advanced in support of these generally harsh and unbending decisions that they were reached in cases involving requirements considered important by a majority of courts in this country. Moreover, several involved statutes which were drafted in language evidencing a legislative desire that the requirements be treated as important. There was a total lack of compliance with statutory requirements in several cases. This factor might properly raise a question as to the good faith of the contractor and would perhaps justify a refusal to apply any mitigating principles, even where the legislative intention was not unequivocally expressed. Moreover, mere substantial compliance or compliance with a similar statutory requirement arguably should not entitle one to obtain the benefit of the bargain by recovering the contract price. However, all relief was denied even in those cases where strong and

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45 1 C. Antieau, Municipal Corporation Law §10.27 (advertising), §10.31 (specifications), §10.47 (authorization by ordinance, majority permit quasi-contractual relief), §10.50 at 791 (certification of funds), §10.52 (approval) (1968).


47 McCormick v. City of Niles, 81 Ohio St. 246, 90 N.E. 803 (1909); Buchanan Bridge Co. v. Campbell, 60 Ohio St. 406, 54 N.E. 372 (1899), 66 Ohio L. 54, 55 §8, §10 (1869), as amended; 68 Ohio L. 20 §7, 103 §9 (1871), as amended, Ohio Rev. Stats. §§795-99.

48 McCloud & Geigle v. City of Columbus, 54 Ohio St. 439, 44 N.E. 95 (1895), Ohio Rev. Stats. §2303, 86 Ohio L. 341 (1889), supra note 16.
definite legislative intent was not evident in the language of the statutes involved.\(^{49}\) (On the other hand, where strong statutory language was used, the court has lessened the severity of its approach by denying recovery to a county without restoration of the benefits it had received.\(^{50}\)

In light of this treatment of the problems in this area of the law by the Ohio Supreme Court, a number of broad conclusions might be justifiably drawn: The court will not place controlling significance on the phrasing of the statutory requirement. It is not likely to discriminate between the more and the less significant requirements, nor to be influenced by the degree to which they have been followed (unless, of course, they have been completely satisfied). Rather, the court has accepted the theory that observance of statutory requirements is necessary for the municipality to acquire the power to contract. The court has sought to find and effectuate a statutory intent to protect the taxpayer, apparently accepting the premise that the contractor is able to protect himself. Arguments based on unjust enrichment have seldom moved the court. In short, the approach taken by the court has, in general, been one of solicitude for the public and of relative indifference toward the contractor.

There remains the need to examine the manner in which the approach charted by the Ohio Supreme Court in these germinal cases has been developed.

A. Implied-in-Fact Contracts

Acting consistently with the *Morgan* and *McCormick* approach,\(^{51}\) courts have denied recovery to persons who have supplied benefits to a municipality without procuring an express contract to cover the claim for payment,\(^{52}\) and persons whose per-


\(^{50}\) *State, ex rel. Hunt v. Fronizer*, 77 Ohio St. 7, 82 N.E. 518 (1907), 93 Ohio L. 218 (1898), Ohio Rev. Stats. § 28346 (analogous section now Ohio Rev. Code § 5705.41 (1953), *supra* note 32).

\(^{51}\) 81 Ohio St. 246, 90 N.E. 803 (1909).

\(^{52}\) *John T. McGowan Co. v. City of Portsmouth*, 106 Ohio St. 629, 140 N.E. 171 (1922); *City of Toledo v. National Supply Co.*, 16 Ohio L. Abs. (Continued on next page)
formance varied from the terms of an express contract. In view of the sometimes nice distinctions separating implied-in-fact and quasi-contract, it is not always clear in these cases which was the real basis for the decision. However, to the extent that the latter theory was the rationale, it should properly be limited to denying relief when statutory requirements have not been met.

B. Failure to Advertise

Advertising for the submission of bids and awarding contracts to the lowest (or lowest and best) bidder have been required of public authorities by statutes covering a wide expanse of time. These requirements have generally been imposed for the purpose of establishing free and open competition for public contracts, thereby lessening the danger of fraud, favoritism, and corruption and increasing the opportunity of obtaining the best performance at the lowest price. It was this type of requirement that was involved in the Miller, Buchanan, Frisbie and Hommel cases, in which the court: established the invalidity of the contract; refused to permit recovery on it; issued an injunction against payment; declined to invoke an estoppel;
and denied quasi-contractual relief, specific restitution, and relief based on the theory of conversion.

The course of those decisions has not been noticeably changed with respect to the invalidity holding, the denial of recovery on the contract, and the granting of an injunction against further performance or payment. On the authority of Morgan, quasi-contractual relief was denied in Landis v. Board of Education, as being a "novel theory" destructive of statutory requirements of fifty years' standing. In that case the court avoided being misled by the first Hommel case by limiting its meaning (as did the Supreme Court itself in the second Hommel case) to authorizing only specific restitution. This relief, however, was not granted in Landis because there was no way to return the labor furnished. A common pleas court has acted inconsistently by following both Landis (and denying recovery for labor supplied) and the first Hommel case (by suggesting that compensation be paid for supplies used by the school board).

The defense of invalidity was successfully raised in an early circuit court case in which a county sought relief under a contract awarded without meeting bidding requirements. The court suggested that to hold otherwise would amount to compelling performance from the contractor when payment therefor could later be refused or be enjoined by a taxpayer's suit.

Instead of a complete failure to abide by advertising requirements, as occurred in the cases just considered, defective compliance (such as took place in the McCloud case) has been the issue in a number of cases through the years. It is in addressing itself to such an issue, involving statutory infractions and potential injury to the contractor of varying degrees of

60 State, ex rel. Baen v. Yeatman, 22 Ohio St. 546 (1872).
62 Newton v. City of Toledo, 18 Ohio C.C.R. 756 (Cir. Ct. 1892), aff'd, 52 Ohio St. 649, 44 N.E. 1133 (1895), against issuance of bonds to pay money due under a contract awarded without required advertising; State, ex rel. Files v. Biddle, 3 Ohio N.P. 173 (C.P. 1896), quasi-contract also denied.
63 16 Ohio L. Abs. 190, 191 (Ct. App. 1933).
65 State, ex rel. Huston v. Esswein, 11 Ohio C.C.R. (n.s.) 225 (Cir. Ct. 1908), aff'd, 81 Ohio St. 552, 91 N.E. 1140 (1910).
66 McCloud & Geigle v. City of Columbus, 54 Ohio St. 439, 44 N.E. 95 (1896).
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seriousness, that a court would seem to need flexibility of remedy the most. However, the pattern has been as nearly uniform in the denial of relief here as in the cases involving more extensive deficiencies.

Invalidity has been found: for failure to provide required plans and specifications for proper advertising (and recovery of lost profits was denied); \(^{67}\) for alteration of a bid for a nonapparent mistake after award of the contract (and recovery of the balance due on the contract was denied); \(^{68}\) for failure to state bids for material and labor separately for a county contract; \(^{69}\) for stifling competition by making prior arrangements with a bidder; \(^{70}\) and for supplying vague specifications.\(^ {71}\) The state has also been denied damages for breach of a contract awarded after insufficient advertisement for bids.\(^ {72}\)

Both quasi-contractual relief and application of the doctrine of estoppel were denied the contractor in one case,\(^ {73}\) but in another case, involving similar facts, a mandatory injunction to compel the contractor to repay funds already received under a fully executed contract was denied.\(^ {74}\)

When dealing with requests for injunctive relief to prevent payment under contracts awarded by defective advertising, the courts have been less unyielding than in the cases just considered. This is no doubt due in part to the equitable considerations present in the individual cases. However, by tailoring the

\(^{67}\) Cordeman v. City of Cincinnati, 23 Ohio St. 499 (1872).
\(^{68}\) McGreevey v. Board of Educ., 20 Ohio C.C.R. 114 (Cir. Ct. 1900).
\(^{70}\) Young v. City of Dayton, 12 Ohio St.2d 71, 232 N.E.2d 655 (1967) involved the violation of charter provisions requiring competition in the sale of surplus municipal property and making violating contracts void.
\(^{71}\) Eikenbary v. City of Dayton, 3 Ohio App.2d 295, 210 N.E.2d 402 (1964) involved the violation of an ordinance imposing the requirement of competition in awarding urban renewal contracts.
\(^{72}\) State v. Kuhner & King, 107 Ohio St. 406, 140 N.E. 344 (1923).
\(^{73}\) McGreevey v. Board of Educ., 20 Ohio C.C.R. 114 (Cir. Ct. 1900) supra note 68.
\(^{74}\) McAlexander v. Haviland Village School Dist., 7 Ohio N.P. (n.s.) 590 (C.P. 1906). In this case the bidder had been permitted prior to the award of the contract to bring the amount of his bid down below the amount available to the district. But in another early trial court case, State, ex rel. Huston v. Huston & Cleveland, 4 Ohio N.P. (n.s.) 423 (C.P. 1906), it was held that an allegation that there had been a failure to file plans as a preliminary to advertising was not irrelevant to an action to recover back money claimed to have been illegally spent under a county contract.
use of this remedy to the seriousness of the defect in issue the courts have nevertheless achieved a degree of flexibility.\textsuperscript{75} An injunction even against further performance has been denied in one instance,\textsuperscript{76} although granted in others.\textsuperscript{77}

C. Lack of Prior Appropriation or Certification of Funds

Statutory provisions both for municipal corporations\textsuperscript{78} and other public subdivisions\textsuperscript{79} have for a long time required that before public contracts be awarded, funds be appropriated for payments to become due under them, and when tax money is involved, a statement be issued certifying that sufficient funds are either in the treasury or in the process of collection. These provisions were early construed as legislative efforts to guard against "extravagant and improvident"\textsuperscript{80} spending and to prevent "floating indebtedness."\textsuperscript{81} Acting consistently with the strong statutory language prohibiting relief under defective con-

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\textsuperscript{75} An injunction was denied on the basis of laches even though alternative specifications had been advertised thereby giving public officials discretion to select upon what basis the contract would be awarded. \textit{Emmert v. City of Elyria}, 6 Ohio C.C.R. (n.s.) 381 (Cir. Ct. 1905), \textit{aff'd on other grounds}, 74 Ohio St. 185, 78 N.E. 269 (1906). Where no laches were found and the statute made the contract void, an injunction was granted. \textit{Herstenstern v. Herrman}, 6 Ohio N.P. 93 (Super. Ct. of Cincinnati 1898). Possible avoidance of specification limitations by acceptance of non-conforming goods was not sufficient to justify an injunction against payment after full performance. \textit{State, ex rel. Wolfe v. Atcherson}, 12 Ohio L. Abs. 698 (Ct. App. 1932).

\textsuperscript{76} The reason was a failure to show that legal remedies were inadequate. In this case, involving a state contract, cost estimates had been changed during the time they were required to be on file for public examination. \textit{State, ex rel. Ohio National Lime & Stone Co. v. Merrell}, 19 Ohio L. Abs. 547 (Ct. App. 1935).

\textsuperscript{77} The defect was a failure to advertise for the prescribed time for a joint state-county contract in \textit{State, ex rel. Boyd v. McMasters}, 10 Ohio App. 361 (1918); and specifications were so restrictive as to stifle competition in \textit{Fisher Auto & Service Co. v. City of Cincinnati}, 16 Ohio N.P. (n.s.) 369 (Super. Ct. of Cincinnati 1914).

\textsuperscript{78} 79 Ohio L. 54, 55 (1882), with amendments, Ohio Rev. Stats. \S 2702, \textit{supra} note 21; 96 Ohio L. 37 \S 45 (1902), Ohio Mun. Code \S 45; 96 Ohio L. 37 \S 45 (1902), Bates Ohio Rev. Stats. \S 1536-205; 101 Ohio L. 262 (1910), Ohio Gen. Code \S 3806; Ohio Rev. Code \S 5705.41 (1953).

\textsuperscript{79} 92 Ohio L. 341 (1895), with amendments, Ohio Rev. Stats. \S 2834b, \textit{supra} note 32; Ohio Rev. Stats. \S 2834b, with amendments, Ohio Gen. Code \S\S 5660, 61; 112 Ohio L. 406 \S 33 (1927), with amendments, Ohio Gen. Code \S 5623-33; Ohio Rev. Code \S 5705.41 (1953).

\textsuperscript{80} \textit{L. H. Bond v. Village of Madisonville}, 2 Ohio C.C.R. 449, 452 (Cir. Ct. 1887).

\textsuperscript{81} \textit{Mad River Township v. Austin-Western Road Machinery Co.}, 5 Ohio App. 293, 305 (1916).
tracts. The courts have construed these statutes to be the "measure" of the municipal power to contract.

These requirements were involved in the Miller, Comstock and Fronizer cases, in which the Supreme Court refused relief on the contract, granted an injunction against payment, and rejected both estoppel and quasi-contractual relief, but conditioned the county's right to recover back payments made upon restoration of the benefit obtained. Only slight variations from this pattern of decisions are discernible in the many elaborating rulings concerning these certification and appropriation requirements.

In several cases emphasis has been placed on the failure to meet the appropriation requirement. Here recovery on the contract has been denied, and injunctions against performance and payment have been granted.

When there has been a failure to obtain a required certification of funds courts have held the contract invalid and denied recovery on it by the contractor, or on a surety bond by the

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82 The original statutes, §§ 2702 and 2834b, Ohio Rev. Stats., provided that "all . . . contracts . . . entered into . . . contrary to the provisions of this section shall be void . . . " and later statutes, including the current version, § 5705.41, Ohio Rev. Code, added "and no warrant shall be issued in payment of any amount due thereon."
83 Emmert v. City of Elyria, 74 Ohio St. 185, 194, 78 N.E. 269, 271 (1906).
84 City of Lancaster v. Miller, 58 Ohio St. 558, 51 N.E. 52 (1898).
86 State, ex rel. Hunt v. Fronizer, 77 Ohio St. 7, 82 N.E. 518 (1907).
87 There is a great amount of litigation over these requirements in other states as well, e.g., Illinois. Ancel, Municipal Contracts, 1961 U.Ill. L.F. 357.
88 State, ex. rel. McGraw v. Smith, 129 Ohio St. 246, 194 N.E. 872 (1935); Pittinger v. City of Wellsville, 75 Ohio St. 508, 80 N.E. 182 (1907); Industrial Rescue Mission v. City of Columbus, 83 Ohio App. 188, 81 N.E.2d 254 (1948).
89 City of Cincinnati v. Board of City Affairs, 10 Ohio Dec. 104 (Super. Ct. of Cincinnati 1900).
90 State, ex rel. Ampt v. Lewis, 6 Ohio N.P. 198 (Super. Ct. of Cincinnati 1899).
91 City of Findlay v. Pendleton & Whitely, 62 Ohio St. 80, 56 N.E. 649 (1900); Schumacher Stone Co. v. Village of Columbus Grove, 73 Ohio App. 557, 57 N.E.2d 251 (1944); Lowry v. City of Ironton, 10 Ohio L. Abs. 222 (Ct. App. 1931); State, ex rel. West v. Hudson, 8 Ohio L. Abs. 474 (Ct. App. 1930); Lima Hospital Soc'y v. City of Lima, 4 Ohio L. Abs. 562 (Ct. App. 1928); Knowlton & Breinig v. Board of Educ., 13 Ohio App. 30 (1919); Mad River Township v. Austin-Western Road Machinery Co., 5 Ohio App. 298 (1916).
subcontractor or the public body, even when there were funds actually on hand in the treasury sufficient to cover the amount of the contract. The benefit to be derived from setting aside funds was emphasized in the latter cases. Where a certificate has been issued, but the available fund not fully allotted, the amount of the fund rather than the amount of the certificate would appear to limit the extent of the contractor’s recovery.

As was true with respect to defective advertising, requests for an injunction against payment to the contractor have proved troublesome. An injunction was granted in the Comstock case, and in several cases since, but dictum opposing the granting of such relief appears in a later Supreme Court case, and an injunction has been refused in trial court cases of about this period. Thus the courts have retained a degree of flexibility in their approach to granting this remedy.

Estoppel, too, has been denied the contractor suing on the contract and materialmen seeking recovery against a surety

93 State, ex rel. Huston v. Esswein, 11 Ohio C.C.R. (n.s.) 225 (Cir. Ct. 1908), aff’d, 81 Ohio St. 552, 91 N.E. 1140 (1910), county contract. As to the availability of relief by a materialman on such a bond, two appeals courts have come to opposite conclusions: for relief, Metropolitan Paving Brick Co. v. Federal Surety Co., 50 Ohio App. 143, 197 N.E. 603 (1935), and against (involving a school board contract) Southern Surety Co. v. Moorer-Coney Co., 29 Ohio App. 310, 163 N.E. 575 (1928).
94 City of Findlay v. Pendleton & Whitley, 62 Ohio St. 80, 56 N.E. 649 (1900); State, ex rel. West v. Hudson, 8 Ohio L. Abs. 474 (Ct. App. 1930); Knovelton & Breinig v. Board of Educ., 13 Ohio App. 30 (1919).
95 City of Cleveland v. Walsh Constr. Co., 279 Fed. 57 (6th Cir. 1922), involving a unit price contract. This result is now codified in Ohio Rev. Code § 5705.41 (1953). Where the fund was exhausted by subsequently-awarded contracts relief was granted in City of Cincinnati v. Cameron, 33 Ohio St. 336 (1878), but in another case it was denied because the fund was fully allotted and if relief were granted, both the certificate and the fund would have been exceeded. Village of Carthage v. Diekmeyer, 79 Ohio St. 323, 87 N.E. 178 (1909). Accord, Board of Comm’rs vs. A. Bentley & Sons Co., 103 Ohio St. 443, 134 N.E. 441 (1921).
96 But these cases also involved other defects, e.g.: Hawley v. City of Toledo, 47 Ohio App. 246, 191 N.E. 827 (1934); Smith v. Village of Rockford, 9 Ohio C.C.R. (n.s.) 465 (Cir. Ct. 1906); Matheny v. White, 3 Ohio Op. 357 (C.P. 1935).
97 Emmert v. City of Elyria, 74 Ohio St. 185, 194-95, 78 N.E. 269, 271 (1906).
98 City of Columbus v. Bohl, 1 Ohio N.P. (n.s.) 469 (C.P. 1903); Ampt v. City of Cincinnati, 34 Weekly Law Bull. 111 (C.P. 1893), aff’d, 57 Ohio St. 669, 50 N.E. 1236 (1897); and in dictum in the following cases: Caldwell vs. Mertens, 8 Ohio N.P. (n.s.) 387 (C.P. 1909); Fergus v. City of Columbus, 6 Ohio N.P. 82 (C.P. 1888).
when the prime contract was void for lack of a certificate. However, a special problem involving estoppel arises when a certificate is issued which proves to be false. Several cases justify the conclusion, subsequently confirmed by statute, that if there has been reasonable reliance through part performance, an injunction against payment will be denied.

The decision in the Morgan case and the holding in Miller have seemingly discouraged claimants from seeking relief on the basis of quantum meruit. Few cases even raise the issue. Where it has been raised it has been refused, although continued suggestions are made that specific restitution of the item obtained is available.

Finally, the conclusion in Fronizer that the statutory right of a county to recover back benefits paid the contractor is conditioned upon return by the county of the benefits it has received was accepted by two trial court cases of the same period.

D. Miscellaneous Deficiencies

Ohio statutes, like those of most states, impose numerous miscellaneous requirements for various public bodies to meet in awarding their contracts. The failure to meet these require-

100 Southern Surety Co. v. Moores-Coney Co., 29 Ohio App. 310, 163 N.E. 525 (1928).
101 Emmert v. City of Elyria, 6 Ohio C.C.R. (n.s.) 381 (1905), (aff'd on other grounds, 74 Ohio 185, 78 N.E. 269 (1906); Broken Sword Stone Co. v. Monroe Township Trustees, 5 Ohio N.P. (n.s.) 573 (C.P. 1906), aff'd, 78 Ohio St. 444, 85 N.E. 1120 (1908), dictum; irregularly issued, City of Cleveland v. Walsh Const. Co., 279 Fed. 57 (6th Cir. 1922). An injunction against payment was granted in Smith v. Village of Rockford, 9 Ohio C.C.R. (n.s.) 465 (Cir. Ct. 1906), but there was no reasonable reliance.
102 "Any certificate of fiscal officer attached to a contract shall be binding upon the political subdivisions as to the facts set forth therein." Ohio Rev. Code § 5705.41 (1953).
103 Landis v. Board of Educ., 16 Ohio L. Abs. 190 (Ct. App. 1933); North v. Commissioners of Huron County, 10 Ohio C.C.R. (n.s.) 462 (Cir. Ct. 1907); 1938 Ops. Att'y Gen. 2053 at 510. A trial court, probably because of a misconception of precedent, indicated quantum meruit was available in State, ex rel. Kuhn v. Smith, 92 Ohio L. Abs. 527 (C.P. 1963). Then in another early, liberal, and evidently out-of-step decision, City of Cleveland v. Denison, 16 Ohio C.C.R. 541 (Cir. Ct. 1898), such relief was granted.
104 Landis v. Board of Educ., 16 Ohio L. Abs. 190 (Ct. App. 1933); North v. Commissioners of Huron County, 10 Ohio C.C.R. (n.s.) 462 (Cir. Ct. 1907).
ments is often used as a defense to a suit brought on the contract. Frequently, a finding of invalidity and a denial of relief are the result reached, although occasionally the court considers the particular requirement to be minor, or "directory." Unfortunately, when the latter conclusion is reached it is often supported only by an assertion that the requirement breached is not vital to the protection of the taxpayer, rather than by a discussion of the importance of the requirement, which might serve as a guide to future litigants. An examination of the course of these decisions may help to clarify what one decision leaves unclear.

Failure to record official acts \(^{106}\) (at times with the aid of estoppel—both in favor of \(^{107}\) and against the public body \(^{108}\)) has frequently been treated as a violation of a merely directory provision. Estoppel has also been of aid in preventing a denial of relief in a case involving the failure to state labor and material bids separately. \(^{109}\) The timing of the issuance of a certification of funds so that it would precede the authorization of the contract, \(^{110}\) and the filing of the certification with the proper official \(^{111}\) have been treated as directory, as have a number of other minor defects. \(^{112}\)

On the other hand, failure to obtain the prior approval of some public body or officer for the awarding of a contract has

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\(^{107}\) *Commissioners of Athens County v. Baltimore Short Line R.R.*, 37 Ohio St. 205 (1881).

\(^{108}\) *Welder v. Commissioners of Hamilton County*, 41 Ohio St. 601 (1885).

\(^{109}\) *Wiese & Hanby v. City of Cincinnati*, 17 Ohio N.P. (n.s.) 481 (C.P. 1913), 96 Ohio L. 67 § 143 (1902), Ohio Gen. Code § 4329 (now Ohio Rev. Code § 735.06 (1953)).


resulted in a denial of quantum meruit relief\textsuperscript{113} and in the prevention of a county from enforcing a surety bond.\textsuperscript{114} Failure to list persons interested in the bidders' success has resulted in a finding of invalidity\textsuperscript{115} and in the granting of an injunction against performance.\textsuperscript{116} Cases involving other requirements in which similar results were reached are set forth in the notes.\textsuperscript{117}

A statutory requirement that private contracts or modifications be evidenced by a writing does not prevent quasi-contractual relief generally,\textsuperscript{118} or in Ohio.\textsuperscript{119} If established by contract the requirement can be waived,\textsuperscript{120} but if a municipal contract and a statutory demand of a writing are involved, it has been held that no relief is available.\textsuperscript{121}

\textsuperscript{113} State, ex rel. Files v. Biddle, 3 Ohio N.P. 173 (C.P. 1896).
\textsuperscript{114} State, ex rel. Huston v. Esswein, 11 Ohio C.C.R. (n.s.) 225 (Cir. Ct. 1908), aff'd, 81 Ohio St. 152, 91 N.E. 1140 (1910), 66 Ohio L. 55 § 10 (1899), as amended, Ohio Rev. Stats. § 789 (now Ohio Rev. Code § 153.44 (1953)). Faced with the dilemma as to which set of taxpayers to protect, a court applied estoppel against a city, on receipt of benefits, and in favor of a county in a water supply contract which lacked the approval of council as required by 66 Ohio L. 207 § 348 (1899), as amended, 69 Ohio L. 25 § 352 (1872), as amended, Ohio Gen. Code §§ 3967, 3973 (now Ohio Rev. Code §§ 743.13, 18 (1953)). Mahoning County Comm'rs v. City of Youngstown, 49 Ohio L. Abs. 186, 75 N.E.2d 724 (Ct. App. 1946).
\textsuperscript{115} State, ex rel. Huston v. Esswein, 11 Ohio C.C.R. (n.s.) 225 (Cir. Ct. 1908), aff'd, 81 Ohio St. 152, 91 N.E. 1140 (1910), 66 Ohio L. 55 § 10 (1899), as amended, Ohio Rev. Stats. § 789 (now Ohio Rev. Code § 153.44 (1953)). Faced with the dilemma as to which set of taxpayers to protect, a court applied estoppel against a city, on receipt of benefits, and in favor of a county in a water supply contract which lacked the approval of council as required by 66 Ohio L. 207 § 348 (1899), as amended, 69 Ohio L. 25 § 352 (1872), as amended, Ohio Gen. Code §§ 3967, 3973 (now Ohio Rev. Code §§ 743.13, 18 (1953)). Mahoning County Comm'rs v. City of Youngstown, 49 Ohio L. Abs. 186, 75 N.E.2d 724 (Ct. App. 1946).
\textsuperscript{116} State, ex rel. Files v. Biddle, 3 Ohio N.P. 173 (C.P. 1896).
\textsuperscript{117} State, ex rel. Huston v. Esswein, 11 Ohio C.C.R. (n.s.) 225 (Cir. Ct. 1908), aff'd, 81 Ohio St. 152, 91 N.E. 1140 (1910), 66 Ohio L. 55 § 10 (1899), as amended, Ohio Rev. Stats. § 789 (now Ohio Rev. Code § 153.44 (1953)). Faced with the dilemma as to which set of taxpayers to protect, a court applied estoppel against a city, on receipt of benefits, and in favor of a county in a water supply contract which lacked the approval of council as required by 66 Ohio L. 207 § 348 (1899), as amended, 69 Ohio L. 25 § 352 (1872), as amended, Ohio Gen. Code §§ 3967, 3973 (now Ohio Rev. Code §§ 743.13, 18 (1953)). Mahoning County Comm'rs v. City of Youngstown, 49 Ohio L. Abs. 186, 75 N.E.2d 724 (Ct. App. 1946).
\textsuperscript{118} State, ex rel. Huston v. Esswein, 11 Ohio C.C.R. (n.s.) 225 (Cir. Ct. 1908), aff'd, 81 Ohio St. 152, 91 N.E. 1140 (1910), 66 Ohio L. 55 § 10 (1899), as amended, Ohio Rev. Stats. § 789 (now Ohio Rev. Code § 153.44 (1953)). Faced with the dilemma as to which set of taxpayers to protect, a court applied estoppel against a city, on receipt of benefits, and in favor of a county in a water supply contract which lacked the approval of council as required by 66 Ohio L. 207 § 348 (1899), as amended, 69 Ohio L. 25 § 352 (1872), as amended, Ohio Gen. Code §§ 3967, 3973 (now Ohio Rev. Code §§ 743.13, 18 (1953)). Mahoning County Comm'rs v. City of Youngstown, 49 Ohio L. Abs. 186, 75 N.E.2d 724 (Ct. App. 1946).
\textsuperscript{119} State, ex rel. Huston v. Esswein, 11 Ohio C.C.R. (n.s.) 225 (Cir. Ct. 1908), aff'd, 81 Ohio St. 152, 91 N.E. 1140 (1910), 66 Ohio L. 55 § 10 (1899), as amended, Ohio Rev. Stats. § 789 (now Ohio Rev. Code § 153.44 (1953)). Faced with the dilemma as to which set of taxpayers to protect, a court applied estoppel against a city, on receipt of benefits, and in favor of a county in a water supply contract which lacked the approval of council as required by 66 Ohio L. 207 § 348 (1899), as amended, 69 Ohio L. 25 § 352 (1872), as amended, Ohio Gen. Code §§ 3967, 3973 (now Ohio Rev. Code §§ 743.13, 18 (1953)). Mahoning County Comm'rs v. City of Youngstown, 49 Ohio L. Abs. 186, 75 N.E.2d 724 (Ct. App. 1946).
\textsuperscript{120} State, ex rel. Huston v. Esswein, 11 Ohio C.C.R. (n.s.) 225 (Cir. Ct. 1908), aff'd, 81 Ohio St. 152, 91 N.E. 1140 (1910), 66 Ohio L. 55 § 10 (1899), as amended, Ohio Rev. Stats. § 789 (now Ohio Rev. Code § 153.44 (1953)). Faced with the dilemma as to which set of taxpayers to protect, a court applied estoppel against a city, on receipt of benefits, and in favor of a county in a water supply contract which lacked the approval of council as required by 66 Ohio L. 207 § 348 (1899), as amended, 69 Ohio L. 25 § 352 (1872), as amended, Ohio Gen. Code §§ 3967, 3973 (now Ohio Rev. Code §§ 743.13, 18 (1953)). Mahoning County Comm'rs v. City of Youngstown, 49 Ohio L. Abs. 186, 75 N.E.2d 724 (Ct. App. 1946).
\textsuperscript{121} State, ex rel. Huston v. Esswein, 11 Ohio C.C.R. (n.s.) 225 (Cir. Ct. 1908), aff'd, 81 Ohio St. 152, 91 N.E. 1140 (1910), 66 Ohio L. 55 § 10 (1899), as amended, Ohio Rev. Stats. § 789 (now Ohio Rev. Code § 153.44 (1953)). Faced with the dilemma as to which set of taxpayers to protect, a court applied estoppel against a city, on receipt of benefits, and in favor of a county in a water supply contract which lacked the approval of council as required by 66 Ohio L. 207 § 348 (1899), as amended, 69 Ohio L. 25 § 352 (1872), as amended, Ohio Gen. Code §§ 3967, 3973 (now Ohio Rev. Code §§ 743.13, 18 (1953)). Mahoning County Comm'rs v. City of Youngstown, 49 Ohio L. Abs. 186, 75 N.E.2d 724 (Ct. App. 1946).
Despite the fact that some pattern is discernible in these decisions, a contractor with a public body would still be well advised to demand the most careful compliance with each statutory requirement, for without direct and favorable precedent the contractor cannot safely assume that an omission will be overlooked.

E. Contracts for Extras

A contract for modification of a municipal contract may fail because of an absence of consideration.\textsuperscript{122} It may fail because it is not truly for "extras" but is instead an entirely different contract and one or more of the usual statutory requirements for municipal contracts have not been met.\textsuperscript{123} Finally, it may fail, even though for extras, because special statutory requirements for modifications have not been met. In the latter situation estoppel against a city has been refused and an injunction against payment granted.\textsuperscript{124} On the other hand, in a contract for extras an injunction against payment has been refused when the usual advertising requirements were found to be impractical and renewed authorization by council was deemed unnecessary. However, the limit of the original appropriation was enforced through the issuance of an injunction against excessive expenditures.

The statutory requirement that orders for extras be in writing\textsuperscript{126} has suffered from both judicial attention and inattention.

\textsuperscript{122} State, ex rel. Uible v. Harlan, 37 Ohio App. 222, 174 N.E. 366 (1930) (dictum). However, the Uniform Commercial Code, § 2-209 (Ohio Rev. Code § 1302.12 (Supp. 1962)) permits, within its purview, modification of contracts without consideration.

\textsuperscript{123} Lloyd, ex rel. City of Toledo v. City of Toledo, 20 Ohio C.C.R. (n.s.) 47 (Cir. Ct. 1912), granting an injunction against payment for failure to advertise for added purchase of an air compressor when the original contract was for construction of a bridge; Mueller v. Board of Educ., 11 Ohio N.P. (n.s.) 113 (C.P. 1911), failure to advertise prevented recovery on the contract; Gano v. Eshelby, 10 Ohio Dec. Reprint 442 (Super. Ct. of Cincinnati 1889), granting an injunction against payment for failure to advertise. Estoppel was also rejected.

\textsuperscript{124} Gano v. Eshelby, 10 Ohio Dec. Reprint 442 (Super. Ct. of Cincinnati 1889), failure to stay within the amount of the original contract.

\textsuperscript{125} Lloyd, ex rel. City of Toledo v. City of Toledo, 20 Ohio C.C.R. (n.s.) 47 (Cir. Ct. 1912).

\textsuperscript{126} Current provisions are contained in Ohio Rev. Code § 735.07 (1953): "When, in the opinion of the director of public service, it becomes neces-
Quite recently it has been nearly negated by a decision which by its liberal implications will probably give rise to hopes, possibly false, of judicial distaste for statutory formalities.

In a very early case\textsuperscript{127} the Supreme Court permitted a writing requirement to be waived by municipal authorities, and just a few years ago an appeals court apparently ignored such a limitation.\textsuperscript{128} An intervening 1922 Supreme Court decision\textsuperscript{129} provided the basis in part for the most recent holding on the subject. In the 1922 case the writing requirement had been met, and the certification of funds requirement was found inapplicable to the type of contract involved. The Supreme Court found that the order was not for extras at all; hence no further agreement on price was necessary, since the price of any additions had been specified in the properly-awarded original contract.

The same court, in deciding \textit{Lathrop Co. v. City of Toledo}\textsuperscript{130} in 1966, relied on the \textit{Portsmouth} holding when confronted by a similar prior agreement on price. But it went a step further, by concluding that fulfilling the unmet requirements of a writing and certification was also unnecessary. Therefore, recovery on the original contract (or even in quasi-contract) was justified, since no applicable requirement had been violated.

Offering an additional ground, the court declared that the city's agreement (in the original contract) to be liable for extras and the contractor's agreement to perform on order (with a reservation of a later determination of rights) implied a promise

\begin{footnotesize}
\begin{enumerate}
\item \textit{City of Cincinnati v. Cameron}, 33 Ohio St. 336 (1878).
\item \textit{City of Portsmouth v. Nicola Building Co.}, 106 Ohio St. 550, 140 N.E. 174 (1922).
\item 5 Ohio St.2d 165, 214 N.E.2d 408 (1966).
\end{enumerate}
\end{footnotesize}
on the part of the city to make certain that preconditions to liability—including a writing and certification—were met.

The net result of this case is the enforcement of an order for extras that did not meet charter requirements. This was accomplished by an extension of precedent and the application of a somewhat unusual theory of implied promise. The latter approach seems only partially justified by the terms of the contract in view of other provisions (emphasized by the dissent) in which the city disclaimed liability until these requirements were met. But even if justified by the contract, the court would still be permitting the city to abrogate charter requirements by first promising their fulfillment and then failing to keep its promise. However, this case has only limited application as a method of avoiding contract restrictions, since there cannot be an enforceable promise to fulfill such requirements unless there first exists an enforceable contract. Moreover, the case probably does not evidence a general desire on the part of the court to be more liberal about granting relief in this field, in view of its reference to restrictive precedent and the decision reached by it in the same term in the Pincelli\textsuperscript{131} case, to be considered later. However, the underlying similarity between the implied promise approach and the doctrine of estoppel is worthy of note.

II.

Other Limitations on Municipal Power to Contract

It is not only by mandatory statutory procedures that the municipal power to contract is circumscribed. Other forms of limitations also operate in Ohio, such as the following restrictions: A contract must be within the general power of the city; it must not violate constitutional or statutory prohibitions or public policy considerations; and it must be entered into by a properly authorized agent. These are not mutually exclusive concepts and some, in fact, tend to overlap the statutory procedure field already considered. One can better understand limitations on the municipal power to contract and gain a better perspective of the law on statutory procedures by examining a brief résumé of the Ohio case law dealing with these limitations.

\textsuperscript{131} Pincelli \textit{v.} Ohio Bridge Corp., 5 Ohio St. 2d 41, 213 N.E.2d 356 (1966).
A. Ultra Vires Contracts

Since the adoption of the Home Rule Amendments to the Ohio Constitution in 1912, municipal corporations have had the power to contract to carry out their functions. Since this power is granted by the constitution, statutory grants are, in general, unnecessary. This reversal of the previous situation does not apply to other political subdivisions of the state. Still, it serves to reduce materially the area of ultra vires contracts—those beyond the power of a public body to enter. This area can be considered to include contracts violating implied limitations on the power to contract derived from statutory provisions. However, those agreements violating express statutory prohibitions should be distinguished and will be considered later.

A municipality is subject to statutory provisions imposing limitations on municipal indebtedness and restrictions on accounting procedures pursuant to constitutional grants over these matters to the state. It has been held that statutory restrictions on the manner of contracting, already considered, come within this state power, since contracting has been held to create a debt. Where a statutory restriction is considered to be a measure of municipal power the language of ultra vires is often used.

This method of classification, although of some value generally, is of little significance in Ohio, since the type of relief available to a contractor is nearly the same whether his contract is found to be in violation of statutory requirements for

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132 Ohio Const. art. XVIII, § 3, general grant; Ohio Const. art. XVIII, 4, public utilities grant.

133 Hines v. City of Bellefontaine, 74 Ohio App. 393, 57 N.E.2d 164 (1943); City of Cleveland v. Village of Cuyahoga Heights, 81 Ohio App. 191, 75 N.E.2d 99 (1947); City of Cleveland v. Coughlin, 16 Ohio N.P. (n.s.) 468 (C.P. 1914).

134 E.g., Vindicator Printing Co. v. State, 68 Ohio St. 362, 67 N.E. 733 (1903), no power to contract to print notices more often than stated in statute.

contracting, ultra vires or, as will be seen, in violation of ex-
press statutory prohibitions.

Efforts to enforce an ultra vires contract in pre-Amendment
days have been rejected. The doctrine of estoppel has gen-
erally been found not to be usable by a contractor against a
municipality. However, its use against the contractor has at
times been suggested, despite the difficulty of explaining how
a contractor might mislead a municipality concerning its own
power and of justifying the fact that such an approach makes
estoppel a one-way street in favor of a city. Such a use of the
doctrine does enable a municipality to get what it bargained
and paid for, but it clearly amounts to the enforcement of an
ultra vires contract, something courts, in general, have been re-
luctant to permit.

Recovery by both a city and a county of payments made
to a contractor under an ultra vires contract has also been per-
mitted after provision of statutory authority.

B. Unconstitutional Grants of Power

As with respect to ultra vires contracts, the likelihood of
contracting under an unconstitutional grant of power to a mu-
nicipality was much greater in pre-Amendment days than it is

137 Kerlin Bros. v. City of Toledo, 19 Ohio C.C.R. (n.s.) 120 (Cir. Ct.
1909).

138 Louisville & N.R.R. v. City of Cincinnati, 76 Ohio St. 481, 81 N.E. 983
(1907); Cleveland & P.R.R. v. City of Cleveland, 15 Ohio C.C.R. (n.s.)
193 (Cir. Ct. 1910), aff'd, 87 Ohio St. 1122 (1912), appeal
dismissed, 235 U. S. 50 (1914). In two earlier cases, Pugh v. Cincinnati
Edison Elec. Light Co., 19 Ohio C.C.R. 594 (Cir. Ct. 1900), and Darby v.
City of Norwood, 17 Ohio Dec. 253 (C.P. 1906), injunctive relief was
denied taxpayers because of a lack of equity in favor of the cities due
in part to estoppel considerations.

139 City of Columbus v. Public Util. Comm'n, 103 Ohio St. 79, 133 N.E.
800 (1921); City of Columbus v. Federal Gas & Fuel Co., 10 Ohio N.P.
(n.s.) 305 (C.P. 1910), aff'd, 88 Ohio St. 547, 106 N.E. 1056 (1913).

722 (S.D. Ohio), aff'd, 253 F.2d 909 (6th Cir.), rev'd on other grounds, 359 U.S.
552 (1959).

141 City of Cleveland v. Legal News Publishing Co., 110 Ohio St. 360, 144
N.E. 256 (1924).

142 Vindicator Printing Co. v. State, 68 Ohio St. 362, 67 N.E. 733 (1903).

143 101 Ohio L. 382 § 286 (1910), as amended, Ohio Gen. Code § 286 (now
Stats. § 1277 (1896) (now Ohio Rev. Code § 309.12 (1953)), respectively.
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now. Moreover, the problems it creates and the solutions it invites would at first appear to be little different from those presented by an ultra vires contract. In fact, this seems to be true in a number of cases where recovery on the contract,\textsuperscript{144} or an injunction against enforcement\textsuperscript{145} or against the collection of the resulting tax levies to pay for bonds already issued,\textsuperscript{146} was sought. However, a contractor labors under a double burden if he is held to know of the defect of municipal power existing here. It is not the simple case of finding authority, but the more difficult one of avoiding being misled by the false appearance of authority. Some courts have been reluctant to impose such a burden. Consequently, where there has been reliance through a shift of position, estoppel has been applied to protect the contractor, particularly where a court in a prior decision has upheld the constitutionality of the authority.\textsuperscript{147} Even where there was no prior decision, courts have occasionally applied estoppel in favor of the contractor,\textsuperscript{148} as well as in favor of the corporation.\textsuperscript{149} This result has not been uniformly reached, as an earlier cited case would indicate.\textsuperscript{150} But the refusal to grant relief by means of estoppel in some cases may be explained on the basis that reliance was not justified,\textsuperscript{151} or that additional defects were present.\textsuperscript{152}

\textsuperscript{144} City of Findlay v. Pendleton & Whitely, 62 Ohio St. 80, 56 N.E. 649 (1900).
\textsuperscript{145} Horstman, ex rel. City of Cincinnati v. City of Cincinnati, 12 Ohio Dec. 762 (Super. Ct. of Cincinnati 1902).
\textsuperscript{146} Hubbard v. Fitzsimmons, 57 Ohio St. 436, 49 N.E. 477 (1898).
\textsuperscript{147} Thomas v. State, ex rel. Gilbert, 76 Ohio St. 341, 81 N.E. 437 (1907), denying an injunction against payment. Suggested in the following decisions: City of Findlay v. Pendleton & Whitely, 62 Ohio St. 80, 56 N.E. 649 (1900); Lewis v. Symmes, 61 Ohio St. 471, 56 N.E. 194 (1899); Hubbard v. Fitzsimmons, 57 Ohio St. 436, 49 N.E. 477 (1898); State, ex rel. Losh v. Gibson, 8 Ohio N.P. 367 (Super. Ct. of Cincinnati 1900), granting an injunction against levying a tax to pay county bonds.
\textsuperscript{148} City of Mt. Vernon v. State, ex rel. Berry, 71 Ohio St. 428, 73 N.E. 515 (1905).
\textsuperscript{149} New York Cent. R.R. v. City of Bucyrus, 126 Ohio St. 558, 186 N.E. 450 (1933).
\textsuperscript{150} Hubbard v. Fitzsimmons, 57 Ohio St. 436, 49 N.E. 477 (1898).
\textsuperscript{151} Horstman, ex rel. City of Cincinnati v. City of Cincinnati, 12 Ohio Dec. 762 (Super. Ct. of Cincinnati 1902), rev'd on other grounds, 72 Ohio St. 93, 73 N.E. 1075 (1905).
\textsuperscript{152} City of Findlay v. Pendleton & Whitely, 62 Ohio St. 80, 56 N.E. 649 (1900), no certification of funds.
The restoration of benefits by a county as a precondition to its recovery of payments made to a contractor has been suggested as being required in this area.153

C. Constitutional or Statutory Prohibitions

As previously noted, express constitutional or statutory prohibitions against contracts are closely related to implied denials of power which result in the contracts being held ultra vires, and the former are overlapped by statutes which prescribe the mode of contracting and make offending contracts void. Yet, here the restriction is likely to be more direct and apparent.

There are of course strong reasons for denying relief under a contract when it is made in direct violation of an express prohibition. In fact, those who would liberalize relief by way of quasi-contract for those contractors who have entered into defective municipal contracts are far less emphatic in their suggestions when considering this limitation.154 However, in view of the strict approach in Ohio with respect to the other two types of limitations, there is no basis for expecting any marked difference in results here.

A contract which violated constitutional provisions155 against municipal aid to privately owned firms has been held invalid and an injunction seeking its enforcement has been denied.156 However, municipal efforts to recover back property given in the form of aid have been both successful157 and unsuccessful.158 In the latter case the court reasoned that since the initial purchase of property by the city was for an illegal purpose the city never gained title to it and, therefore, had no right to recover it from the private firm to which it had conveyed it. The ultimate result of this approach is to negate, rather than to enforce, this constitutional prohibition.

Contracts which contravene statutory prohibitions have also

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155 Ohio Const. art. VIII, § 6.
156 Bellaire Goblet Co. v. City of Findlay, 5 Ohio C.C.R. 418 (Cir. Ct. 1891).
158 Markley v. Village of Mineral City, 58 Ohio St. 430, 51 N.E. 28 (1898).
been found invalid and recovery on them has been denied.\textsuperscript{159} Injunctions against providing funds for payments under an invalid contract have been granted and estoppel against the city has been denied.\textsuperscript{160} Recovery back of payments made under such a contract has been permitted despite losses incurred by the contractor and without mention of any duty to restore benefits the village may have gained.\textsuperscript{161} Contracts exceeding statutory time limitations\textsuperscript{162} have been held invalid even for that portion within the statutory limits,\textsuperscript{163} since, it was reasoned, to hold a segment valid would be to make a contract for the parties. This rationale has not been applied, and the results have been different, with respect to portions of contracts which did not exceed statutory monetary limitations.\textsuperscript{164}

One common type of statutory prohibition consists of restrictions against public officials having an interest in public contracts. The clearest form is a direct prohibition against such a contract,\textsuperscript{165} and an injunction has been granted against payment under one.\textsuperscript{166} Contracts have been found invalid, enforce-
ment has been refused, and payment has been denied when they have been found to have been made in violation of a statute that simply made having an interest a crime. In a criticized trial court decision, the return of payments given a contractor was refused because the city had not first restored the benefits it had received.

Even where having an interest was prohibited but no criminal penalty was prescribed, an injunction has been granted against payment under a contract in violation of the statute; and payment has been refused under contracts offending this kind of enactment. Express language in the latter statute authorizing recovery of payments made under a violating contract has been used to grant recovery without mention of a municipal duty to restore what it had received.

D. Public Policy Restrictions

Contracts which violate underlying principles of fairness or good government are considered to be against public policy and are held to be void in Ohio. Three such concepts have been the subject of Ohio decision: conflict of interests, contracting away of legislative power, and delegation of discretionary power.

At times both a public policy consideration and an express statutory prohibition have been involved in the same case. In one such, it was suggested in dictum that enforcement of the contract be denied because of the policy against a conflict


168 State, ex rel. Winn v. Wichgar, 27 Ohio C.C.R. 743 (Cir. Ct. 1905).

169 Present versions of the statutes are now found in Ohio Rev. Code §§2919.08, .09, .10 (1953).


of interest. In another, an improper delegation of authority caused the court to permit the city to recover back what it had paid.

Recovery on a contract which hampers or embarrasses the future use of public legislative or administrative power has met with refusal in one case, the suggestion that it be refused in another, and the avoidance of such a result only by interpretation of a state contract in still another.

Contracts found to involve an improper delegation of discretionary authority have also been held invalid, and relief under them has been refused either because they were inconsistent with statutory language vesting power in a particular person or body or because they violated a broader principle.

E. Lack of Authority

A municipal contract may also be defective because it was entered into by an unauthorized officer. This defect is both less serious and more easily corrected than that of ultra vires, since here it is not the municipal corporation who is without authority. Many of the cases have involved either the current or earlier analogous statutory provisions which require express prior authorization by council before an officer can act to bind a municipal corporation. Consequently, they could have been included in the earlier treatment of statutory prescribed methods of contracting. However, the results reached by the Ohio courts in these statutory cases differ little from those

177 Village of Hicksville v. Blakeslee, 103 Ohio St. 508, 134 N.E. 445 (1921).
179 Rogers v. City of Cincinnati, 10 Ohio App. 238 (1918), also rejecting estoppel in dictum.
181 Board of Educ. v. Mills, 38 Ohio St. 383 (1882); State, ex rel. Manufacturer's Appraisal Co. v. Sayre, 33 Ohio C.C.R. 602 (Cir. Ct. 1911), aff'd, 86 Ohio St. 362, 99 N.E. 1133 (1912); Burkholder v. Lauber, 6 Ohio Misc. 152, 216 N.E.2d 909 (C.P. 1965), quasi-contractual relief also denied.
182 City of Cleveland v. Division 268, Amalgamated Ass'n of Street, Electric Ry. & Motor Coach Employees of America, 30 Ohio Op. 395 (C.P. 1945); Ampt v. City of Cincinnati, 3 Ohio N.P. 223 (C.P. 1896), refusing an injunction against payment because it had already been made.
in which subordinate personnel fail to act within their authority, and since they all present the same basic fact pattern, they are considered together here.

Where a lack of authority has been found the courts have been uniform in holding that the resulting contracts, or specific provisions of them, are invalid,184 and efforts to enforce them by specific performance,185 enjoining their breach,186 or recovery of payments due under them,187 have failed. At the same time, injunctions against their performance188 and against making payments for work done under them have been granted.189 A municipal corporation has been denied relief on a surety's bond when the principal contract was found to be unauthorized.190 Estoppel has been denied,191 but it has also been used to permit relief against a municipality where there was defective compliance with a statutory authorization requirement.192

Because of the very nature of the defect, ratification by a municipality of an unauthorized act of its agent acting on its behalf is a well recognized theory of relief.193 Its availability appears to be readily accepted in several Ohio cases where it was raised as an issue but the courts failed to find sufficient facts to justify its application.194

The Attorney General of the state has advised against the availability of quasi-contractual relief and in favor of recovery back by a municipality of payments made provided it restored as far as possible benefits received under a contract which had

184 Lowry v. City of Ironton, 10 Ohio L. Abs. 222 (Ct. App. 1931); Burrows v. City of Warren, 61 Ohio L. Abs. 539, 103 N.E.2d 311 (C.P. 1951).
185 Lowry v. City of Ironton, 10 Ohio L. Abs. 222 (Ct. App. 1931).
188 Helmsteder v. City of Barberton, 14 Ohio L. Abs. 447 (Ct. App. 1933).
189 Hawley v. City of Toledo, 47 Ohio App. 246, 191 N.E. 827 (1934).
191 Village of Millersburg v. Wurdach, 22 Ohio N.P. 49 (C.P. 1919); Welch v. City of Lima, 89 Ohio App. 457, 102 N.E.2d 888 (1950), where facts did not justify its application.
been awarded without compliance with both statutory authorization and certification requirements.\textsuperscript{195}

### III.

**The Pincelli Case**

The most recent expression of the Ohio Supreme Court on the availability of relief to a contractor under an invalid public contract is the case of *Pincelli v. Ohio Bridge Corp.*\textsuperscript{196} As stated at the beginning of this article, this decision is noteworthy primarily because of the extent to which it remains faithfully consistent with the body of law just examined.

The case arose as a taxpayer's suit under statutory authority\textsuperscript{197} to enjoin the payment of $60,556 allegedly due the defendant corporation under two contracts for the supply to a county of a pre-fabricated bridge in place and the repair of another. In the construction of bridges, code sections 153.31 to 60,\textsuperscript{198} required preparation of plans, specifications, material lists, advertising of an invitation for bids, and the awarding of the contract to the lowest bidder. The county, however, purported to act under the force account provisions of section 5543.19.\textsuperscript{199} Consequently, the county engineer prepared the specifications, but without having advertised for bids, he accepted the defendant’s proposal when it was found to be lower than that of another.\textsuperscript{200} No certificate of availability of funds, as required by section 5705.41,\textsuperscript{201} was obtained.

The common pleas court granted the requested injunction after it determined that the force account authority was not simply an alternative to the formal advertising provisions of Chapter 153 of the Ohio Revised Code which would permit the county to “shop around and enter into a contract for some contracting firm to perform the whole contract for a total set figure

\textsuperscript{195} 1938 Ops. Att'y Gen. 2053.
\textsuperscript{196} 5 Ohio St. 2d 41, 213 N.E.2d 356 (1966).
\textsuperscript{197} Ohio Rev. Code § 309.13 (1953).
\textsuperscript{198} Ohio Rev. Code (1953). Certain provisions of these sections have since been superseded by Ohio Rev. Code §§307.86-92 (Supp. 1967).
\textsuperscript{199} Ohio Rev. Code (1953).
\textsuperscript{200} The defendant's proposal was lower for the construction contract; no other proposal was submitted for the repair contract.
\textsuperscript{201} Ohio Rev. Code (1953).
arrived at by the county engineer.” Rather, it was found to be limited so that the county engineer was “to do the work . . . from the labor he could hire locally and ready at hand and available to him, and with the tools and equipment that he could hire and the materials readily available.” As the basis for granting the injunction the court relied on the authority of State v. Kuhner & King, for the failure to obtain a certificate of funds, and Buchanan Bridge Co. v. Campbell, for the failure to follow other statutory requirements.

The court of appeals affirmed and took special note that to decide whether the trial court’s injunction was so broad as to preclude the county’s recognition of a moral obligation was premature, since no action of recognition had been taken. The same disposition was made of the claim that specific restitution was available since it was not within the scope of the appeal.

The Supreme Court also affirmed. It found that the procedure followed did not arguably amount to the proper use of the force account method. It concluded that failure to follow the procedure of Chapter 153 of the Ohio Revised Code, meant that the chapter could in no way serve as legal authority for this contract. In fact, it found the purchase orders were not authorized by any statute and, therefore, relying on the Buchanan case, “no contract authorizing the expenditure of public

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203 Id. at 175, 198 N.E.2d at 48B. Apparently in response to the suggestions of the court of appeals in Pincelli v. Ohio Bridge Corp., 1 Ohio App.2d 342, 343, 345, 204 N.E.2d 696, 697, 698 (1965), the legislature has clarified the applicability of force account procedure by amending Ohio Rev. Code §5543.19 (Supp. 1967), effective December 9, 1967. This section now provides that force account is not available if the estimate of the work to be done by the county on bridges and culverts exceeds $25,000 unless no bid is received or all bids are rejected.

Sections 307.86-92 Ohio Rev. Code (Supp. 1967), which impose competitive bidding procedures, are also newly adopted, having taken effect on the same day as Ohio Rev. Code §5543.19 (Supp. 1967). They are broad in scope, covering all purchases, leases, or construction carried out by a county. They thus supersede certain provisions of Ohio Rev. Code §§ 153.31-60 (1953). The new sections exclude contracts of $2,000 or less, and certain service contracts (§307.86), and provide for several other exceptions, e.g., emergency construction (§307.86(A)), or purchases from other governmental bodies (§307.86(C)).

204 107 Ohio St. 406, 140 N.E. 344 (1923).
205 60 Ohio St. 406, 54 N.E. 372 (1899).
funds resulted." In its syllabus, the court approved and followed this case by stating that competitive bidding requirements of Chapter 153, Ohio Revised Code, were mandatory and a contract made without compliance with them was void. The court went on to note that the failure to obtain a certificate of funds also resulted in making the contract void according to the express terms of section 5705.41, and as they were construed in State v. Kuhner & King. Finally the court failed to find any justification to the claim that the taxpayer's suit came too late since statutory provisions of section 309.13, did not limit such a suit to the time before work was completed.

In this case there was a complete lack of compliance with applicable statutory procedures unrelieved by even a colorable claim to a right to use the force account method of contracting. This would serve to overcome any judicial hesitancy, noted earlier, in granting the stringent relief of an injunction against payments. As a consequence, the approach of all three courts to this case and the results they reached are in no way unjustified, either in light of the precedent they cited or other precedent available to them. In this regard the case adds no new law to the Ohio scene. (The suggestion by the Supreme Court concerning recognition by a public body of a moral obligation will be treated later.) The case only reiterates in a more modern setting the courts' older views on the significance of these statutes. But this result is significant, for it means that the suggestions of some legal scholars and the liberalizing decisions of some courts in other states have not had sufficient impact on the Supreme Court to cause it to expand its opinion to include a restatement of the rationale behind the results reached, let alone a reconsideration of its merits. It also means that the changes that have been wrought by modern urban society have had no discernible effect on the Court; nor has the passage of time induced a re-examination of past precedent for possible misconceptions or

208 Id. at 45, 213 N.E.2d at 360.
210 107 Ohio St. 406, 140 N.E. 344 (1923).
over-emphases. Although this may not have been the appropriate case, or an appropriate time, for a massive re-examination of this subject by the Supreme Court, there certainly was no indication that it has any immediate desire to undertake such an effort. If, as suggested in the treatment of *Lathrop Co. v. City of Toledo*[^214^], the Court may be inclined to temper the harshness of the law in this area, this is not indicated in the *Pincelli* case.

### IV.

**Criticisms of Restrictive Decisions**

The rationales underlying the broad areas treated, such as ultra vires, statutory prohibitions, and statutory modes of contracting, in themselves justify refusal to enforce offending contracts by either injunction or damage awards for their breach. They also serve as compelling reasons against overlooking common factual deficiencies by liberalizing the application of the theories of ratification and estoppel to indirectly achieve the same result. Certainly, policy considerations in favor of protecting the taxpayer and the public treasury do nothing but re-enforce such a denial. But the strong principles of fairness and justice which serve as the basis for the concept of unjust enrichment, the cornerstone of the law of restitution, militate against a similar denial of quasi-contractual relief based on the reasonable value of the materials or services rendered. To give effect to such a fair and flexible theory of relief does no violence to the above rationales. It should, therefore, be rejected only if it would tend to defeat the objectives sought to be achieved by their development, and more particularly, those implicit in the passage of statutory provisions. This is the approach suggested by the writers of the *Restatement*.[^215^]

Fully in accord with the spirit of this approach, Professor Chester J. Antieau, one of the leading writers in this field, suggests that quasi-contractual relief be made available to contractors despite the fact that the contract is ultra vires[^216^], violates public policy[^217^], or was awarded by an unauthorized

[^214^]: 5 Ohio St.2d 165, 214 N.E.2d 408 (1966).
[^217^]: Id. at § 10.15 at 719; Id. at § 10.22 at 739.
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agent. He would have courts deny its application only where statutory provisions make this imperative. This suggestion is not without judicial support, for although probably a majority of courts do deny this relief in these areas, there are many who do not. With respect to statutory requirements concerning the manner of contracting, Professor Antieau suggests no generalization be made but that each statute and requirement be tested in light of the following considerations before quasi-contract is denied:

Rather than indulging in such labels, the judiciary should be encouraged to a conscious awareness and weighing of the social purpose underlying the statute or charter provision, the persons intended to be protected thereby, a consideration of whether the legislative aims can be reasonably attained while granting some form of relief to the citizen, the degree of deception or bad faith of the local government agents and officers in the particular transaction, the extent of culpable carelessness on the part of the private party, the possibilities of restoration to the status quo, and in general, the possibility of enforcing society's strong policy against unjust enrichment.

In the absence of countervailing considerations operating in a particular state, there is the further suggestion that quasi-contract be made available to contractors even though requirements of advertising for bids, prior authorization or approval, recording of contracts, prior appropriation, or certificate of funds were not met. Again, there is considerable judicial support for such relief in these circumstances, reaching trend or even majority proportions.

218 Id. at § 10.24 at 749.
219 Id. at § 10.12 at 708-11; at § 10.14 at 717; at § 10.15 at 719; at § 10.22 at 738; at § 10.24 at 748-49.
220 Id. at § 10.26 at 752.
221 Id. at § 10.27 at 756.
222 Id. at § 10.47 at 785.
223 Id. at § 10.49 at 788.
224 Id. at § 10.50 at 790.
225 Id. at § 10.50 at 791.
226 Id. at § 10.49 at 787-88; at § 10.50 at 789-91.
227 Id. § 10.27 at 754-56, formal advertising.
228 Id. § 10.47 at 785, authorization by ordinance.
Insofar as these requirements are motivated by a desire to protect the public treasury and thereby the taxpayer from excessive prices, granting quasi-contractual relief would do no disservice as an indirect raid on the treasury. The municipality would be liable only for the value it had received. A value computed by a competent judicial system based on relatively clear principles of long standing. The "water" resulting from favoritism, negligence, excessive advantages, or any advantages of the bargain at all, would be wrung out in the granting of this relief. That these evils might not be prevented, is true, but certainly, their primary cause would be.

Extravagant spending beyond municipal needs or the capabilities to pay might be advanced if adherence to the prior authorization and certification of funds requirements were endangered. However, if a contractor were to become a willing partner to such a practice he would continue to run the risk of no recovery for the benefit conferred if, as suggested, his culpability were considered as one of the determinates of relief. If an innocent victim of the expansive ambitions of the municipal officials, denial or relief to him would penalize one who had no influence in causing the transgression, and would not serve as an effective deterrent to those responsible, the municipal authorities. Reliance would better be placed on improving the more carefully directed deterrent of effective administrative procedures if scrutiny by the electorate, implemented directly and more immediately by the availability of a taxpayer's injunction suit, are thought insufficient.

There is the possibility that the denial of all relief will serve to heighten the contractor's caution in entering contracts with public bodies and will thereby cause him to shoulder the burden of seeing to it that municipal authorities act within their

**Notes:**

229 Some still find in the presence of profit in quantum meruit, i.e. the difference between expenses and market value, sufficient reason to deny quasi-contractual relief in order to prevent the breakdown in the safeguard against favoritism, fraud, and corruption erected by advertising requirements. Case Note, 2 U.C.L.A.L. Rev. 591, 595 (1958). Others emphasize the loss of product improvement with the curtailment of competition. Wessells, *Stimulate Competition on Public Business*, 74 Am. City 160 (April 1959).

230 Contracting without authorization by council would be destructive of councilmanic control over a vital area of municipal government. How common a practice this might become, despite all possible administrative safeguards, if quasi-contractual relief were granted, is a question that needs to be considered.
power and in the manner prescribed. No doubt this is a possible result. But, aside from the fact that at times this is a very heavy burden indeed, and increasingly so in the complexities of modern purchasing, it would appear to be a misplaced one. As already stated, efforts at improving administrative procedures would be more to the point. Then too, the ultimate responsibility of supervision is the electorate’s. If its opportunity to elect honest and competent officials and its ability to institute taxpayer’s injunctive suits are not adequate to prevent municipal abuse, shifting the consequences of this deficiency to the contractor as an insurer of public well-being is at best a stopgap, and certainly an unfair one, at that.

It might well be concluded that a denial of all relief and even the ordering of the return to the municipality of benefits conferred by it are both an ineffective way to advance municipal honesty, integrity, or efficiency, and often constitute a clear injustice to good faith municipal contractors.231

Clearly, the Ohio picture fails to meet these criticisms. As has been seen, instead of examining the merits of each case—including the culpabilities of the parties, the particular policies to be advanced, and the specific language of pertinent statutes—the courts have been stiflingly uniform in denying all quasi-contractual relief, generally after first denying other theories or forms of recovery. This uniformity of result is the unfortunate consequence of the Supreme Court’s apparent misconception in the Morgan case232 that quasi-contract is a form of contract rather than simply a form of relief. This situation exists despite some tendency to mitigate its severity by granting the incomplete remedy of specific restitution, by demanding the restoration of benefits before allowing the municipality to recover back those conferred by it, by occasionally applying estoppel, and by sometimes refusing to enjoin payment for work done. This is not to suggest that quasi-contract should be granted in all cases, for this would indicate as much insensitivity to the specifics of each case as does the present policy of uniformly denying relief. Rather, an evaluation of all relevant factors, including legislative intent and public policy considerations, is imperative. Results should not depend on an unimaginative following of

231 Tooke, Quasi-Contractual Liability of Municipal Corporations, 47 Harv. L. Rev. 1143, 1169-70 (1934).
232 City of Wellston v. Morgan, 65 Ohio St. 219, 62 N.E. 127 (1901).
precedent or a heavy reliance on mere labels. As a practical matter, a major shift in approach by the Ohio courts would seem highly unlikely, given the past history of this problem. Even if the courts were receptive to a change, in some instances statutory language would stand in the way. It is therefore apparent that resort must be had to the legislature if corrective action is to be undertaken.

V.

Moral Obligation

Before the unhappy plight of a municipal contractor can be confirmed and the resulting criticisms can be established, an examination of a further matter must be made. This is the extent to which a municipality is empowered to make compensation without legal compulsion for benefits received. Certainly, there must be made, as an incident to this examination, an estimate of the relative merit of this approach as compared to that of granting judicial relief—that is, between recovery as a matter of grace and as a matter of legal right. It is also with respect to this consideration that the Pincelli case may have its greatest importance.

The administrative or legislative approach to relief (as contrasted with the judicial one) is not new. In fact, until modern statutes waived immunity it was the only means available to obtain relief against the federal government. At the municipal level recognition of a claim can take two possible forms, that of corrective legislation at the initiative of the state, or at the initiative of the municipal corporation. The latter form is of primary concern here—general or piecemeal recognition of a moral duty by a municipal council to make compensation for a benefit received or an injury caused by the municipality for which it is not legally liable. As a form of relief this approach has both advantages and shortcomings for a municipal contractor. If no

234 State, ex rel. Uible v. Harlan, 37 Ohio App. 222, 174 N.E. 366 (1930); Mill Creek Valley St. Ry. v. Village of Carthage, 18 Ohio C.C.R. 216 (Cir. Ct. 1899), aff'd, 62 Ohio St. 636, 58 N.E. 1102 (1900). This power is limited so that it can not be used to benefit only the state and be detrimental only to the contractor. State v. Kuhner & King, 107 Ohio St. 406, 140 N.E. 344 (1923).
235 "A 'moral obligation' means that some direct benefit was received by the state as a state or some direct injury has been suffered by the
other relief is available, it is a clear gain, but in comparison to judicial relief as a matter of right, it suffers from its voluntariness and unpredictability. Arguably, however, being at the mercy of a municipal administrator or a municipal council is no worse than being at the mercy of a jury. It is true that factors irrelevant to the claim may enter into treatment by the municipality, such as the closeness of an election, the end of the fiscal year, or even the personality of the aggrieved contractor. However, the apparent stability and predictability of legal relief may easily run aground on the shoals of jury capriciousness. Legislative relief is characterized as inferior by one legal writer and preferable by some municipal administrators. Whichever is more nearly true, recognition of a moral obligation by a municipality is clearly an ameliorating factor, one necessitated by the unsatisfactory state of the law in this area. Yet, at the same time, it constitutes an incongruity in the pattern. Courts have denied municipal legislative correction by ratification because of a lack of power. They have stopped short of accepting judicially recognized administrative correction through the use of the theory of estoppel. They have declined to recognize judicial power to take corrective action through the application of quasi-contractual relief. It is therefore remarkable that they should accept the theory that the municipality has power to make amends by acknowledging a moral obligation.

The recognition of a moral obligation cannot even be distinguished entirely from the other theories on the basis of municipal willingness to make an adjustment. But insofar as such a distinction can be drawn between that approach and quasi-contract, municipal amenability to liability has, by itself, no bearing on the justice of the claim, the plight of the contractor, or the policy of the statute. The former approach may involve

(Continued from preceding page)

claimant under circumstances where in fairness the state might be asked to respond, and there must be something more than a mere gratuity involved.’” It is “‘a duty which would be enforceable at law were it not for some positive rule which exempts the party in that particular instance from legal liability.’” State, ex rel. Caton v. Anderson, 159 Ohio St. 159, 163, 111 N.E.2d 248, 250 (1953).

236 Tooke, Quasi-Contractual Liability of Municipal Corporations, 47 Harv. L. Rev. 1143, 1171 (1934).

237 This view was expressed by at least some in response to a questionnaire concerning municipal practices and opinions with respect to the payment of moral claims against a municipality which was distributed to a number of municipal law directors in Ohio by the author.
just as great a raid on the treasury and just as improper an expenditure of tax money as may the latter. Given the justice of the claim, the question resolves itself into whether the contractor should be placed at the tender mercies of municipal authorities or those of a jury. Clearly, if the latter remedy is to be denied, the former is certainly better than nothing. But if municipal relief is justified, what prevents acceptance of judicial remedies?

Is the concept of moral obligation recognized in Ohio? The answer to this question was at best clouded prior to the Pincelli case, and that decision may have succeeded in adding to the obscurity.

The concept is well recognized in the adjudication of tort claims at the state level, and since 1953 it has been recognized at the municipal level that "(t)he city may be just..." There is nothing in the Caton case which would deny its application to contract claims. In fact, there is scattered but inconclusive judicial support for such an application. There can be

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239 State, ex rel. Caton v. Anderson, 159 Ohio St. 159, 164, 111 N.E.2d 248, 251 (1953). This power, too, is limited so that the point of a gift is reached by repeated payments of the same claim. Peters v. State, ex rel. Jaehn, 42 Ohio App. 307, 182 N.E. 139 (1932).
240 Some is to be found in dictum at the Supreme Court level in Emmert v. City of Elyria, 74 Ohio St. 185, 78 N.E. 269 (1906), where the court used moral obligation as the basis for its reluctance to enjoin the city from making payment for benefits received under a contract thought not to be void even though awarded without a certification of funds. More, but also by way of dictum, appears in another case in which injunctive relief was sought: Caldwell v. Marvin, 8 Ohio N.P. (n.s.) 387 (C.P. 1909). But still another trial court, in Maloney v. Gutelius, 16 Ohio Op. 145 (C.P. 1939), while granting an injunction against payment, took note of the undercutting effect the recognition of a moral obligation has on the requirements of ratification and suggested, again in dictum, that recovery be limited to legal claims.

Actual holdings on the question of moral obligation have been few and conflicting. Several cases in part support such recovery. In one, Arnold v. City of Akron, 54 Ohio App. 382, 7 N.E.2d 660 (1936), the court refused an injunction against payment for lack of a certificate of funds, but also relied on the theory of ratification. In another, State, ex rel. Morgan v. Rusk, 37 Ohio App. 109, 174 N.E. 142 (1930), the court granted relief in part on the theory that there was an enforceable contract. In a third, State, ex rel. German American Publishing & Printing Co. v. Wall, 2 Ohio N.P. (n.s.) 517 (C.P. 1902), the contract violated charter provisions. The power to recognize a moral obligation was denied in Caster v. Village of Pleasant Ridge, 7 Ohio N.P. (n.s.) 174 (C.P. 1907), where an injunction against payment was granted because of a total disregard of statutory requirements. In Village of Pleasant Ridge v. Dayton Limestone Co., 1 Ohio App. 405 (1913), the appeals court, in overturning a trial court decision permitting the contractor relief on the basis of a moral obligation (despite

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no doubt that many municipal authorities consider themselves empowered to give such relief (usually in a piecemeal fashion) in contract claims, although some apparently still do not do so.241 This belief is supported by the approach taken by the Bureau of Inspection and Supervision of Public Offices of the state auditor's office in its acceptance of such expenditures242 in the course of carrying out its statutory243 duty to examine municipal accounts.

Still, the Supreme Court in Pincelli can reasonably be interpreted as having cast doubt on the validity of this practice. The question is not thoroughly discussed by the court, a fact which makes one hesitant to state any firm conclusions. Also, the appeals court had noted that a decision on the moral obligation issue was premature, since such an obligation had not been recognized by the county. Yet, the Supreme Court stated in its decision that statutory authority for taxpayers to prevent by injunction the expenditure of county money244 (and the same would likely be true with respect to municipal money245) "makes untenable the position . . . that payment can be made on a basis of moral obligation." 246 It seems that a taxpayer's request for an injunction, which in the past had met with judicial hesitancy and statements favorable to a municipal power to recognize a moral obligation, may now meet with success.

Even though purely a matter of statutory interpretation, and apparently only dictum at that, this statement could have major ramifications. Given a narrow construction, it may mean merely that recognition of a moral obligation could be prevented by a taxpayer's suit such as the one before the court. This may have

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a lack of a certificate of funds and of advertising) found the municipality's defense of the suit indicated that the village was actually resisting payment. However, there was also a defect in the village's attempt to recognize the obligation. Doubt as to the authority of a municipality to recognize a moral obligation in a defective contract was expressed by the Attorney General of the state in 1938 Ops. Att'y Gen. 2053, at 510.

241 This is evident from a number of replies obtained in the survey mentioned in note 237, supra.
242 From a statement made in a letter from the Bureau's office to the author, dated June 19, 1968.
244 Ohio Rev. Code § 309.13 (1953).
been the law previously, although no case has come to the
author's attention in which this issue was presented. On the
other hand, the statement might be given a broader interpreta-
tion, namely, that a moral obligation cannot be recognized in any
case in which a taxpayer's suit could be brought, that is, any
case involving the illegal expenditure of public funds—including
payments made under an invalid contract. It seems clear that if
either interpretation is correct and becomes authoritative in
future decisions, the body of Ohio municipal contract law will
thereby become more consistent, but at the same time it will
become even more inflexible and unfair to the municipal con-
tractor.

VI.
Conclusion

Under Ohio law a municipal contractor is almost entirely
unable to enforce a defective contract with the municipality,
whatever the nature of the defect. Only those flaws caused by
a violation of the most technical statutory requirements have
given rise to different treatment. Recovery for the value of work
or materials supplied is also generally denied, regardless of the
theory of relief employed or the nature of the defect involved.
However, estoppel has been given limited application, particu-
larly in the case of unconstitutional grants of authority or the
issuance of a false certificate of funds. Ratification is also avail-
able in cases involving unauthorized agents. Specific restitution
of benefits has been suggested on occasion. Injunctions against
payment are generally granted, but some hesitancy is evident
when defective advertising or the failure to procure a certificate
of the availability of funds is involved. In addition, a duty to
restore benefits conferred on a municipality is generally treated
as a condition to the statutory right of a municipality to recover
back benefits it has given the contractor.

Ohio courts have stood steadfast against the granting of
quasi-contractual relief when statutory requirements for con-
tracting have not been followed. This is explained as being
necessary in order to sustain and support the policies which pre-
sumably motivated the legislature to establish the requirements.
Developed early, this approach has been consistently reaffirmed,
even in the most recent case of Pincelli v. Ohio Bridge Corp.\textsuperscript{247}

\textsuperscript{247} 5 Ohio St.2d 41, 213 N.E.2d 356 (1966).
However, this case may well constitute more than just a re-affirmation of precedent, for it casts doubt on the validity of municipal efforts to alleviate the inequities involved in denying legal relief by recognizing a moral obligation to pay for benefits received under otherwise unenforceable contracts.

The denial of quasi-contractual relief and the possible denial (by Pincelli) of a municipality's right to recognize a moral obligation to pay have severely curtailed the ability of any public body (short of the state legislature) to fit the remedy to the situation and thereby to achieve a result which is fair to both the contractor and the public. This state of affairs is manifestly unsatisfactory, and there is clearly a need for remedial action by the General Assembly.