

# RECENT DEVELOPMENTS

## CONTRACTS: PARTY HELD LIABLE IN QUASI-CONTRACT FOR THE VALUE OF SERVICES RENDERED RATHER THAN BENEFIT RECEIVED

In *Campbell v. Tennessee Valley Authority*<sup>1</sup> the Fifth Circuit Court of Appeals held that the measure of recovery in an action based on a contract implied in law<sup>2</sup> was the fair market value of the services rendered and not the value of the benefit that the TVA received. Having entered into an oral agreement to microfilm certain technical journals through an agent of the TVA who had no authority to make such an agreement and acted in violation of the TVA competitive bidding statute,<sup>3</sup> Campbell delivered the microfilm to the TVA and destroyed the original journals. Another agent who accepted delivery was not authorized to do so, and it was not until two months later that the TVA learned of the film's presence in its library and returned it to Campbell. During the intervening period only three of 336 film cartridges were used by the public. Campbell refused to accept the return of the film and filed a complaint in the United States District Court against the TVA alleging breach of contract.<sup>4</sup> The TVA's motion for summary judgment was granted, and Campbell then amended his complaint to state an action based upon a contract implied in law.<sup>5</sup> The case was tried on this theory, and the jury granted recovery in the amount of the contract price,

---

1. 421 F.2d 293 (5th Cir. 1969), *reh. en banc denied per curiam*, 421 F.2d 307 (5th Cir. 1970).

2. The court uses the terms "*quantum meruit*" and "contract implied in law" as equivalents. See 421 F.2d at 294. However, because of the confusion surrounding *quantum meruit*, see notes 14-25 *infra* and accompanying text, that term will be avoided in this article whenever possible.

3. 421 F.2d at 294, 16 U.S.C. § 831h(b) (1964) provides:

All purchases and contracts for supplies or services . . . made by the Corporation, shall be made after advertising, in such manner and at such times sufficiently in advance of opening bids, as the Board shall determine to be adequate to insure notice and opportunity for competition . . . .

The section then provides for certain exceptions which do not apply in this case.

4. 421 F.2d at 294.

5. *Id.*

after finding that sum to be fair market value of the services rendered.<sup>6</sup> On appeal the TVA contended that the district court committed error in instructing the jury to determine the amount of recovery by "the fair market value of the microfilm . . . ." The Court of Appeals affirmed over a lengthy dissent which contended that the TVA was not liable, or if it were liable, the measure of recovery should be limited to the value of the benefit the TVA received.<sup>8</sup>

A careful examination of not only the distinction between contracts implied in law, otherwise known as quasi-contracts, and contracts implied in fact but also a discussion of the correct use of the term "*quantum meruit*" is necessary for a proper understanding of the issues presented by the majority and dissenting opinions.<sup>9</sup> Technically, an implied in law contract does not involve a contractual obligation because it is not based upon any agreement of the parties in either the objective or subjective sense.<sup>10</sup> An implied in fact contract, however, does involve an agreement in the objective sense. As a Pennsylvania court has explained:

A quasi contract arises when the law implies a duty upon a person not because of any express or implied promise on his part to perform it, but even in spite of any intention he might have to the contrary. . . . [A] contract implied in fact . . . is an actual contract . . . which arises where the parties agree upon the obligation to be incurred, but their intention . . . is inferred from their acts in the light of the surrounding circumstances.<sup>11</sup>

The practical significance of this distinction between implied in law, or quasi-contracts, and implied in fact contracts is the measure of recovery under each. The amount of recovery on a contract implied in law is limited to the value of the defendant's unjust enrichment, there being no express or implied promise for the court to enforce.<sup>12</sup> On the other hand, in an implied in fact contract action there is an

---

6. *Id.* at 295.

7. *Id.*

8. *Id.* at 296. For the dissent of Judge Rives, see *id.* at 298-307.

9. See Corbin, *Quasi-Contractual Obligations*, 21 *YALE L.J.* 533, 550-52 (1912), for the distinction not only between contracts implied in law and contracts implied in fact but also between contracts implied in law and torts.

10. See F. WOODWARD, *THE LAW OF QUASI CONTRACTS* § 4, at 6 (1913); Corbin, *supra* note 9, at 551-52.

11. *Cameron v. Enyon*, 332 Pa. 529, 532, 3 A.2d 423, 424 (1939). See Ames, *The History of Assumpsit*, 2 *HARV. L. REV.* 1, 63 (1888).

12. See F. WOODWARD, *supra* note 10, § 4; Costigan, *Implied-in-Fact Contracts and Mutual Assent*, 33 *HARV. L. REV.* 376, 376-77 (1920).

implied promise to pay the plaintiff the fair market value for the services he provides, and this promise is enforced by granting recovery equal to such fair market value.<sup>13</sup> The importance of the distinction between a contract implied in law and one implied in fact is apparent when the value of the services rendered is not equal to the value of the benefit received. Unfortunately, this distinction is often lost in the confusion which surrounds the use of the term "*quantum meruit*." Blackstone, writing at a time when implied in fact and implied in law contracts were referred to together as implied contracts,<sup>14</sup> stated that if he employed a servant and failed to "make him amends," the law would give the servant a remedy in *assumpsit* on *quantum meruit* for the fair market value of his services.<sup>15</sup> Today, Blackstone's example would be that of a contract implied in fact,<sup>16</sup> and *quantum meruit* recovery would seem to be limited to such cases. At common law, however, since the action of *assumpsit* would be sustained "if the plaintiff proved an express promise, or a promise inferred from acts other than verbal expression, or . . . any quasi-contractual obligation that the court was willing to recognize,"<sup>17</sup> the courts often failed to distinguish the basis upon which recovery was granted, and any action asking for recovery for work done was designated *quantum meruit*.<sup>18</sup> The shortcomings of such a broad use of *quantum meruit* became important as the courts began to distinguish between contracts implied in law and those implied in fact.<sup>19</sup> Some courts limited *quantum meruit* actions to those based on a contract implied in fact and allowed *quantum meruit* recovery in the amount of the fair market value of the services rendered,<sup>20</sup> while other courts allowed *quantum meruit* actions based on contracts implied in law and recovery in the

---

13. See 5 Å. CORBIN, CONTRACTS § 992, at 6 (1951) [hereinafter cited as CORBIN]; F. WOODWARD, *supra* note 10, § 4; Corbin, *supra* note 9, at 550.

14. For a discussion of the mutual assent theory of contracts which requires a meeting of the minds for the formation of a contract see 3 W. PAGE, CONTRACTS § 1497, at 2560 (1920). See generally 1 S. WILLISTON, CONTRACTS § 3, at 3 (1926).

15. 3 W. BLACKSTONE, COMMENTARIES 161 (1966 reprint).

16. See UNIFORM COMMERCIAL CODE § 2-305. See generally *id.* § 2-204.

17. 1 CORBIN § 20, at 42 (1950). For a general discussion of the confusion surrounding *assumpsit* and the distinction between implied in law and implied in fact contracts see 3 W. PAGE, *supra* note 14, § 1495; F. WOODWARD, *supra* note 10, § 4.

18. See 1 CORBIN § 20, at 43.

19. The case of *Moses v. Macferlan*, 97 Eng. Rep. 676 (K.B. 1760) marks the emergence of the separate contract implied in law action. F. WOODWARD, *supra* note 10, § 2, at 2.

20. See, e.g., *Colyer v. Lahontan Mines Co.*, 54 Nev. 358, 360-61, 20 P.2d 654, 655 (1933). See also *Moncrief v. Hall*, 63 So. 2d 640, 642 (Fla. 1953).

amount of the benefit received.<sup>21</sup> The danger in such a diverse use of the term "*quantum meruit*" became obvious whenever courts, after labelling an action "*quantum meruit*," failed to determine whether the underlying action was one based on a contract implied in fact or one implied in law and applied the wrong measure of recovery.<sup>22</sup> Although such a misapplication of the remedy may not always alter the outcome of a case,<sup>23</sup> it does lead to misunderstanding as to what the proper measure of recovery is in an action based upon a contract implied in law. Further confusion is caused by a court's failing to state when it is applying an exception to the general rule of recovery in implied in law contract actions. For example, in cases where the contract is unenforceable because of the statute of frauds, and courts do not limit recovery to the value of the benefit received, statements have been made which indicate that the measure of recovery in an action based upon a contract implied in law is the fair market value of the services provided.<sup>24</sup>

---

21. See, e.g., *Ylijarvi v. Brockphaler*, 213 Minn. 385, 393-94, 7 N.W.2d 314, 319 (1942) (the court limited *quantum meruit* actions to those based on a contract implied in fact and found on the facts of the case that there was no such contract). See also *Carpenter v. Josey Oil Co.*, 26 F.2d 442, 443-44 (8th Cir. 1928); *Dallas Joint Stock Land Bank v. Colbert*, 127 S.W.2d 1004, 1007-08 (Tex. Ct. Civ. App. 1939), *rev'd on other grounds*, 136 Tex. 268, 150 S.W.2d 771 (1941). For courts allowing recovery in *quantum meruit* upon both a contract implied in law and one implied in fact see *Duncan v. Hackman*, 3 La. App. 421, 423 (1926); *State v. Haley*, 94 N.H. 69, 72, 46 A.2d 533, 535 (1946).

22. See *Clark v. United States*, 95 U.S. 539, 542 (1877); *Williams v. United States*, 127 F. Supp. 617 (Ct. Cl.), *cert. denied*, 349 U.S. 938 (1955). For a discussion illustrating the difficulties a court may encounter in determining if a contract is implied in law see *Martin v. Campanaro*, 156 F.2d 127, 130-31 n.5 (2d Cir.), *cert. denied*, 329 U.S. 759 (1946).

23. The outcome of the case will not be changed by the misapplication of remedy where the fair market value of the services rendered equals the value of the benefit received. For an example of the confusion that a court may cause see *Costigan*, *supra* note 12, at 387-88 n.19, where the author criticizes courts for indicating that they are utilizing a "rule of thumb" test and allowing quasi-contractual recovery in an amount equal to the fair market value of the services rendered, when they are in reality enforcing something akin to an implied in fact contract.

24. E.g., *Evans v. Mason*, 82 Ariz. 40, 308 P.2d 245 (1957); see RESTATEMENT OF CONTRACTS § 347 (1932); RESTATEMENT OF RESTITUTION § 62, at 243 (1937). Courts allowing recovery when a contract is unenforceable because of the statute of frauds point to the intent of the parties to make a contract and, because they cannot enforce the contract, grant recovery on an implied in law contract in the amount of the fair market value of the services rendered. 3 S. WILLISTON, CONTRACTS § 536 (rev. ed. 1948). For claims that granting recovery in the amount of the fair market value of the services rendered is enforcement of the contract in violation of the statute of frauds see *Boone v. Coc*, 153 Ky. 233, 239, 154 S.W. 900, 903 (1913); S. WILLISTON, *supra* note 14, § 536; *Costigan*, *supra*

Once the distinction between a contract implied in law and one implied in fact and the reasons for the confusion surrounding the term "*quantum meruit*" are understood, an analysis of the TVA's legal status and partial immunity is helpful in determining the liability of the TVA upon a contract implied in law. The TVA appears to enjoy a varying status depending upon the particular function under examination, even though the enabling legislation provides that the organization "[m]ay sue and be sued in its corporate name."<sup>25</sup> Notwithstanding the Tucker Act's prohibition of actions implied in law against the United States,<sup>26</sup> this clause has been given a broad interpretation, reflecting both the disfavor of sovereign immunity generally and judicial decisions concerning other analogous governmental corporations.<sup>27</sup> This interpretation has resulted in the TVA being generally treated as a non-governmental corporation when exercising its corporate power and, hence, subject to an action based upon a contract implied in law.<sup>28</sup> Despite this broad interpretation of the "sue and be sued" clause, the TVA is still considered an instrumentality of the United States and enjoys the same immunities as the federal government when it is subject to state regulation<sup>29</sup> or when it is acting in a traditional governmental

---

note 12, at 392-93. *But see* 3 S. WILLISTON, CONTRACTS § 536 (rev. ed. 1948). For examples of other "exceptions" to the general rule of recovery in implied in law contract actions see W. PAGE, *supra* note 12, §§ 1549, 1551. For a commentator who would extend the "exceptions" to the limitations on implied in law contract recovery see I C. ANTEAU, MUNICIPAL CORP. LAW § 10.08, at 700 (1968).

25. 16 U.S.C. § 831c(b) (1964).

26. The Tucker Act, 28 U.S.C. § 1491 (1964) provides: "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States . . . founded upon any express or implied contract with the United States . . ." This Act is interpreted as not granting the Court of Claims (or under other relevant sections, the district courts) jurisdiction in cases where, if the transaction were between private parties, an action based upon a contract implied in law would lie. *See Merritt v. United States*, 267 U.S. 338 (1925); *Tatem Mfg. Co. v. United States*, 386 F.2d 898 (Ct. Cl. 1967). Here, as in other areas, the courts have used the term "*quantum meruit*" indiscriminately and have said that the Tucker Act prohibits actions in *quantum meruit* against the United States when, in fact, an implied in law contract is involved.

27. *See generally* *RFC v. J.G. Menihan Corp.*, 312 U.S. 81 (1941); *FHA v. Burr*, 309 U.S. 242 (1940); *Woodbury v. United States*, 192 F. Supp. 924 (D. Ore. 1961); *Darlington Inc. v. FHA*, 142 F. Supp. 341 (E.D.S.C. 1956).

28. *See Posey v. TVA*, 93 F.2d 726 (5th Cir. 1937); *United States v. Pressnell*, 219 F. Supp. 727 (E.D. Tenn. 1963); *United States v. General Electric Co.*, 209 F. Supp. 197 (N.D. Ala. 1962); *City of Tullahoma v. Coffee County*, 204 F. Supp. 794 (E.D. Tenn. 1962), *rev'd*, 328 F.2d 683 (1964), *cert. denied*, 379 U.S. 989 (1965).

29. *See TVA v. Kinzer*, 142 F.2d 833 (6th Cir. 1944); *TVA v. Local 110, Sheet Metal Workers*, 233 F. Supp. 997 (W.D. Ky. 1962); *Littleton v. Vitro Corp.*, 130 F. Supp. 774 (N.D. Ala. 1955); *Grant v. TVA*, 49 F. Supp. 564 (E.D. Tenn. 1942).

area, such as navigation control.<sup>30</sup> Because the TVA is neither a purely business nor a purely governmental entity, questions arise as to its liability for the unauthorized acts of its agents and for contracts which are awarded in violation of bidding requirements. By analogy to other governmental corporations, it would seem that the TVA, like the United States government, should not be liable in an implied in law contract action for the unauthorized acts of its agents.<sup>31</sup> This nonliability for the contracts or acceptances of unauthorized agents arises because one dealing with a governmental corporation is charged with notice of its agent's scope of authority.<sup>32</sup> Yet, the corporation may be liable on a contract implied in law for the unjust enrichment it receives.<sup>33</sup> However, because an unauthorized acceptance is the equivalent of no acceptance, the governmental corporation, having received no benefit, cannot be held liable even on a contract implied in law for an unauthorized acceptance unless it later impliedly or expressly ratifies that acceptance.<sup>34</sup> By analogy to other governmental corporations and municipal corporations, a policy question is raised whether the TVA should ever be held liable upon a contract implied in law when a bidding statute has been violated by an agent's unauthorized act. The old rule was that no recovery would be allowed if the bidding statute was not followed because to allow such recovery would defeat the purposes of the bidding statute.<sup>35</sup> The trend is away from this

---

30. See *Lynn v. United States*, 110 F.2d 586 (5th Cir. 1940); *Atchley v. T VA*, 69 F. Supp. 952 (N.D. Ala. 1947); *Grant v. T VA*, 49 F. Supp. 564 (E.D. Tenn. 1942); cf. *Adams v. T VA*, 254 F. Supp. 78 (E.D. Tenn. 1966).

31. For examples of the breadth of the application of the non-liability rule see *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *United States v. Stewart*, 311 U.S. 60, 70 (1940) (Farm Labor Board); *de Bilbao-Bastida v. Immigration and Naturalization Serv.*, 409 F.2d 820, 822 (9th Cir.), *petition for cert. dismissed*, 396 U.S. 802 (1969); *Farmers Elevator Mut. Ins. Co. v. Jewett*, 394 F.2d 896, 899 (10th Cir. 1968) (United States Warehouseman); *Mahoney v. Federal Sav. and Loan Ins. Corp.*, 393 F.2d 156, 162 (7th Cir.), *cert. denied*, 343 U.S. 837 (1968); *ANA Small Business Inv. Co. v. Small Business Admin.*, 391 F.2d 739, 743 (9th Cir. 1968); *Arthur Venner Co. v. United States*, 381 F.2d 748, 750 (Ct. Cl. 1967) (Army Corps of Engineers).

32. The reason why one dealing with a public corporation is on notice of the scope of the agent's authority is said to be the protection of the public treasury. See *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947).

33. See generally *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 566 n.22 (1961); *Bake Construction Co. v. United States*, 296 F.2d 393, 396 (D.C. Cir. 1961); *C. ANTEAU*, *supra* note 24, § 10.02, at 686.

34. Cf. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 566 n.22 (1961); *Trinity Hosp. Ass'n v. City of Minot*, 76 N.W.2d 916 (N.D. 1956).

35. See *Los Angeles Dredging Co. v. City of Long Beach*, 210 Cal. 348, 291 P. 839 (1930);

view, and many courts now look to see if the bidding statute is directory or mandatory.<sup>36</sup> It has been suggested that this mandatory-directory distinction is an unconscious balancing of the social utilities involved.<sup>37</sup> On one side is the desire to prevent unjust enrichment while on the other side is the desire to prevent collusion and fraud and to promote economy. One resolution of this weighing has been to grant recovery based on a contract implied in law in an amount equal to the value of the benefit received unless fraud or collusion was shown, in which case no recovery is allowed.<sup>38</sup> In short, the TVA has been regarded as a governmental-corporate hybrid which is not bound by the unauthorized acts of its agents and which, by one resolution of the policy issues involved, could be held liable for the benefit it receives pursuant to a contract which has been made in violation of proper bidding procedures.

In *Campbell v. TVA*<sup>39</sup> the Fifth Circuit proceeded from the premise of the TVA's liability and, without discussing the nature of *quantum meruit*, held that the measure of recovery was the value of the services rendered.<sup>40</sup> Considering the measure of recovery as the only principal issue to be decided, the majority examined the dicta<sup>41</sup> and holdings<sup>42</sup> of several cases and concluded that there was a conflict between the courts as to the proper measure of recovery in an action based upon *quantum meruit* or a contract implied in law.<sup>43</sup> The majority discussed neither the possibility of extending the statute of frauds exception to the rule of recovery in an implied in law contract action<sup>44</sup> nor the cases limiting recovery to unjust enrichment when a bidding statute has been violated. Rather, the court

---

*Fluet v. Eberhardt*, 294 Mass. 408, 2 N.E.2d 463 (1936); *Bremerton Municipal League v. Bremer*, 15 Wash. 2d 231, 130 P.2d 367 (1942).

36. See *Lykes v. City of Texarkana*, 223 Ark. 287, 265 S.W.2d 539 (1954); *O'Neill v. City of S. Omaha*, 102 Neb. 836, 170 N.W. 174 (1918); *Home Owners Constr. Co. v. Borough of Glen Park*, 34 N.J. 305, 169 A.2d 129 (1961); *Edwards v. City of Renton*, 67 Wash. 2d 598, 409 P.2d 153 (1965).

37. See C. ANTIEAU, *supra* note 24, § 10.27, at 755-57; Tooke, *Quasi-Contractual Liability of Municipal Corporations*, 47 HARV. L. REV. 1143, 1171 (1934). See also C. ANTIEAU, *supra* note 24, § 10.24.

38. See *Wakley v. County of St. Louis*, 184 Minn. 613, 240 N.W. 103 (1931).

39. 421 F.2d 293 (5th Cir. 1969).

40. *Id.* at 296.

41. *Id.* at 295-96.

42. *Id.* at 296.

43. *Id.* The court treats "*quantum meruit*" as a synonym of "contract implied in law."

*Id.*

44. See note 24 *supra*.

concluded that the real benefit that the TVA received was having the film available for use in its library, that the benefit could not be measured in terms of dollars, that the film had value only to the TVA, and that therefore the "rule of thumb test" allowing recovery in an amount equal to the value of the services rendered would be applied.<sup>45</sup> The dissent rejected the majority's basic premise that the TVA was liable, implicitly assuming that the TVA's liability on the unauthorized contracts of its agents was the same as the United States government's liability on that type of contract, and concluded that the TVA was not liable.<sup>46</sup> The dissent recognized that recovery on a contract implied in law was allowable against the United States in certain circumstances and attempted to define these circumstances by distinguishing between a contract implied in law upon which, because of the dissent's interpretation of the Tucker Act, no recovery can be allowed and an implied in fact contract upon which recovery can be allowed.<sup>47</sup> Having rejected the contract implied in law action, the dissent also found that the TVA could not be held liable on a contract implied in fact because acceptance of the film was unauthorized.<sup>48</sup> As an alternative position, the dissent argued that even if the TVA were liable, its liability would be limited to the "minuscule" benefit it received from the public's use of the film.<sup>49</sup> To hold that the benefit was having the film available for use, the dissent contended, would ignore the fact that previous to Campbell's destruction of the original journals the same reference sources were available for use.<sup>50</sup>

Although the decision that the measure of recovery against a governmental corporation on a contract implied in law is the fair market value of the services provided appears to be unique, the major significance of *Campbell v. TVA*<sup>51</sup> is the resolution of several policy issues. The court answered affirmatively *sub silentio* the following three considerations: (1) whether one dealing with a governmental corporation should be held to know the scope of authority of the corporation's agent; (2) whether a remedy based upon a contract implied in law should be available when a bidding

---

45. 421 F.2d at 296.

46. *Id.* at 298-307.

47. *Id.* at 299-305.

48. *Id.* at 302.

49. *Id.* at 306.

50. *Id.* at 305-07.

51. *Id.* at 293.

contract procedure has not been followed; and (3) if recovery upon a contract implied in law is allowed, whether the statute of frauds exception to the general rule of recovery in implied in law contract actions should be extended to the bidding situations. As evidenced by the lack of discussion on any of the issues, however, it is doubtful that the court was even aware of these considerations. Resolution of the policy issues raised by *Campbell* cannot be found unless a court considers not only the status of the TVA but also the nature of a contract implied in law and the appropriate recovery where a bidding statute is involved. The dual nature of the TVA as a governmental-corporate hybrid<sup>52</sup> raises many questions, and a court should neither, as the dissent did, automatically assume that the TVA is the equivalent of the United States government nor ignore the TVA's status as a governmental corporation, as the majority appeared to do. Rather, a court should determine if the TVA requires any or some of the benefits of its governmental status when it is operating in a private business capacity. The earlier suggestion that the TVA be subject to suit in an implied in law contract action but not be liable for the unauthorized acts of its agents is suggested as a possible resolution of this dilemma.<sup>53</sup> By disallowing recovery where there is fraud or collusion, the purposes of preventing the same would not be compromised. Once this inquiry is concluded, a court should consider the essence of a contract implied in law for the purpose of determining the appropriate recovery. The court must not be misled by the term "*quantum meruit*," the danger of which is apparent in *Campbell* where the majority treated an action in *quantum meruit* and an action based on a contract implied in law as synonymous<sup>54</sup> and then mistakenly cited to the term "*quantum meruit*" in cases where it was not used synonymously with contract implied in law.<sup>55</sup> Had the *Campbell* court made such an inquiry, the conflict found by the majority in the case authority as to the measure of recovery in an action based upon a contract implied in law would have been found to be illusory since one case involved an implied in fact contract,<sup>56</sup> one an implied in law contract,<sup>57</sup> and the

---

52. See notes 25-30 *supra* and accompanying text.

53. See note 38 *supra* and accompanying text.

54. *Id.* at 296.

55. *Id.* at 295-96. The cases cited in which *quantum meruit* was not the equivalent of a contract implied in law included *Crocker v. United States*, 240 U.S. 74 (1916) (*quantum valebant*) and *Clark v. United States*, 95 U.S. 539 (1877).

56. *In re Moyer*, 190 F. Supp. 867 (W.D. Va. 1960).

57. *Hill v. Waxberg*, 237 F.2d 936 (9th Cir. 1956).

third the previously discussed statute of frauds exception to the usual benefit received recovery awarded under an implied in law contract.<sup>58</sup> The court's application of the "rule of thumb," which allows recovery in an amount equal to the fair market value of the services where the value of the benefit received cannot be ascertained,<sup>59</sup> further indicates the danger of not analyzing the term "*quantum meruit*," for courts apparently limit the application of this rule to statute of frauds cases.<sup>60</sup> To apply the rule, when a contract is implied in law, as the court in *Campbell* did, would draw the jury away from the real issue of unjust enrichment and more towards the judicial enforcement of an otherwise unenforceable contract. To avoid being misled by the term "*quantum meruit*," a court must determine if it is dealing with an implied in fact or an implied in law contract. Having failed to distinguish these types of contracts, the court failed to reach the further issue of whether the reasoning which led to the statute of frauds exception should be extended to the bidding contract. It is suggested that any such extension would detract from the effectiveness of the bidding procedures by always assuring plaintiffs a return equal to the value of their services.<sup>61</sup>

---

58. *Evans v. Mason*, 82 Ariz. 40, 308 P.2d 245 (1957); see note 24 *supra*.

59. The court cites Costigan, *Implied-in-Fact Contracts and Mutual Assent*, 33 HARV. L. REV. 376, 387 (1920), as authority for the use of the "rule of thumb" measure of damages in an implied in law contract action. 421 F.2d at 296. Costigan indicates, however, that the "rule of thumb" *should not* be used in implied in law contract cases and that when courts do use the "rule of thumb" they are enforcing something akin to an implied in fact contract. The cases he cites, *Fabian v. Wasatch Orchard Co.*, 41 Utah 404, 125 P. 860 (1912) and *Waters v. Cline*, 121 Ky. 611, 85 S.W. 209 (1905), which apply the rule are statute of frauds cases. Thus, it would seem that the court's own source limits the applicability of the "rule of thumb" to statute of frauds cases. As earlier discussed, courts have generally granted recovery in an amount equal to the fair market value of the services rendered in statute of frauds cases without the help of the rule. See note 24 *supra*. For arguments against extending the statute of frauds exception and the "rule of thumb" see note 61 *infra* and accompanying text.

60. See notes 23 and 59 *supra*.

61. This is the view of the majority of the courts. See C. ANTIEAU, *supra* note 24, § 10.08, at 700. Antieau, however, takes the minority view on reasoning analogous to that in the statute of frauds cases. See note 24 *supra*. This or any suggested extension of the "rule of thumb" measure of recovery seems questionable since it could lead to the subversion of both the statute of frauds when the contract is oral as in *Campbell*, and the bidding statute. See notes 37-38 *supra* and accompanying text.