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Quasi-Contracts - Recovery of Municipal Payments for Goods or Serivces Under Void Contracts

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QUASI-CONTRACTS—RECOVERY OF MUNICIPAL PAYMENTS FOR GOODS OR SERVICES UNDER VOID CONTRACTS

The doctrine is well established by the great weight of authority in the law of municipal corporations that when a municipality had no contractual power whatever with reference to the subject matter of a purported contract for services or goods, it does not become liable either upon the purported contract for the contract price, or on principles of quasi-contract for the reasonable value of the goods or services; and in such a case where the money has been paid, it may be recovered back. The same doctrine prevails with respect to contract or quasi-contract recovery where the municipal corporation, though having the power to contract with reference to the subject matter, is prohibited by statute or the common law from contracting in any other than a specified way and the prohibition is disregarded.[1]

In this case however, where the municipality *has paid* for the goods or services, an action will not lie to recover back the money into the treasury. While the weight of the authorities is likewise with the latter proposition, they are extremely rare, and the purpose here is to examine these authorities and into the reasons which have been advanced for what looks like an anomaly; namely, that there can be no recovery from the municipality on the principle of quasi-contract for the goods and services, yet when goods or services have been paid for, the payments cannot be recovered back into the treasury.

Turning first to the rule denying recovery on principles of quasi-contract for goods delivered or services rendered under contracts which are void because the statutory regulations as to the mode of contracting have been disregarded, the reasoning of the courts in denying recovery seems to be that while municipalities are within the principle of quasi-contract liability that no person shall be unjustly enriched at another's expense, yet that principle should not be applied in such cases on grounds of "public policy", as quasi-contract recovery would encourage violation of these statutes and would thus seriously impair the protection of citizens and the taxpayers from the unfortunate consequences of an extravagant, unwise, or corrupt municipal administration.

This reasoning is apparent from such authorities as *Federal Paving Corporation v. City of Wauwatosa*,[2] in which the plaintiff sought re-

[1] 47 Harv. Law Rev. 1143; 32 Col. L. Rev. 1018; Journal Painting Co. v. Racine, 210 Wis. 222, 246 N. W. 425 (1933); Shulse v. Mayville, 223 Wis. 624; 271 N. W. 643 (1937); Federal Paving Corporation v. Wauwatosa, 231 Wis. 658, 286 N. W. 546 (1939); Bechthold v. Wauwatosa, 228 Wis. 544, 277 N.W. 657, 280 N. W. 320 (1938).

[2] 231 Wis. 655, 286 N. W. 546 (1939).

covery on quasi-contract for the reasonable value of the paving done under a contract which was void because there had been a substantial failure to comply with statutory requirements that contracts should be let to the lowest bidder. In denying recovery, the court said:

> "However harsh the result may appear to be the decisions are sound in principle if there is to be effective enforcement of mandatory statutes and avoidance of the circumvention of statutory prohibitions."

The court, in reaching its decision, quoted with approval from *Woodward, Quasi-Contracts:*[3]

> "If the irregularity is such as to deprive the municipality of the protection of a safeguard against the extravagance or corruption of its officers . . . recovery should be denied."

The Court also quoted from the *Restatement of Restitution:*[4]

> "A person otherwise entitled to restitution of a benefit conferred by mistake is disentitled thereto if restitution would seriously impair the protection intended to be afforded by common law or by statute to persons in the position of the transferee or of the beneficiary, or to other persons."

Turning now to the rule denying recovery back, a statement thereof is also found in the *Federal Paving Corporation* case, Justice Wickhem speaking for the Court as follows:

> "When a municipality has received money, goods, or services, and accepted the benefits, and it had power, had it proceeded in the statutory way to acquire the money, goods, and services *and it has paid therefor,* an action will not lie to recover back the money into the city treasury."[5]

The foregoing rule was applied in the Wyoming case of *Tobin v. Sundance.*[6] In this case the plaintiff had contracted with the town council of the City of Sundance to do a $5,500.00 street repair job. On completion, one-half of the agreed price would be payable in cash and the remaining one-half payable in one year. The contract was performed and the plaintiff received the agreed cash payment, but the defendant refused to pay the balance due in one year. The plaintiff brought this action on the contract. The defense raised was that the contract was void as it was not let to the lowest bidder after due advertisement as prescribed by statute. The defendant also counterclaimed as in an action for money had and received for the amount already paid. Both the petition and counter-claim were dismissed.

[3] P. 261, Sec. 161.
[4] P. 241, Sec. 62.
[5] 231 Wis. 655, pg. 658.
[6] 45 Wyo. 219, 17 Pac. (2d) 666 (1933).

In affirming the trial court, the appellate court held that a contract let without compliance with a statute requiring contracts for public improvements to be let to the lowest bidder after due advertisement for bids is void. Neither acceptance of the work done nor retention and use of the benefits received estops the municipality from denying liability on the void contract.

As to the counter-claim however, the court held that recovery could not be had in an action for money had and received in the absence of a showing that the party seeking to compel repayment is equitably entitled thereto. Defendant municipality may not recover the amount paid in the absence of a showing of wilful evasion of the law, secrecy, haste, fraud, undue influence, or collusion in making the payments, and that none of the municipal officers were personally interested in the contract.

In *Village of Pillager v. Hewett*,[7] it appeared that the village and the defendant entered into a written contract for the erection by the latter of a bridge needed by the former. Shortly thereafter, the village council inspected the bridge and accepted it. The village then paid to the defendant the sum of $500.00 in cash and delivered to him it's bonds in the sum of $1,300.00, pursuant to the agreement as made. Subsequently, it refused to pay the balance of the contract price. The contract was entered into privately and not upon and after advertisement for bids as the law required.

It also appeared in the case that the contract had been entered into by the parties in good faith and that the price thereby agreed to be paid for the bridge was fair and reasonable; the bridge was a necessary improvement; and the village was wholly justified in contracting for and constructing it. The action was brought to recover the money paid and the bonds delivered to the defendant on the ground of illegality in the contract. The court denied recovery. In affirming the judgment, the appelate court said:

> "We have, then, a case where the plaintiff, a municipal corporation, was authorized by law to enter into a valid contract for the building of a bridge, and in form, did so with the defendant, but by reason of its failure to comply with the details required by the statute (Gen. Laws 1885, p. 170c. 145, p. 51), in letting the contract, it was void. It may be concluded that the defendant could not have maintained an action on the contract to recover the contract price for the bridge, although he had fully performed the contract on his part, for upon the grounds of sound public policy the doctrine of ultra vires is applied with greater strictness to municipal than to private corporations. This, however, is an action in the nature of an action for money had and received, which is based upon equi-

[7] 98 Minn. 265, 107 N. W. 815 (1906).

table principles, to recover back the consideration paid by the plaintiff to the defendant for building a bridge which was accepted by it, and which fully complied with the terms of the contract . . . The fact that the bridge was afterwards carried away by a flood is not material, for it was not due to any fault of the defendant or anyone else. After the acceptance of the bridge it became public property, which from its nature could not be restored to the defendant, and, of necessity, the the plaintiff would retain and enjoy the benefits thereof so long as it stood. The defendant in good faith received the money and bonds in payment for the bridge which he had built for the plaintiff. The consideration for such payment was full and fair, and, in equity and good conscience, it ought to have been made by the plaintiff. Such being the case, it would be most inequitable and unconscionable to compel the defendant to return the money and bonds paid to him under the circumstances found by the trial court, and we hold that the plaintiff cannot maintain this action to recover them."

The case of *State ex rel. Hunt v. Fronizer*[8] was instituted under a statute of the State of Ohio which authorized the prosecuting attorney to recover back county funds which had been misapplied or illegally drawn from the county treasury. It appeared that the county commissioners had let a contract for the erection of a bridge to the defendants, which had been fully executed and the money had been paid them for the bridge. Another state statute positively forbade the commissioners to enter into any contract unless a certificate was obtained from the county auditor that the money for the obligation to be incurred was in the treasury to the credit of the fund or was in process of collection, and any contract made in violation of this law was by the law declared to be void. No certificate as thus required had been obtained relative to the bridge contract. The Court of Common Pleas, the Court of Appeals, and the Supreme Court of Ohio all concurred in denying a recovery of the money thus paid; the court of last resort saying:

"And, putting the question presented in terse form, it is whether or not section 1277, as above given, authorizes the recovery back of money paid on a county commissioners bridge contract fully executed, but rendered void by force of section 2834b, because of the lack, through inadvertance, of the county auditor's certificate as therein required, there being no claim of unfairness or fraud in the making, or fraud or extortion in the execution, of such contract for such work, nor any claim of effort to put the contractor in statu quo by a return of the bridge or otherwise; the same having been accepted by the board of commissioners and incorporated as part of the public highway.

[8] 77 Ohio St. 7, 82 N. E. 518 (1907).

> "This court is of the opinion that such recovery is not authorized. The principle applicable to the situation is the equitable one that where one has acquired possession of the property of another through an unauthorized and void contract, and has paid for the same, there can be no recovery back of the money paid without putting, or showing readiness to put, the other party in statu quo, and that rule controls this case unless such recovery is plainly authorized by the statute. The rule rests upon that principle of common honesty that imposes an obligation to do justice upon all persons, natural as well as artificial, and is recognized in many cases."

In *Miller v. City of Des Moines*[9] suit was brought to restrain the performance of a printing contract let by the city council and for a return of considerable sums of money paid under it. The trial court held the contract properly awarded. This holding was reversed on review, the appellate court finding that the award of the contract had been arbitrarily made and not in the exercise of legal discretion, in considering the comparative merits of the submitted bids, as required by law. The action of the council was accordingly declared void. Affirming that part of the judgment of the trial court denying a recovery of the sums already paid on the printing contract, this language was used:

> "In any event the work has been done; it has been accepted by the city; it is of a character which cannot be returned to the contractors and thus place them in stau quo; it is work which if not done by this contractor would have to be done by some other person; the prices charged are not shown to be unreasonable; the invalidity of the contract is not chargeable to any wrong or omission on the part of the contractor, but solely to the act of the city through its council. To say that the party doing such work must receive no remuneration therefor, and must return the compensation already received, is to impose all the penalty upon an innocent party for the profit of the only party chargeable with the wrong. We are not disposed to so order. Courts of equity often refuse to enforce a naked legal right when the results would be manifestly unjust or unconscionable."

A case frequently cited on the rule against recovery back is the Wisconsin case of *Frederick v. Douglas County et al*,[10] where the suit was brought by taxpayers of the county to restrain the county and its officers from paying additional sums to one Grace on a contract for his services as attorney for the county in certain tax cases and to compel him to refund to the county several thousands of dollars which had theretofor been paid. The trial court held

[9] 143 Iowa 409, 122 N. W. 226 (1909).
[10] 96 Wis. 411, 71 N. W. 798 (1897).

the contract void, enjoined further payments thereon, and ordered a return of money paid. The legal principle determined there was that the county board of supervisors had no power or authority to employ Grace to take charge of the tax cases and bind the county for the value of such services. The appellate court affirmed that part of the decree restraining further payments, but in reversing the part directing a refund, the appellate court said:

> "But he who comes into a court of equity must do equity. Could it, under any view of the circumstances, be said to be equitable to compel Mr. Grace to pay back the money which he received for long and valuable labors, rendered honestly and in good faith, the benefit of which the corporation has received, and concerning which the taxpayers of Superior were, or ought to have been, fully informed during their entire progress? Were a court of equity to make this judgment under the circumstances, we should regard it as having become an engine of oppression, rather than an instrument of justice."

This case was followed in *Ellefson v. Smith*,[11] where money was paid out under a contract for building a reservoir for the city; such contract having been let by the city officials of Viroqua, Wisconsin, without any advertisement for bids having been made, no specifications for the work having been provided, and the contractor having furnished no bond as required by the state law. The suit was one in equity to compel restoration to the city treasurer of the money thus expended by the city officials and the contractor. Affirming a judgment dismissing the suit, the Wisconsin court said:

> "The case is one where the city has the full benefit of the improvement necessarily made, the price was fair, and the city cannot turn over to the defendants the property so built for the city. A court of equity does not sit to inflict punishment, but rather to do justice on well-defined principles. We do not recognize any appeal to conscience in this matter. No one has been injured in his person or property right."

In *Murphy v. Paul*,[12] the Wisconsin court again held:

> "It seems to be quite well established from our own decisions as well as from decisions in other states and in accordance with principles announced by text book writers that in a matter in which the municipality has power to act, where there has been a completed transaction, though irregular and unlawful, a court of equity will not require restoration of the money paid unless some loss can be shown to the taxpayers. Because to do so would be grossly inequitable."

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[11] 182 Wis. 398, 196 N. W. 834 (1924).
[12] 192 Wis. 93, 212 N. W. 402 (1927).

The case of *Marinette County v. Schmitt*,[13] decided in 1946, reaffirmed the rule in Wisconsin. The Supreme Court reversed a judgment for the county in its action for money had and received by the defendant for services rendered as court reporter in the county court. The defendant was paid, pursuant to a special statute, on a per diem basis of $10.00 per day, while actually engaged as such reporter. The act further provided that payments were to be made out of the county treasury upon the certificate of the county judge. Between 1929 and 1942 the defendant was paid $5,840.00 on 130 certificates, to 67 of which defendant had affixed the judge's name, the judge signing the other certificates. The evidence showed that the defendant upon numerous occasions signed various orders, papers, and certificates in the name of the county judge and this was the general practice established by the judge, who knew generally thereof and approved the same. The judge did not, however, authorize the defendant to affix the judge's signature to the certificates in question, nor did he have actual knowledge thereof until an audit was made by the Wisconsin Department of Taxation which disclosed that the judge's name was written in two different handwritings, that of the judge and that of the defendant. There was no means of establishing the number of days defendant was actually engaged as such reporter, the necessary records and note books of the defendant having been destroyed according to custom. The plaintiff made no charge of fraud or deceit against the defendant, but sought recovery solely because the statute required the county judge to make and sign the certificate as a condition precedent to payment. The Supreme Court felt that because the certificates signed by the judge, the certificates signed by the defendant, and the judge's testimony that he had full confidence in the defendant were uncontroverted, the evidence sufficiently showed that the services were actually performed. The payments having been made for value received, and not being malum prohibition, but merely an irregular exercise of a statutory power, the court held the action would not lie to recover the money back. *Frederick v. Douglas County, Ellefson v. Smith,* and *Murphy v. Paul*,[14] were cited as authority.

Justice Wickhem, joined by Justice Barlow, dissented;[15] their argument being that in the instant type of case, the municipality, to recover, must prove that the services were actually not performed, and the very difficulty of proof called for an exception to the general doctrine applying to the usual case in which the value received by the municipality is susceptible to conclusive proof.

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[13] 248 Wis. 308, 21 N. W. 2d. 717 (1946).
[14] Footnotes 11, 12, 13 supra.
[15] 22 N. W. 2d. 151 (Wis., 1946).

A recent federal case denying recovery back is that of *United States v. Goodwin*.[16] This was an action by the federal government to recover $3,425.00 in wages paid the defendant as an employee of the Home Owner's Loan Corporation between July 1, 1938 and January 31, 1941. The defendant, although a resident of Nebraska, was in fact an alien and a citizen of Great Britain during all of the time in question. The government contended that the payments were contrary to the Appropriation acts covering this period which prohibited payment of any of the appropriated funds to aliens, were therefor illegal, and recovery should be had. The court, in denying recovery, decided that where the government, or an agency thereof, has the corporate power to make a contract, if the contract, although invalid and unenforcable, has been executed, and the government has accepted and holds the benefits of its execution, having paid therefor, the government may not, while retaining the benefits, recover back the money which it has paid.

The defendant, in making application for employment, had certified that she was a citizen of the United States, and was born in Iowa. Under an Act of Congress passed in 1941 the payments to the defendant, even though an alien, might have been validated by a finding by the proper authority that there was good faith on the part of the defendant. That there was no such finding did not preclude the defendant's rights, the court clearly so holding in the following language:

> "However, the fact that there has been no such finding in the defendant's favor is not alone conclusive with respect to whether the government may recover in this action."

The court felt that even though there had been false representations, since the governmental corporation had the power to employ, the misrepresentations were immaterial in the absence of a showing that they effected payment for which no corresponding benefit had been received.

Summarizing briefly, it would appear that the reason for the anomalous rule denying quasi-contract recovery from municipalities for goods and services rendered under contracts declared illegal, and at the same time denying recovery to the municipality for payments made therefor, is that in the first case a strong public policy operates to prevent recovery in a case otherwise clearly within the principles of such recovery, while the second case is not within principles of quasi-contract recovery. There the defendant has not been unjustly enriched, but has only acquired by the action of the municipality in paying him what is justly due, and the courts consider that to compel

[16] 66 F. Supp. 214 (1946).

him to pay it back would be making the court an "engine of oppression rather than an instrument of justice".[17]

In other words, the courts seem to have no inclination to make a public policy which defeats recovery in a case otherwise within quasi-contract recovery principles the basis of quasi-contract recovery in another case in which those principles are not otherwise applicable.

It could be reasoned that denial of recovery back of a payment which has been received under a contract void because of violation of statutory prohibitions also encourages further violation of such statutory prohibitions, though more remotely.

Apparently the courts feel that the rule denying recovery for goods and services fairly rendered on grounds of public policy is harsh, as it has been laid down with a quite natural disinclination to so rule, and that the penalizing force of the policy should not be extended, even to the reverse case.

It would appear that this is sound and that it would be going to an extreme bordering on oppression to compel repayment except where there is found fraud, haste, concealment, collusion, or like bad faith on the part of the lefendant, forming an ordinary basis of quasi-contract recovery.

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[17] 96 Wis. 411 at 426 (1897).