

## Illegal Contracts: Fraud; Agreement Supported by Bond

Stanley D. Celichowski

Follow this and additional works at: <http://scholarship.law.marquette.edu/mulr>



Part of the [Law Commons](#)

---

### Repository Citation

Stanley D. Celichowski, *Illegal Contracts: Fraud; Agreement Supported by Bond*, 13 Marq. L. Rev. 247 (1929).  
Available at: <http://scholarship.law.marquette.edu/mulr/vol13/iss4/11>

This Article is brought to you for free and open access by the Journals at Marquette Law Scholarly Commons. It has been accepted for inclusion in Marquette Law Review by an authorized administrator of Marquette Law Scholarly Commons. For more information, please contact [megan.obrien@marquette.edu](mailto:megan.obrien@marquette.edu).

**Illegal Contracts; Fraud; Agreement Supported by Bond**

*Washington County v. Froelich Mercantile Co.*

Supreme Court of Wisconsin, February 5, 1929.

Washington County entered into a contract with the Froelich Mercantile Company whereby the latter was to furnish the county with all the cement for the paving season, and a refund would be made on every empty sack returned to the Froelich concern. Washington County complied with the contract, but, the Froelich Company refused to make a refund as agreed between the parties. The contract made provision for a bond which was posted by the Froelich Company for the faithful performance of said contract. Having failed to fulfill their part of the contract, the Mercantile Company is being sued on the bond. Plaintiff claims that defendant is liable by reason of a bond given it by defendant for the faithful performance of a contract entered into between the plaintiff and the defendant, Froelich Mercantile Company. It is alleged that the Mercantile Company failed to perform its part of the contract, and plaintiff demands judgment on the bond of said defendant for its damage.

The defendant admits the making of the contract and the giving of the bond, but, alleges that he did not know, and plaintiff gave him no notice, that plaintiff had turned over property to the Mercantile Company pursuant to said contract, for which the Mercantile Company was to make a refund, and in that respect, the plaintiff was guilty of gross neglect, fraud, and disregard of defendant's rights. The defendant alleges that the contract was in violation of Section 348.28 of the Statutes, and, for that reason the contract is void and of no effect, in this—that one Froelich was at the time of the making of such contract a member of the county board of supervisors of the plaintiff's county, and a member of the road and bridge committee, and was at the same time a stockholder and pecuniarily interested in said Mercantile Company.

The contract is alleged to be void because made by faithless officials. Notice of breach or default is not required to be given him in order to maintain an action against him on his bond.<sup>1</sup> The bond is unconditional and no failure of duty on the part of the creditor will defeat the obligation of the bond.<sup>2</sup> This defense based on the grounds of lack of notice to the defendant does not state a defense to the action.

As to the second defense, based on the ground that the contract is void and unenforceable, because it was entered into in violation of the Statute, against malfeasance in office, it questions the intent and

---

<sup>1</sup> 9 *Corp. Juris*. Pages 81-85; 21 *Ruling Case Law*, Page 1071; 96 *Wis.* 578.

<sup>2</sup> *Fanning v. Murphy*, 126 *Wis.* 538—105 *N.W.* 1056.

purpose of the Statute. This contract was entered into in bad faith and contrary to law, because Froelich was an officer of the county and pecuniarily interested in his company and in the contract. He was in a position where his judgment leaned more favorably towards his pecuniary interests rather than the public interest and consequently he was not acting faithfully for the good of the people he represented.

Now, the purpose of the Statute is to prevent the public from being the victim of loss through the misconduct of its officers. Generally, it is held that a contract entered into in violation of a penal Statute is void.<sup>3</sup> But our Statute does not say that the county shall not contract to build highways, but that its officers acting for the county in making a contract shall not be financially interested in such contract. The county considered in its corporate capacity, did no wrong. The contract was within its public duty. Its officers violated the Statutes, became criminally liable, and subject to heavy penalties.<sup>4</sup> The county, however, was guilty of no offense, and therefore is not subject to a penalty, but, it is subject to recover whatever damage it suffered because of the defendant's failure to fully comply with the contract. Where the complaining party is specially protected by the law, and the agreement is not illegal *per se*, but merely prohibited, and the prohibition was intended for his protection and the parties not being in *pari delicto*, he is entitled to recover.<sup>5</sup> The fact that the penalty is imposed only on the offending officer shows that the municipality or innocent party is not to be penalized. Judgment was given for the plaintiff.

A distinction should be made between the corporate municipality and the corrupt officers who represent it. In *Norbeck & Nicholson Co. vs. State* 32 S.C. 189; 142 N.W. 847, Ann. Cas. 1916 A, 229, it was held that a contract specially prohibited by the constitution of the state could not be enforced against the State, and stating that as a general rule, such a contract is void. But, the Court said: "To the general rule there are exceptions which permit the party who has performed an illegal contract, and who has parted with consideration, to recover such consideration on the *Quantum meruit* or *quantum valebat*. One exception to this general rule is where the law itself provides for such recovery. Another exception is where the parties are not in *pari delicto*, in which case the party not participating in the wrong may recover his consideration, but not the other party. It might be said that in the present case, the defendant state is not in *pari delicto*, but this would not apply to plaintiff nor to the state officials who entered into this contract on behalf of the state."

<sup>3</sup> 189 Wis. 343; 207 N.W. 697; 117 Wis. 446; 114 Wis. 108, 89 N.W. 892.

<sup>4</sup> Statute No. 348.28.

<sup>5</sup> 13 *Corpus Juris* 499.

In *Land, Log, and Lumber Co. vs. McIntyre*, 100 Wis. 245; 75 N.W. 964, 69 *Am. St. Rep.* 915, this above distinction is brought out. There, a member of the county board received money from the county on such an illegal contract and the county not being in *pari delicto* was allowed to recover the money so paid in a taxpayer's action. In *Lauro vs. Pacific Mutual Life Insurance Company* 131 Wis. 555; 111 N.W. 660, Justice Timlin presents many cases illustrating the general principle applicable in such cases. He there quotes with approval from *Harris vs. Runnels*, 12 How. 72, "It must be obvious from such diversities of legislation, that Statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined before courts should refuse to give aid to enforce contracts which are said to be in contravention of them."

The late Chief Justice Vinje said that the principle running through the cases is this: "Not all contracts forbidden by statute are void." The entire subject is admirably discussed, and numerous cases cited which are to the point in a note at Page 618, 12 L.R.A. (NS). The principle to be applied, which would give relief to the blameless party, and the innocent victim, seems to be: Where the contract is not expressly prohibited by statute, where the contract is not *Malum per se*, or where the parties are not in *pari delicto*, courts will look to the purpose and intent of the statute and give it effect accordingly.

STANLEY D. CELICHOWSKI

### Lateral Support; Rights and Duties of, to Adjoining Landowners

The subject of lateral support touching on the rights and duties of property owners to the same is of utmost importance to the practicing lawyer of today. We are living in an age of concentration of forces which has resulted in the upbuilding of large cities. The growth of cities has greatly increased the value of property in certain districts. Likewise the growth of cities has made for the concentration of forces in particular districts for commercial purposes. The increase in value together with the desirability of concentration has led to the utilization of every foot of land by property owners. The above two forces have likewise resulted in the placing of greater burdens on the land through the building of higher buildings. Years ago when a man built on his property he erected his building within his lot so that the support from his own land was enough to protect his structure in case his neighbor wished to excavate and build on his land. The immense structures which are built today, usually extend to the edge of the lot line. When the adjoining owner wishes to construct a building on his lot, there is danger of the first building being damaged if some means of support is not given during the time the excavation is being