

Quantum Meruit Recovery on Unenforceable Contracts

Cyrus D. Schabaz

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



Part of the [Law Commons](#)

Repository Citation

Cyrus D. Schabaz, *Quantum Meruit Recovery on Unenforceable Contracts*, 11 Marq. L. Rev. 235 (1927).
Available at: <http://scholarship.law.marquette.edu/mulr/vol11/iss4/6>

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.

QUANTUM MERUIT RECOVERY ON UNENFORCEABLE CONTRACTS

CYRUS D. SCHABAZ

THIS article is to deal with the unenforceable contracts, not those unenforceable because of moral turpitude or immorality, but those contracts *malum prohibitum* through some statute or settled public policy. The scope of this article will show what contracts are unenforceable, how recovery can be maintained nevertheless, and what is necessary to show the implied contract, together with a recommendation as to how the doctrine of *quantum meruit* should be extended.

The article will be divided into three parts: Contracts void under the statute of frauds, personal service contracts, and Sunday contracts, to be treated in the order mentioned.

At the outset the statutes under consideration should be set forth. The section relating to real estate is 240.06.

Conveyance of land, etc., to be in writing. No estate or interest in lands, other than leases for a term not exceeding one year, nor any trust or power over or concerning lands in any manner relating thereto shall be created, granted, assigned, surrendered or declared unless by act or operation of law or by deed or conveyance in writing subscribed by the party creating, granting, assigning, surrendering or declaring the same or by his lawful agent thereto authorized in writing.

Section 240.08 further makes void all leases not in writing and signed by the party by whom the lease is made. Section 240.10, passed in 1917, extends the statute of frauds to real estate dealers' contracts and makes contract for commission on sale or lease void unless in writing, specifying the terms, commission to be paid, and signed by the one agreeing to pay the commission.

In order to maintain an action on a contract which must be in writing, the statute must be followed closely. In *Durkin v. Machesky*¹ there was no contract but a mere receipt and description was "Southwest corner 28th and Meinecke." This was held insufficient and the contract unenforceable under the statute of frauds but the money paid under the void contract was recovered back.

Our court has been loath to allow the defendant in such an action to keep the results of a void contract. As early as *Tollensen v. Gunderson*² the court has allowed the plaintiff to recover back his money paid under a void contract.

¹ 177 Wis. 595, 188 N.W. 97.

² 1 Wis. 113.

And why shouldn't the plaintiff recover? The contract is not tinged with immorality. Nothing passes to the defendant by virtue of it and he acquires no rights so he can be deprived of no advantage secured under it. Recovery by the plaintiff leaves the defendant in the same position as before and he is at liberty to dispose of his land.³

The doctrine of these two cases has been modified and extended for the first time in *Clark v. Davidson*⁴ where the plaintiff went into possession under a parol agreement to purchase, void, of course, and the court allowed recovery on *quantum meruit* for the fair value of his services and this amount need not be the same as the contract rate. The court stated this was no different than allowing the plaintiff to recover money back paid under a void contract and on authority of the two early cases gave judgment.

Then the case of *Koch v. Williams*⁵ was decided, in 1892, and has been cited as a leading case ever since. There the plaintiffs were architects and agreed to prepare plans for the defendant, payment to be made by conveyance of several lots. Defendants refused to convey and plaintiffs sued for reasonable amount for services. The court held the contract void and said, "The statute must be complied with as long as it is in force. The parties stand as if there had been no express contract and the plaintiff may recover on *quantum meruit* for work done upon an implied contract of the defendants to pay what the services are reasonably worth."

This case has been cited and followed to date and is the present Wisconsin law; *Durkin v. Machesky*, *supra*; *Siefert v. Mueller*,⁶ *Nelson v. Christensen*,⁷ and numerous other cases.

The case of *Siefert v. Dirk*,⁸ passing on Section 240.10, regarding real estate contracts was decided along the same line as *Koch v. Williams*. The statute provided contracts for payment of commission on real estate sales shall be void if not in writing but the court by a vote of 4 to 3 allowed recovery on *quantum meruit*. Eschweiler, Justice, wrote a wonderful opinion for the majority, outlining the history of the principle and tracing the cases down to date. The holding is that Sec. 240.10 makes void the express contract only and the common law right to recover on *quantum meruit* upon an implied promise has not been legislated out of existence. Contrary to the holding of a similar statute of Missouri valid by that court,⁹ our court held that the com-

³ *Brandeis v. Neustadt*, 13 Wis. 142.

⁴ 53 Wis. 317, 10 N.W. 384.

⁵ 82 Wis. 186, 52 N.W. 257.

⁶ 156 Wis. 629, 146 N.W. 787.

⁷ 169 Wis. 373, 172 N.W. 741.

⁸ 175 Wis. 220, 184 N.W. 698.

mon law right to recover on *quantum meruit* still exists, although the express contract under which services were rendered is declared void because oral.

So thus, if there has been a void contract to convey land but the plaintiff enters and performs valuable services in spite of it the defendant must pay for such service in money. This is no harsh rule for the defendant because the statute demands such contracts be in writing and, although the defendant never agreed to pay money but was merely to convey a lot, by his ignorance in not complying with the statute he is penalized and has no ground for complaint.

In personal service contracts recovery is predicated on *quantum meruit* in many instances as where no express contract can be proved or when an entire contract is only partly performed.

The case of *Wheeler v. Lucy Hall*⁹ lays down the underlying principle. Defendant and James were tenants in common in a mill and James hired plaintiff to do some repair work. Plaintiff sues the defendant for this work and the court allowed recovery, saying, "On the principle that if one accepts or knowingly avails himself of the benefits of services done for him without his request, he shall have to pay for them, Lucy would have been personally liable to the plaintiff even though James had employed plaintiff without her knowledge."

This recovery is founded on an implied promise, as there is no express contract with the defendant, and the plaintiff recovers the reasonable value of the services rendered.

The rule has been stated again in *Wojohn v. Nat'l Union Bank*¹¹ where the court said, on p. 667, "The general rule is that if a person performs valuable services for another, at that other's request, the law implies, as a matter of fact, the making of a promise by the latter and acceptance thereof by the former to pay the one performing the reasonable value thereof."

So that, as between strangers, the rendition of valuable services by one raises an implied promise of the recipient to pay and although no express contract can be proven, recovery may be had on *quantum meruit*. But several things are necessary to raise such an implied contract. First, the services must have been performed under such circumstances as to give the recipient thereof some reason to think they are not gratuitous, not performed for some other person, but with the expectation of compensation from the recipient; secondly, the services must have been beneficial to the person sought to be made liable.¹² These are the nec-

⁹ *Rothwell v. Gibson*, 98 S.W. 801.

¹⁰ 41 Wis. 447.

¹¹ 144 Wis. 646, 129 N.W. 1068.

¹² *Segnitz v. Grossenbach Co.*, 158 Wis. 511.

essary elements to recover and the case rests on the plaintiff's ability to prove these elements.

Then there are entire contracts for personal service. In *Diefenback v. Stark*,¹³ the court held a personal service contract entire and full performance necessary to recover. The consideration is entire on both sides and there cannot be a recovery on *quantum meruit* for part performance unless the plaintiff was prevented from completing the contract by an act of God or some other cause beyond his control.

This is the present rule so that when the employee himself terminates an entire contract wrongfully there is no recovery but if the employer terminates the contract, rightfully or wrongfully, there is a recovery against such employer.¹⁴

Judge Marshal lays down the exceptions to the rule and allowing the plaintiff to recover after part performance after having been rightfully or wrongfully discharged by the employer and while the person discharged may not sue on *quantum meruit*, his recovery must be upon *quantum meruit* on the contract basis. The discharged servant is entitled in any event for his wages to the time of discharge, but subject to deductions for his torts and deficiencies.

This case overrules the case of *Green v. Gilbert*¹⁵ where recovery was allowed after part performance but the contract was unenforceable and so recovery was allowed, not for the contract price but on *quantum meruit*.

But almost the same result is reached, that is, recovery after part performance is allowed, but the Green case allows an action on *quantum meruit* and judgment for more than the contract price while the Hildebrand case grants recovery upon *quantum meruit* on the contract basis and limits recovery to the amount of the contract.

In the family relationship a different set of presumptions arise. There, when services are rendered it is presumed that they were rendered gratuitously and an express contract must be shown. In *re Schmidt's estate*¹⁶ the rule is, "Where near relations reside as one family and one renders services and the other furnishes board and lodging, the presumption arises that neither party intended to pay or receive compensation, and that they were intended as mutual acts of kindness, done or furnished gratuitously."

But such presumption does not arise between married brothers about forty-five years old with independent families and the rendition of val-

¹³ 56 Wis. 462, 14 N.W. 621.

¹⁴ *Hildebrand v. The Am. Fine Art Co.*, 109 Wis. 171, 85 N.W. 268.

¹⁵ 21 Wis. 395.

¹⁶ 93 Wis. 120, 67 N.W. 37.

uable services by one raises implied promise to pay and recovery is had on *quantum meruit* for the reasonable value of such services.¹⁷

The presumption of gratuitous service arising from the family relation is rebutted by proof of promise of father to devise land to son and, though promise was void under statute of frauds, it is a sufficient basis for *quantum meruit* recovery for the services rendered.¹⁸ For the void promise to devise real estate in consideration of services the law substitutes the valid implied contract to pay reasonable value.

Authorities are clearly divided as to whether a woman who in good faith believes herself a man's wife can recover on implied contract for services if the marriage is, in fact, illegal. This is merely to note the split of authority and while some courts allow recovery on *quantum meruit* the majority rule allows no recovery, but our court in *Estate of Fox*¹⁹ allowed the plaintiff to recover but based recovery on the fraud and deceit of the deceased.

While the holding is correct the theory seems wrong. The court expressly says that the question as to whether there would be recovery if both parties acted innocently is undecided, nevertheless they seem to infer that, except for the fraud and deceit of the defendant the plaintiff would not have recovered. So it may be said to follow that if there was no fraud or deceit there would be no recovery. The question of the misrepresentations of the defendant should be immaterial because the action of *quantum meruit* is based on the right of the plaintiff to recover, not on the position of the defendant.

So most likely when the facts are presented squarely before the court, and both parties are entirely innocent, the court will allow recovery, as it should, but change the theory to *quantum meruit*. Although there is no presumption that the husband is to pay the wife for her services, the wife intended to perform such service for her lawful husband only and would not have entered into the contract had the true facts been known. So the woman should recover on implied contract, whether or not the defendant had deceived her.

Now as to the last class of contracts, Sunday contracts. The Wisconsin Statutes in reference to this are 351.46 to 351.51 and provide a penalty for performance of any business or amusement on Sunday except the certain instances allowed expressly by these sections. The question is whether a contract valid in all other respects except that it has been executed on Sunday, can be a basis for recovery and if there is no recovery on the express contract will the law imply a contract and allow *quantum meruit* recovery.

¹⁷ *Williams v. Williams*, 114 Wis. 79.

¹⁸ *Laughnan v. Estate of Laughnan*, 165 Wis. 348, 89 N.W. 835.

¹⁹ 178 Wis. 369, 190 N.W. 90.

As for the loaning and borrowing of money on Sunday, the law is settled that there can be no recovery. The early case of *Hill v. Sherwood*²⁰ allowed no recovery in an action on a note executed on Sunday.

There is no *quantum meruit* recovery and the court in *Froewert v. Decker*²¹ said, "The loaning of money on Sunday is illegal and the mere fact that the person borrowing it retains it does not raise an implied promise to repay."

Even as to goods sold and delivered on Sunday there can be no recovery as is seen in the case of *Moore v. Kendal*,²² where neither the vendor nor vendee can rescind the sale or recover back the property or purchase money on a contract executed on Sunday. This is the present Wisconsin law and unless part of the contract has been performed on a secular day no right of action exists.

But if the contract is signed on Sunday and delivered on another day it is valid.²³ While the Sunday contract is void and incapable of ratification,²⁴ nevertheless, a void agreement made on Sunday may be validated by payment on a secular day²⁵ and in the case of *Schmidt v. Thomas*²⁶ the court had gone a great length to get some consideration to validate a Sunday contract. There the contract was for the sale of an organ and stool for \$65, the organ being delivered on Sunday and the stool on Monday. The court held the contract entire and the subsequent delivery and acceptance of the stool validated an otherwise illegal contract.

So the court attempts to allow the plaintiff to recover if there is anything it can label "consideration," given on a secular day. But why should there be an exception to the *quantum meruit* rule?

In personal service contracts the plaintiff can recover the reasonable value of services performed under a Sunday contract, even though the original case was stated in express contract and not until the trial did the plaintiff amend to *quantum meruit*.²⁷ This is merely a re-statement of an old rule announced by our court many times.²⁸

There seems to be no reasonable ground for the distinction between these cases. Why should not the vendor of an automobile sold on

²⁰ 3 Wis. 343.

²¹ 51 Wis. 46.

²² 2 Pinney 99 (Wis.).

²³ *Gibbs v. Sterrett*, 111 U.S. 597; *O'Day v. Meyers*, 147 W. 549, 133 N.W. 605.

²⁴ *King v. Graef*, 136 W. 548, 117 N.W. 1058.

²⁵ *Allen v. City of Greenwood*, 147 W. 626, 133 N.W. 1094; *Melchoir v. McCarty*, 31 W. 252.

²⁶ 75 W. 529, 44 N.W. 771.

²⁷ *Gist v. Johnson Carey Co.*, 158 W. 188, 147 N.W. 1079.

²⁸ *Pearson v. Kelley*, 122 W. 660, 100 N.W. 1064; *Kiewert v. Rindsdorf*, 46 W. 481, 1 N.W. 163.

Sunday recover the same as a laborer performing services under a Sunday contract? This is an instance where the doctrine of *quantum meruit* should be extended and just as valid a promise implied from the delivery of goods on Sunday as there is from the performance of services under a Sunday contract, the recovery on a contract void under the statute of frauds or allowing the plaintiff to recover on *quantum meruit* for part performance under an entire contract, where no contract action can be stated and ordinarily there is no recovery.