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Contracts of Wisconsin Municipal Corporations

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CONTRACTS OF WISCONSIN MUNICIPAL CORPORATIONS

Contracts of a municipal corporation, while similar in some respects to all contracts in general, are, nevertheless, subject to entirely different and peculiar rules. Thus, as to certain ultra vires contracts of a municipality, any taxpayer may bring an action for an injunction to prevent the municipality from carrying them out even though the other party may have fully performed; or, if the municipality has paid out money on the contract, the officer paying such money is personally liable for its return. If it cannot be recovered from the one to whom it was paid, the officer must make it up. It becomes important, therefore, for the contractor, and the officer paying these contractors, to know whether or not the contract on which they are furnishing material, labor and money is a valid one. This knowledge is made even more necessary because of the fact that the equitable rules, which allow the contractor to recover on quantum meruit for work and labor performed for individuals when he cannot recover on the contract itself, are greatly abridged when applied to the invalid contracts of municipalities. This is because the interest in the funds and property of the municipality is so large and so close to the eyes of the court that it is hard for the court to see around and beyond this interest of the public to the equities of the contractor. "It is deemed so unsafe to allow the officers of a municipality to bind it beyond the scope of its powers that all persons are held firmly to the rule that, in dealing with such a corporation, they are presumed to know the limits of its authority and to act at their peril."[1]

To properly discuss contracts of municipalities the subject should be divided into three classes.

1. Contracts which are not within the scope of the power of the municipal corporation to make under any circumstances.

2. Contracts which are within the scope of the corporate powers, for which a prescribed method of contracting is provided and it being expressly prohibited to make them in any other manner.

3. Contracts which are within the scope of the power but which have been irregularly formed, the irregularity not being sufficient to bring them within the second class.

[1] *Schneider v. Menasha,* 118 Wis. 298. See also *Harahan v. Janesville,* 145 Wis. 457.

1. Strictly speaking, contracts in the first class are the only ones which may properly be called ultra vires; the other two classes are more properly called irregular contracts.[2] In the cases, however, the term ultra vires is invariably applied to all three classes. Contracts arising under the first class most frequently either disable the municipality from performing the functions and duties undertaken and imposed by its charter and the law or they enter into a field into which the municipality has neither expressed nor implied power to act as a legal individual. Examples of the former are contracts in which the municipality attempts to barter away its governmental functions, limit its legislative powers, or abrogate any public function,[3] an example of the latter would be a contract by which the municipality sought to set up a huge municipal department store, or to engage in a general manufacturing business, etc. The rule is universal that in all such cases there is absolutely no liability on the part of the municipality whether the contract is executory or executed, either on the contract or impliedly.

2. The second class of cases most commonly violate the methods of contracting prescribed for the purpose of securing competition in the letting of contracts. All municipal charters prescribe several steps which the municipality must take as a condition precedent to the making of a valid contract. Each step is meant to secure more perfect competition and to thus prevent fraud from the influencing of the decisions of the boards in letting contracts. This class is restricted to those contracts in which the charter prescribing the method of contracting *expressly* prohibits the making of the contract in any other manner; the general rule running through all the cases seems to indicate, however, that where the methods prescribed are *fully* set forth, prohibition to contract in any other manner will be implied, and the effect will be the same as though the prohibition were expressed. The leading Wisconsin case, *Chippewa Bridge Co. vs. City of Durand,* 122 Wis. 85, states the rule to be: "The general rule is that a municipality is without authority to make a contract having any vitality whatever other than for the objects and in the manner prescribed by law; and that one in form entered into in any other manner than *substantially*[5] that provided by law, where the provisions in that respect are coupled with a prohibition to other-

[2] Cooley's *Municipal Corporations,* P. 249 (Hornbrook Series).
[3] Cooley's *Municipal Corporations,* P. 251 (Hornbrook Series).
[5] All words or phrases italicised herein are so emphasized by the author.

wise contract, *imposes no liability* on the municipality even though it is performed by the other party."[6] Later in the case the court interpreted the word "substantially" when used as above to mean: "There is no such thing known to the law as substantial compliance with the prescribed method for making public contracts, other than performance in substance of every condition precedent to such making regardless of whether the result obtained could have been reached in that particular instance in a more economical manner or not." In this class of cases the court will not permit a recovery either on an express or on an implied contract. The contractor or the officer as the case may be is the victim of his own folly in failing to observe the law.

An apparent exception to this rule is found in the cases dealing with contracts where the debt limit of the municipality, as fixed by the constitution, is exceeded. In one such case the contract was to lay a sewer, payment to be made at so much per foot, the exact number of feet of sewer not being definitely decided upon or ascertainable when the contract was entered into. When completed, the total cost was found to make the indebtedness exceed the constitutional limit. On the ground that the contract was severable, the court allowed the contractor to recover *on the contract* up to the debt limit and declared the excess absolutely void.[7] A later case extended the rule to those cases in which the contract was not severable.[8] It seems hardly necessary to add that these contracts had to be perfect in every other respect. The theory of the courts is in effect as follows: This prohibition is not against contracting but against incurring indebtedness. Both parties knew of this constitutional provision limiting the debt. Therefore, when they said, "for said consideration the municipality promises to pay $1,000,000," they meant and in effect said, "for said consideration the municipality promises to pay the difference between the amount of indebtedness permitted by law and its present indebtedness, said sum not to exceed $1,000,000." Also the rule at present is limited to those cases in which the contract is executed on the part of the contractor

[6] See accord: *Balch v. Beach*, 119 Wis. 77; *Hoeffner-Bartlett Co. v. City of Rhinelander*, 142 Wis. 229; *Appleton Water Works Co. v. Appleton*, 131 Wis. 653; *Cawker v. Central B. P. Co.*, 140 Wis. 25; *Oconto Electric Co. v. People's Land and Mfg. Co.*, 165 Wis. 467.

[7] *Herman v. City of Oconto*, 110 Wis. 660.

[8] *Balch v. Beach*, 119 Wis. 77. See also *McGillwray v. Joint School District*, 112 Wis. 354.

and the consideration is such that it cannot be returned, e. g., lumber in a schoolhouse, etc.

However, in case of an *emergency* calling for *immediate* action, it seems that the contract will not be held void for failure to follow the steps prescribed.[8a]

3. In the third class of ultra vires contracts, the cases more nearly allow the equities permitted in contracts between individuals. Here the city has a perfect right to enter the contract, but some slight irregularity prevents it being a valid one. In such a case, by supplying the defect the contract is ratified and becomes binding on all parties; such ratification may be implied by law.

A. In order to permit recovery on a contract when based on ratification, the contract must be such that it could have originally been authorized, i. e., it must not fall within either of the first two classes. In *Chippewa Bridge Co. vs. City of Durand, Supra,* the court refused to uphold the contention that the municipality had ratified the contract, saying: "The plea of ratification of a contract made in violation of a charter provision such as the one under discussion is of no avail unless the acts relied upon for ratification would be sufficient to support a contract as an *original* matter." Also the contract in *Balch vs. Beach, Supra,* was declared incapable of ratification because absolutely prohibited. However, see *O'Laughlin v. Dorn,* 168 Wis. 205, where the contention of ratification was sustained, the court saying that assuming the power in 1911, it was within the power of the school district in 1915 to ratify, approve and make their own that which they might lawfully have done in 1911.[9]

B. The principal cases in which recovery is allowed on an implied contract are those in which the plaintiff has paid his money into the treasury of the municipality for an invalid security. The language of the courts in these cases is that recovery will be allowed for *property or money* used for a legitimate corporate purpose, but the writer has been unable to find any case in which this broad statement of the rule is the law of the case and not a mere dictum. It may be presumed that the reason for this is that practically all contracts for property fall within the second class of ultra vires contracts, if improperly executed. The leading

[8a] *Sheehan vs. N. Y.,* 37 Misc. 432; 15 N. Y. Supp. 802.

[9] See also *Hoeffner-Bartlett Co. v. City of Rhinelander,* 142 Wis. 229; *Cawker v. Central B. P. Co.,* 140 Wis. 25; *Kneeland v. Gilman,* 24 Wis. 39; and *Koch v. Milwaukee,* 89 Wis. 220.

case setting forth the implied liability of a municipal corporation is *Thompson v. Town of Elton,* 109 Wis. 589. As reported it is an action for money loaned to a municipality through officers unauthorized to negotiate the loan. In *First National Bank v. Larsen,* 146 Wis. 653, the court states that the records show it to be an action on a bond which was invalid because the officers signing the bond had no power to bind the municipality. The plaintiff is allowed to recover. After citing and discussing previous cases, the court says: "The principle of those cases *(Paul v. Kenosha,* 22 Wis. 266; *Smith v. Barron Co.,* 44 Wis. 686; *Brodhead v. Milwaukee,* 19 Wis. 624; and *Lafebre v. Board of Education,* 81 Wis. 660*)* is that municipalities are bound by moral obligations as well as individuals; and that where, in case of the latter, such an obligation will give rise to a legal liability it may have the same effect as to a municipality; for if a municipality obtains money of a person by an illegal sale of property to him, or an illegal contract of some kind, not expressly prohibited by law nor tainted by moral turpitude so that the court, on the ground of public policy, will not recognize it, or the relations growing out of it, to grant relief, and such person acts in good faith in parting with his money, believing the name to be for the benefit of the municipality, and the latter uses the money for its legal and legitimate purposes, to that extent the law will imply a promise to return the same upon which an action for money had and received will lie. 'Justitia nemini neganda est' applies even to a person dealing with a public corporation."[10]

Wisconsin has wrestled with this very complex problem, attempting to do justice to the individual whenever consistent with the maintainance of a strict protective fence around the public rights in the municipal property and funds. The reasoning on which most of the cases are decided is well set out in the following quotation: "While the doctrine of non-liability of municipal corporations for benefits received under contracts invalid because violating statutory restrictions or charter restrictions, or limitations, or limitations upon the power of the municipality to make such contracts, seems in some cases to be hard and unconceivable and undoubtedly often results in hardship and injustice, yet it should be remembered that courts of justice are instituted to carry into effect the laws of the country, and not to aid violation of

[10] Accord: *Rice v. Ashland Co.,* 114 Wis. 130; *State v. Milwaukee,* 145 Wis. 131. But see a helpful criticism of this rule in 7 A. L. R. 353.

law either directly or indirectly, and hence, merely because the enforcement of the law might result in hardship and injustice they should not aid such violation, by an implication permitting recovery upon quantum meruit * * * for services rendered or materials furnished under a contract with a municipality expressly prohibited by law. * * * 'To do this would be to throw down all the bars that have been raised to protect the people from the consequences of charter violations, and would smooth the way to dangerous inroads upon the municipal treasuries. There are apparent injustices in some cases in adhering strictly to the charter provisions. Individuals may suffer, but it is better so than that entire communities should be deprived of protection given them against the infractions of the law by which they are governed, especially where the loss falls upon one who has knowingly taken upon himself the risk of loss.' "[14]

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[14] Excerpts from 27 L. R. A. (N. S.) 1117. See it and also supplements thereto in 39, 41 and 43 L. R. A. (N. S.).