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MUNICIPAL CORPORATIONS - QUASI-CONTRACTUAL LIABILITY - DISTINCTION BETWEEN QUASI-CONTRACT AND RATIFICATION

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MUNICIPAL CORPORATIONS — QUASI-CONTRACTUAL LIABILITY — DISTINCTION BETWEEN QUASI-CONTRACT AND RATIFICATION — Plaintiff sued to recover for services rendered as foreman on a city "Works Project," the services having been rendered at the request of the mayor and with full knowledge on the part of the city council. Because of the foregoing fact the plaintiff claimed the contract had been ratified even though no formal corporate action had been taken authorizing the contract. Defendant's demurrer was overruled in the circuit court. On appeal, *held*, although plaintiff could not recover in an action based on the alleged contract because no formal contract was ever entered into, and because plaintiff's compensation had not been fixed by ordinance as required by statute, nevertheless he could recover on the basis of unjust enrichment for the amount of benefits received by the city. One justice dissented. *Shulse v. City of Mayville*, 223 Wis. 624, 271 N. W. 643 (1937).

It is uniformly conceded that on a truly ultra vires contract¹ there can be no recovery against a municipal corporation, either on the contract or in quasi-contract.² However, there is a split of authority³ as to whether quasi-

¹ That is, a contract totally without the scope of the corporate powers of the city. However, the term is sometimes inaccurately used to describe a contract which is merely invalid because the statutory steps have not been taken in its formation. For a discussion on the various meanings attached to the term, see 7 FLETCHER, CYCLOPEDIA CORPORATIONS, rev. ed., § 3399 (1931).

² *Thomas v. City of Richmond*, 12 Wall. (79 U. S.) 349, 20 L. Ed. 453 (1871); *State ex rel. City of St. Paul v. Minnesota Transfer Ry.*, 80 Minn. 108, 83 N. W. 32 (1900).

³ "Indeed, upon the general subject of the extent of the liability of a municipal corporation, the authorities are a tangled web of contradictions, and it is difficult to

contractual recovery should be allowed when the contract is within the general powers of the corporation, but there has been a failure to observe the statutory requirements in the formation of the contract.⁴ Of course, if the statutory provision is such a relatively unimportant safeguard that it can be construed as being merely "directory," there is no objection to allowing recovery on the contract itself.⁵ On the other hand, even if the statutory directions are construed to be "mandatory" and have not been followed in the first instance, recovery may be had on the contract if the municipality subsequently so conducts itself that it can be deemed to have ratified the contract, provided, of course, the contract is capable of ratification.⁶ For example, if there was not a valid ordinance passed authorizing the contract, it may be ratified by a subsequent

assert any proposition with respect to the same for which adjudications on both sides may not be cited." Chief Justice Field, on petition for rehearing in *Argenti v. City of San Francisco*, 16 Cal. 255 at 283 (1860).

⁴ Sometimes a further distinction is made between contracts executed without statutory authorization, and those expressly prohibited by law, recovery in quasi-contract being permitted in the first case, but not in the latter. *Allen v. Intendant and Councilmen of La Fayette*, 89 Ala. 641, 8 So. 30 (1889); *Bluthenthal and Bickert v. Town of Headland*, 132 Ala. 249, 31 So. 87 (1901); *Mayor and Aldermen of the City of Ensley v. Hollingsworth & Co.*, 170 Ala. 396, 54 So. 95, Ann. Cas. 1912D 652 at 659 (1910). The latter case was commented on with approval in *Bristol v. Dominion National Bank*, 153 Va. 71, 149 S. E. 632 (1929). See also, *Borough of Henderson v. County of Sibley*, 28 Minn. 515, 11 N. W. 91 (1881).

⁵ The following provisions have been held to be directory only: Formal order not entered in the minutes for drawing of money from the treasury, but a memo instead, *Kelly v. Mayor of the City of Brooklyn*, 4 Hill (N. Y.) 263 (1843); statute requiring contracts to be made in duplicate, *Saleno v. City of Neosho*, 127 Mo. 627, 30 S. W. 190, 27 L. R. A. 769, 48 Am. St. Rep. 653 at 661 (1895); charter provision requiring yeas and nays to be called and recorded in voting on the approval of a contract, *City of Indianola v. Jones*, 29 Iowa 282 (1870); charter requiring ordinances to be published in all newspapers employed by the city, *Moore v. Mayor of New York*, 73 N. Y. 238 (1878).

⁶ It must be noted that some contracts from their very nature cannot be ratified by subsequent corporate action; e.g., where there has been a violation of the "lowest responsible bidder" statute because it is no longer possible to comply with the requirements of the statute. See *Zottman v. City of San Francisco*, 20 Cal. 96 (1862).

Also some contracts are not allowed to be ratified on the grounds of public policy, an example of this being where there has been a violation of the rule forbidding municipal officers to have an interest in any contracts let by the city. *Ferle v. City of Lansing*, 189 Mich. 501, 155 N. W. 591 (1915). Again, ratification must not be confused with quasi-contract recovery since there is a difference in the legal problems involved, and sometimes, in the amount of recovery. However, many courts use both terms very loosely, and speak of ratification and then only allow recovery in quasi-contract, this being due in part to the fact that the amount of recovery is the same in both instances. See *City of Texarkana v. Kenney*, (Tex. Civ. App. 1932) 50 S. W. (2d) 339; *Forrest City v. Orgill*, 87 Ark. 389, 112 S. W. 891 (1908); *Venable v. Town of Plummerville*, 130 Ark. 477, 198 S. W. 106 (1917).

It is impossible to lay down any general rule stating how and under what conditions a court will hold a contract may be ratified since the decisions are as contradictory as those bearing on quasi-contract recovery. For a comprehensive treatment of the subject of ratification, see 3 McQUILLIN, MUNICIPAL CORPORATIONS, 2d ed., § 1357 ff. (1928), and cases cited.

ordinance recognizing the contract.⁷ Also, the paying of claims on an otherwise invalid contract,⁸ the acceptance of the benefits of the contract,⁹ or mere silence,¹⁰ may constitute ratification so as to make the city liable on it. But a more difficult problem is presented, where, for example, there has been a failure to pass an ordinance authorizing the contract,¹¹ or a failure to advertise for bids,¹² or make a prior appropriation for the contract as required by statute,¹³ and the contract is either incapable of ratification or there has been no subsequent action on the part of the municipality sufficient to constitute a ratification thereof. Such requirements are often held to be "mandatory,"¹⁴ and when such mandatory requirements are violated, recovery is denied, not only on the contract, but in quasi-contract as well, since otherwise the very purpose for which the statute was passed would be circumvented.¹⁵ On the other hand, a number of courts hold that a municipal corporation is bound to the same

⁷ *Darling v. City of Manistee*, 166 Mich. 35, 131 N. W. 450 (1911); *City of Denver v. Webber*, 15 Colo. App. 511, 63 P. 804 (1900).

⁸ *Moore v. Hupp*, 17 Idaho 232, 105 P. 209 (1909); *Union Water Meter Co. v. Town of New Martinsville*, 83 W. Va. 480, 98 S. E. 516 (1919); *Steiner v. Polk County*, 40 Ore. 124, 66 P. 707 (1901).

⁹ *Backman v. Charlestown*, 42 N. H. 125 (1860); *Town of Bruce v. Dickey*, 116 Ill. 527, 6 N. E. 435 (1886); *Etter v. City of Tacoma*, 77 Wash. 267, 137 P. 820 (1914); *City of Conyers v. Kirk & Co.*, 78 Ga. 480, 3 S. E. 442 (1887).

¹⁰ *Norwalk Gaslight Co. v. Borough of Norwalk*, 63 Conn. 495, 28 A. 32 (1893).

¹¹ *Paul v. City of Seattle*, 40 Wash. 294, 82 P. 601 (1905).

¹² *Zottman v. City of San Francisco*, 20 Cal. 96 (1862); *Buchanan Bridge Co. v. Campbell*, 60 Ohio St. 406, 54 N. E. 372 (1899); *La France Fire Engine Co. v. City of Syracuse*, 33 Misc. 516, 68 N. Y. S. 894 (1900); *Burgess v. City of Cameron*, 113 W. Va. 127, 166 S. E. 113 (1932).

¹³ *Lincoln Land Co. v. Village of Grant*, 57 Neb. 70, 77 N. W. 349 (1898).

¹⁴ *Zottman v. City of San Francisco*, 20 Cal. 96 (1862), is the leading case upholding this view. Three early California cases have had a great influence on the law of this subject. The cases are *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453 (1858); *Argenti v. City of San Francisco*, 16 Cal. 255 (1860); and the *Zottman* case. These cases have been cited in many subsequent decisions, and strangely enough, they have been cited for opposite propositions, this being due to the fact that the sweeping assertions in the first case to the effect a municipal corporation is bound in quasi-contract on the same principles as a private corporation, were later modified in the *Argenti* case and finally overruled in the *Zottman* case. Some courts, however, in their desire to allow quasi-contract recovery have merely ignored the fact that the two earlier cases had been repudiated and have cited them as authorities many years after they were overruled. See *Gas-Light Co. v. Memphis*, 93 Tenn. 612, 30 S. W. 25 (1894), and *Ward v. Town of Forest Grove*, 20 Ore. 355, 25 P. 1020 (1891). As a whole the courts have been very strict in enforcing the "lowest responsible bidder" statutes, and a violation of them generally precludes recovery. But see *Nebraska Bitulithic Co. v. City of Omaha*, 84 Neb. 375, 121 N. W. 443 (1909). Other statutory requirements, the violation of which has been held to forbid recovery in quasi-contract are: Failure to post a contractor's bond, *Mackey v. Township of Columbus*, 71 Mich. 227, 38 N. W. 899 (1888); failure to put the contract in writing, *Leland v. School District*, 77 Minn. 469, 80 N. W. 354 (1899); and failure to pass an ordinance authorizing the contract, *Bosard v. City of Grand Forks*, 13 N. D. 587, 102 N. W. 164 (1904); *Paul v. City of Seattle*, 40 Wash. 294, 82 P. 601 (1905); *City of Bryan v. Page & Sims*, 51 Tex. 532, 32 Am. Rep. 637 (1879).

¹⁵ See cases cited in note 14, supra.

principles of fairness and honesty as a private corporation or an individual,¹⁶ and that ordinary equity principles should be applied when a municipal corporation is sought to be bound in quasi-contract.¹⁷ The general rule, in those states where quasi-contract recovery is permitted, is that it will be allowed only when the municipal corporation has received some tangible benefit, either in the form of money, materials, or services, and when to allow recovery would not nullify the safeguards to the taxpayer provided by the statute.¹⁸ Thus, recovery has been permitted where there was a failure to put the contract in writing,¹⁹ or a failure to notify all the aldermen of the special meeting when the contract was made,²⁰ or where there was a failure to advertise for bids when it was not practicable to do so.²¹ But many cases have gone beyond these limits and have allowed recovery even when the city has not received any benefits,²² or when in so allowing it, the court has made the statutory safeguards meaningless.²³ For example, some courts have permitted recovery where there has been a failure to make an antecedent appropriation for the contract as required by statute,²⁴ or when the required submission to the electorate for the approval of the contract has been omitted,²⁵ or when a member of the city council has also been an officer in the plaintiff corporation,²⁶ and finally, when

¹⁶ "We are unable to assign a good reason for differentiating between the private and the municipal corporations as respects the rule of justice and common honesty." Chief Justice Brown in *First National Bank of Goodhue v. Village of Goodhue*, 120 Minn. 362 at 366, 139 N. W. 599 (1913); *Village of Harvey v. Wilson*, 78 Ill. App. 544 (1898).

¹⁷ *Sluder v. City of San Antonio*, (Tex. Comm. App. 1928) 2 S. W. (2d) 841. See also *Ogren v. Crystal Springs School District*, 52 N. D. 455, 203 N. W. 324 (1925).

¹⁸ *Gas-Light Co. v. Memphis*, 93 Tenn. 612, 30 S. W. 25 (1894); *Land Co. v. Jellico*, 103 Tenn. 320, 52 S. W. 995 (1899); *Peterson v. City of Ionia*, 152 Mich. 678, 116 N. W. 562 (1908); *Appalachian Electric Power Co. v. City of Huntington*, 115 W. Va. 588, 177 S. E. 431 (1934).

See also WOODWARD, QUASI CONTRACTS, § 161 (1913). This section enunciating the above rule is quoted with approval in *City of New York v. Davis*, (C. C. A. 2d, 1925) 7 F. (2d) 566 at 573. Thus, even in a state where quasi-contract recovery is allowed, if it is shown that the municipal corporation has not received any benefits, recovery will be denied. *First National Bank of Durand v. Joint School District*, 187 Wis. 547, 203 N. W. 762 (1925). On the general subject of municipal liability in quasi-contract, see notes in 27 L. R. A. (N. S.) 1117 (1910) and 41 L. R. A. (N.S.) 473 (1913).

¹⁹ *Gas-Light Co. v. Memphis*, 93 Tenn. 612, 30 S. W. 25 (1894).

²⁰ *Land Co. v. Jellico*, 103 Tenn. 320, 52 S. W. 995 (1899).

²¹ *Peterson v. City of Ionia*, 152 Mich. 678, 116 N. W. 562 (1908).

²² *Edwards v. Lubbock County*, (Tex. Civ. App. 1930) 33 S. W. (2d) 482.

²³ *Village of Harvey v. Wilson*, 78 Ill. App. 544 (1898).

²⁴ *Lincoln Land Co. v. Village of Grant*, 57 Neb. 70, 77 N. W. 349 (1898).

²⁵ *City Council of Dawson v. Dawson Waterworks Co.*, 106 Ga. 696, 32 S. E. 907 (1899); *Olsen v. Independent & Consolidated School Dist.*, 175 Minn. 201, 220 N. W. 606 (1928).

²⁶ *Grand Island Gas Co. v. West*, 28 Neb. 852, 45 N. W. 242 (1890). See also, *Ferle v. City of Lansing*, 189 Mich. 501, 155 N. W. 591 (1915).

there has been a violation of the "lowest responsible bidder" statute.²⁷ While the wisdom of these latter decisions is somewhat debatable, they represent a definite trend in this country to broaden the application of the quasi-contract remedy against municipal corporations.²⁸ This trend seems reasonable in view of the fact that municipal corporations today are constantly expanding their business activities; it would seem that municipal corporations should be held

²⁷ *Nebraska Bitulithic Co. v. City of Omaha*, 84 Neb. 375, 121 N. W. 443 (1909).

²⁸ This trend is especially noticed when one traces the decisions in a particular state. For example, in *City of Bryan v. Page & Sims*, 51 Tex. 532, 32 Am. Rep. 637 (1879), the mayor employed the plaintiffs as attorneys without having an ordinance passed as required by the city charter. Recovery was denied both on the contract and in quasi-contract on the grounds, "They [the plaintiffs] were bound to know of the limitations on the authority of these officials and their services were rendered at their own hazard." (51 Tex. 532 at 536.) But subsequent Texas decisions have later repudiated this case and now the Texas decisions are the most liberal of all where the statutory requirements have not been complied with. See *Edwards v. Lubbock County*, (Tex. Civ. App. 1930) 33 S. W. (2d) 482; *City of Texarkana v. Keeney*, (Tex. Civ. App. 1932) 50 S. W. (2d) 339; *Goodrich Rubber Co. v. Town of Collinsville*, (Tex. Civ. App. 1937) 101 S. W. (2d) 583.

The Minnesota decisions also illustrate the same trend. In *Leland v. School District*, 77 Minn. 469, 80 N. W. 384 (1899), where the contract was not in writing as required by statute, recovery in quasi-contract was denied. But a subsequent Minnesota decision has allowed recovery when a loan has been made without previous authorization by the voters, and when the president of the council was also a managing officer of the plaintiff bank. *First National Bank of Goodhue v. Village of Goodhue*, 120 Minn. 362, 139 N. W. 599 (1913). See also, *Olsen v. Independent and Consolidated School Dist.*, 175 Minn. 201, 220 N. W. 606 (1928).

Again, taking the Michigan decisions, in *Mackey v. Township of Columbus*, 71 Mich. 227 at 230, 38 N. W. 899 (1888), recovery in quasi-contract was denied because the plaintiff failed to post a contractor's bond as required by statute because "if a township can be held on implied contract, or estoppel by the acts of its officers, when there is no valid contract, it would enable these persons to disregard the law entirely, and collude with their friends to do indirectly, what if directly done, would be a plain illegality." Despite the fears expressed in this case, later Michigan decisions have very often allowed quasi-contract recovery when statutory provisions have not been followed. See *Coit v. City of Grand Rapids*, 115 Mich. 493, 73 N. W. 811 (1898); *Spier v. City of Kalamazoo*, 138 Mich. 652, 101 N. W. 846 (1904); *Peterson v. City of Ionia*, 152 Mich. 678, 116 N. W. 562 (1908); *Commercial State Bank of Shepherd v. School District*, 225 Mich. 521, 196 N. W. 373 (1923); *Webb v. Township of Wakefield*, 239 Mich. 521, 215 N. W. 43 (1927).

Cf. also, *Bosard v. City of Grand Forks*, 13 N. D. 587, 102 N. W. 164 (1904); *Ogren v. Crystal Springs School District*, 52 N. D. 455, 203 N. W. 324 (1925).

On the subject of quasi-contractual liability of municipal corporations, see Knowlton, "The Quasi Contractual Obligations of Municipal Corporations," 9 MICH. L. REV. 671 (1911); Tooke, "Quasi-Contractual Liability of Municipal Corporations," 47 HARV. L. REV. 1143 (1934); Weiss, "Law Or Justice? The Quasi Contractual Liability of Municipal Corporations," 6 FLA. ST. BAR ASSN. J. 284 (1932). Case notes may be found in 21 KY. L. J. 489 (1933); 10 N. Y. UNIV. L. Q. REV. 64 (1932); 20 MINN. L. REV. 564 (1936); 16 VA. L. REV. 628 (1930); 22 VA. L. REV. 829 (1936); 31 YALE L. J. 779 (1922).

in their business dealings, as much as possible, to the same standards of legal liability as private corporations. In this light the result in the principal case seems justified.

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