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Municipal Corporations--Liability on Implied Contract

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Wis. 238, 177 N. W 14 (1920). It is undesirable that delivery of the passbook or certificate of deposit be dispensed with here because in the usual case the donor's lips have been silenced by death before the question comes before the courts and for this reason it is necessary to scrutinize both the delivery and the intention of the donor carefully in order to prevent dishonest practices. Yet this should not be carried to the point of adding a long string of technical requirements to the successful completion of a gift, particularly gifts *causa mortis*, as common experience has shown us that it is an ordinary human failing to neglect provisions and transactions in anticipation of death until the last hour makes unheeded apprehensions grow certain.

2. When the deposit is in the name of the donee, it is not essential for a valid gift that there be any delivery of the passbook if the donee has knowledge of the gift and the donative intent of the donor can be shown. This situation is less frequently found, but where it has developed, the above rule seems to have been followed. *McKinnon v. First National Bank*, 77 Fla. 777, 82 So. 748 (1919), *Turner v. McManus*, 38 R. I. 35, 94 Atl. 667 (1915), in addition to the two Kentucky cases cited above have followed it. The difference in this situation and the rule governing it from that in No. 1 is that the deposit in the name of the donee serves as the delivery and no delivery of the passbook or other evidence of ownership is necessary. However the mere fact of deposit in the donee's name alone is not sufficient, but must be accompanied by knowledge on the part of the donee that the deposit was made in his name. This is an important element, not only in completing the requirements of delivery, but perhaps also in justifying such a case as *Collins v. Collins' Admr.*, *supra*, in which the donor continued to exercise dominion over the funds after depositing them in the donee's name; in which case it may be held that any dominion which the donor exercised over the funds after the donee knows of the deposit in his name, is illegal and of no effect, and therefore such illegal exercise of dominion has no effect on the validity of the gift. This was the reasoning of the court in the principal case. In all gift cases the intention of the donor is an important consideration, and if it can be clearly discovered, should, perhaps, be given more weight than any other element.

JOSEPH D. WEBB.

MUNICIPAL CORPORATIONS—LIABILITY ON IMPLIED CONTRACT.—G had a contract to pump water from his mine into a city reservoir for which the city promised to pay one hundred dollars per month. G decided to cease operating the mine, so the city made a new contract to pay twenty dollars a day if G would continue to furnish the water until the city could make other arrangements. The contract was held to be invalid. (Probably because not passed by city ordinance.) This was the case of *Gugenheim v. City of Marion*, 242 Ky 350, 46 S. W (2d) 478 (1932), in which the Kentucky Court of Appeals decided that G

could not collect for the reasonable value of his service on the theory of implied contract.

The law is settled that a municipality or other public corporation having general power to contract with reference to the subject matter of an express contract, invalid for some irregularity in the execution thereof, is liable upon an implied contract for any benefit received thereunder, when the form and manner of the letting or execution does not violate any mandatory statutory restriction upon the power of such corporation to contract, and it is not otherwise violative of public policy. *Kinsey v. Little River Co.*, Fed. Case No. 7829 (1876), *Howell Elec. L. & P. v. Howell*, 132 Mich. 117, 92 N. W. 940 (1903), *Wentick v. Passiac Co.*, 66 N. J. L. 65, 48 Atl. 609 (1901), *Port Jervis Waterworks Co. v. Port Jervis*, 151 N. Y. 111, 45 N. E. 388 (1896).

But in general this doctrine applies only when the form and manner of contracting, or the persons by whom and with whom contracts are to be made, are not prescribed by statute or charter, and the right to contract is not limited to the form and manner therein specified.

Referring to a state of facts falling within this rule, a California court said in a leading case: "Under some circumstances a municipal corporation may become liable by implication. The obligation to do justice rests equally upon it as upon an individual. It cannot avail itself of the property or labor of a party and screen itself from responsibility under a plea that it never passed an ordinance on the subject. (No statute required an ordinance—Ed.) As against individuals the law implies a promise to pay in such cases, and the implication extends equally against corporations." *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453 (1858).

However the great majority of the cases fall without the classification above. The most of them are either, (a) *ultra vires* or, (b) violative of some statutory limitation or requirement which is mandatory as to the manner of execution.

(a) In a situation where the contract with a municipality is strictly *ultra vires* there can be no implied contract. *Hovey v. Wyandotte Co.*, 56 Kan. 577, 44 Pac. 17 (1896), such a contract can not be ratified. *Cedar Rapids Water Co. v. Cedar Rapids*, 117 Iowa 250, 90 N. W. 746 (1902). Nor can a city be estopped from pleading *ultra vires*. *State, ex rel. v. Minn. Transfer R. Co.*, 80 Minn. 108, 83 N. W. 32 (1900).

(b) In a case where a city receives benefits under an express contract violative of statutory restrictions (such as the requirement that sealed bids be received), or where there was no contract and a statute or charter required contracts to be made in a certain manner (for instance by passing an ordinance), the great weight of authority is that no implied liability can arise against the municipality. *Moss v. Sugar Ridge Tp.*, 161 Ind. 417, 68 N. E. 460 (1903), *Van Buren L. & P. v. Van Buren*, 118 Me. 458, 109 Atl. 3 (1920); *Niland v. Brown*, 193 N. Y. 180, 85 N. E. 1012 (1908), *White v. Seaside*, 107 Ore. 330, 213

Pac., 892 (1923); *Edison Elec. Co. v. Pasadena*, 178 Fed. 425, 102 C. C. A. 401 (1910), *Richardson v. Grant Co.*, 27 Fed. 495 (1883), cases collected in 27 L. R. A. (N. S.) 1120.

At page 849, Vol. 3, McQuillin on Municipal Corporations, the author states the rule thus: " if a contract is within the corporate power of a municipality but the contract is entered into without observing certain mandatory legal requirements specifically regulating the mode in which it is to be exercised, there can be no recovery thereunder. If the statute or charter says that certain contracts must be let to the lowest bidder, or that they must be made by ordinance, or that they must be in writing, or the like, there is a reason therefor based on the idea of protecting the taxpayers and inhabitants, and these provisions are mandatory, and while it is undoubtedly true that mere irregularities in making the contract are not fatal to a recovery, yet if the contract is entered into or executed in a different manner, the mere fact that the municipality has received the benefits of the contract which has been performed by the other party, does not make the municipality liable, either on the theory of ratification, estoppel, or implied contract, in order to do justice to the other party by paying the reasonable value of the property or services."

Only Illinois and Minnesota are contra to this rule. *Westbrook v. Middlecliff*, 99 Ill. App. 327 (1901), *Fargo Foundry v. Calloway*, 148 Minn. 273, 181 N. W 584 (1931). Early Kentucky decisions denying the rule have been reversed. *Worrell Mfg. Co. v. Ashland*, 159 Ky. 656, 167 S. W 922 (1914).

The argument made to support this line of decisions is that certain safeguards to taxpayers have been established by charter provisions and statutes, and the courts should not allow these to be avoided by enforcing implied contracts. The statutory requirements are limitations on the right of municipal corporations to contract and certainly they cannot be bound by an implied contract to accept a responsibility which they could not assume by express contract. The New York court in *La France Fire Engine Co. v. Syracuse*, 68 N. Y. S. 894 (1900), said, that to allow collection on an implied contract " . . . would open the door to that fraud and collusion which it was the purpose of the legislature to prevent. It would be to say that the mere persistence in wrong-doing renders legal what the law forbids." The California court states the reason for the rule in this language: "Nor is the corporation liable for the value of the work by reason of any implied promise to pay, upon the idea that the city derived a benefit from it. If so, as previously argued, it would dispense with the exercise of the power conferred on those in authority to execute contracts, and the contractor, or the party performing the work at the instance of any official of the corporation or even an inhabitant of the city, could make improvements beneficial to the corporation, and thereby create an implied contract on the part of the city to pay. The difference between contracts of a private person and those of an officer of a corporation is this; an individual has the right-

to make, alter, or ratify a contract at his own will and pleasure with the consent of the party contracting with him, or if he stands by and permits others to work for him, and accepts the work, the law implies a promise to pay its value; while an officer of a corporation has no power to make a contract except in the manner pointed out by the statute from which the power is derived." *Zottman v. San Francisco*, 20 Calif. 96 (1862).

This does not seem so harsh a rule against the party contracting with a municipal corporation when it is remembered that such a party is presumed to know the powers and limitations of the corporation to make contracts. The loser knowingly took the risk. "Persons contracting with a municipal corporation must, at their peril, inquire into the power of its officers to make contracts." *City of Bowling Green v. Gaines*, 123 Ky. 562, 96 S. W. 852 (1906).

New York makes exception to the rule in cases where there has been an attempt in good faith to carry out the requirements of the statute. *N. River Elec. L. & P. Co. v. New York*, 62 N. Y. S. 726 (1900). Also when a contract is made in an emergency when it is not practicable to follow the statutory requirements. *Sheehan v. New York*, 75 N. Y. S. 802 (1902).

The only argument offered in support of the minority line of decisions (represented by *Westbrook v. Middlecliff and Fargo Foundry v. Calloway*, *supra*), is that it is not justice, where a contract is entered into between a municipality and another, in good faith, and the corporation has received the benefits, to permit the corporation to retain the benefits without paying the reasonable value therefor, the same as a private corporation or an individual would have to do. This does not seem sufficiently to answer the argument that a city having a limited power to contract cannot be held liable beyond those limits.

Because of constitutional and statutory provisions in Kentucky (Ky. Const., secs. 157, 162, 164, Ky. St. 2741a-2, 2741m-1 and standard city charter provisions), all cases in this state fall in classification (b), and the principal case follows a long line of Kentucky decisions which have consistently followed the majority rule stated above.

No cases have arisen in Kentucky analogous to the exceptional cases decided in New York but in view of the uncompromising position of the Kentucky court on the subject, it seems safe to predict that no exceptions would be made.

BRUCE MORFORD.

JURISDICTION—SITUS OF CRIME.—A newspaper of recent date contained an account of a very peculiar murder. A, while standing in West Virginia, shot across the border and killed B, who was standing in Kentucky. A was brought to trial in West Virginia on a murder charge, but was released because the court held that it did not have jurisdiction to try the offense since the murder occurred in Kentucky.

This case raises an interesting question, and an important one also, since upon this decision may rest the safety of a number of in-