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MUNICIPAL CORPORATIONS—CONTRACTS—RATIFICATION AND ESTOPPEL IN CONTRACTS MADE BY UNAUTHORIZED AGENT—Plaintiff's infant daughter, admitted to Newark City Hospital as an emergency case,[1] received hospitalization and medical treatment worth $1,190 during her seventy-day period of confinement. The medical director of the hospital had made an agreement with the Hospital Service Plan of New Jersey which provided that regardless of the amount or quality of the hospitalization required, payment of the flat sum of $100 for any subscriber-patient would constitute payment in full to the city. The city accepted the $100 check paid by the Plan as billed by the hospital for the care of the child. In order to facilitate settlement with the person whose alleged negligence had caused his daughter's injuries, by removing the city's hospital lien for the balance of the charges for treatment, plaintiff sued for a declaratory judgment absolving him of any liability to the city. The real contest having evolved between

[1] The hospital, a public institution owned by the municipality, was principally dedicated to the care of indigents, but under an ordinance enacted in 1937 could treat non-indigents in emergencies.

the city and the Plan,[2] the trial court rendered judgment for the Plan ordering cancellation of the lien. On certification to the New Jersey Supreme Court, *held,* affirmed, one justice dissenting without opinion. Even assuming that the medical director was without authorization to consummate the agreement, the city is bound by its subsequent course of conduct[3] which impliedly ratified the contract, and is also estopped to deny its validity. *Johnson v. Hospital Service Plan of N. J.,* (N.J. 1957) 135 A. (2d) 483.

Since municipal corporations derive their contractual powers exclusively from statute and charter,[4] it is uniformly held that no recovery may be had against a municipality on a contract truly ultra vires,[5] on theories of ratification[6] or estoppel to deny its validity,[7] or in quasi-contract.[8] Because any ratification must be performed in the same manner in which the contract could originally have been validly executed, contracts which are within the general powers of the municipality but invalid for failure to observe mandatory statutory conditions precedent in the mode or manner of formation generally may not be validated by ratification or estoppel.[9]

2 In the lower court an agreed statement of facts was drawn, stipulating that under no circumstances would plaintiff be liable for the sum involved.

3 There was strong evidence that the proper municipal officer knew in detail of the agreement and acquiesced in its continuation despite a provision permitting termination. Further proof of implied ratification lay in the receipts found in the financial reports of the hospital of sums which had been accepted under the agreement, and exposure at hearings on the city budget of the operation of the contract.

4 See 10 MCQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §29.05 (1950).

5 Thomas v. Richmond, 12 Wall. (79 U.S.) 349 (1870). A truly ultra vires contract is most commonly defined as one which it is not within the powers of the municipality to make. The confusing distinction, adhered to by New Jersey, is sometimes made between contracts ultra vires in the "primary sense" as above defined and those ultra vires in the "secondary sense," defined as within the power of the municipality to make but irregularly or defectively executed. See Summer Cottagers' Assn. v. Cape May, 19 N.J. 493, 117 A. (2d) 585 (1955); Bell v. Kirkland, 102 Minn. 213, 113 N.W. 271 (1907). Ratification and estoppel are applicable to contracts ultra vires in the secondary sense. Bauer v. Newark, 7 N.J. 426, 81 A. (2d) 727 (1951).

6 Cedar Rapids Water Co. v. Cedar Rapids, 118 Iowa 234, 91 N.W. 1081 (1902); Oakland v. Key System, 64 Cal. App. (2d) 427, 149 P. (2d) 195 (1944).

7 West Tennessee Power & Light Co. v. Jackson, (6th Cir. 1938) 97 F. (2d) 979; Gontrum v. Baltimore, (Md. Ct. App. 1943) 35 A. (2d) 128.

8 Fort Edward v. Fish, 156 N.Y. 363, 50 N.E. 973 (1898). Although not here considered, the quasi-contractual liability of municipal corporations is closely interrelated with the doctrines of ratification and estoppel. See generally Tooke, "Quasi-Contractual Liability of Municipal Corporations," 47 Harv. L. Rev. 1143 (1934); Antieau, "The Contractual and Quasi-Contractual Responsibilities of Municipal Corporations," 2 ST. LOUIS L. J. 230 (1953). See also Shulse v. Mayville, 223 Wis. 624, 271 N.W. 643 (1937); American La France & F. I. v. Borough of Shenandoah, (3d Cir. 1940) 115 F. (2d) 866.

9 Denial of recovery based on ratification: Paul v. Seattle, 40 Wash. 294, 82 P. 601 (1905) (necessity for ordinance); Indianapolis v. Wann, 144 Ind. 175, 42 N.E. 901 (1895) (necessity for prior appropriations); Tobin v. Town Council, 45 Wyo. 219, 17 P. (2d) 666 (1933) (necessity for advertisement for bids); Arnott v. Spokane, 6 Wash. 442, 33 P. 1063 (1893) (necessity that the contract be in writing). But see City Affairs Committee v. Jersey City, 134 N.J.L. 180, 46 A. (2d) 425 (1946), where it was held that a contract

The rationale behind the denial of recovery in these instances is that these statutory limitations, which exist for the protection of the liabilities of taxpayers against the unwarranted assumption of municipal authority, must not be annulled by indirectly and retroactively enforcing void or inherently invalid contracts.[10] Since all who contract with a municipality are charged with notice of the nature and scope of the authority of its officers and agents,[11] contracts executed by an unauthorized municipal agent are invalid.[12] It is settled, however, that if as in the principal case the sole defect is of this nature,[13] the contract is subject to enforcement by application of ratification and estoppel theories.[14] In such cases conduct constituting ratification or permitting use of estoppel against the municipal corporation should make the contract enforceable, since, as explained in the principal case,[15] the taxpayers are not thereby disserved as there is nothing inherently invalid in the nature of the contract. Ratification, which operates by relating back to validate the original contract,[16] may be direct, e.g., by passage of an authorizing ordinance or resolution,[17] or by implication from conduct indicative of the intention to ratify,[18] but must be by the agency

invalid for failure of an appropriation may be ratified by the subsequent making of the required appropriation. Denial of recovery based on estoppel: Mullins v. Kansas City, 268 Mo. 444, 188 S.W. 193 (1916). An emergency may justify recovery despite noncompliance with statutory requirements. Los Angeles Dredging Co. v. Long Beach, 210 Cal. 348, 291 P. 839 (1930). When the statutory requirements are classified as "directory" as distinct from the above examples of "mandatory" requirements, recovery is permitted. Edwards v. Kirkwood, 147 Mo. App. 599, 127 S.W. 378 (1910); Hansen v. Town of Anthon, 187 Iowa 51, 173 N.W. 939 (1919). Recovery has sometimes been based on the tenuous distinction between "governmental" and "proprietary" functions. See City of Staples v. Minnesota Power & Light Co., 196 Minn. 303, 265 N.W. 58 (1936).

10 Zottman v. San Francisco, 20 Cal. 96 (1862).

11 Potts v. Utica, (2d Cir. 1936) 86 F. (2d) 616.

12 Jameison v. Paducah, 195 Ky. 71, 241 S.W. 327 (1922).

13 The city conceded in the principal case that: (1) the contract was within the general scope of its powers as authorized by N.J. Stat. Ann. (1952) §17:48-7; and (2) there had been no failure to comply with the requisite statutory conditions precedent in the formation of the contract. While the trial court had held that the hospital medical director was in fact the proper official to execute the contract, the Supreme Court declined to rule on that issue, placing its decision entirely on ratification and estoppel.

14 Pontiac v. Ducharme, 278 Mich. 474, 270 N.W. 754 (1936) (ratification); Barnard & Co. v. County of Sangamon, 190 Ill. 116, 60 N.E. 109 (1901) (estoppel). But cf. Frank v. Board of Education of Jersey City, 90 N.J.L. 273 at 280, 100 A. 211 (1917), where it was stated: "Agency by estoppel has no proper place in the law of municipal corporations."

15 Principal case at 486.

16 In re Settlement of Hanson, 206 Minn. 371, 288 N.W. 706 (1939); Fruchtl v. Foley, (Fla. 1956) 84 S. (2d) 906.

17 Ogden City v. Weaver, (8th Cir. 1901) 108 F. 564.

18 Ratajczak v. Board of Education of Perth Amboy, 114 N.J.L. 577, 177 A. 880 (1935); Town of Bruce v. Dickey, 116 Ill. 527, 6 N.E. 435 (1886). But see Shulse v. Mayville, note 8 supra, at 634, where Rosenberry, C.J., said, "It must be held that where there is no formal ratification there is no ratification at all. Ratification by acquiescence permits the city to become liable on a contractual basis in a manner other than that specified by statute."

originally empowered to make the contract,[19] with full knowledge of the material facts.[20] While any conduct of either an affirmative or negative character,[21] with the requisite knowledge and indicative of an intent to recognize the obligation, can constitute implied ratification, the doctrine has frequently been indiscriminately applied by courts seeking to bind a municipality for goods or services rendered under an invalid contract.[22] The doctrine of estoppel in pais, by which a municipality acting with knowledge of the facts to recognize a contract made by an improper agent is precluded by a change of position in reliance on such action from denying the validity of the contract, is closely allied with ratification in its application.[23] A sound basis for estopping the municipality existed in the principal case, for the Plan over a period of eleven years had paid benefits to the city in reliance on the validity of the agreement.[24] In many cases, however, estoppel has been invoked merely to indicate the legal effect of ratification, i.e., that having ratified a contract, the municipality is estopped to deny its validity.[25] While, as in the principal case, the same course of action frequently gives rise to both ratification and estoppel, each has been correctly applied as an independent ground for enforcing a municipal contract,[26]

19 Ramsey v. City of Kissimmee, 139 Fla. 107, 190 S. 474 (1939); Brann v. City of Ellsworth, 137 Me. 316, 19 A. (2d) 425 (1941).

20 Corpus Christi v. Johnson, (Tex. Civ. App. 1932) 54 S.W. (2d) 865; Board of Education v. Montgomery, 177 Okla. 423, 60 P. (2d) 752 (1936). It has been held that knowledge possessed by the individual members of the city council does not constitute knowledge by the body as a whole. Texarkana v. Friedell, 82 Ark. 531, 102 S.W. 374 (1907).

21 Vermuele v. Corning, 186 App. Div. 206, 174 N.Y.S. 220 (1919) (affirmative, payment of bills on the contract after notification); Stockwell v. Sioux Falls, 68 S.D. 157, 299 N.W. 453 (1941) (affirmative, purchase pursuant to invalid option agreement); Town of Brice v. Dickey, 116 Ill. 527, 6 N.E. 435 (1886) (negative, failure to object to services rendered); Norwalk Gaslight Co. v. Borough of Norwalk, 63 Conn. 495 (1893) (negative, silence when duty to deny authority). But cf. Service Commercial Body Works v. Borough of Dumont, 5 N.J. Super. 327, 68 A. (2d) 892 (1949).

22 City of Conyers v. Kirk & Co., 78 Ga. 480, 3 S.E. 442 (1887); City of Staples v. Minnesota Power & Light Co., note 9 supra; Day v. City of Malvern, 195 Ark. 804, 114 S.W. (2d) 459 (1938). But cf. Giant Mfg. Co. v. City of Wamego, (Kan. 1935) 41 P. (2d) 744.

23 10 MCQUILLIN, MUNICIPAL CORPORATIONS, 3d ed., §29.103, p. 415 (1950): "The rules as to ratification of corporate contracts and estoppel to deny the validity of such contracts being so interwoven, and the exact division line between ratification and estoppel in many cases being so shadowy, it is deemed preferable to treat these two together."

24 Principal case at 488. In addition the Plan relied to its detriment on the agreement's validity in those cases where it paid the city $100 when the value of the services rendered was less.

25 B.F. Goodrich Rubber Co. v. Collinsville, (Tex. Civ. App. 1937) 101 S.W. (2d) 583; Greeley v. Evansville, (7th Cir. 1939) 128 F. (2d) 824.

26 Moore v. Hupp, 17 Idaho 232, 105 P. 209 (1909) (ratification). Samuel v. Wildwood, 47 N.J. Super. 162, 135 A. (2d) 583 (1957) (estoppel). Since in theory ratification itself validates the original contract, to apply estoppel merely to indicate the binding effect of acts of ratification would seem superfluous. But see BIGELOW, ESTOPPEL, 6th ed., 493 (1913): "It is common enough at present to speak of acquiescence and ratification as an estoppel. Neither the one nor the other, however, can be more than part of an estoppel,

and the court in the principal case is to be commended for applying each on its own separate, self-sufficient analytical basis.

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at best. An estoppel is certain, being a legal inference or conclusion arising from acts or conduct; while acquiescence and ratification, like waiver, are but matters of fact which might have been found otherwise. Besides, the most that acquiescence or ratification can do, and this either may under certain circumstances do, is to supply an element necessary to the estoppel, and otherwise wanting, as e.g. knowledge of the facts at the time of making a representation."