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Quasi Contracts--Right of Contractor to Recover Rent from County for Use of Property Obtained Under a Contract Void Because Not in Compliance with Constitutional Requirements

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been held to be "so-called" governmental functions with resultant immunity from liability: maintenance of a jail,[6] supplying water for fire protection[7] and the operation of schools.[8] To the group of proprietary functions in whose exercise the municipality is liable for want of ordinary care is added the statutory liability for injuries caused by defective streets and sidewalks.[9]

In arriving at the conclusion that the maintenance of a public swimming pool is a proprietary function, our court classified swimming pools as within the definition of public parks. As indicated above it was held in *Warden v. City of Grafton*[10] that the maintenance of a public park by a municipality was a proprietary function.

In other jurisdictions there are two lines of authority, as to parks and public swimming pools, one holding that their maintenance is a governmental function,[11] the other a proprietary function,[12] but the tendency of late cases is to classify this activity as a proprietary function.[13] The principal case and *Warden v. City of Grafton* demonstrate that West Virginia is definitely in accord with the modern trend.

J. G. McC.

QUASI CONTRACTS — RIGHT OF CONTRACTOR TO RECOVER RENT FROM COUNTY FOR USE OF PROPERTY OBTAINED UNDER A CONTRACT VOID BECAUSE NOT IN COMPLIANCE WITH CONSTITUTIONAL REQUIREMENTS. — The County of Arlington, Virginia, attempted to purchase fire apparatus. The contract of purchase was held void and recovery on an implied agreement to pay reasonable value was

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[6] Shaw v. City of Charleston, 57 W. Va. 433, 50 S. E. 527 (1906); Brown's Adm'r v. Guyandotte, 34 W. Va. 299, 12 S. E. 707 (1890).

[7] Mendel v. City of Wheeling, 28 W. Va. 233 (1886).

[8] Krutili v. Board of Education, 99 W. Va. 466, 129 S. E. 486 (1925). See Price, *Governmental Liability for Tort in West Virginia* (1931) 38 W. VA. L. Q. 101 for municipal liability for tort in general.

[9] W. VA. REV. CODE (Michie, 1937) c. 17, art. 10, § 17.

[10] 99 W. Va. 249, 128 S. E. 375 (1925).

[11] Bolster v. Lawrence, 225 Mass. 387, 114 N. E. 722 (1917). It is interesting to note that this case was cited in the case commented upon as authority for the proposition that a public swimming pool is within the definition of a public park. 6 MCQUILLAN, MUNICIPAL CORPORATIONS (2d ed. 1937) § 2850.

[12] Barthold v. Philadelphia, 154 Pa. 109, 26 Atl. 304 (1893); 6 MCQUILLAN, MUNICIPAL CORPORATIONS § 2850.

[13] 6 MCQUILLAN, MUNICIPAL CORPORATIONS §§ 2850, 2859; Notes (1935) 99 A. L. R. 686; (1928) 57 A. L. R. 406; (1927) 51 A. L. R. 370; (1926) 42 A. L. R. 263.

denied in a former case[1] because the purchase was not made in accordance with constitutional requirements.[2] The vendor now seeks specific restitution of the property and compensation for its use while in the possession of the county. *Held,* that the apparatus should be returned to the seller and a fair amount of rent or compensation paid by the county for the use thereof, with interest on that amount, less cash payment made by the county. *American-LaFrance & Foamite Industries, Inc. v. Arlington County.*[3]

It is reasonably well-established that where a contract with a county is merely invalid and not fraudulent or *malum in se,* the party furnishing real or personal property thereunder may upon equitable terms recover it in specie, if recovery may be had without material injury to other property and without inconveniencing the public other than to deprive it of that to which it has no just claim.[4] There was no fraud in the principal case, and the purchase of fire apparatus was within the power of the county;[5] therefore this contract was merely invalid and was not substantially illegal, and the seller was entitled to a specific restitution of the property.[6] A more difficult problem, however, arises in regard to the allowance of rent or compensation for the use of the property.

Statutes limiting or qualifying the contracting authority of a municipal corporation or county aim solely at the protection of the taxpayers and inhabitants of the particular political division.[7] The public policy against a contract entered into in disregard of these limitations is so strong that an implied agreement to pay reasonable value for the property or services secured by virtue thereof cannot arise, since to allow this would be to permit indi-

[1] 164 Va. 1, 178 S. E. 783 (1935).

[2] VA. CONST. § 115a: "No debt shall be contracted by any county . . . . except in pursuance of authority conferred by the general assembly by general law; and the general assembly shall not authorize any county . . . . to contract any debt except to meet casual deficits in the revenue, a debt created in anticipation of the collection of the revenue of the said county, or to redeem a previous liability, unless in the general law authorizing the same provision be made for the submission to the qualified voters of the proper county . . . . for approval or rejection, by a majority vote of the qualified voters voting in an election, of the question of contracting such debt; and such approval shall be a prerequisite to contracting such debt."

[3] 192 S. E. 758 (Va. 1937).

[4] Note (1934) 93 A. L. R. 441.

[5] VA. CODE (Michie, 1930) §§ 542, 2743, 2757a, 3144k.

[6] Fairbanks, Morse & Co. v. City of Wagoner, 86 F. (2d) 288 (C. C. A. 10th, 1936); Yaffe Iron & Metal Co. v. Pulaski County, 188 Ark. 808, 67 S. W. (2d) 1017 (1934).

[7] American-LaFrance & Foamite Industries, Inc. v. Arlington County, 164 Va. 1, 178 S. E. 783 (1935).

rectly that which is expressly forbidden.[8] Here, nevertheless, the court allowed recovery on the theory that since the county had used the apparatus, it was liable for rental charges accruing during the use. There is some authority for awarding this compensation,[9] but any allowance of that nature must be made with the greatest of care, or it will be subject to the same objections which prevent the original contractual or quasi-contractual obligation from arising. This recovery must not create an obligation which is, in itself, a violation of some positive rule of law.

There is a possibility in the principal case that a full rental allowance would be illegal.[10] The apparatus had been in use for practically six years, and the court states that the depreciation had been so great as to make a sale of the property an empty remedy.[11] If compensation were allowed for this full time, it would virtually result in payment of a large percentage of the purchase price. A recent federal case from Texas,[12] strongly relied upon by the court as authority for allowing recovery, qualifies its award of rent by requiring that the amount paid be within the current revenues of the city, and by holding that the Statute of Limitations barred any installment accruing after the time rent was paid up by application to that purpose of the initial payment on the contract and prior to two years immediately preceding the institution of the action. Other cases, which have allowed rent for property acquired by virtue of a void contract, modify recovery so as to avoid indirect violation of statutory or constitutional provisions.[13]

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[8] City of Bristol v. Dominion Nat. Bank, 153 Va. 71, 149 S. E. 632 (1929); Burgess v. City of Cameron, 113 W. Va. 127, 166 S. E. 113, 703 (1932); Hyre v. Brown, 102 W. Va. 505, 135 S. E. 656 (1926), Note (1933) 84 A. L. R. 936, 954. *Contra*: Wakely v. County of St. Louis, 184 Minn. 613, 240 N. W. 103 (1931).

[9] Bailey v. Miller County, 24 Ga. App. 746, 102 S. E. 178 (1920); Mineralized Rubber Co. v. City of Cleburne, 22 Tex. Civ. App. 621, 56 S. W. 220 (1900); Parkersburg v. Brown, 106 U. S. 487, 1 S. Ct. 442 (1882).

[10] VA. CODE (Michie Supp. 1932) § 2724a: "No board of supervisors shall expend in any year for any purpose an amount greater than the amount available for such purpose during the year nor shall any board of supervisors order issued against any fund at any time any warrant or warrants in excess of the amount available in such fund and in the treasurer's possession at the time such warrant is issued. . . ."

[11] "Now the equipment is no longer new, and the sale thereof and the application of the proceeds to the purchase price would provide a more or less empty remedy."

[12] City of Floydada v. American LaFrance & Foamite Industries, Inc., 87 F. (2d) 820 (C. C. A. 5th, 1937).

[13] City of Little Rock v. White Co., 103 S. W. (2d) 58 (Ark. 1937); Fabric Fire Hose Co. v. City of Teague, 152 S. W. 506 (Tex. Civ. App. 1912).

The true test is whether restitution can be granted without harm to the persons protected.[14] The policy of the law in denying recovery in these instances extends no further than necessary to afford that protection; the purpose is not to impose a penalty on the parties.[15] If relief can be granted without violation of a statute or circumvention of constitutional mandate, it will not be denied.[16]

J. H. H.

[14] RESTATEMENT, RESTITUTION, QUASI CONTRACTS, AND CONSTRUCTIVE TRUSTS (1937) § 62b.

[15] Fairbanks, Morse & Co. v. City of Wagoner, 86 F. (2d) 288 (C. C. A. 10th, 1936).

[16] Town of Meredith v. Fullerton, 83 N. H. 124, 139 Atl. 359 (1927).