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ULTRA VIRES CONTRACT; RECOVERY OF PROPERTY TRANSFERRED THEREUNDER. The Supreme Court of the United States has handed down its final judgment in the long pending case of *Pullman Palace Car Co.* v. *Central Transportation Co.*, 18 Sup. Ct. Rep. 808 (May 31, 1898), reversing the Circuit Court for the Eastern District of Pennsylvania on the question of measure of damages, and remitting the case to the lower court with directions to enter judgment for the Central Transportation Company in accordance with the opinion of the court. This case has excited the greatest interest, not only on account of the magnitude of the interests involved, but because of the unsettled status of parties to an *ultra vires* contract, together with the peculiar view taken by the United States Supreme Court of contracts of this character. The prominence of the parties, the amount involved, the importance of the question and the recognized abilities of the counsel on both

sides, makes this in every respect a "leading case" and one which will no doubt be a mile stone in the development of corporation law in this country.

Briefly stated, the facts were as follows: In 1870 the Central Transportation Company, a corporation chartered by the Legislature of Pennsylvania for manufacturing and leasing sleeping cars, entered into a so-called lease with the Pullman Palace Car Company, by which it turned over to the latter its entire plant and property, including cars, patent rights and contracts with railroads, for a term of ninety-nine years, during which time it agreed not to engage in the manufacturing or hiring of sleeping cars. The consideration for this contract was payment by the Pullman Company of the sum of $264,000 annually for the term of ninety-nine years, in quarterly payments. For fifteen years the parties carried out this contract strictly, but in 1885, a dispute having arisen, the Pullman Company repudiated the lease and refused to pay the rental. Upon suit being brought for the rent the defence offered was the illegality of the lease as *ultra vires* of the Central Transportation Company.

This plea prevailed in the lower court and was affirmed by the Supreme Court in *Central Transportation Co.* v. *Pullman Palace Car Co.*, 139 U. S. 24 (1891). In that case Mr. Justice Gray, in affirming the judgment of the lower court, used the following language: "A contract of a corporation which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity or be the foundation of any right of action upon it."

Had the court stopped here it would have left the plaintiff in a peculiarly unfortunate position and would have laid the law open to a fair charge of extreme harshness. But, though refusing to acknowledge any potency in the *ultra vires* contract or to recognize it in any way as a basis of action, the court further on suggested a ground of relief which has since been acted upon and a fair measure of justice secured. Mr. Justice Gray's language, in pointing out the true ground for recovery, was as follows:

"A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation, by the law of its creation, is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract, have always striven to do justice between the parties, so far as could be done consistently with adherence to law, by permitting property or money, parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the

action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return or, failing to that, to make compensation for property or money which it has no right to retain. To maintain such an action is not to affirm but to disaffirm the unlawful contract."

Pending this decision the Pullman Company had filed a bill in the Circuit Court asking that the Central Company should be enjoined from bringing additional suits for rent as the quarterly payments came due. Acting upon the hint given by the Supreme Court in its judgment, the Central Company filed a cross bill praying relief by return of its property or compensation for same, and also that the Pullman Company should account for all profits made by it through use of said property, and that the Pullman Company should be adjudged a trustee for the Central Company of all contracts for transportation, whether original, new, or renewals, held by the Pullman Company with railroads with which there were contracts of transportation with the Central Company at the time of the making of the lease in 1870. The court referred the case to a master with directions to ascertain the value of the property when transferred, together with its earnings since, less amount paid as rental. The master reported in favor of the Central Company for the sum of $4,235,044 with costs, and exceptions to report having been dismissed, judgment was so entered. From this judgment appeal was taken to the Supreme Court of the United States, and final judgment upon this appeal has now been entered.

The court denies that there is any question of trusteeship in the case and holds that the Pullman Company is only liable for the value of the property belonging to the Central Company held by it, together with interest from date of repudiation of the lease. It is to the basis of calculating the value of this property by the master that the chief objection of the court is directed. The master, having first assumed that the value of the property was the same in 1885 as in 1870, took the very simple and easy method of ascertaining its value by taking the value of the Central Company's stock in the open market in 1870 which was 58, the par value being 50, thus placing the value in 1885 at $2,552,000, which sum he allowed with interest from that date, making the total sum $4,235,044. The court, however, points out that the market price of the Central Company's stock could not be taken as a true basis of the value of their property, since the market price of the stock simply represented the view taken by investors, or, it may be, speculators, in the *supposed* value of the property and was based upon the value of the property, value of leases, patent rights, future prospects and perhaps faith in the skill of the officers of the company. But, as it points out, the leases and patent rights held by the Central Company and transferred by it had all run out or expired during the fifteen years of the continuance of the lease, and the annual payments made by the Pullman Company during that time had presumably paid the Central Company their full value,

for at the time of the repudiation of the lease, their value was *nil.* There was, therefore, nothing to be taken into account but the actual value of property turned over to the Pullman Company, which the court found to consist of cars and equipments valued at $710,846.50, together with cash amounting to $17,000, making a total valuation of $727,846.50, for which amount judgment was entered with interest from 1885 with costs.

The court agreed with the master that, in absence of evidence to the contrary and in view of the fact that the Pullman Company had agreed to keep the property in good order and repair, they would assume that the value of the property was the same in 1885 as in 1870.

The decision in this case is thoroughly consistent with the numerous decisions by the court in cases involving *ultra vires* leases, of which this is a fair type, and from the standpoint taken by the court the basis of settlement seems to be perfectly fair and logically correct. See, in this connection, *Thomas* v. *W. J. R. R.*, 101 U. S. 71 (1879); *Penna. R. R. Co.* v. *St. Louis, Etc., Ry. Co.*, 118 U. S. 307 (1885); *Penna. R. R. Co.* v. *Keokuk Bridge. Co.*, 131 U. S. 371 (1888); *Pullman Palace Car Co.* v. *Central Trans. Co.*, 139 U. S. 24 (1891); *St. Louis, Vandalia, Etc., R. R.* v. *Terre Haute, Etc., R. R.*, 145 U. S. 393 (1891). It is to be noted that there is a seeming inconsistency between the views taken by the court in *Thomas* v. *W. J. R. R.* and in the Vandalia case. In the former the defendant, having repudiated the lease as *ultra vires*, received the commendation of the court for having so acted, since, the lease being illegal, the defendant merely did what it should have done. In the latter case the plaintiff company having filed a bill asking that the *ultra vires* lease be cancelled, the court refused to interfere, on the ground that the parties having placed themselves in the position in which they then were and being *in pari delicto*, no relief would be granted.

This would seem to be an extension of the application of the maxim *in pari delicto*, since in this case the plaintiff to the illegal contract was in default, while heretofore the maxim has been invoked only in cases where the plaintiff has sought relief, the defendant being in default. In any event it seems difficult to see why the West Jersey Railroad Company should be commended for repudiating a void lease while the Vandalia Company should be denied the right to do so. Perhaps the explanation would be that the latter company asked the court to help it in the matter. If it had deliberately repudiated the lease and refused to pay the rental and thus compelled the other party to the lease to sue, it would have been in the same position as was the West Jersey Railroad Company.

While the position of the Supreme Court upon the question of recovery of property parted with under an *ultra vires* lease has many critics, and is not followed in many of the states where recovery is allowed upon the lease itself in cases involving no moral turpitude,

as in *Oil Creek R. R.* v. *Penna. Trans. Co.*, 83 Pa. 160 (1876); *State Board of Agriculture* v. *St. Ry. Co.*, 47 Ind. 407 (1874); *Whitney Arms Co.* v. *Barlow*, 63 N. Y. 62 (1875); *Hall Manf'g Co.* v. *American Ry. Supply Co.*, 48 Mich. 331 (1882); yet it is now well settled and is no longer a debatable question. The court has clearly and consistently expressed and carried out its views as to the proper form of suit and grounds of recovery, and nothing now remains upon the part of members of the Bar but to act accordingly.

EXPERT TESTIMONY; PHYSICIAN; REFUSAL TO TESTIFY; EXTRA COMPENSATION. From the great mass of expert testimony that is daily heard in the courts one would surmise that some of the vexed problems this class of testimony raises are nearing a final decision. The Supreme Court of Illinois, in *Dixon* v. *The People*, 168 Ill. 179, 48 N. E. 108, opinion by Mr. Justice Magruder (Nov. 1, 1897), has added another decision to a question argued at some length by a number of able text writers. The question presented in this case is whether a physician, subpœnaed and interrogated as an expert witness *only*, can refuse to testify upon the ground that no compensation greater than that allowed to an ordinary witness has been paid or promised him. The decision in this case, which was a civil suit, was that the refusal of such physician to answer a hypothetical question calling for his opinion, on the above grounds, justifies the trial judge in fining him for contempt.

All authorities, it would seem, agree that in a criminal suit or where the witness is testifying to facts, that such a proceeding is clearly within the power of the court, but many text writers and some decisions hold that, where the witness is to testify merely as an expert, he should receive extra compensation for his testimony as for a professional opinion.

In England, by 5 Eliz. c. 9, a witness must "have tendered to him, according to his countenance or calling, his reasonable charges;" and under this statute there were several decisions that held to the distinction between the case of a man who sees a fact, and a man who is selected by a party to give his opinion about a matter with which he is peculiarly conversant: *Webb* v. *Paige*, 1 C. & K. 23 (1843); *Buckley* v. *Rice*, 1 Plow. 125 (1554); but those decisions have been doubted and there is judicial authority for the statement, "If the rule were to undergo revision I cannot say it would stand the test of examination:" *Moore* v. *Adam*, 5 M. & S. 156 (1816); *Collins* v. *Godfrey*, 1 B. & Ad. 950 (1831); *Lonergan* v. *Royal Exchange Assurance*, 7 Bingh. 731 (1830).

On the strength of these opinions, in the case of *Ex parte Dement*, 53 Ala. 389 (1875), it was decided that a physician or other expert witness could be held for contempt. This was, as the court intimates, a test case and the opinion cites the English authorities at length.

The text writers, and especially those on Medical Jurisprudence, strongly favor the view that a physician or expert cannot be held

for contempt under such a state of facts: Wharton on Evidence, §§ 380, 456; 2 Phillips on Evidence, (4th Am. Ed.) 828; Underhill on Evidence, 277; Redfield on Wills, § 31, p. 154, note 44; Rice on Evidence, Chap. 14, § 197; Taylor on Evidence, § 1135; Taylor's Principals of Medical Jurisprudence, p. 19; The Jurisprudence of Medicine in its Relation to the Law of Contracts, Torts and Evidence, by Ordronaux, §§ 114, 115.

Thus we see a whole field of text writers arrayed against what is now the constant trend of judicial decision. The most recent and, perhaps, the strongest case favoring the view adopted by the text book writers is, *Buckman* v. *State*, 59 Ind. 1 (1877), which was a decision by a divided court, and even then eventually based on the Bill of Rights of the state, § 21, which provides that "no man's particular services shall be demanded without just compensation." This case, as well as the other cases of recent years in the United States, is thoroughly considered by the Illinois court in *Dixon* v. *People* (*supra*).

Three grounds are generally advanced to sustain the right of such extra compensation, viz., (1) That the time of the expert witness is more valuable than the time of ordinary men; (2) That the skill and accumulated knowledge of an expert are his property, and that a man's property should not be taken without just compensation; (3) Based on *Buckman* v. *State* (*supra*), calling expert testimony "particular services."

However, the argument against this position is strengthened by the fact that the Alabama case, *Ex parte Dement* (*supra*), has been followed, not only by *Dixon* v. *People* (*supra*), but also by *State* v. *Teipner*, 36 Minn. 535 (1887); *Sumners* v. *State*, 5 Tex. App. 365 (1879); *County Commissioners* v. *Lee*, 3 Colo. App. 177 (1892); *Flinn* v. *Prairie County*, 60 Ark. 204 (1895).