DOSITHÉ BERNARDIN (PLAINTIFF)....APPELLANT; 1891

AND

THE MUNICIPALITY OF NORTH DUFFERIN (DEFENDANTS)..... } RESPONDENTS.

*Jan. 21, 22, 23.

*Nov. 16.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH, MANITOBA.

Corporation—Contract of—Seal—Performance—Adoption—Municipality —By-law—Manitoba Municipal Act, 1884, *s.* 111.

A corporation is liable on an executed contract for the performance of work within the purposes for which it was created, which work it has adopted and of which it has received the benefit, though the contract was not executed under its corporate seal, and this applies to municipal as well as other corporations. Ritchie C.J. and Strong J. dissenting.

In sec. 111 of the Manitoba Municipal Act, 1884, which provides that municipal corporations may pass by-laws in relation to matters therein enumerated, the word "may" is permissive only and does not prohibit corporations from exercising their jurisdiction otherwise than by by-law. Ritchie C.J. and Strong J. dissenting.

APPEAL from a decision of the Court of Queen's Bench, Manitoba (1), affirming the judgment of nonsuit at the trial.

The action in this case was brought to recover the amount alleged to be due plaintiff for building a bridge for the defendant municipality. The defence set up was that the contract was not under the corporate seal of the municipality and the plaintiff, consequently, could not maintain an action. The trial judge nonsuited the plaintiff and his judgment was affirmed by the full court from whose decision this appeal was brought.

*PRESENT: Sir W. J. Ritchie C.J., and Strong, Fournier, Taschereau, Gwynne and Patterson JJ.

(1) 6 Man. L. R. 88.

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The facts are fully set out in the judgments of Mr. Justice Gwynne and Mr. Justice Patterson.

Tupper Q.C. for the appellant. The law is not yet settled as to the necessity for a seal in contracts with municipal corporations. In *Young* v. *Leamington* (1) though there are *dicta* against the appellant's position, Lord Bramwell expressly said, in the House of Lords, that the question did not arise.

The law on this matter has been made by the courts and in 1856 it was settled that in the case of trading corporations the seal was not essential in all cases.

In executed contracts, the benefit of which has been enjoyed, the courts have always striven to make corporations liable. The latest case is *Scott* v. *Clifton School Board* (2); and see *Clarke* v. *Cuckfield Union* (3); followed in *Nicholson* v. *Bradfield Union* (4); *Sanders* v. *St. Neat's Union* (5), approved in *Smart* v. *Guardians of West Ham Union* (6).

There are a number of Ontario cases in the same direction beginning with *Marshall* v. *School Trustees* (7). See *Pim* v. *Ontario* (8); *Lawrence* v. *Corporation of Lucknow* (9); *Canada Central Railway Co.* v. *Murray* (10).

Osler Q.C. and *Martin*, Attorney-General of Manitoba, for the respondents cited *Wallis* v. *Municipality of Assiniboia* (11); *Silsby* v. *Dunnville* (12).

Sir W. J. RITCHIE C.J.—Concurred in the judgment prepared by Mr. Justice Strong.

(1) 8 Q.B.D. 579; 8 App. Cas. 517.
(2) 14 Q.B.D. 500.
(3) 21 L.J.Q.B. 349.
(4) L.R. 1 Q.B. 620.
(5) 8 Q.B. 810.
(6) 10 Ex. 867.
(7) 4 U.C.C.P. 373.
(8) 9 U.C.C.P. 304.
(9) 13 O.R. 421.
(10) 8 Can. S.C.R. 313.
(11) 4 Man. L.R. 89.
(12) 8 Ont. App. R. 524.

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STRONG J.—I am of opinion that this appeal must be dismissed. The appellant seeks to recover as the assignee of one John F. Grant for work done in the building of a bridge under an alleged contract with the respondent. The work was performed under an agreement which was signed by Grant but which was not sealed with the corporate seal of the respondents, nor authorized by any by-law passed by the council of the municipality. Subsequently to the commencement of the work a resolution of the council authorising the payment of $200 to Grant on account of the contract was passed, but this was a mere resolution, not a by-law, and was not under the seal of the corporation. The Municipal Act of Manitoba, in force when the agreement mentioned was signed, was that of 1883. The act of 1883 was afterwards, and before the work was completed, superseded by the "Manitoba Municipal Act of 1884." By both these acts, however (the sections applicable being the 113th of the former and the 111th of the latter act), the power of a municipal council to enter into contracts and to expend money for the construction of bridges was, according to the view I take, restricted to cases in which a by-law authorising the contract and the expenditure under it should be passed. Section 111 of the act of 1884 is as follows:

> The council may pass by-laws for such municipality in relation to matters coming within the classes hereinafter enumerated, that is to say: (1) The raising of a municipal revenue. (2) The expenditure of the municipal revenue. (3) Roads and bridges and the construction and maintenance of roads and bridges wholly within the municipality.

Section 113 of the act of 1883 was, as I have said, in the same words. These are the only provisions in the acts to which the authority of a municipal council to contract for the construction of a bridge can be referred. The 180th sections of both

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the acts are identical and in the following words:

> Every by-law shall be under the seal of the corporation and shall be signed by the head of the corporation or by the person presiding at the meeting at which the by-law has been passed and countersigned by the clerk or acting clerk of the corporation.

Without statutory authority the municipality could not enter into a contract for building a bridge, and we are therefore bound to enquire whether the conditions upon which alone the power invoked could be exercised have been complied with. That the words "construction and maintenance of roads and bridges" embrace contracts for the performance of such works, and are not to be restricted to cases in which the municipality may take upon itself to perform the work by workmen hired from day to day, cannot admit of a doubt, for if it were otherwise there would be no power to enter into such a contract as the plaintiff insists upon in the present case, and having regard to what, from common experience, we know to be universal, such a power is always exercised by means of a contract. Then the provision of the statute is plain; it is an indispensable condition to the validity of such a contract that it should be authorised by a by-law which by-law, according to the 180th section, must be under the seal of the municipality. Then no such by-law was ever passed.

The consequence is, therefore, inevitable that the work in question was not performed under any contract binding upon the municipality. The contention that the work having been executed and accepted the case is taken out of the statute is, in the face of the recent decision of the House of Lords in *Young* v. *Leamington* (1), and that of the English Court of Appeal

(1) 8 App. Cas. 517.

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in *Hunt* v. *Wimbledon* (1), wholly untenable. These cases decide, absolutely and unequivocally, that where a statutory power is conferred upon a municipal corporation to make contracts in a particular form that form must be followed, and no dispensation with the requirements of the statute is admissible upon the ground of part performance, or because the corporation has taken the benefit of the contract; and this is so held apart altogether from the vexed question of the general liability of corporations upon contracts not under seal which have been executed by the other contracting party.

How then is it possible to come to any other conclusion than that which has been arrived at by the Court of Queen's Bench in Manitoba? Were we to hold otherwise we should be treating the enactment of the legislature as a dead letter, and upon the mere ground of hardship setting aside the statute.

But even if it were admissible to treat a contract to build a bridge as one which the municipal council had incidentally power to enter into, without regard to the preliminary requirements of a by-law as provided for by sections 111 and 113 of the respective statutes, I should feel great difficulty in coming to any other conclusion than that arrived at by the court below. It is true that the cases of *Young* v. *Leamington* (2) and *Hunt* v. *Wimbledon* (1) already referred to are decisions proceeding upon the terms of the act of parliament conferring the power, but still the judgments delivered in these cases in the Court of Appeal do contain *dicta* of very eminent judges adverse to the doctrine which the English Court of Queen's Bench, following Mr. Justice Wightman's decision in *Clarke* v. *Cuckfield Union* (3), acted upon in several cases, namely, that irrespective

(1) 4 C. P. D. 48. (2) 8 App. Cas. 517.
(3) 21 L. J. Q. B. 349.

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altogether of the exceptions dispensing with a seal to contracts of corporations, in the case of trading corporations and in matters of trivial importance and frequent recurrence, there was a third exception in all cases where the contract had been executed by the other contracting party and the execution had been accepted and the benefit of it taken by the corporation. The Ontario Courts of Common Pleas and Queen's Bench in the cases of *Pim* v. *Ontario* (1) and *Fetterly* v. *Russell and Cambridge* (2) did, it is true, adopt and act upon this principle, but it has been so strongly disapproved of in very late cases by the highest authority in England that I doubt much whether, if the matter were now *res integra*, the same result would be arrived at in the Ontario courts.

It is to be observed that the English Court of Exchequer always rejected the doctrine of *Clarke* v. *Cuckfield Union* (3) and acted upon the reverse principle.

Lord Justice Lindley, in his late work upon the Law of Joint Stock Companies (4) published in 1889, thus decisively treats the distinction in favour of executed contracts as exploded and states the law:

> Even a resolution of a body corporate is not equivalent to an instrument under its seal, and a corporation will not be compelled to execute a contract which it has been resolved shall be entered into by it. A distinction was at one time supposed to exist between executed and executory contracts; but except where the equitable doctrines of part performance are applicable a corporation is no more bound by a contract not under its seal, of which it has had the benefit, than it is by a similar contract which has not been acted upon by either party.

As regards part performance in equity that (as is the doctrine of part performance generally) is limited to such cases as courts of equity ordinarily exercise jurisdiction in, such as contracts for the sale of land and others in which courts of equity will grant specific

(1) 9 U. C. C. P. 304.
(2) 14 U. C. Q. B. 433.
(3) 21 L. J. Q. B. 349.
(4) P. 221.

performance. That the mere want of a seal in the case of a contract with a corporation not coming within the ordinary jurisdiction of the court affords no ground for equitable interference is a proposition most clearly and conclusively established by the cases of *Kirk* v. *Bromley Union* (1) and *Crampton* v. *Varna Railway Company* (2).

Upon the whole I see no reason to doubt that the law is now as stated in the very full and able judgment of Mr. Justice Killam, though I prefer to rest the decision of the present appeal on the ground first mentioned, namely, that the respondents, a statutory body, had no authority to enter into such a contract as that which the appellant asks us to enforce otherwise than in a particular form and under conditions, prescribed by the statute, which have not been complied with.

The appeal must be dismissed with costs.

FOURNIER J.—I am of opinion that the appeal should be allowed.

TASCHEREAU J.—I would allow this appeal. I concur in my brother Gwynne's judgment.

GWYNNE J.—In 1868 all the cases theretofore decided in the English courts relating to the rights of action arising upon parol contracts entered into with corporations aggregate were brought under review in *South of Ireland Colliery Company* v. *Waddle* (3), where Bovill C.J. says :

> The contract declared on is admitted to have been made by the directors with the defendant. The objection is that it is not under the corporate seal of the company, and it is contended on the defendant's behalf that by reason of the absence of a seal there is no mutuality; that the plaintiffs are not bound by it, and therefore are not entitled

(1) 2 Ph. 640. (2) 7 Ch. App. 562.
(3) L. R. 3 C. P. 463.

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to sue upon the contract. It appears further that the contract had been partly performed, and that the company were ready and willing to perform the rest. It had in fact been adopted and acted upon by both parties. The objection is a technical one, but though technical if it be in accordance with law the court is bound to give effect to it. Originally all contracts by corporations were required to be under seal. From time to time certain exceptions were introduced, but these for a long time had reference only to matters of trifling importance and frequent occurrence, such as the hiring of servants and the like. But in progress of time, as new descriptions of corporations came into existence, the courts came to consider whether these exceptions ought not to be extended in the case of corporations created for trading and other purposes. At first there was considerable conflict, and it is impossible to reconcile all the decisions on the subject. But it seems to me that the exceptions created by the recent cases are now too firmly established to be questioned by the earlier decisions which if inconsistent with them must, I think, be held not to be law. These exceptions apply to all contracts by trading corporations entered into for the purposes for which they were incorporated. A company can only carry on business by agents, managers and others, and if the contracts made by these persons are contracts which relate to objects and purposes of the company and are not inconsistent with the rules and regulations which govern their acts they are valid and binding on the company though not under seal. It has been urged that the exceptions to the general rule are still limited to matters of frequent occurrence and small importance. The authorities, however, do not sustain that argument. It can never be that one rule is to obtain in the case of a contract for £50 or £100, and another in the case of a contract for £50,000 or £100,000.

He then proceeded to show that there was no special provision either in the act of parliament under which the company became incorporated or in the articles of association which required the contract sued upon to be under seal, and the court, therefore, held that the contract was valid without a seal notwithstanding the rule of the common law, and Montague Smith J. winds up his judgment by saying that the result is that *East London Waterworks Co.* v. *Bailey*(1) can no longer be considered to be law. Upon appeal to the Exchequer Chamber that court (2), consisting of three judges of the Court

(1) 4 Bing 283. (2) L. R. 4 C. P. 617.

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of Queen's Bench and three of the Court of Exchequer, unanimously affirmed the judgment of the Court of Common Pleas. Cockburn C.J. delivering the judgment of the court there says:

> We are all of opinion that the judgment of the Court of Common Pleas ought to be affirmed. It is unnecessary to say more than that we entirely concur in the reasoning and authority of the cases referred to in the judgment of Bovill C.J. which seems to us to exhaust the subject. In early times, no doubt, corporations could only, subject to the well known exceptions, bind themselves by contracts under seal, and for some time that rule was applied to corporations which were formed for the purpose of carrying on trade. But the contrary has since been laid down by a long series of cases and may now be considered settled law. The machinery contracted for in this case was clearly necessary for the purpose for which the company was formed, namely, the working of coal mines.

Now that was the case of an executory contract. It is only necessary now to consider whether the principles established by the cases decided prior to the *South of Ireland Colliery Co* v. *Waddle*, (1) and upon which that case proceeded, are limited in their application to trading corporations only, or whether they are not equally applicable in the case of a municipal corporation, such as the defendants in the present case are, who have received the benefit of a work executed for them upon a parol contract made with them in relation to a matter within the purposes for which the corporation was created, which work the governing body of the corporation has accepted as completed under the contract, and has paid part of the price agreed upon. In the *Mayor of Stafford* v. *Till* (2) it was held by the Court of Common Pleas in 1827 that a corporation aggregate might sue in assumpsit for use and occupation where the tenant held premises under a parol contract with the corporation. The principle upon which that case proceeded was that the tenant being in occupation of the land the contract between him and the corpora-

(1) L. R. 3 C. P. 463. (2) 4 Bing. 75.

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tion must be considered as executed, and that the contract having been executed the defendant was in justice bound to pay for his occupation, so that a promise to pay might be implied although in the case of an executory contact it might be otherwise. In the *East London Waterworks Co.* v. *Bailey* (1) the same court in the same year in the case of an executory contract held that although an act of parliament authorized the directors of the plaintiff company to make contracts, agreements and bargains with the workmen, agents, undertakers and other persons engaged in the undertaking, the company could not sue upon a parol contract with the defendants for the supply of pipes at certain stated periods for a breach of such contract, In *The Mayor of Ludlow* v. *Charlton* (2) to an action for rent payable under a demise by deed executed under the corporate seal of the plaintiffs the defendant pleaded a set-off, whereby he claimed to be allowed a sum of money alleged and proved to have been expended by him under a parol contract contained in a resolution passed at a corporate meeting and entered in the books of the corporation. The Court of Exchequer in that case held that notwithstanding the defendant had executed the work he could not set-off the amount so expended, the contract not having been under the corporate seal. It cannot be denied that the Court of Exchequer in that case, which was decided in 1840, were of opinion that the exceptions of the general common law rule that corporations can contract only under their common seal are to be limited to cases of urgent necessity, where, in fact, to hold the common law rule applicable would occasion very great inconvenience or tend to defeat the object for which the corporation was created. The court, however, in delivering judgment (3) say:

(1) 4 Bing. 283.

(2) 6 M. & W. 815.

(3) P. 823.

The seal is required as authenticating the concurrence of the whole body corporate.

That is the principle upon which the common law rule is founded. They go on, however, to say, and to lay down principles which might reasonably be construed as affording good foundation for future exceptions, as follows :

If the legislature in erecting a body corporate invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then undoubtedly the adding a seal would be matter purely of form and not of substance. Every one becoming a member of such a corporation knows that he is liable to be bound in his corporate character by such an act, and persons dealing with the corporation know that by such an act the body will be bound. But in other cases the seal is the only authentic evidence of what the corporation has done or agreed to do. The resolution of a meeting, however numerously attended, is after all not the act of the whole body. Every member knows he is bound by what is done under the corporate seal and by nothing else.

It is necessary, therefore, in every case to refer to the particular act or acts of parliament creating a corporation for the purpose of determining whether any express *or implied* authority is given to any particular person or persons, or part of the corporate body, to bind the whole body, for if there be, then upon a reasonable construction of the above language of the Court of Exchequer the reason assigned for the necessity of affixing the corporate seal to any contract would seem to cease to exist. Now, by the acts incorporating municipal institutions throughout the Dominion of Canada, the inhabitants of every municipality, be it a city, town, village, county or township, are the body corporate. Convenience and necessity require that the powers vested in the corporate body should be, and accordingly all such powers are by express enactment required to be, exercised by a deliberative, legislative governing body called a municipal council, consisting of members of the corporate body elected for that pur-

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pose by the inhabitants of the municipality. All of the proceedings, resolutions and minutes of these deliberative, legislative, governing bodies in respect of every matter coming under their consideration are recorded in a book required to be kept for that purpose by their clerk, so that, in the above language of the Court of Exchequer, every inhabitant of the municipality, or member of the corporate body, knows that he is liable to be bound in his corporate character by the resolutions and acts of the council or governing body. It may well, I think, be doubted whether any officers of such municipal corporations could bind the corporate body by setting the corporate seal to any contract not authorised by the council by resolution or otherwise. It is difficult, therefore, as it seems to me, to understand why in the case of those municipal institutions the affixing a seal to a contract with the corporate body should be deemed of such vital importance if, before the seal can be effectually set, there must be a precedent resolution of the council authorising the contract. It may more correctly be said that these municipal corporations speak and act by and through the acts and resolutions of their deliberative councils or governing bodies than by and through a seal, the affixing of which in such cases, as is admitted by the Court of Exchequer in *The Mayor of Ludlow* v. *Charlton* (1), would be a "matter purely of form."

In *Arnold* v. *The Mayor of Poole* (2) it was held by the Court of Common Pleas, in 1842, that a corporation could not appoint an attorney except under the corporate seal.

In *The Fishmongers Co.* v. *Robertson* (3) the contract sued upon was not one coming within any of the established exceptions to the general rule that con-

(1) 6 M. & W. 815.
(2) 4 M. & G. 861.
(3) 5 M. & G. 131.

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tracts of corporations must be by deed. The subject-matter of the contract had no relation to any of the purposes for which the company were incorporated. It was a contract whereby the Fishmongers Company of London agreed with the defendants to withdraw their opposition to a bill introduced into parliament by the defendants whereby they sought to be invested with power to drain certain marsh lands in Ireland contiguous to which the Fishmongers Company owned land which they feared might be injuriously affected by the powers sought by the defendants; and the plaintiffs, alleging that they had performed all the stipulations and conditions agreed to be performed by them, averred in their declaration divers breaches by the defendants of the stipulations agreed to be performed by them, and it was held by the Court of Common Pleas in 1843, upon the objection that the contract was not executed under the seal of the plaintiffs, and was therefore invalid, that the contract having been executed by the plaintiffs and the defendants having thereby received the benefit of it they could not *upon any principle of reason or justice* be permitted to raise the objection. In that case the corporation, it is true, were the plaintiffs, but the same principle of reason and justice seems to me to apply to prevent a corporation, which has received the full benefit of a parol contract executed in every particular as agreed upon with the managing body, from resisting payment of the price agreed upon by contending that the contract had not been executed under their seal. Such a defence would be equally fraudulent and unjust whether urged by an individual in an action at the suit of the corporation who had executed the parol contract, or in an action by an individual who had executed it on his part against the corporation who had accepted and enjoyed the full benefit of it. In the *Fishmonger Co.*

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v. *Robertson*, (1) a case before Sir J. Leach, V.C, in 1823, was cited, *Marshall* v. *Corporation of Queensborough* (2), wherein the Vice Chancellor said:

> If a regular corporate resolution passed for granting an interest in a part of the corporate property, and upon the faith of that resolution expenditure was incurred, he was inclined to think that both principle and authority would be found for compelling the corporation to make a legal grant in pursuance of that resolution.

And in *The London and Birmingham Railway Company* v. *Winter* (3), in 1840 an objection to a bill by an incorporated railway company for specific performance of a parol contract entered into by their agent that it did not appear that the agent was authorised under the corporate seal, and therefore that there was no mutuality, was overruled, the Lord Chancellor Cottenham holding that as the company had, before the bill was filed, not only acted on the contract by entering into possession of the land, but actually made a railroad over it, if it had been necessary for the defendants to have filed a bill for specific performance against the company he had no doubt they would be compelled specifically to perform the contract.

In *Paine* v. *The Strand Union* (4) it was held by the Court of Queen's Bench in Hilary term, 1846, that the guardians of a poor law union could not bind themselves by an order not under seal for making a survey and map of the ratable property in a parish forming part of the union; and the reason of that judgment was that the making of the plan so ordered was not in any way incident to the purposes for which the corporation was created. Lord Denman C.J. delivering the judgment of the court, says:

> The plan was wanted in order to enable a fair and correct estimate to be made of the net value of the hereditaments rated in that parish;

(1) 5 M. & G. 131.
(2) 1 Sim. & Stu. 520.
(3) Cr. & Ph. 57.
(4) 8 Q.B. 326.

the other parishes in the union had nothing to do with it, nor were in any way benefited by it, so that the making the plan cannot have been in any way incident to the purposes for which the defendants were incorporated, which purposes related to the whole union, the defendants having no power to act as a corporation in matters confined to any particular parish.

And in the following term the same court in *Sanders* v. *The Guardians of St. Neot's Union* (1) held that where work had been done for the corporation under a verbal order, which work had been accepted and adopted by them, the corporation could not in an action to recover the price object that the order was not given under seal. Lord Denman C.J. delivering judgment there, saying :

> We think that they (the corporation) could not be permitted to take the objection, inasmuch as the work in question after it was done and completed was adopted by them for purposes connected with the corporation.

The court, it is submitted, based their judgment in that case upon a sound and rational principle, equally applicable to the case of every corporation and not limited to trading corporations only, namely, that where work has been executed for a corporation under a parol contract, which work was within the purposes for which the corporation was created, and it has been accepted and adopted and enjoyed by the corporation after its completion, it would in such case be fraudulent for the corporation, while enjoying the benefit of the work, to refuse to pay for it upon the ground that the contract in virtue of which it had been executed was invalid for want of the corporate seal, and that reason and justice required that they should not be permitted to commit such a fraud ; that they cannot be permitted, in fact, to appeal to the rule of common law so as to enable them to commit a manifest fraud. In *Lamprell* v. *Billericay Union* (2), in 1849, it must be

(1) 8 Q. B. 810.

(2) 3 Ex. 283.

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admitted that the Court of Exchequer, professing to act upon the authority of their own decision in *The Mayor of Ludlow* v. *Charlton* (1), held that a person who had performed work for a corporation under the directions of the architect of the corporation could not recover against the corporation upon a *quantum meruit* for the work done, although it had been accepted by the architect as completed in accordance with his directions and the corporation enjoyed the benefit of the completed work. In that case the Court of Exchequer assumed the decisions of the Court of Queen's Bench in *Arnold* v. *The Mayor of Poole* (2) and *Paine v. The Strand Union* (3) to be in affirmance of the judgment of the Exchequer in *The Mayor of Ludlow* v. *Charlton* (1), an assumption which does not appear at all warranted by the reports of those cases or by the expressions of judges of the Queen's Bench in subsequent cases.

In *The Copper Miners Co.* v. *Fox* (4) A.D. 1850, the action was upon a parol contract with the defendant, who undertook to supply the company with iron rails averring mutual promises and breach by the defendant. The court held that the action would not lie the contract not being under seal, the plaintiffs' charter of incorporation having only authorized them to deal in copper as copper miners. Lord Campbell C.J. delivering judgment, says :

> Had the subject of this contract been copper, or if it had been shown in any way to be incidental or ancillary to carrying on the business of copper miners, the contract would have been binding though not under seal.

This language of the court, applied as it was to an executory contract, is in direct conflict with the judgment of the Exchequer in the *The East London Waterworks Co.* v. *Bailey* (5). In *Diggle* v. *The London and*

(1) 6 M. & W. 815.
(2) 4 M. & G. 861.
(3) 8 Q. B. 326.
(4) 16 Q. B. 230.
(5) 4 Bing. 283.

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Blackwall Railway Company (1) where a railway company entered into an agreement not under seal with a contractor that he should execute certain works upon their railway for the purpose of changing the system of locomotion which they then employed, the rope and stationary engine system, to the ordinary locomotive principle, and the contractor had entered upon the work and performed a portion but was dismissed by the company before the works were completed, the Court of Exchequer decided that he could not recover upon a *quantum meruit* for the work done. Pollock C.B. there says :

> The evidence shows that the parties never intended to deal as on an implied contract, such as a corporation may, under certain circumstances, enter into without their seal. They intended to contract by writing and to enter into a solemn and express contract ; and the offer of the plaintiff to do the work was accepted on the faith that there would be such a contract. It is, however, suggested that under the act incorporating the company the defendants were competent to contract by their directors without writing, merely by a resolution communicated to the plaintiff authorizing him to set about the work, and I am not quite prepared to say that might not be the case ; for there is a material distinction between the clauses of this statute and those in *Cope* v. *The Thames Haven Dock Company* (2) cited for the defendants ; but assuming that the directors here could so contract by resolution communicated to the plaintiff without writing (about which, being a matter of some doubt, I am not prepared to give an opinion) ; assuming also, as to which there can be no doubt, that they could contract by writing under the hands of three of them ; assuming also that they could contract under the seal of the company ; the foundation of my judgment is that there is no contract under seal, none signed by three directors, and none entered into under such resolution of the directors.

This case was not the case of a work which had been completely executed under a parol contract which work the corporation for whom it had been so executed had accepted as completed in accordance with the terms of the parol contract, and enjoyed the

(1) 5 Ex. 442. (2) 3 Ex. 841.

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benefit thereof; to such a case, *Diggle* v. *The London and Blackwall Railway Company* (1) cannot apply; much less can it apply to a case in which, during the progress of the work which was within the express purposes for which the corporation was created, the contract was recognized, adopted and acted upon as valid by resolutions of the governing body of the corporation, and by like resolutions was partly paid for and finally accepted as completed. The case of *Cope* v. *The Thames Haven Dock Co.* (2) referred to by the Chief Baron in *Diggle* v. *The London and Blackwall Railway Co.* (1), was a decision merely to the effect that where a section of the act incorporating the company had prescribed certain forms to be observed by directors of the company in all contracts entered into by them to be binding on the company, a person purported to have been appointed an agent of the company to enter into certain negotiations with another company by the directors, but not in the manner prescribed in the act of incorporation, could not sue the company under such contract for the services rendered by him in executing the agency so purported to have been conferred upon him. In *Finlay* v. *The Bristol and Exeter Railway Company* (3) where the defendants had occupied certain premises of the plaintiff for two years at a fixed rent under a parol demise, and at the expiration of the two years continued in occupation without any new agreement for three months when they left the premises, paying, however, for the three months at the rate they had previously paid, it was held by the Court of Exchequer in 1852, in an action against the company for the rent for the nine months of the year after the company had ceased to occupy the premises, that the landlord could not recover on a count for use and occupation for they

(1) 5 Ex. 442.

(2) 3 Ex. 841.

(3) 7 Ex. 409.

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did not occupy; and that no contract to occupy the premises for another year could be implied from the continuance of the company in occupation for the three months subsequent to the expiration of the two years; that as against a corporation no contract could be implied from conduct; and so that under the circumstances, there having been no contract under seal, the plaintiff had no action against the company. This decision appears to have no application upon the question of the liability of a corporation to pay for work executed for them under a parol contract in respect of a matter within the purposes for which the corporation was created, and which work the corporation have accepted as completed within the terms of the contract, and continue to enjoy the full benefit thereof. In *Clarke* v. *The Cuckfield Union* (1) it was held in 1852 that the guardians of a poor law union, who at a board properly constituted and authorized to enter into contracts give orders to a tradesman to supply and put up water closets in the Union workhouse and he puts them up and the guardians approve and accept them, they cannot afterwards in an action against them as a corporation for the price defend themselves by showing that there was no contract under seal, for that the purposes for which the guardians were made a corporation require that they should provide such articles. Wightman J. after reviewing all the cases, says:

> The question is whether the demand in question comes within any of the recognized exceptions to the general rule. I am disposed to think it does, and that wherever the purposes for which a corporation is created render it necessary that work should be done or goods supplied to carry such purposes into effect * * * and orders are given at a board regularly constituted, and having general authority to make contracts for work or goods necessary for the purposes for which the corporation was created, and the work is done or goods supplied and accepted by the corporation, and the whole consideration for payment

(1) 21 L. J. Q. B. 349.

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executed, the corporation cannot keep the goods or the benefit and refuse to pay on the ground that though the members of the corporation who ordered the goods or work were competent to make a contract and bind the rest, the formality of a deed or of affixing the seal was wanting and then say—no action lies, we are not competent to make a parol contract, and we avail ourselves of our own disability.

The principle thus enunciated is applicable to every corporation; it is not limited in its application to trading corporations only; exceptions to the common law rule as recognized in the case of trading corporations rest upon principles equally applicable to every corporation aggregate. The judgment of Wightman J. in *Clarke* v. *Cuckfield Union* (1) recommends itself to my mind as founded upon the plainest principle of justice; it is based upon precisely the same principles as that upon which the Court of Queen's Bench held in *Paine* v. *The Strand Union*, (2) that under the circumstances of that case the action did not lie, and in *Sanders* v. *St. Neot's Union* (3), that under the circumstances of that case the action well lay, which principle may be thus enunciated, namely, that a corporation which has received the full benefit of a parol contract made with it for the execution for it of work within the purposes for which the corporation was created, and has accepted the work so contracted for as completely executed within the terms of the parol contract, cannot be permitted to set up to an action for the price the fraudulent defence that although the corporation has received the full benefit of the contract they can claim exemption from payment of the price upon the ground that the contract under which they procured the work to be executed for them was not under the corporate seal. *Smart* v. *West Ham Union* (4) decided in 1885 has not much bearing upon the point under consideration. The deci-

(1) 21 L. J. Q. B. 349.
(2) 8 Q. B. 326.
(3) 8 Q. B. 810.
(4) 10 Ex. 867.

sion of the Court of Exchequer in that case was, that assuming the appointment of a collector of rates by the guardians of a union to be valid although not under the corporate seal, a point which was not decided, still the act of parliament 4 & 5 Will. 4, ch. 76, which authorized the guardians to make the appointment, did not make them liable for payment of the collector's salary.

In *The Australian Steam Navigation Co.* v. *Marzetti* decided by the Court of Exchequer in 1855 (1) the case was that the company had by parol contract bought from the defendant large quantities of ale for the use of steamships which their act of incorporation authorized them to employ for the carrying of the mails and passengers and cargo. The ale for which they had paid proved to be unsound, unwholesome and unfit for use, and thereupon the company sued the defendant in assumpsit for not furnishing ale of the quality contracted for and for furnishing ale unfit for use. To an objection that the contract under which the ale had been supplied was not under the corporate seal it was held that such objection could not be entertained, Pollock C.B. there saying:

> It is now perfectly established by a series of authorities that a corporation may, with respect to those matters for which they are expressly created, deal without seal. This principle is founded on justice and public convenience and is in accordance with common sense.

This language of the Chief Baron seems to me, I confess, to be in affirmance of the principle as laid down by the Queen's Bench in *Paine* v. *The Strand Union* (2); *Sander* v. *St. Neots Union* (3), and *Clarke* v. *The Cuckfield Union* (4). In *Henderson* v. *The Australian Steam Navigation Co.* decided in 1855 (5) it was held by the Court of Queen's Bench that the corporation were liable under

(1) 11 Ex. 228.
(2) 8 Q. B. 326.
(3) 8 Q. B. 810.
(4) 21 L. J. Q. B. 349.
(5) 5 E. & B. 409.

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a contract made by their directors, not under the corporate seal, to pay remuneration for services rendered in bringing home a disabled vessel. Wightman J. there in plain terms reaffirms the principle upon which he proceeded in *Clarke* v. *The Cuckfield Union* (1), namely :

> That the general rule that a corporation cannot contract except by deed admits of an exception in cases where the making of a certain description of contracts is necessary and incidental to the purposes for which the corporation was created.

And Erle J. says :

> I am also of opinion that there should be judgment for the plaintiff on the ground that the contract was made for a purpose directly connected with the object of the incorporation, as it was a contract to bring home one of their ships the company being incorporated to trade with ships.

He then proceeds to show that this principle is recognized in *Beverley* v. *Lincoln Gas Co.* (2) ; in *Sanders* v. *St. Neot's Union* (3) ; in *Clarke* v. *Cuckfield Union* (1) ; and in *Copper Mining Co.* v. *Fox* (4) ; and he might have added *Paine* v. *The Strand Union* (5) ; and also by Pollock C.B. in *Australian Steam Navigation Co.* v. *Marzetti* (6), only that this case was not decided in the Exchequer Court until two days after the delivery of judgment in *Henderson* v. *The Australian Steam Navigation Company* (7). The learned judge then proceeded to show that, in his opinion, the principle upon which the court was proceeding did not come in question in *The Mayor of Ludlow* v. *Charlton* (8), or in *Arnold* v. *The Mayor of Poole* (9), for as to these cases he says :

> It is quite clear that the mayor, aldermen and burgesses of the borough of Ludlow were not incorporated for the purpose of altering stables

(1) 21 L. J. Q. B. 349.
(2) 6 A. & E. 829.
(3) 8 Q. B. 810.
(4) 16 Q. B. 230.
(5) 8 Q. B. 326.
(6) 11 Ex. 228.
(7) 5 E. & B. 409.
(8) 6 M. & W. 815.
(9) 4 M. & G. 861.

(which was the work for executing which the contract, sought to be enforced in that case, was entered into). nor the mayor, aldermen and burgesses of the borough of Poole for the purpose of litigation. There is more difficulty, he proceeds to say, in reconciling some of the other decisions of the Court of Exchequer with this principle, and *Diggle* v. *The Blackwall Ry. Co.* (1) may, perhaps, be in direct conflict with it. Perhaps it may be distinguished on the ground that the contract there was for the purpose of changing the railway from a line worked by stationary engines to a line for locomotives, and therefore in its nature unique and such as could occur only once in the life time of the corporation. Unless it can be distinguished on that ground the case is in conflict with the other authorities. I do not pretend to overrule the decision of a court of co-ordinate jurisdiction, but if *Diggle* v. *The London and Blackwall Ry. Co.* (1) is in conflict with the authorities laying down this principle I adhere to them and not to it.

I have already endeavoured to point out that it may, perhaps, be distinguished upon another ground, namely, that the moneys sought to be recovered there were not for a completed work which the company had accepted as completed and enjoyed the full benefit of, and the court held that for so much of the work that had been done when the company prevented the plaintiff from proceeding further he could not recover as upon an implied assumpsit, the evidence having shown that the parties never contemplated dealing as on an implied contract. This case appears to me to have little bearing upon a case where the whole work contracted for by parol has been completed and has been received by the company as completed and enjoyed by them and they seek to avail themselves of the defence that the contract was not under their corporate seal, and that, therefore, they are under no obligation to pay for the work of which they enjoy the benefit.

In *Reuter v. The Electric Telegraph Company* (2), decided in 1856, it appeared that by the deed of settlement of the company the directors were to manage

(1) 5 Ex. 442.

(2) 6 E. & B. 341.

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the company's business, but there was a special provision in the deed that all contracts above a certain value should be signed by at least three directors or sealed with the seal of the company under the authority of a special meeting. The plaintiff sued the company on an agreement involving a sum above the prescribed value. The matter of the contract was within the scope of the company's business but it was not signed by three directors nor under the seal of the company; it was made by parol with the chairman who had entered a memorandum of it in the minute book of the company. It was recognized in correspondence with the secretary, and the plaintiff did the work and received payments on account of it by cheques, which payments passed into the accounts of the company. On a case stating these facts, with power to draw inferences of fact, it was held that the contract, although not signed as required by the deed of settlement by three directors, nor under the company's seal, was ratified by the company by the conduct above and being so ratified was binding. In *London Dock Company* v. *Sinnott* (1), A.D. 1857, the action was upon an executory, not upon an executed, parol contract. The defendant had tendered for a contract with the plaintiffs for scavenging the London docks for a year, but when a contract for the performance of the work in accordance with the conditions contained in his tender was presented to him he refused to sign it, and it was held that no action would lie against him for such refusal for that no power to enter into such a contract by parol is conferred upon the corporation of the London docks, and that the plaintiffs did not bring themselves within any of the exceptions to the general rule that a corporation aggregate can only be bound by contracts under the seal of the corporation.

(1) 8 E. & B. 347.

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The case simply decides that a parol contract with a corporation aggregate to enter into and sign a contract binding in law with them is not recognized to be an exception to the general rule that corporations aggregate can contract only under their corporate seal.

In *Haigh* v. *North Bierley Union* (1) it was held by the Queen's Bench, in 1858, that where a plaintiff had been employed under resolutions of the board of guardians to do certain work for them, but no contract was made under the seal of the board, the plaintiff was entitled to recover in assumpsit for the work and labour performed by him. Erle J. there in very clear language affirms *Sanders* v. *St. Neot's Union* (2) and *Clarke* v. *The Cuckfield Union* (3) as laying down the principle that an action lies against the guardians of a union to recover money for work and labour though performed under a contract not under seal. And he says that the question, therefore, before the court was one rather of fact than of law, namely, whether the work performed by the plaintiff was incidental to the purposes for which the guardians were incorporated, and he was of opinion that it was. Compton J. concurred, but felt, as he said, a difficulty in distinguishing the case from *The London Dock Company* v. *Sinnott* (4). But with great deference the distinction is to my mind very apparent, that being an action at suit of the corporation for breach of a parol contract to enter into a binding contract, which action could not be maintained as the corporation were under no obligation to enter into a contract under seal with the defendant if he had called upon them to so do and they had refused. But *Haigh* v. *North Bierley Union* (1) was an action against the corporation to recover the price or value of work completely executed for them under a

(1) E. B. & E. 873.
(2) 8 Q. B. 810.
(3) 21 L. J. Q. B. 349.
(4) 8 E. & B. 347.

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parol contract but in relation to matters within the purposes of which the corporation was created, and of which they had received and enjoyed the benefit.

In *Laird* v. *The Birkenhead Railway Co.*(1) the plaintiff, having under the terms of a parol agreement with the railway company constructed a tunnel under land lying between a coal yard of the plaintiff and a station on the railway of the defendants for the use of the plaintiff by way of communication between his coal yard and the defendants' station, filed his bill to enforce specific performance by the railway company of the parol contract on their part, to which bill the company set up the defence that the contract was not under their seal and so was not binding upon them. This defence was overruled by Sir W. Page Wood V.C., in 1859, who in the course of his judgment made use of the following language :

> I must say that when works of this kind are commenced in this way and carried on continually in the presence of the company's servants, for all the purposes of knowledge and acquiescence the company are bound, so far as the agency of the servants goes, just as much as individuals would be. The consequence of what took place was that with the full knowledge therefore of the company, under the eyes of their servants, the plaintiff proceeded to lay out £1,200 and the tunnel was completed.

And again he says :

> I very much doubt, looking at the authorities, whether having allowed the plaintiff to lay out his money which could only be for a particular purpose they can now break up the whole matter and say, you have been very foolish ; and he overruled the objection.

In *Wilson* v *West Hartlepool Ry. Co.* (2) where the plaintiff filed his bill against the company for specific performance of an agreement for the purchase of a piece of land entered into with the plaintiff by the defendants through the medium of an agent, who, however, had not been appointed under the corporate

(1) 6 Jur. N. S. 140. (2) 10 Jur. N. S. 1064.

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seal, Sir John Romilly M. R. upon the authority of *The London and Birmingham Ry. Co.* v. *Winter* (1) held that the directors of the company having held out to the world a person as their agent for a particular purpose could not afterwards dispute the acts done by such person within the scope of the agency, which he held the contract sued upon to be, upon the ground that the agent had not been appointed under their corporate seal; and upon the ground of the contract being within the scope of the agency, as he conceived it to be, as well as upon the ground of acts done in accordance with the contracts by the servants and officers of the company which were referable to the contract and to nothing else, he decreed a specific performance of the contract. Upon appeal to the Court of Appeal in chancery (2) Lord Justice Turner, so far as the case rested upon any direct authority having been given by the directors to the person who entered into the contract to enter into it, was in favour of the defendants.

But then it was said (he proceeds) on the part of the plaintiff that the directors ratified the contract, and I think they must be held to have done so. Upon this contract being entered into the machinery belonging to the plaintiff which had been deposited on some lands on the west of the railway, which the plaintiff alleges he had previously bought from the company, was brought over to the land in question and there deposited. Other machinery belonging to the plaintiff which had been landed at the company's harbour was also brought by the company's waggons to and deposited on this land; the plaintiff was let into possession of the land; the land was measured by an officer of the company; the company laid down lines of rails for the purpose of communication between this land and their main line of railway, and they made borings in the land. These acts were in conformity with the contract and they amount, I think, to representation by the defendants to the plaintiff that the contract was a subsisting and valid contract.

And so he held the acts to be a ratification of the

(1) Cr. & Ph. 57. (2) 11 Jur. N. S. 124.

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contract and in part performance of it. He then proceeds to state the principles upon which the court proceeds in such a case, namely, that it would be a fraud to permit the defendants to defeat the contract. He says:

> The court proceeds in such cases on the ground of fraud, and I cannot hold that acts which, if done by an individual, would amount to fraud ought not to be so considered if done by a company. * * * * * There is authority for saying that in the eye of this court it is a fraud to set up the absence of agreement when possession has been given upon the faith of it.

He then deals with a question which was raised by the defendants whether the contract ought to be held binding on the company, having regard to the statutory provisions affecting the company, and upon this point he says:

> It is not disputed that the directors had power on behalf of the company to sell the land in question, and having that power it must, as it seems to me, have been competent for them to ratify a contract made by the manager of the company for the sale of it. They in fact ratified this contract.

Then holding that apart from the enactment of any statutory provisions to the contrary the court could not refuse specific performance of the contract, he entered upon the enquiry whether certain statutory provisions relied upon in argument had made any alteration, and he held that they had not, saying:

> These provisions are contained in 8 & 9 Vic. ch. 16 sec. 97. The legislature has in this section pointed out modes in which the powers of directors to contract may lawfully be exercised, and has enacted that all contracts made according to these provisions shall be binding and effectual; but it has not said that contracts made in other modes shall not be binding and effectual where there is power so to make them, and certainly it has not said that any equity which may have existed in the court before these provisions were introduced shall no longer exist. The act, it is to be observed, is in the affirmative, and affirmative acts are not generally to be construed so as to take away pre-existing rights or remedies. Had this been intended I cannot but think that it would have been expressed.

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He was of opinion, therefore, that the decree of the Master of the Rolls was right. Lord Justice Knight-Bruce, while not dissenting from any of the principles laid down by Lord Justice Turner, was of opinion that a decree for specific performance should not have been made for the reason solely that he thought there were some provisions in the contract which could not be enforced.

In *Nicholson* v. *The Bradfield Union* (1) to an action for the price of coal sold and delivered to the defendants in 1866, under a parol contract, the corporation set up by way of defence that the contract was invalid not being under the corporate seal. The court overruled the objection and rendered judgment for the plaintiff upon the authority of *Clarke* v. *The Cuckfield Union* (2), Blackburn J. who delivered the judgment of the court, saying:

> It is not necessary to express any opinion as to what might have been the case if the plaintiff had been suing in this court for a refusal to accept the coals, or any other breach of the contract whilst still executory, or how far the principle of the *London Dock Company* v. *Sinnott* (3) would then have applied to such a contract. The goods in the present case have actually been supplied to, and accepted by, the corporation. They were such as must necessarily be from time to time supplied for the very purposes for which the body was incorporated, and they were supplied under a contract, in fact, made by the managing body of the corporation. If the defendants had been an unincorporated body nothing would have remained but the duty to pay for them. We think that the body corporate cannot under such circumstances escape from fulfilling that duty merely because the contract was not under seal. The case of *Clarke* v. *The Cuckfield Union* (2) is in its facts undistinguishable from the present case.

Upon a careful consideration of these cases, and of the manner in which the governing principle is discussed and applied in them, it is obvious, I think, that the principle which is to govern is equally applicable to

(1) L. R. 1 Q. B. 620. (2) 21 L. J. Q. B. 349.
(3) 8 E. & B. 347.

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all corporations aggregate, whether they be or be not trading corporations; and it cannot, I think, admit of a doubt that the great weight of authority deducible from those cases is that the principle upon which *Paine* v. *The Strand Union* (1) proceeded, which was the same as that upon which *Sanders* v. *St. Neot's Union* (2) proceeded, and upon which also was based the judgment in *Clarke* v. *The Cuckfield Union* (3), and which was expressly affirmed and acted upon in *Henderson* v. *The Australian Steam Navigation Company* (4), and several others of the above cases, is the true principle; and that *The Mayor of Ludlow* v. *Charlton* (5), unless it is, for some such reason as that suggested by Erle J. in *Henderson* v. *The Australian Steam Navigation Company* (4), or that hereinbefore suggested by me, or for some other reason, distinguishable from, and in so far as it is at variance with, *Clarke* v. *The Cuckfield Union* (3), and the other cases which proceeded upon the principle of that case, is not law. All of the above cases came under review in the *South of Ireland Colliery Company* v. *Waddle* (6), and the judgment in that case and the principles therein laid down, as well those applicable to executory parol contracts with corporations, as those applicable to such contracts as have been completely executed, approved as they have been in such emphatic language by the judgment of the Exchequer Chamber, must be taken to be now established law unless and until a court of higher authority shall decide otherwise, an event which I venture to think will never take place and which, in my opinion, cannot take place without doing violence to every principle of justice, public convenience and sound sense. As regards executed parol contracts, with which alone we

(1) 8 Q. B. 326.
(2) 8 Q. B. 810.
(3) 21 L. J. Q. B. 349.
(4) 5 E. & B. 409.
(5) 6 M. & W. 815.
(6) L. R. 3 C. P. 463.

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are concerned in the present case, the judgment of the Exchequer Chamber in *South of Ireland Colliery Company* v. *Waddle* (1) has established that exceptions to the common law rule are no longer limited to matters of frequent occurrence and small importance; that it is a matter of indifference whether the amount involved in the contract be £50 or £50,000; that in the language of the Chief Baron Pollock in *Australian Steam Navigation Company* v. *Marzetti* (2), it is now formally established that with respect to all matters within the purposes for which the corporation was created it may deal without seal; and that where the managing body of a corporation aggregate contracts by parol for the execution of any work in respect of a matter within the purposes for which the corporation was created, and the work has been executed in accordance with the contract and accepted as complete, it would be a fraud in the corporation to refuse to pay for the work so executed the stipulated price, or in the absence of a stipulated price the value thereof, and so to repudiate the contract upon the ground that it was not executed under the corporate seal; and therefore, upon every principle of justice, public convenience and sound sense, they cannot in the absence of a special statutory enactment affecting the particular case be permitted to urge such a defence to an action instituted to recover from them the price or value of the work. We have applied this principle in this court in two cases, viz.: in *The London Life Assurance Company* v. *Wright* (3) and *The Canada Central Railway Company* v. *Murray* (4) In *Crampton* v. *Varna Railway Company* (5) it was held by Lord Chancellor Hatherly that the person who

(1) L. R. 3 C. P. 463.
(2) 11 Ex. 228.
(3) 5 Can. S. C. R. 466.
(4) 8 Can. S. C. R. 313.
(5) 7 Ch. App. 562.

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had executed certain work for the company under a parol contract entered into with him could have no relief against the company in a court of equity, because the claim was for a mere money demand over which courts of equity in England never assumed jurisdiction. It was further held, that in the particular case the contract was wholly invalid as not executed under the corporate seal, an objection upon which ground neither a court of law or equity could reject, because by an express provision in the act incorporating the company it was enacted that

> all contracts and agreements to be made by the company involving sums of more than £500 (which the contract in question did) shall have the common seal affixed thereto together with the signatures of at least two members of the council and the secretary.

The Lord Chancellor, however, entertained no doubt that in a proper case for a court of equity to entertain the court would have no difficulty in granting relief against the common law rule requiring corporation contracts to be under the corporate seal, for he says that he thinks the arm of the court always strong enough to deal properly with such cases.

> There might, he says, be a contract without seal under which the whole railway was made, and of which the company would reap the profit, and yet it might be said that they were not liable to pay for the making of the line. When any such case comes to be considered I think there will be two ways of meeting it. It may be, and perhaps is so in this case, that the contractor has his remedy against the individual with whom he entered into the contract ; or it may be that the court, acting on well recognized principles, will say that the company shall not in such case be allowed to raise any difficulty as to payment.

I have already referred to some cases where those principles have been recognized and acted upon. Thus in all the courts of law and equity it may be asserted to have become, at least in 1868, when, in *South of Ireland Colliery Company* v. *Waddle* (1), it was

(1) L. R. 3 C. P. 463.

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by the Court of Exchequer Chamber established, too firmly to be further questioned, that where a corporation aggregate have by their managing body procured work to be done for them within the purposes for which the corporation was created under a parol contract, and where the managing body of such corporation has accepted the work as completed under the parol contract, and the corporation have received the benefit thereof, it would be a fraud in the corporation to resist payment of the price or value of the work upon the ground that the contract was not executed under their corporate seal, and therefore, unless there be some express statutory enactment to the contrary governing this particular case, they cannot upon every principle of justice and sound sense be permitted to do so, either in courts of law or equity, whose principles as to prevention of the committing of such a fraud are identical.

Hunt v. *Wimbledon Local Board* (1), and *Young* v. *The Mayor and Corporation of Leamington* (2), proceeded upon the same principle as did *Crampton* v. *Varna Railway Company* (3), namely, that there was a special statutory enactment governing the cases. The questions arose under the Public Health Act of 1875, 38 & 39 Vic. ch. 55, the 174th sec. of which enacted that:

> With respect to contracts made by an urban authority under this act the following regulations shall be observed :—
>
> 1st. Every contract made by an urban authority whereof the value or amount exceeds £50 shall be in writing and sealed with the common seal of such authority.

This clause was held to be obligatory and not merely directory, and as the amounts involved in those cases respectively did exceed £50, and the contracts were not entered into under the corporate seal as required

(1) 4 C. P. D. 48. (2) 8 App. Cas. 517.
(3) 7 Ch. App. 562.

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by the statute, they could not, although executed, be enforced against the corporations who contested their liability for want of the seal. They have no application in the present case, save only that parliament when passing the Board of Health Act of 1875, had been, as well may be assumed, aware of the state of the law upon the subject of parol contracts with corporations aggregate as laid down by the courts in the above cases, and more especially of the latest decision in *The South of Ireland Colliery Company* v. *Waddle* (1), affirmed in the Exchequer Chamber which finally established that the exception from the common law rule is no longer limited to matters of frequent occurrence and small importance, and that it is a matter of indifference whether the amount involved be £50 or £50,000; and it was no doubt for this reason that it was especially provided by the act of parliament that corporations created by the Board of Health Act should have no power to enter into any contract in respect of a matter exceeding £50, otherwise than under their corporate seal, leaving the law as finally established by the Exchequer Chamber in the *South of Ireland Colliery Company* v. *Waddle* (1), in respect of corporations governed only by the common law, to apply to contracts entered into by the corporations created by the act of 1875 wherein the amount involved did not exceed £50.

Now the evidence in the present case has established beyond controversy the following facts, namely, that one John F. Grant in September, 1882, under his hand, executed a contract for the construction of the bridge in question, which contract had been drawn up for his signature by the clerk of the municipality within the limits of which the bridge was required to be erected; by this contract Grant undertook

(1) L. R. 3 C. P. 463.

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to build the bridge in question for $800.00, to be paid to him by the municipality as follows, viz.: $200.00 at the commencement of the work, $200.00 more at its completion, and the balance of $400.00 one year after the completion of the work. Before the bridge was commenced the legislature divided the municipality into two municipalities; the new municipality within which was the place where the bridge was to be erected was organised in January, 1884, and its council met immediately thereupon.

Before anything had been done towards the erection of the bridge under the agreement signed by Grant in 1882, the question of the erection of the bridge was discussed by the council of the new municipality at several meetings at which or at some of which Grant was present, and the council having satisfied themselves as to the terms of the contract signed by Grant at a meeting of council approved thereof and directed Grant to proceed with the work upon the terms of the contract he had signed, and the $200.00 payable at the commencement of the work was subsequently paid to Grant in pursuance of a resolution of the council to that effect passed on the 29th March, 1884.

Thereupon Grant proceeded to erect the bridge. In the month of November, 1884, in consideration of $500.00 paid to him by the plaintiff he assigned to the plaintiff his contract with the municipal corporation for the building of the bridge, and thereby undertook to assist the plaintiff in the completion thereof. Plaintiff thereupon proceeded with the erection of the bridge. In the month of January, 1885, Grant gave an order upon the municipality in the following words to one Clendinning:

Municipality of North Dufferin will please pay W. H. Clendinning $37.00 for sawing plank for bridge over Boyne River in township 6,

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R. 4 W., and charge to account of my contract for that work and oblige

JOHN F. GRANT.

In acceptance of this order the municipality gave an order or cheque signed by the reeve and clerk upon their treasurer.

TO THE TREASURER OF NORTH DUFFERIN.

CARMAN, MANITOBA, 20th Sept., 1885.

Pay to the order of W. H. Clendinning the sum of thirty-seven dollars, account of order by J. F. Grant on bridge account.

R. P. ROBLIN,
Reeve.

J. H. HAVERSON,
Clerk.

Shortly after this, but when in particular does not precisely appear, the plaintiff sent to the council a copy of Grant's assignment of his contract to the plaintiff. Afterwards in the month of April, 1885, a resolution was passed by the council of the municipality which was transmitted to Grant by the clerk of the council as follows:

Moved by councillor Morrison, seconded by councillor Reekie, that the clerk be instructed to notify John F. Grant, that unless he takes immediate steps to complete the bridge between sections 28 and 33, township 6, R. 4 W., his contract will be annulled and the council will proceed to complete the same.—Carried.

You will please govern yourself according to above motion and accept this notice.

Yours truly,
J. H. HAVERSON,
Clerk.

Under these circumstances it is impossible to come to any other conclusion than that the original parol contract with Grant, made with the corporation as formerly constituted, was ratified and adopted and made their own by the managing body of the municipality as subsequently constituted, who alone had power to bind the corporation. It was further proved in evidence that the bridge was an actual necessity for the public

convenience of the inhabitants of the municipality, that is to say, of the corporate body. That the erection of the bridge was a matter within the purposes for which the municipal corporation was created cannot, in my opinion, admit of a doubt. By the 19th section of the Manitoba Act respecting municipalities, passed on the 14th February, 1880, roads and bridges are enumerated among a long list of other matters which are placed under the jurisdiction of the councils of every municipality. By an act passed on the 23rd December, 1880, it is expressly enacted that:

> All roads and road allowances within the province shall be held to be under the jurisdiction of the municipality within the limits of which such roads or road allowances are situated, and such municipality shall be charged with the maintenance of the same with such assistance as they may receive from time to time from the Government of the province.

Under this act there can, I think, be no doubt that jurisdiction is vested in the councils of every municipality to construct a bridge over a river crossing a road within the limits of the municipality, so as to unite the termini of the road on either side of the river, and thus to make the bridge when constructed a part of the road. By the act respecting municipalities in the Revised Statutes of Manitoba, passed on the 15th May, 1881, it is enacted in its 20th section that:

> In every municipality the council may pass by-laws for such municipalities in relation to (among other things enumerated) roads and bridges, provided that no by-law shall compel any person bound to perform statute labour on any public highway, road or bridge to perform the same, or any part thereof, at any point more than three miles distant from the land in regard to which the liability to perform the labour is imposed.

By the 111th section of 47 Vic. ch. 11, entitled "an Act to revise and amend the Acts relating to Municipalities," passed on the 29th April, 1884, the same provision is made in the following language:

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In every city, town or local municipality the council may pass by-laws for such municipalities in relation to (among other things enumerated) roads and bridges, and the construction and maintenance of roads and bridges wholly within the municipality, provided that, &c., as in the identical language of the 20th section of the act of 1881, above quoted.

Now, it has been argued that as these sections authorised the municipal councils to exercise their jurisdiction over roads and bridges by by-laws, they are precluded from exercising their jurisdiction otherwise than by a by-law, and so that no road or bridge could be repaired or made fit to be travelled on unless a by-law should be first passed for the purpose. The answer to this contention is to be found in the language of Lord Justice Turner in *Wilson* v. *West Hartlepool* (1) quoted above. Affirmative words in a statute saying that a thing may be done in one way do not constitute a prohibition to its being done in any other way. The word "may" in the section of the Manitoba act enacting that the councils may pass by-laws, &c., in relation to the several purposes mentioned in the act is by the Manitoba Interpretation Act to be construed as permissive only, not as imperative. Although, therefore, a by-law is a mode by which councils may exercise their jurisdiction over roads and bridges within the municipality, still there is nothing in the above acts affecting municipalities in Manitoba which prohibits the councils from exercising their jurisdiction in any other way. As to the defendants' pleas, that before they had notice of the assignment by Grant to the plaintiff of the former's contract with the defendants, and his causes of action thereunder, they paid certain moneys in the pleas mentioned under a judge's order made at the hearing of a certain garnishee summons sued out by one Glendinning against the

(1) 11 Jur. N. S. 126.

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said Grant, and duly served on the defendants, all that is necessary to say is that the defendants failed to produce evidence in support of these pleas and rested their case upon the contention that the contract was void for want of the corporate seal.

The appeal must be allowed with costs, and judgment be ordered to be entered for the plaintiff in the court below for $563, together with interest upon $163, part thereof, from the 7th July, 1885, and upon $400, balance thereof, from the 7th July, 1886, together with the plaintiff's costs of suit.

PATTERSON J.—The local municipality of North Dufferin was organized by the statute of Manitoba 46 & 47 Vic. ch. 1, which was passed in July, 1883, and took effect on the first of January, 1884. It consists of the townships 4, 5 and 6, in ranges 3, 4 and 5 west.

By an act passed in 1880, 43 Vic. ch. 1, the province of Manitoba had been divided into municipalities, one of which was called Dufferin North and comprised six townships. Those six townships were by the act of 1883 formed into two municipalities, three of them becoming the municipality of Carlton, and the other three, viz., 4, 5 and 6, in ranges 3, 4 and 5 west the municipality of North Dufferin. The old name of Dufferin North was not continued.

Every municipality formed under the said acts and the inhabitants thereof were declared to be a body corporate. The powers of every such municipality were, by express enactment, to be exercised by the council thereof.

The municipal council of Dufferin North had, in 1882, made an agreement with one Grant for the building of a bridge over the river Boyne upon a road allowance in township No. 6. The price was to be $800; $200 to be paid at the commencement of

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the work, $200 at the completion of it and $400 one year after completion. The defendants allege that that contract was not under the seal of the corporation, but there is no direct evidence in proof of that allegation. Grant had one part or copy of the contract. It was produced at the trial but has since been mislaid, which I regret for I should like to see it. It was signed by Grant but was not under the corporate seal, nor was it signed by any one on behalf of the municipality. But there was another—the original or duplicate original, we are not told which. It was retained by the council but it had unfortunately got out of sight and could not be found by the clerk when the new council wanted to see it in January, 1884, and has not since been found. The following is the information given by the clerk of the old council to the clerk of the new council:

28th January, 1884.

Agreement between J. F. Grant and municipality of North Dufferin has, by some means, got mislaid. I have it some place, but can't tell where just now. I remember the conditions which were, as to payment, two hundred dollars at commencement of work, two hundred on completion, and four hundred in one year from completion.

Said bridge to be subject to an inspector to be appointed by the council. Council expected the bridge to be completed by 1st January, 1883.

I am, yours truly,

CHRIS. F. COLLINS.

To JNO. H. HAVERSON.

The case is discussed in the court below as if it had been established that the original contract was not under seal, not merely that the plaintiff had failed to prove that it was sealed. I cannot adopt that affirmative finding. It is unsupported by any direct evidence. It assumes, what no witness is reported to have said, that the paper retained by Mr. Collins was in all respects like the one given to Grant, not even signed on behalf of one of the contracting parties. I should be

slow to assume that, and should think it more likely that Grant had the paper that was meant to be retained by the council, being the one with Grant's signature, and that one which was to be his voucher as against council was inadvertently kept from him. If the fact were important I should without hesitation presume that the contract was duly sealed. That presumption would be warranted, if not compelled, by the conduct of the whole matter. It would be in support of justice and would not be, as presumptions have often been, opposed to any fact that appears in evidence.

But it is of little or no consequence whether the municipality of Dufferin North was or was not legally bound to Mr. Grant. The defendant municipality did not inherit the burden or the benefit of the contracts of the defunct corporation. That devolution occurred only when a new municipality was coterminous with one of the old ones (1). The defendant corporation has to answer only for its own engagements, and its liability to the plaintiff must depend on the effect of its own doings.

No part of Grant's contract had been performed when the new council took office. That council probably assumed that he was bound to the defendant municipality, and Grant perhaps thought so too. The council procured from Mr. Collins the particulars contained in his letter and urged the doing of the work. Grant was sometimes present at the meetings when the matter was discussed. The reeve gave very distinct and very fair evidence about the matter in his examination and somewhat prolix cross-examination. The substance is contained in this answer:

A. The municipality of North Dufferin were prepared to carry out the conditions of the contract that had been entered into by the old municipality of North Dufferin, and we instructed the clerk to notify Mr. Grant that we would do so.

(1) 47 Vic. ch. 11 s. 434.

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On the 29th March, 1884, a payment of $200 to Grant was included in an order passed in the council for the payment of sundry accounts, and the money was paid to him.

On the 18th of April, 1885, a resolution was passed:

That the clerk be instructed to notify John F. Grant, that unless he took immediate steps to complete the bridge between sections 28 and 33, township 6, range 4 west, his contract will be annulled, and the council will proceed to complete the same.

Then the bridge was built, and on the 4th of July, 1885, it was resolved:

That the bridge over the Boyne river, between sections 28 and 33, township 6, range 4, west, as built by John F. Grant be accepted, and that $200 as per contract be paid into county court, on solicitor's advice less $37, amount already paid on order.

The payment into court was made because the debt had been garnished by a creditor of Grant.

In November, 1884, Grant had assigned his contract to the plaintiff. The plaintiff had completed the bridge and had, on the 25th of June, 1885, given the following notice to the council:

I wish to notify the hon. warden and councillors of the municipality of North Dufferin, that I have completed the bridge over the Boyne river between the north-east ¼ of sec. 28 and the south-east ¼ of sec. 33, township 6, range 4 west. I solicit the hon. council to have it inspected at your earliest convenience, by so doing you will much oblige your humble servant,

DOSITHE BERNARDIN.

That notice led to the resolution of the 4th July, and the resolution and payment were communicated to the plaintiff by the clerk of the municipality, by the following letter:

CARMAN, MANITOBA, 7th July, 1885.

D. BERNARDIN, Esq.

DEAR SIR,—In answer to your letter to the council relative to completion of Grant bridge: I beg to inform you that the same has been accepted, and by order of council $200 will be paid into county court (less amount of previous orders paid) on advice of municipal solicitor.

You are, no doubt, aware that Grant's contract money has been garnished by W. H. Clendinning, which necessitates this step.

Yours truly,

J. H. HAVERSON.

The $37 had been paid to Clendenning in April, 1885, on an order given to him by Grant after the assignment to the plaintiff.

The plaintiff maintains that the $200 thus paid to the creditor of Grant ought to have been paid to him, and he sues for that sum together with the deferred instalment of $400 which was payable one year after the completion of the work, or in July, 1886.

The defence is that the municipality is not liable to pay for the bridge because there was no contract under its corporate seal.

That defence was sustained by Mr. Justice Bain who tried the action, and afterwards by the Chief Justice of Manitoba and Mr. Justice Killam in *banc*, Mr. Justice Dubuc dissenting.

The case presents some striking features. The statute which incorporates the municipality declares that the powers of the body politic shall be exercised by the council thereof. The council at its formal meetings, and acting in furtherance of what it deemed to be the interest of the municipality, urge Mr. Grant to build the bridge on terms that had been agreed on with another body, and which the council and Grant were willing should be the terms between them. Grant having been set in motion, a sum of $200 is paid to him on account of the work and in accordance with the terms of the original agreement. The work is then completed, partly by Grant and partly by the plaintiff as transferee of the agreement. The plaintiff formally notifies the council of the completion of the work. It is, thereupon, inspected on the part of the council and approved, and the council's approval and

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acceptance of the work formally embodied in a resolution which is formally communicated to the plaintiff. Something further is done. The $200 which was to be paid on the completion of the work is set apart for that purpose and is actually paid, but by an oversight is paid to the wrong person. A year later $400, half the price of the work, should also have been paid.

The bridge is on one of the travelled highways of the municipality, crossing a river which the reeve tells us was impassable without it. It is as much a part of the highway as the gravel or broken stone that metals the roadway. It has been kept in repair by the municipality. But the plaintiff is told that he has no claim on the municipality for payment because he has no contract under the common seal of the corporation.

If the decision proceeds upon a true conception of the spirit and effect of the municipal system adopted for the Province of Manitoba it proves that, in one particular at least, the system is not well fitted for the conduct of the affairs of rural communities such as the municipality of North Dufferin. The settlers in these communities, recruited from many nations, being for the most part tillers of the soil, and with no pretension to knowledge of the intricacies of the English law relating to corporations, may find it hard to understand why a man is not entitled to be paid by the municipality for work of a character not only useful to the community but one of the most essential local improvements, which he has done at the express instance of the governing body of the municipality, the body charged by statute with the management of affairs, and which that body has further by express and formal action approved and accepted.

We must, of course, be careful not to let the hardship of the plaintiff's position affect our views of the law further than as it illustrates the importance of inter-

preting a statute like the one before us so as to make the working of it by the members of these rural municipalities, or local municipalities as they are called in the statute, as simple and beset with as few intricacies and pit-falls as the language of the law will allow.

I think, however, that the plaintiff is entitled to have the evidence treated as favourably as it will fairly warrant on one or two subsidiary matters of fact, which may or may not be important but in regard to which a somewhat strict view seems to have been taken. Thus, the learned judge at the trial remarks that no evidence was given to show the necessity of the work further than the bridge was across the river at a well travelled highway. That was by itself pretty good evidence but there was more than that. The action of the two successive councils was evidence of the necessity for the work furnished by those whose duty it was to deal with the matter, and there was in addition the following testimony from the reeve who was the only witnessed examined :

Q. After the completion of that bridge, after its acceptance on the 4th July, what has been done with it since, between that time and now ? A. It has been used by the municipality.

Q. What is it ? A. It is a bridge over the Boyne river, on the road allowance, between sections 28 and 33.

Q. Is that a still travelled road ? A. Yes, a regular highway.

Q. Do you think you would be able to get across if there was not a bridge ? A. No.

Q. Is it a necessity ? A. Yes.

Q. Who has taken charge of the bridge with regard to repairs, &c., since that time ? A. The municipality.

Q. The present defendants ? A. Yes.

Again, Mr. Justice Killam, with whose judgment the learned Chief Justice concurred, remarked that it did not appear whether the $200 ordered to be paid to Grant on the 24th of March, 1884, was paid, though the plaintiff gave credit for it, apparently overlooking the resolution of the 4th of July, 1885, which provided

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for the second $200 that was due on the completion of the work, from which the inevitable inference as against the council is that the first $200 had been paid. In my view of the statute of 1884 the 44th section has an important bearing on the question before us.

> The powers of every such municipality shall be exercised by the council thereof.

I am unable to construe this section as it has been construed by the majority of the court below. The view there held will best appear from an extract from the judgment of Mr. Justice Killam.

> The plaintiff's counsel has referred us to the 44th section of the Municipal Act of 1884, which provides that, "The powers of every such municipality shall be exercised by the council thereof." What are the powers of the municipality and in what mode can the council exercise them?
>
> The 43rd section provides that the municipality "shall have all the rights and be subject to all the liabilities of a corporation," and especially to acquire, &c., property, to sue and be sued, to "become parties to any contracts or agreements in the management of the affairs of the said municipality," &c. The language of the section is all very general, and if interpreted generally would involve the right to make any kind of contract for any purposes whatever. Such can never be considered to be intended. We must look elsewhere to find the objects and purposes for which these corporations are created, the "affairs" to be managed. We find no mention of the roads and bridges or similar local improvements, to be constructed or made by the municipality itself, until we come to the 111th section, under which, "the council may pass by-laws for such municipality in relation to matters coming within the classes of subjects hereinafter enumerated, that is to say: (1) The raising of a municipal revenue * * * (2) The expenditure of the municipal revenue. (3) Roads and bridges and the construction and maintenance of roads and bridges wholly within the municipality," &c., and giving a large number of other subjects.
>
> Except under these provisions the act itself gives the municipalities no power whatever to undertake the construction or maintenance of roads and bridges. The only other authority for their doing so is found in the Act 44 Vic. (2nd sess.) c. 5, if, indeed, that be applicable.

With great respect for the learned judge, who has given us the assistance of a full and able presentation

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of his views upon the controversy in the case, I submit that his mode of looking at this portion of the statute assumes that the legislature took a rather roundabout way of conveying what could, if intended, have been easily said in plain terms. When the 43rd section declares that municipal corporations—

> shall be in law capable of * * * becoming parties to any contracts or agreements in the management of the affairs of the said municipality—

there is no suggestion that we are to look to section 111 to find what is meant by the affairs of the municipality. Nor do I see any reason to be startled by the extent of the power to contract affirmed by the words in their literal force. The limitation of the contracting power to the affairs of the municipality, which is expressed and would have been implied if it had not been expressed, must not be overlooked. Section 43 declares that the municipality shall have all the powers and shall be subject to all the liabilities of a corporation. That covers all the ground. The enumeration that follows—"and especially to acquire," &c., &c.—does not limit the generality of the former expression. It embraces some of the ordinary corporate franchises and bestows some others, such as borrowing powers. The object of the incorporation is to provide for the convenient and efficient management of matters of common interest, "the affairs of the municipality," and amongst those the making and maintenance of roads must have a prominent place. Express power to make or mend roads was not necessary, and the existence of the power is tacitly recognised by the statute in such provisions as those contained in sections 206 to 217 concerning statute labour, and in sections 221, 427, 431 and others respecting the alteration of old roads and the opening of new ones.

Section 111 gives certain powers of a legislative

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character to the council, but does not meddle with its executive functions. It enacts that:

> In every city, town, or local municipality the council may pass by-laws for such municipality in relation to matters coming within the classes of subjects hereinafter enumerated, that is to say:—[Setting out 39 classes of subjects] and such by-laws shall be executory and remain in force until they are amended, repealed or annulled by competent authority, or until the expiration of the period for which they have been made.

The council is thus empowered to make general regulations for the municipality, or to adopt a systematic method of dealing with the subjects there enumerated. All of those subjects, with one or at most two exceptions, are obviously matters that cannot be properly dealt with except under such general regulations. Article No. 3 relates to—

> roads and bridges and the construction and maintenance of roads and bridges wholly within the municipality.

But that a general law on that subject is what is meant, which may regulate the exercise of a power not derived from this section, is apparent not only from the context but from the remainder of the article itself, which is:

> Providing that no by-law shall compel any person bound to perform statute labour on any public highway, road or bridge to perform the same or any part thereof at any point more than three miles distant from the land in regard to which the liability to perform the labour is imposed.

The section is strictly permissive in its form. Some of the subjects enumerated in its 39 articles, probably most of them, would not, without special authorization, be within the scope of municipal management, but others would be so—roads and bridges for example, and the expenditure of the municipal revenue, which is the subject of article 2. A corporation has the same right to pay its way as a natural person has, and the authority given to the council to pass a by-law for the

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municipality in relation to the expenditure of the municipal revenue does not imply anything to the contrary. This topic being collateral to the main enquiry which I shall presently deal with it may be occupying time unnecessarily to refer to authorities, but I may be permitted to cite the resolution of the court in the case of *Sutton's Hospital* (1). I read the passage as it is quoted by Mr. Justice Blackburn in *Riche* v. *Ashbury Railway Company* (2), with an observation thereon made by that learned judge:

But the resolution of the court, as reported by Coke (at p. 30b), was that "when a corporation is duly created all other incidents are *tacite* annexed * * * and, therefore, divers clauses subsequent in the charter are not of necessity, but only declaratory, and might well have been left out. As, 1, by the same to have authority, ability and capacity to purchase; but no clause is added that they may alien, &c., and it need not, for it is incident. 2. To sue and be sued, implead and be impleaded. 3. To have a seal, &c.; that is also declaratory, for when they are incorporated they may make or use what seal they will. 4. To restrain them from aliening or demising, but in a certain form; that is an ordinance testifying the King's desire, but it is but a precept and doth not bind in law." This seems to me an express authority that at common law it is an incident to a corporation to use its common seal for the purpose of binding itself to anything to which a natural person could bind himself, and to deal with its property as a natural person might deal with his own.

The case of *Evan* v. *Corporation of Avon* (3) places a municipal corporation on the same footing as other corporations, showing that, apart from the municipal corporations act, it has full power to dispose of all its property like a private individual.

One word with reference to the statute, 44 Vic. ch. 5, which is mentioned by Mr. Justice Killam. The 1st section of it enacts that:

All the roads and road allowances within the province shall be held to be under the jurisdiction of the municipality within the limits of which such roads or road allowances are situated, and such munici-

(1) 10 Coke 1.

(2) L. R. 9 Ex. 224, 263.

(3) 29 Beav. 144.

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pality shall be charged with the maintenance of the same with such assistance as they may receive from time to time from the government of the province.

I throw this into the scale along with the considerations I have advanced upon the proposition that the maintenance of roads is one of the affairs of the municipality irrespective of and anterior to any by-law which the council may pass.

A suggestion made in argument that "maintenance" did not include construction, but merely keeping the roads and road allowances in the state the council found them in, can hardly have been made seriously. If a road allowance was simply to be let alone the assistance of the government was not required.

The act of 1883 (1) which divided the province into counties cast upon the county council the duty of erecting and maintaining bridges over rivers that form or cross the boundary lines of municipalities, but made no provision in express terms for bridging rivers that cross roads within a municipality. That was obviously treated as the affair of the municipality.

The English Municipal Corporations Act, 1882 (2), provides that:

> The municipal corporation of a borough shall be capable of acting by the council of the borough, and the council shall exercise all powers vested in the corporation by this act or otherwise.

And, by another section, that the council may from time to time make such by-laws as to them seem meet for the good rule and government of the borough, and for the prevention and suppression of nuisances, &c., &c., which provision is analogous in principle and also in form, though with less of detail, to section 111.

The English Municipal Corporations Act, 1835 (3), had a provision which may have been equivalent to

(1) 46 & 47 Vic. ch. 1 s. 453. (2) 45 & 46 Vic. ch. 50, ss. 10, 23.
(3) 5 & 6 Wm. 4, ch. 76, s. 6.

section 10 of the act of 1882, but was differently framed. After declaring that a long list of corporate bodies, named in schedules, should take and bear the name of The Mayor, Aldermen and Burgesses of the several boroughs it added :

> And by that name shall have perpetual succession and shall be capable in law, by the council hereinafter mentioned of such borough, to do and suffer all acts which now lawfully they and their successors respectively may do and suffer by any name or title of incorporation, &c.

I may have to allude again to these English acts.

It should be noticed, in connection with the topic of the power of the council to act for the corporation, that the Manitoba statute does not prescribe the method by which the council is to act. While it is enacted that every by-law is to be sealed with the corporate seal there is no general provision, such as is contained in the Ontario Municipal Acts, that the powers of the council shall be exercised by by-law. The omission is, I think, significant and it strikes me as being well advised.

It would be useless for me to enter into an examination of the general subject of the liability of a corporation when it has not bound itself by any instrument under its common seal. The subject will be found discussed with sufficient fulness in one or two judgments which I intend to read as part of my argument. The ancient rule, as it is called, has long lost the attribute of inflexibility. The present rule may, not inaptly, be thus expressed : A corporation can be bound only by its common seal unless when it is convenient that it should be bound without it. The range of the so-called exceptions to the rule has reached an extent which will be shown by the judgments to which I allude. I shall merely remark at present that I do not agree with an observation made in the court below

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that cases such as the *Mayor of Stafford* v. *Till* (1) and *Beverley* v. *Lincoln Gas Light Company* (2) where the immediate point was the form of action, are to be regarded as a distinct class of cases on the subject. When the right or liability of a corporation to sue or be sued in assumpsit is discussed the question is the capacity of the corporation to be a party to a simple contract, which is the main question.

Dicta of judges have now and then been addressed to the explanation of the principle of the exceptions, but the explanations given vary a good deal from one another. If stress is to be placed on opinions thus expressed it will be found that the reasons sometimes given for adherence to the general rule show its inapplicability to cases like the present. Take the case of *The Mayor, &c., of Ludlow* v. *Charlton* (3) which is so much relied on against the relaxation of the rule where municipal corporations are concerned. Lord Cranworth (then Rolph B.) who delivered the judgment of the court said, amongst other general observations :

> The seal is required as authenticating the concurrence of the whole body corporate. If the legislature, in erecting a body corporate, invest any member of it, either expressly or impliedly, with authority to bind the whole body by his mere signature, or otherwise, then, undoubtedly, the adding a seal would be purely a matter of form and not of substance. * * * The resolution of a meeting, however numerously attended, is after all not the act of the whole body. Every member knows that he is bound by what is done under the corporate seal and by nothing else. It is a great mistake, therefore, to speak of the necessity for a seal as a relic of ignorant times. It is no such thing : Either a seal, or some substitute for a seal, which by law shall be taken as conclusively evidencing the sense of the whole body corporate, is a necessity inherent in the very nature of a corporation, and the attempt to get rid of the old doctrine by treating as valid contracts made with particular members, and which do not come within the exceptions to which we have adverted, might be productive of great inconvenience.

(1) 4 Bing. 75. (2) 6 A. & E. 844.
(3) 6 M. & W. 815.

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Now let us see how the doctrines thus formulated apply to the case before us. The corporation under the statute of Manitoba (1) consists of the municipality and the inhabitants thereof, a comprehensive definition even if savouring of tautology. The seal would not express the sense of every member of the corporation. It would, if so understood, be a delusion. The statute which creates the corporation invests certain members of it, viz.: the reeve and six councillors, with authority to bind the whole body. "The powers of the municipality shall be exercised by the council thereof." There is no such thing as a general meeting or any other method of managing the affairs of the corporation or ascertaining the corporate will. The seal is therefore a matter of form and not of substance. It may bind the corporation as being affixed by persons authorised to act for the corporation, but is only a formal act.

The rule in the United States is thus stated by Mr. Dillon in section 450 of his treatise on municipal corporations:

> Modern decisions have established the law to be that the contracts of municipal corporations need not be under seal unless the charter so requires. The authorised body of a municipal corporation may bind it by an ordinance, which in favour of private persons interested therein may, if so intended, operate as a contract; or they may bind it by a resolution, or by a vote clothe its officers, agents or committees with power to act for it; and a contract made by persons thus appointed by the corporation though by parol (unless it be one which the law requires to be in writing) will bind it.

Reading this passage along with that which I have quoted from the judgment in *Mayor of Ludlow* v. *Charlton* (2), and with reference to this Manitoba corporation, it seems to me that the action of the council in the matter of the contract in question can be brought under the American doctrines without transgressing the principle expounded by Lord Cranworth.

(1) 7 Vic. ch. 11, sec. 43.

(2) 6 M. & W. 815.

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I do not think that what was said by Patteson J. in *Beverley* v. *Lincoln Gas Light Company* (1), partly with reference to the American law a leading decision of which is that of the Supreme Court of the United States in *Bank of Columbia* v. *Patterson* (2), has ever been disapproved. He said:

> It is well known that the ancient rule of the common law, that a corporation aggregate could speak and act only by its common seal, has been almost entirely superseded in practice by the courts of the United States in America. The decisions of those courts, though intrinsically entitled to the highest respect, cannot be cited as direct authority for our proceedings; and there are obvious circumstances which justify their advancing with a somewhat freer step to the discussion of ancient rules of our common law than would be proper for ourselves. It should be stated, however, that, in coming to the decision alluded to, those courts have considered themselves, not as altering the law, but as justified by the progress of previous decisions in this country and in America. We, on our part, disclaim entirely the right or the wish to innovate on the law upon any ground of inconvenience, however strongly made out; but when we have to deal with a rule established in a state of society very different from the present, at a time when corporations were comparatively few in number, and upon which it was very early found necessary to engraft many exceptions, we think we are justified in treating it with some degree of strictness, and are called upon not to recede from the principle of any relaxation in it which we find to have been established by previous decisions. If that principle, in fair reasoning, leads to a relaxation of the rule for which no prior decision can be found expressly in point, the mere circumstance of novelty ought not to deter us; for it is the principle of every case which is to be regarded; and a sound decision is authority for all the legitimate consequences which it involves.

These remarks seem very pertinent in the present case. The state of society in the province of Manitoba differs widely from that of the ancient days in England. Whatever were the conditions that pointed towards the discussion of the ancient rules of the common law in the United States with less restraint than might be felt in England the same conditions repeat themselves in the new province.

(1) 6 A. & E. 829, 837. (2) 7 Cranch 299.

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The question whether an executory contract made by the council of one of these municipalities, not under the corporate seal, can be enforced against the corporation should, I think, be considered as an open question. It is not necessary now to decide it because this contract is executed. It has not, for the same reason, been fully argued. I therefore say no more with regard to the point than that there is room for argument on both sides of the question.

Regarding the contract as executed, and I have shown why I think that beyond dispute, I think the preponderance of authority, amounting to an overwhelming preponderance, as well as the reason of the thing and the plain demands of justice, concur in favour of the plaintiff's right to recover, even if by reason of the absence of the seal the council could have withdrawn before the work was done.

In the province of Ontario similar questions have often arisen but during the last thirty years they have been decided upon the law as settled by the Court of Error and Appeal in *Pim* v. *The Municipal Council of the County of Ontario* (1). The corporation in that case had made a parol contract for the building of a court house and gaol, and had accepted the buildings but refused to pay for them until compelled by the decision I refer to. Setting aside the point I make as to the effect of section 44 the case may be considered as on all fours with the one in hand. The corporation had possession of the buildings in *Pim's* case and occupied them, but I take it that the acceptance of the bridge in the present case is even more complete, having regard to the expressed approval of the work, and there is moreover as complete an assumption of possession as the nature of the work admits of. To revert to an illustration already used, what was done

(1) 9 U. C. C. P. 304.

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is in effect the same as if the council gave an order or made a contract in any other way, but not under seal, for the supply and laying on the road of so much broken stone at so much a toise, and then, when the work was done, approved and accepted it by formal resolution communicated to the contractor. The bridge case is somewhat stronger because it is proved that the municipality keeps the bridge in repair.

The points which I desire to make on this branch of the case are clearly made and ably supported by Chancellor Blake in the judgment delivered by him in Pim's case. In place of myself traversing the same ground I shall read the report of his remarks as part of my argument. I refer also to what was said on the same occasion by Mr. Justice Hagarty, who is now the Chief Justice of Ontario. The judgment of the Chancellor is as follows :

The Chancellor.—The present state of the law upon the subject is a reproach to the administration of justice in England. It may be that the evil calls for legislative interference, but if the legislature will neither declare the law nor alter it courts of justice are bound to place their decisions upon some principle intelligible to the public and sufficient for their guidance.

It is said, I believe, in the case now under appeal, that the decisions in the English courts harmonise and negative the right of the present plaintiff to relief. But the cases which have arisen since the decision in the court below show that the judgments in the English courts are in direct conflict, and are so treated by the learned judges by whom they were pronounced. In *Smart* v. *The Guardians of the Poor of the West Ham Union* (1) Parke B. says, "The case which has been cited and relied upon for the plaintiff is a case with which I cannot agree. It would in effect overrule several previous decisions of this court"; and Alderson B. adds, "I quite agree with the observation of my brother Parke in reference to the judgment in *Clarke* v. *The Guardians of the Cuckfield Union* (2) as it is directly in opposition to several cases decided by the court upon similar questions. To these cases we should

(1) 10 Ex. 867.

(2) 21 L. J. Q. B. 349 ; 16 Jur. 686.

adhere until they are overruled by a court of error." While in the case alluded to, Mr. Justice Wightman admits his inability to reconcile his own judgment with the cases in the Exchequer; and in *Henderson* v. *The Australian Steam Navigation Co.* (1), which is, I believe, the latest case upon the subject, Mr. Justice Crompton says with becoming candour, "At the same time I cannot distinguish this from *Diggle* v. *The Blackwall Railway Co.* (2), *Homersham* v. *The Wolverhampton Water Works Co.* (3). I cannot disguise from myself that we are deciding the case in opposition to these authorities, which have, however, I believe, excited some surprise." See also and contrast *Clarke* v. *The Cuckfield Union* (4), and *Sanders* v. *St. Neot's Union* (5), with *Diggle* v. *The Blackwall Railway Co.* (2) and *Lamprell* v. *The Guardians of the Poor of the Billericay Union* (6), and other cases in the Exchequer.

It cannot be doubted therefore, that the authorities in the English courts conflict, and it is certainly difficult, moreover, to extract from them any satisfactory principle for our guidance. But the cases have been so often collected and so fully commented upon of late days, and are so familiar to every one conversant with the subject, that it would be mere pedantry to enter upon a detailed review of them here. I shall content myself, therefore, with a short statement of the principle upon which, in my humble opinion, the judgment of the court below ought to be reversed.

The action in this case is brought upon an executed contract. The court house had been built under the supervision and to the satisfaction of the defendants' architect before action brought. The justice, therefore, of compelling the defendants to pay for the work, labour and materials, of which they have had the benefit, is obvious; and if there be a principle upon which they are to be absolved from that just liability, it must be the principle that being a corporation their will cannot be expressed except through their common seal; and as they are incapacitated from making their own will known except through their common seal, so it cannot be implied by courts of justice from their conduct, so as to subject them to any liability either in *tort* or assumpsit.

Now it will be found, I apprehend, that there never was any such universal rule as that which has been supposed. The old notion certainly was, that a corporation being a body politic, and invisible, could neither act nor speak, except by its common seal (7), or as it was expressed in argument in *Rex* v. *Bigg* (8), the common seal was

(1) 5 E. & B. 409.
(2) 5 Ex. 442.
(3) 6 Ex. 137.
(4) 21 L. J. Q. B. 349.
(5) 8 Q. B. 810.
(6) 3 Ex. 283.
(7) Bro. Abr. Tit. Corporation and Capacities.
(8) 3 P. Wm. 423.

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the hand and seal of the corporation. But that dogma, never well founded in point of reason, was from the first subject to considerable qualification, and has undergone, from time to time, still further limitations.

Matters of small amount and frequent recurrence were always treated as exceptions from the rule. It is difficult to understand the principle upon which that class of cases is said to have proceeded. Had the rule rested upon a different foundation it might have been relaxed for purposes of convenience, but being a rule of necessity, and not of policy, it is difficult to understand how it can be made to consist with the cases to which I have referred. See observations of Macaulay C. J. in *Marshall* v. *The School Trustees of Kitley* (1) and of Patteson J. in *Beverley* v. *The Lincoln Gas Light and Coke Co.* (2). In *Henderson* v. *The Australian Steam Navigation Co.* (3), already cited, Erle J., says : "It would be very dangerous to rest the exception upon the ground of frequency or insignificance ; nor do I gather from the cases that that has been put forward as the principle. Certainly as to trading corporations the exception has not been so limited, and I think that the soundest principle on such a matter is to look to the nature and subject-matter of the contract, and if that is found to be within the fair scope of the purposes of incorporation to hold the contract binding, even though not under seal." The doctrine propounded by Mr. Justice Erle, if it be sound, and I am very much inclined to think it so, would furnish a solution for most of the difficulties which have arisen upon the subject ; but upon that point, which does not necessarily arise in the case before us, we need not express any opinion, because the plaintiff's right to maintain this action may be rested, as it seems to me, on well-established principles.

When it had been determined that the corporate will might be ascertained in certain cases otherwise than through the common seal, and that, as a necessary consequence, assumpsit might be maintained in such cases either by or against corporations even upon executory contracts, the difficulty of maintaining the rule as to torts and executed contracts must have been obvious. Had the old dogma been maintained in its integrity a corporation could not have been liable in tort unless the agent had been appointed or the act adopted under the corporate seal, and in no case could a promise have been implied by law from conduct ; and upon reasoning of that sort the liability of corporations under such circumstances has been from time to time resisted. But the inconvenience and injustice of such a rule was felt to be intolerable. Had this been the law corporations would have been, as Mr. Justice

(1) 4 U. C. C. P. 378. (2) 6 A. & E. 844.
(3) 5 E. & B. 409.

Coleridge has expressed it, a great nuisance. *Hall* v. *The Mayor of Swansea* (1).

And it is now well settled that corporations aggregate are liable in tort although there has been nothing under the common seal authorizing the agent or adopting his act. *Yarborough* v. *The Bank of England* (2); *Smith* v. *Birmingham Gas Co.* (3); *Eastern Counties Railway Co.* v. *Broom* (4). Again when land has been used and occupied by a corporation the law implies a promise to pay a reasonable compensation. *Dean and Chapter of Rochester* v. *Pierce* (5); *Mayor of Stafford* v. *Till* (6); *Lowe* v. *London and North Western Railway Co.* (7). And when money has been wrongfully received, assumpsit for money had and received may be maintained. *Hall* v. *The Mayor of Swansea* (1).

Now if trover and trespass may be maintained under the circumstances to which I have alluded, and if the law implies a contract when land has been used, or moneys wrongfully received, it is difficult to understand why the same principle should not be applied wherever the contract being legal has been executed and the corporation has received all that it could have demanded if there had been a contract under the corporate seal. The argument seems to me, I must confess, conclusive. In *Hall* v. *The Mayor of Swansea* (1) Lord Denman rests the judgment of the Court of Queen's Bench, which has not, I believe, been questioned, upon the ground of necessity; and that language of Lord Denman has been since translated by Lord Campbell to mean "no other than a moral necessity; that the defendants should pay their debts"; or as Mr. Justice Erle has expressed the same sentiment, "that it was absolutely necessary that the defendants should be compelled to do that which common honesty required." *Lowe* v. *The London and North-Western Railway Co.* (7). Now, if the necessity in *Hall* v. *The Mayor of Swansea* (1) was the moral necessity of compelling the defendants to do what common honesty required, assuredly that necessity exists to as great an extent at least in cases circumstanced like the present when the consideration has been executed and the corporation has received all that it could have required if there had been a formal contract under the corporate seal.

But the distinction between executed and executory contracts does not depend upon the reason of the thing, however clear; it has been repeatedly recognized by judges of the greatest eminence; in *The East London Waterworks Co.* v. *Bailey* (8) Best C. J. in enumerating the

(1) 5 Q. B. 544.
(2) 16 East 6.
(3) 1 A. & E. 526.
(4) 6 Ex. 314.
(5) 1 Camp. 466.
(6) 4 Bing. 75.
(7) 18 Q. B. 632.
(8) 4 Bing. 287.

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cases in which a corporation is liable, although no contract has been executed under the corporate seal, says, "The first is when the contract is executed; in that case the law implies a promise, and a deed under seal is not necessary, as we have lately decided in *The Mayor of Stafford* v. *Till* (1), where it was holden that a corporation might maintain assumpsit for the use and occupation of the land." And in *Beverley* v. *The Lincoln Gas Light and Coke Co.* (2), Mr. Justice Patteson, who delivered the judgment of the Court of Queen's Bench, says: "In the progress, however, of these exceptions, it has been decided that a corporation may sue in assumpsit on an executed parol contract; it has, also, been decided that it may be sued in debt on a similar contract; the question now arises on the liability to be sued in assumpsit. It appears to us that what has been already decided in principle warrants us in holding that the action is maintainable."

It is said, however, that the distinction between executory and executed contracts was exploded by *Church* v. *The Imperial Gas Light and Coke Co.* (3) which has been treated by some as a governing case upon the subject. I am not certain that Lord Denman's language, properly interpreted, means that: his lordship's object was to negative the distinction between executed and executory contracts—not generally—but as to contracts of a particular class; contracts which would be valid without the corporate seal, and in parts of the judgment the language is distinctly limited to that object; it is said, for instance, (4) "assuming it therefore to be now established in this court that a corporation may sue or be sued in assumpsit upon executed contracts of a certain kind, among which are included such as relate to the supply of articles essential to the purposes for which it is created, the first question will be whether, as affecting this point, and in respect of such contracts, there is any sound distinction between contracts executed or executory." The question proper on that principle is strictly confined to contracts of the particular class to which I have referred, and viewed as a solution of that question the judgment is quite sound; it must be admitted, however, that the language in other parts is much less guarded and that the case has been often assumed to be an authority for the general proposition. The *Mayor of Ludlow* v. *Charlton* (5); *Clarke* v. *The Guardians of the Cuckfield Union* (6).

In answer to the argument deduced from *Church* v. *The Imperial Gas Light and Coke Co.* (3), and the subsequent authorities in which that case has been recognised, an argument which possesses, I must admit,

(1) 4 Bing. 75.
(2) 6 A. & E. 845.
(3) 6 A. & E. 846.
(4) At p. 859.
(5) 6 M. & W. 815.
(6) 21 L. J. Q. B. 349.

considerable force, I have to say, first, that the point was not decided. Secondly, that Lord Denman's reasoning as an argument for the general proposition is, in my humble judgment, quite conclusive. And, lastly, that since the decision of the case alluded to, the distinction in this respect between executory and executed contracts has been recognized by the Court of Queen's Bench, including Lord Denman himself, on more occasions than one, and has received the sanction of other judges of still greater eminence. In *Sanders* v. *The Guardians of St. Neot's Union* (1), Lord Denman, delivering the judgment of the Court of Queen's Bench, says: "A motion in this case was made for a new trial on the ground that no contract under seal was proved against the defendants. But we think that they could not be permitted to take the objection, inasmuch as the work in question, after it was done and completed, was adopted by them for the purposes connected with the corporation." In *Doe d. Pennington* v. *Taniere* (2), the same learned judge observes: "To enforce an executory contract against a corporation, it might be necessary to show that it was by deed; but where the corporation have acted as upon an executed contract, it is to be presumed against them that everything has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made." In *The Fishmonger's Company* v *Robertson* (3), Chief Justice Tindal says: "The question therefore becomes this, whether in the case of a contract executed before action brought, where it appears that the defendants have received the whole benefit of the consideration for which they bargained, it is an answer to an action of assumpsit by the corporation that the corporation itself was not originally bound by such contract, the same not having been made under their common seal. Upon the general ground of reason and justice no such answer can be set up." Lastly in *The Governor and Company of Copper Miners in England* v. *Fox* (4), Lord Campbell intimates his opinion that the distinction between executory and executed contracts had not been exploded by *Church* v. *The Imperial Gas Light and Coke Co.* (5).

Upon the whole, I quite concur in the principle enunciated upon the subject so often and so clearly by His Lordship, the Chief Justice, and by the late Chief Justice of the Court of Common Pleas, Sir J. B. Macaulay; I am of opinion that the distinction in this respect, between executed and executory contracts, is sound and ought to be maintained. I do not disguise from myself that this opinion is opposed to many

(1) 8 Q. B. 810.
(2) 12 Q. B. 1013.
(3) 5 M. & G. 193.
(4) 16 Q. B. 229.
(5) 6 A. & E. 846.

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cases in the Exchequer, and to much that is to be found elsewhere; but when these decisions are in such manifest and painful conflict it becomes the duty of the court to adopt that conclusion which appears upon the whole most consistent with the principles of justice.

I desire also to refer to opinions expressed about the same time by other judges who, like the two just named, rank high in the annals of the jurisprudence of Upper Canada.

The case of *Marshall* v. *School Trustees of Kitley* (1), and *Pim* v. *The Municipality of Ontario* (2), involved the same question. Both actions were in the Common Pleas, and both were decided by that court in favour of the corporation. The former was decided one term before the latter. The decision was either reversed in appeal, though there is no published report of its having been appealed, or at all events it was overruled on the appeal of Pim's case. In Marshall's case Chief Justice Macaulay dissented from the judgment of his two colleagues, delivering a judgment which I might also quote as part of my argument if time permitted. One judge who took part in the decision was Richards J., who afterwards became Chief Justice of the Common Pleas, later Chief Justice of the Queen's Bench, and ultimately Chief Justice of this court. His shrewd and practical common sense, and his knowledge of the real life of the country which no man understood more thoroughly, give interest and value to his views on the state of the law which I am about to quote:

> In this country, he said, studded as it is with municipal and trading corporations, and where the legislature has given great facilities for the establishment of these bodies, it may be of great convenience, almost amounting to necessity, that the decision arrived at in the Supreme Court of the United States, and to some extent approved of by the Court of Queen's Bench here, should be law in this province, and if it should be so decided, either by the Court of Appeals or the legislature, I am far from being certain that it would not be most convenient and advantageous.

(1) 4 U. C. C. P. 373. (2) 9 U. C. C. P. 304.

These remarks apply as directly to the state of things in Manitoba as they did to Upper Canada. The thirty-five years that have passed since they were uttered have not made the reasons for adopting the suggestions less numerous or forcible. In one respect at least the contrary has been the case, because the great extension during that period of the scheme of incorporation under general laws has been, and no doubt will continue to be, prolific of corporate associations for all kinds of objects and pursuits.

Stoneburgh v. *The Municipality of Brighton*(1) is another Upper Canada case which was decided by the Court of Common Pleas shortly after the decision of Pim's case by the Court of Error and Appeal, but which found its way into the reports before Pim's case. The action was for building a bridge. Draper C. J. tried the action and also delivered the judgment of the court in *banc*, deciding on both occasions against the plaintiff, who had built the bridge under the direction of persons acting as a committee but without sufficient authority from the council. I refer to the case for the sake of what was said as to the law and as to the evidence that would have proved an adoption of the work. On both points the remarks bear upon the questions before us.

The latest decisions in England have established that when a corporation is a trading one, and as I understand especially where it is established for a special purpose, they are bound by a contract made in furtherance of the purposes of the corporation, though not under their corporate seal. The same doctrine and fully to the same extent has been established in this province by the decision of the Court of Appeal in *Marshall* v. *School Trustees of Kitley* (2) and *Pim* v. *The Municipal Council of Ontario* (3). We cannot, therefore, entertain any objection for the mere want of a contract under seal to charge the defendants as a corporation. But there are other difficulties in the way. I am not prepared to

(1) 8 U. C. C. P. 155.
(4) 4 U. C. C. P. 373.
(3) 9 U. C. C. P. 304.

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admit that the township council can, by resolution, delegate to third parties power to bind them by contract for purposes which the legislature have specially entrusted to the council and enabled them to execute by the passing of by-laws. The plaintiff did not contract with any known officer or servant of the municipal corporation. * * * If therefore there is a liabilty on the part of the municipality it must arise from their subsequent adoption of the contract or a receiving of the work. * * * I thought, if in fact there had been an adoption of the contract and the work done by an appropriation of a sum on account of it after it was so nearly brought to a conclusion, it was a matter capable of easy and direct proof. * * * When the expense incurred by the committee became known, and it was proposed to make an appropriation for it, the appropriation was refused, because it was thought the expenditure was unauthorized and that an unfair advantage was sought to be taken of the resolution appointing the committee. * * * As to any acceptance of the work there was no proof whatever of it, except that it was conceded that the public used the bridge as part of the highway which had theretofore been in use, and this I thought formed nothing on this point for the plaintiff.

Can it be doubted that, with evidence such as there is in this case of the contract by the council, the acceptance of the work and the other facts already dwelt upon, the liability of the corporation would have been unhesitatingly affirmed?

The difficulty which the plaintiff has encountered in this case seems to have been to a great extent due to the effect attributed by the court to two comparatively recent English decisions, *Hunt* v. *Wimbleton Local Board* (1) and *Young* v. *The Mayor and Corporation of Royal Leamington Spa* (2); and the difficulty, if not suggested, seems at least to have taken apparent bulk, by reason of something said in the Ontario courts respecting those cases.

I cannot help thinking that the decisions have been misunderstood. I do not think they have nearly so

(1) 4 C. P. D. 48, (1878).

(2) 8 Q. B. D. 579; 8 App. Cas. 517, (1883).

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much bearing on the present controversy as has been supposed.

It will be useful when considering those cases to refer also to two cases of *Frend* v. *Dennett* (1) one of which was decided in 1858 at law, and the other three or four years later in equity.

Hunt v. *Wimbleton* (2) was decided under a section of the Public Health Act, 1875 (3), which declared that:

> Every contract made by an urban authority, whereof the value or amount exceeds £50, shall be in writing and sealed with the common seal of such authority.

An earlier section of the act declared that every local board, being an urban authority, should be a corporation, but nothing turned on that provision, the urban authority sued being already a municipal corporation.

Hunt's case was discussed and decided also under the act of 1875, although, as we are told in the report, the contract was made while the Public Health Act, 1848 (4) was in force.

Frend v. *Dennett* (1) was of course altogether under the act of 1848.

Under that act I do not understand that every local board of health was a corporation, though every board had a seal. The 85th section enacted that:

> The local board of health may enter into all such contracts as may be necessary for carrying this act into execution; and every such contract, whereof the value or amount shall exceed £10, shall be in writing and (in the case of a non-corporate district) sealed with the seal of the local board by whom the same is entered into, and signed by five or more members thereof and (in the case of a corporate district) sealed with the common seal.

Under each act there was the requirement of a seal, whether the common seal of a corporation, such as the

(1) 4 C. B. N. S. 576 at law and 5 L. T. N. S. 73 in equity.
(2) 4 C. P. D. 48.
(3) 38 & 39 Vic. ch. 55 (Imp.)
(4) 11 & 12 Vic. ch. 63 (Imp.)

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Mayor and Corporation of Royal Leamington Spa or the seal of an unincorporated local board such as probably was the Wimbleton Local Board when the contract with Hunt was entered into, though the board was afterwards incorporated by the act of 1875.

Frend v. *Dennett* (1) was an action against the clerk of a local board of health. The question under the Public Health Acts was the same in each of the three cases. It was not a question of the capacity of a corporation to bind itself or to be bound without seal. It was, whether a contract which a statute gave power to make, and directed to be made with certain formalities, could be made without those formalities.

The circumstance that one of the parties to the contract was a corporation was, to my apprehension, an accident which did not alter the character of the question under the statute.

In the common law case of *Frend* v. *Dennett* (1), Cockburn C.J. said :

> It is sought to make the rates for the district liable upon this contract by means of an action against the clerk to the local board. Now, the power given to the board to make contracts so as to bind the rates is the creature of the Act of Parliament, and that, by the very same clause which gives the board power to enter into contracts, amongst other things expressly enacts "That, &c. [quoting the part of section 85, which I have read.] I think the local board had no power to contract so as to bind the rates unless they did so in the manner pointed out by the statute.

The equity case (2) was disposed of by Lord Hatherly, then Vice Chancellor Wood, on precisely the same grounds.

So also were the cases of Hunt and Young.

In Hunt's case the clause of the statute was held to be mandatory and not directory only. I understand the decision further to have been that it was impera-

(1) 4 C. B. N. S. 576. (2) 5 L. T. N. S. 73.
(1) 11 & 12 V. c. 63 Imp.

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tive even as to executed contracts, although the contract in question was held not to be executed because the local board had not, in the opinion of the court, had the benefit of the plaintiffs' work.

There was some general discussion by the lords justices of doctrines concerning corporations, and opinions were given which in the later case of *Young* v. *Leamington* (1) it was thought advisable to refrain from expressing. Lord Esher (then Brett L.J.) in particular expressed a doubt whether there was any such rule in law or equity as that

> where orders are given by or on behalf of a corporation, and those orders result in an apparent contract, though not under seal, and the party with whom that apparent contract is made has fulfilled the whole of his part of the contract, and the corporation on whose behalf such apparent contract has been made accept and enjoy the whole benefit of the performance of the contract, that then the corporation is liable, although the contract is not under seal.

But he did not explain the grounds of his opinion, and expressly said that it was unnecessary, for reasons which he gave, to consider the point.

Bramwell L.J. had been a member of the Court of Exchequer, but not until after the decision of the cases of *Mayor of Ludlow* v. *Charlton* (2) and *Smart* v. *Guardians of West Ham Union* (3). He did not share the doubt expressed by Lord Justice Brett, nor did he appear to entertain the extreme views on which the cases in the Exchequer had been decided.

> This doctrine exists, he said, to some extent or to some amount, that where a man has done work for a corporation under a contract not under seal, and the corporation have had the benefit of it, the person who has done the work may recover. But whether that is limited to contracts for small amounts or not, I repeat, I will not say. It is, however, certainly limited to cases where the benefit has been actually enjoyed, and so far as I know, to cases in which it could be said that the work is such as was necessary ; that it was work which, if the cor-

(1) 8 App. Cas. 517. (2) 6 M. & W. 815.
(3) 10 Ex. 867.

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poration had not ordered, they would not have done their duty ; or if they had not given the order for its execution, they would not have been able to carry out the purposes for which they were called into existence. That seems to have been the state of things in those cases which have decided that the plaintiff may recover when the work has been done.

Those remarks seem to me to recognise the decisions to which they refer as having very much the effect on which the plaintiff in this action relies. Cotton L J. made some observations which point to a distinction between a corporation such as one of these boards of health which acts on behalf of the public, and our municipal corporations which are themselves the public and for whom the councils act. Brett L.J. had also referred to the fact that the corporation was the board and acted for the inhabitants. What Cotton L.J. said on this point was:

> But it is urged that there is another exception, namely, that corporations are liable when goods have been supplied or work done in pursuance of a contract entered into not under seal and the corporation have had the full benefit of such contract. I entertain very grave doubts whether such a corporation as this could be bound on any such ground, because the parties who have a beneficial enjoyment of anything supplied on the order of this body are not the corporation but those for whom the corporation act as trustees.

The principal judgment in the Court of Appeal in *Young* v. *Mayor and Corporation of Royal Leamington Spa* (1) was delivered by Lord Justice Lindley. The case was decided expressly on the same ground as *Frend* v. *Dennett* (2) as had also been the case of *Hunt* v. *Wimbleton Local Board* (3). The question of the effect of the contract there in question having been executed was not discussed by the court, Lord Justice Lindley saying that the cases on the subject were very numerous and conflicting and required review and authoritative exposition by a court of appeal. Brett L.J , ex-

(1) 8 Q. B. D. 579. (2) 4 C. B. N. S. 576.
(3) 4 C. P. D. 48.

pressing, as Cotton L.J. also did, his concurrence with Lindley L.J., did so—

> upon the ground that the defendants were acting as an urban sanitary authority, so that the statute and the former decision of this court apply exactly to the case. I think that the mere want of seal prevents the plaintiffs from recovering, and I am further of opinion, having read all the cases on the point, that the fact that the defendants had the benefit of the contract will not prevent them from setting up the statute in answer to the plaintiffs' claim. The mere want of a seal is a complete bar.

It appears from the report in the House of Lords that, in delivering his judgment, the lord justice added a statement of his opinion that in the case of a municipal corporation not bound by the statute the proper decision in point of law, according to the cases and principle, would be that the want of seal prevented in such a case as the one before him the plaintiffs succeeding, but this statement he did not allow to appear in the published report of the case. Lord Blackburn suggests that in the revised report Brett L. J. (who had become M.R.), had abstained from expressing the opinion because on reflection he saw that it was not necessary for the decision of the case to decide that, and that what he had said was a mere *obiter dictum*. It strikes me as possible that another reason may have had some influence, and that is that when the judgment was delivered, viz.: on 18th March, 1882, the lord justice spoke with reference to corporations governed by the Municipal Corporations Act, 1835. The Municipal Corporations Act of 1882 was passed on the 18th of August, 1882, and it may have occurred to him before the judgment appeared in the law reports, which was later than August, that it would be prudent to withdraw a *dictum* that might require modification when the new act came to be worked under. The new act happens to be more like this Manitoba Act than the former one in one particular to which I have already

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adverted, though I do not say that the effect is different. I have not considered that point.

When *Young* v. *Leamington* (1) was before the House of Lords, Lord Blackburn, holding that the provision of the Public Health Act required contracts of the value of over £50 to be under seal, suggested that the enactment of that provision may have been induced by the differences of opinion that existed on the matter of the liability of corporations on executed contracts not under seal. He reviewed the principal cases in which the divergent views were shown, the stricter views being held in the Exchequer and the more liberal in the Queen's Bench, down to 1866, when the Queen's Bench decided the case of *Nicholson* v. *Bradfield Union* (2) on the doctrine acted on in *Clarke* v. *Cuckfield Union* (3). There was not, he said, any decision in the question between 1866 and the passage of the Public Health Act of 1875, and he expressed his idea that the legislature, knowing of the difference of opinion that existed, and the difficult questions that might yet have to be decided, really intended to provide that those difficulties should not arise with respect to the urban authorities they were creating. Now, without presuming to criticise this theory by suggesting that the measure was not a new one, but was the re-enactment of a law made seven and twenty years before, we may take from Lord Blackburn's statement these two conclusions: There is no rule settled by English decisions opposed to that on which the case of *Pim* v. *Ontario* (4) was decided, but while there has been a conflict of opinion, as not overlooked in that case, the latest decision, pronounced several years after Pim's case, agrees with the judgment of the Upper Canada Court; and secondly, the

(1) 8 App. Cas. 517.
(2) L. R. 1 Q. B. 620.
(3) 21 L. J. Q. B. 349.
(4) 9 U. C. C. P. 304.

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corporations, acting as urban authorities under the Public Health Act, are not left to the operation of the common law rules affecting the corporations as expounded and applied by the courts, but are under a rule concerning their contracts which, being statutory, does not permit the modifications and adaptation to changing circumstances which the ancient rule of corporations allows. Lord Bramwell gave judgment also. He said :

> As I think the case turns on the construction of the statute, I have not thought it necessary to go into the doubtful and conflicting cases governed by the common law.

Lord Blackburn had expressly intimated that the case at bar did not give an opportunity for reviewing those cases, and he only examined them so far as he thought was required for the purposes of construing the Public Health Act, 1875.

It seems manifest to me that these cases of Hunt and Young leave the general question of the contracts of corporations, either at common law or under the municipal system, just where they found it, and I am at a loss to understand how they were supposed to affect the question. If there were serious doubt of that it would be worth while to notice that the action which the Public Health Acts required to be done with the formalities of signature and seal was the action of the corporation itself, not something to be done by a body delegated, like the council under the Manitoba statute, to exercise the powers of the corporation. The position is almost the converse of that noticed by Lord Justice Cotton, as existing under the Public Health Act, for here the council accepts on behalf of the corporation, and the corporation enjoys the benefit of the work. It is not necessary, however, to pursue this topic.

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The decisions since *Young* v. *Leamington* (1), do not throw much new light upon the subject, but as far as they have come under my notice they appear to confirm the views of that case and of Hunt's case which I have taken. In *The Attorney-General* v. *Gaskill* (2), which was decided while Young's case was on its way to the House of Lords, Bacon V. C. held an agreement made by a local board, without being sealed, valid, section 174 of the Public Health Act, 1875, notwithstanding, because it was not an agreement "necessary for carrying the act into execution," which is the class of contracts authorized by the section and required to be under seal. The agreement related to the compromise of an action, and the Vice-Chancellor applied to it the ordinary rule applicable, according to many cases, to ordinary corporations.

In December, 1884, the case of *Scott* v. *Clifton School Board* (3) was decided by Mathew J. The action was by an architect to recover payment for plans prepared for the school board which is a corporate body. There was no contract under seal. Mathew J. said:

> If it were necessary for my decision I should hesitate to regard the cases relied on for the defendants [which were the same cases now relied on for the defendants] where contracts by corporate bodies were held to require to be under the common seal, to be a safe guide in the present case (or indeed in any other case) where the contract was for a purpose incidental to the performance of the duties of the corporate body, and its necessity was shown by proof that the corporation, with full knowledge of its terms and of all the facts, had acted upon and taken the benefit of the performance.

The case was decided, however, on the ground that the contract in question was one which, under the learned judge's construction of a provision of the Elementary Education Act, 1870, was well made by a minute of the board, a distinction which is not with-

(1) 8 App. Cas. 517. (2) 22 Ch. D. 537.
(3) 14 Q. B. D. 500.

out resemblance to that which I have just hinted at between contracts made by a corporation and those made by another body which has power to bind the corporation.

In *Melliss* v. *The Shirley and Freemantle Local Board of Health* (1), Mr. Justice Cave decided, in April, 1885, that when a contract with a local board had been made without a seal and partly performed, the seal being then attached and the contract work afterwards completed, the contract was binding, under section 174, for the whole work. Under the strictest apprehension of the rules touching corporations the question could not have been raised. Mr. Justice Cave held the plaintiff entitled to recover notwithstanding that he came under section 193, which imposed a penalty on persons contracting with an urban authority with respect to a matter in which they were interested. The Court of Appeal held that section 193 made the contract void, and reversed the decision on that ground, saying nothing about the point taken under section 174 (2).

In *Phelps* v. *Upton Snodsbury Highway Board* (3), Mr. Justice Lopes in 1885, holding that a highway board which was a corporate body was not bound to pay a solicitor for opposing a bill in parliament because he was appointed by resolution only and not by deed, put his decision on the ground that the purpose for which the retainer was given was not incidental to the purpose for which the highway board was incorporated.

The greater strictness applied to the restrictions of section 174 than to the ordinary doctrines respecting corporations was exemplified in 1889 in the case of *Tunbridge Wells Improvement Commissioners* v. *Southborough Local Board* (4), before Mr. Justice Kay, where a peti-

(1) 14 Q. B. D. 911.
(2) Weekly Notes, 1885, p. 224.
(3) 1 Cababe and Ellis 524.
(4) 60 L. T. 172.

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tion under the seals of both the plaintiff and defendant corporations set out an agreement between them respecting which they presented the petition to the Local Government Board. The agreement was not under the seal of the defendant corporation, wherefore it was held, nothwithstanding the petition, not to bind the board under section 174.

Burial boards, appointed under 15 & 16 Vic. ch. 85, are incorporated by the statute and authorized to make certain contracts which are directed to be made in a certain way. The plaintiff in *Stevens* v. *Hounslow Burial Board* (1) contracted in proper form to do repairs to chapels of the defendants for £38, and did extra work under verbal orders for which he sought to recover £13 more.

Fry L.J. and Mathew J., sitting as a divisional court, differed as to his right, the former holding that the statute was against it, and the latter thinking that the board was liable because the extras were each of trivial importance, and the board could not be expected to affix their seal to every order for small matters as they were required.

These are all the English cases of later date than *Young* v. *Leamington* (2) which I have happened to see. They certainly indicate no apprehension of the law being what is asserted by the defendants.

In my opinion the rule settled and acted on in Upper Canada thirty-five years ago in Pim's case, and adhered to in that province and the province of Ontario, as shown by numerous decisions which it would be alike tedious and unprofitable to notice in detail, is still the law of Ontario, and should be held to be also the law of Manitoba under the municipal system of that province which takes that of Ontario for its model, though differing from it in occasional matters of detail.

(1) 61 L. T. 839.

(2) 8 App. Cas. 517.

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I think the judgment of Mr. Justice Dubuc in the court below gives sound and conclusive reasons for maintaining that under the circumstances of this case the corporation is liable to the plaintiff.

It would, in my judgment, be a matter seriously to be deplored in the interests of the people of both provinces if the more rigid black letter rule contended for were held to be the law. I see no reason why the rule established so long ago in Upper Canada should not be maintained as the law of that province, and as also the rule of interpretation to be acted on in Manitoba, even if, upon a review of the matter, the English courts should adopt the views which Lord Esher seemed inclined to take of the result of the previous decisions. The rule which enjoins caution in disturbing principles that have been long settled and acted on ought to apply.

It has been declared in England by the highest authority that there is there a conflict of opinion which requires to be set at rest by a court of appeal. The Ontario rule was settled by the decision of an appellate court thirty-five years ago. Since that time the municipal law has been re-enacted a number of times in that province, and as far as the constitution and functions of municipal corporations and municipal councils are concerned, the same law has been made the law of Manitoba.

Under these circumstances it would be, in my judgment, our duty to affirm, or refuse to disturb, the rule so settled, even if upon an independent examination of the question we should not ourselves necessarily arrive at the same conclusion.

It is reasonable to assume that if the legislatures of the province of Manitoba and the province of Ontario, which cannot be accused of reluctance to introduce into the municipal law any change that was deemed

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desirable, had not treated the rule as being finally settled by the decision of the Court of Error and Appeal they would when re-enacting the law have acted on the suggestions thrown out by Chancellor Blake in Pim's case, and before that by Sir William Richards in *Marshall* v. *School Trustees of Kitley*(1), and have removed all question by some express enactment. The decision in Pim's case may thus fairly be regarded as indirectly sanctioned by the legislature, and confirmed as the law of the province of Ontario with regard to its municipal corporations; and it may properly be held that the legislature of Manitoba adopted the rule in question as part of the municipal system in which it followed the older province.

In my opinion the appeal should be allowed with costs, and judgment given for the plaintiff for $600, with interest on $200 from the fourth day of July, 1885, and on $400 from the fourth day of July, 1886, with costs.

Appeal allowed with costs.

Solicitors for appellant: *Ewart, Fisher & Wilson.*

Solicitor for respondent: *J. B. McLaren.*

(1) 4 U. C. C. P. 373.