1882
*Nov. 30.
*Dec. 1.
1883
*May. 1.

THE CANADA CENTRAL RAILWAY COMPANY .... } APPELLANTS;

AND

THOMAS MURRAY AND WILLIAM MURRAY .... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Agreement, Construction of—Evidence—Question for the Jury—Contract not under seal.

To an action on the common counts brought by *T.* and *W. M.* against the *C. C. R. Co.*, to recover money claimed to be due for fencing along the line of *C. C.* railway, the *C. C. R. Co.* pleaded never indebted, and payment.

The agreement under which the fencing was made is as

*PRESENT.—Sir W.J. Ritchie, C.J., and Fournier, Henry, Taschereau, and Gwynne, JJ.

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follows: "Memo. of fencing between *Muskrat* river, east, to *Renfrew*. *T.* and *W. M.* to construct same next spring for *C. C. R. Co.*, to be equal to 5 boards 6 inches wide, and posts 7 and 8 feet apart, for $1.25 per rod, company to furnish cars for lumber. " (Signed) *T. & W. M.*
A. B. F."

F. controlled nine-tenths of the stock, and publicly appeared to be and was understood to be, and acted as, managing director or manager of the company, although he was at one time contractor for the building of the whole road. *T.* and *W. M.* built the fence and the *C. C. R. Co.* have had the benefit thereof ever since. The case was tried before *Patterson*, J., and a jury, and on the evidence, in answer to certain questions submitted by the judge, the jury found that *T.* and *W. M.*, when they contracted, considered they were contracting with the company through *F.*, and that there was no evidence that the company repudiated the contract till the action was brought, and that the payments made were as money which the company owed, not money which they were paying to be charged to *F.* and a general verdict was found for *T.* and *W. M.* for $12,218.51. On appeal to the Supreme Court of *Canada*—

Held (affirming the judgment of the Court below) that it was properly left to the jury to decide whether the work performed, of which the *C. C. R. Co.* received the benefit, was contracted for by the company through the instrumentality of *F.*, or whether they adopted and ratified the contract, and that the verdict could not be set aside on the ground of being against the weight of evidence; [*Ritchie*, C.J., and *Taschereau*, J., dissenting, on the ground that there was no evidence that *F.* had any authority to bind the company, *T.* and *W. M.* being only sub-contractors, nor evidence of ratification.]

2. That although the contract entered into by *F.* for the company was not under seal, the action was maintainable.

APPEAL from a judgment of the Court of Appeal for *Ontario*, discharging a rule *nisi* to set aside a verdict in favor of the respondents and to enter a verdict for the appellants.

This action was brought to recover the value of certain fencing done by the respondents along an "Extension" of the appellants' line of railway between *Renfrew* and

Pembroke, during the year 1876, under an agreement made between the plaintiffs and *A. B. Foster* in the month of January, 1876, when the following memorandum, drawn up by *Thomas Murray*, was signed by the respondents and the said *A. B. Foster*, to express the agreement then entered into.

Renfrew, 6th January, 1875.

"Memorandum of fencing between *Muskrat* river, "east to *Renfrew*. *T. & W. Murray* to construct same "next spring for the C. C. R. Co., to be equal to 5 "boards, 6 inches wide, and posts 7 to 8 feet apart, for "$1.25 per rod, Company to furnish cars for lumber.

"*T. & W. Murray.*
"*A. B. Foster.*

The appellants pleaded never indebted and payment, and issue was taken upon these pleas.

The cause was tried by a jury before *Patterson*, J., at the *Pembroke* Spring Assizes for 1880, when a verdict was rendered for the respondents for $12,218.51.

In Easter Term, 1880, a rule *nisi* was obtained to set aside the verdict, and enter a verdict for the appellants, or for the entry of a non-suit on the grounds that "the written contract or agreement relied upon, signed by the plaintiffs and the late *A. B. Foster*, was not one made or purporting to be made with the defendants, and that there was no evidence or sufficient evidence of its being or being intended to be a contract with the defendants, and that if it purported to be or was intended to be a contract with the defendants there was no authority or sufficient authority shown in the said *A. B. Foster* to bind the defendants or to contract for them, and that there was no evidence of any ratification or adoption of said contract by the defendants; that the work of fencing was done for, and on the credit of, the said *A. B. Foster*, and under contract with him individually, and that there was no evidence

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or sufficient evidence to render the defendants liable for said work, or fencing, or any part thereof, and that on the facts and evidence or weight of evidence there should have been either a non-suit or a verdict for defendants; or why the verdict should not be set aside and a new trial be had between the parties for misdirection and improper ruling on the part of the learned judge, in not holding the written contract to be one between the plaintiffs and the said *A B. Foster* personally, and also in submitting it to the jury whether the plaintiffs supposed they were dealing with the defendants; or on the ground of the verdict being against law and evidence and the weight of evidence, for the reasons above set forth as grounds for entering verdict for defendants or a non-suit, and that on the evidence and weight of evidence the plaintiffs were not "entitled to recover, and said verdict should have been "for defendants."

After argument the rule was discharged, the Court of Queen's Bench being unanimously of opinion that the verdict was right, and it appears from the judgment of the learned Chief Justice of the Queen's Bench, that the judge who tried the cause concurred in this opinion.

The appellants then appealed to the Court of Appeal for the Province of *Ontario*.

The judges sitting in appeal were equally divided, the Chief Justice of *Ontario* and Mr. Justice *Burton* being of opinion that the verdict was wrong, and should be set aside; Mr. Justice *Morrison* and Mr. Justice *Osler* being of opinion that the verdict was right, and should not be disturbed.

The court being equally divided, the judgment stood affirmed, and the present appeal is from that judgment.

The work was actually performed by the respondents, and the appellants have had the benefit of it. The

evidence relating to Mr. *Foster's* position and to the adoption by the company of the contract is reviewed in the judgments.

Mr. *J. K. Kerr*, Q. C., and Mr. *Walker*, for appellants, and Mr. *Bethune*, Q.C., and Mr. *Deacon*, Q.C., for respondents.

The points argued and cases relied on by counsel are reviewed in the judgments.

RITCHIE, C. J. :—

I think the appeal should be allowed and non-suit entered for reasons to be found in the judgments of *Spragge*, C. J., and *Burton*, J., in the Court of Appeal. I may, however, add that the ownership of property alone will not render the owner liable for work performed upon it without his request, though he receives it knowing that the work has been performed. In this case, in my opinion, no contract was shewn between the plaintiffs and the defendants, nor can I discover any evidence of any authority on the part of *Foster* to enter into any such contract on behalf of the defendants, or that he intended to do so ; nor is there anything, in my opinion, to shew that defendants in any way held out or permitted the plaintiffs to believe in any existing state of things in reference to this contract, or any act of ratification (assuming the company would be bound by a ratification),precluding them from denying their liability. No payments were, in my opinion, authorized or made, by or in the name of the defendants to the plaintiffs. Those relied on as a ratification, think, were made by the company on account of *Foster*, and not by and on behalf of the defendants. It is said there was no repudiation on the part of the defendants —there was not, that I can see, any necessity for a repudiation.

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Ritchie, C.J.

On the part of the company, there is not the slightest evidence that the company ever knew that any contract was entered into, or professed to be entered into on behalf of the company, or that the plaintiffs were acting on any supposition that there was a contract binding on the company. There was no evidence to show that they permitted *Foster* to deal with plaintiffs as their authorized agent, or held him out as authorized by them in any way to make such a contract. On the contrary, the evidence is clear that though the fencing may not have been included in the written contract, it was, between *Foster* and the company, well understood that it formed part of the work he was to do under his contract. The plaintiffs, so far from communicating with the defendants that they were under any such impression, on the contrary, appear to have rendered their account for this work against *Foster* personally, they never appear to have rendered any account or made any claim against the company until after the death of *Foster*, which took place on the 1st November, 1877, long after the work had been performed. Had the defendants been notified that plaintiffs were doing the work under a contract made by *Foster* on their behalf as their agent, and he had continued to act as such agent and the plaintiffs continued to fulfil their contract without any repudiation on the part of defendants, it may well be that defendants could become bound to plaintiffs on the contract. But in the absence of any authority on the part of *Foster*, or of any knowledge brought home to defendants, or of any ratification or adoption by the company of the contract, how can a liability be fixed on them? I cannot discover that *Foster* had any express or implied authority or ostensible authority to bind the company. Now, the law as to ratification is clear, and applies equally to cases of contract and of

tort. In the case of the *Phosphate Lime Co.* v. *Green* (1) *Willes*, J., laid down the law as to ratification thus :

> The principle by which a person, on whose behalf an act is done without his authority, may ratify and adopt it, is as old as any proposition known to the law. But it is subject to one condition : in order to make it binding, it must be either with full knowledge of the character of the act to be adopted or with intention to adopt it at all events and under whatever circumstances.

Bramwell, B., in *Riche* v. *Ash. Car. Ry. Co.* (1), referring to the case of *Phosphate of Lime* v. *Green*, says :

> My late brother *Willes* laid down a rule (using the language before quoted) by which I am content to be governed.

I may ask, as *Bramwell*, B., did in the case referred to, "Where is the evidence of adoption ?" with intention to adopt it at all events and under whatever circumstances.

FOURNIER, J. :—

I am in favour of upholding the verdict. I have no doubt that the contract was made by the parties with *Foster*, believing they were contracting with the company. It is said in so many words in the writing that the work is to be done for the company. It is true that *Foster* signed his name individually, and that he did not sign it in the quality of an agent, but it was a well known fact that *Foster* had been the general manager of the company. If he was not occupying that position at the time, he had for his own purposes changed his position so often from contractor to general manager, that it was very difficult for the general public to understand what his real position was in a legal point of view. In fact, it was really no change at all, and the jury, in my opinion, were well founded in declaring that he was acting for the company; he was using the cars of the company, the work was being done for the company, and, under

(1) L. R. 7 C. P. 53.

(1) L. R. 9 Eq. 239.

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the circumstances, this verdict ought not to have been disturbed.

HENRY, J.:—

This is an action under the common counts in assumpsit for goods sold and delivered, work done and materials provided, and for work done in building fences for the appellants along their line of railway, and for sawed lumber, fence posts, nails and fencing materials furnished by the respondents for the appellants at their request, and the particulars furnished by the respondents of their claim are as follows:

September 1st, 1876.

To 15,678 rods of fencing done by plaintiffs for defendants at their request on line of Canada Central Railway between the village of *Renfrew* and *Graham's Bridge*, over the *Muskrat* river, in the township of *Westmeath*, at $1.25 per rod, as per agreement, $19,597.50.

The appellants pleaded—

1st. Never indebted as alleged.

2nd. That before action they discharged the plaintiffs claim by payment.

The agreement under which the fences in question were made is as follows:

Renfrew, 6th January, 1876.

Memo. of fencing between *Muskrat* river, east, to *Renfrew*. *T.* and *W. Murray* to construct same next spring for C. C. R. Co., to be equal to 5 boards 6 inches wide, and posts 7 to 8 feet apart, for $1.25 per rod, company to furnish cars for lumber.

(Signed) *T. & W. Murray,*
A. B. Foster.

The agreement was performed by the respondents by the building of the fences, which is fully admitted, and the appellants have had the benefit thereof ever since. It was, however, contended on their behalf, that *Foster* had no authority to bind the company—that the respondents made the agreement with *Foster* personally—that he was under a contract to build the railway,

and that the fences were included in the work to be done by him under his contract, and that therefore the appellants were not responsible to the respondents. The agreement of the respondents is certainly not with *Foster*, but with the appellants. It is signed by him on their behalf. Had he authority to bind them? If he had, our judgment must be for the respondents. No express authority to enter into that particular agreement was shewn; but such express authority is not necessary to be shewn. The evidence is irresistible that he (*Foster*) was to a large extent the company. Such is proved by Mr. *Moffat*, who was a director of the company. He says:

> I knew *Foster*. In 1875 and 1876 he was managing director of the company. I may be mistaken that he was managing director in '75. * * * I think he was manager only 1876. He was building the road in 1875 between *Renfrew* and *Pembroke*. * * * He was managing director after he took the contract. * * * As a matter of fact he was manager of the whole thing.

Mr. *Baker*, who was general manager of the railway, and had been for two years, who was also secretary of the company and had the custody of all the books and papers of the company, and was in the employment of the company since 1869, says:

> *Foster* had the bulk of the stock—about nine-tenths of the stock of the company. * * * *Foster* elected all the directors. He held proxies for nine-tenths of the stock. * * * He had an overwhelming control of the board of the Canada Central. He elected the directors and the directors elected him managing director, &c.

The whole evidence goes to establish these positions. It is shewn that *Foster* had a contract with the company for the building of the railway on the sides of which the fences in question were erected, in which the work to be done by him thereunder is specially described and stated, but not in any way referring to or including the fencing. *Foster*, whilst engaged in

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performing that contract, and, in fact, while directing and controling the whole operations of the company, knowing that no provision had been made for the erection of the fences, entered into the contract therefor with the respondents. Were the case to rest solely on the question of general authority, I should say there was quite sufficient in the evidence I have cited, taken in connection with the rest of the evidence, to justify the submission of it to a jury. But it is plain that *Foster* and the directors well knew the fencing was not included in his contract. They knew they should be erected before the line would be operated, and it is not unreasonable to assume that *Foster* informed them of the contract, or that he was understood to have the whole control and direction as to all that was necessary to be done for the completion of the line outside of his own contract. The directors, if taking at all any active part apart from *Foster* in the completion of the line, must be taken to have known of the respondents' contract. The agreement is found amongst the records and papers of the company and must be considered as known to the directors. If known to them, they must also be assumed to have known that the respondents were performing it. That assumption would not be an unnatural one without any specific proof, but when we see that the materials for the fences were carried for the respondents by the appellants' cars and distributed, and without exacting payment as their freight regulations in all other cases provided, when payments were being made on account from the funds of the company, are we not bound to conclude that the directors knew all about the contract with the respondents. If they did not, they were remiss in their duty, and in the absence of proof we should not clear the company of a liability to pay for what they got good value for by assuming such a dereliction of duty. If the

directors, therefore, were unwilling to ratify the contract they should have so notified the respondents, but instead thereof by their dealings they gave them unmistakable proof of the ratification of it. If the directors knew not of the contract, or were opposed to it, if they thought that *Foster's* contract included the fencing, or that he personally was the contractor with the respondents, it is a little strange that the record shows no attempt to prove either position, although one or more of the directors gave evidence on the trial. There is no evidence that *Foster* on his own account ever made a claim against the company for the fencing or was paid anything for it. Had it been shewn that he had been paid for it through any mistake, and that those managing the company's finances had by a mistake paid him what was due to respondents, although not a defence, it would at all events have shown that the company had been willing to pay some one; but such evidence is wholly wanting, and the impression is, therefore, not a favorable one. The evidence was fairly submitted to the jury by the learned judge who presided at the trial, and they found a verdict for the respondents. I think the learned judge would have been wrong if he had done otherwise, and I think that, under the circumstances, the verdict should not be interfered with, even were we of opinion that it might have been for the appellants. I am, however, of the opinion that the conclusion of the jury was what both in law and equity the evidence warranted.

I think, therefore, the appeal should be dismissed, and a judgment entered for the respondents with costs in all the courts.

TASCHEREAU, J.:—

I cannot concur in the conclusion reached by the majority of the court. I cannot see that *Murray* ever

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contracted with the company. He simply took a sub-contract from the contractor *Foster*, and I cannot see that the company is to be made liable towards him.

GWYNNE, J.:—

The question before us in this case, for the same reason as was that in the case of *The Dublin, Wicklow and Wexford Ry. Co.* v. *Slattery* in the House of Lords (1), is limited to the enquiry whether there was any evidence whatever to go to the jury. Now, that the learned judge could not have withheld the case from the jury, cannot, I think, admit of doubt, and that it was submitted to them with a charge of which the defendants have no just reason to complain, appears to me to be also free from doubt.

The jury accompanied their verdict for the plaintiffs with a declaration in answer to certain questions put to them by the judge for their guidance—that they found as matter of fact that the plaintiffs, when they entered into the contract sued upon, considered that they were contracting with the company through *Foster*, and that there was no evidence that the company ever repudiated the contract until this action was brought; and further, that certain payments made to the plaintiffs on account were made as money which the company owed, and not money they were paying to charge to *Foster*. When we read the evidence, I confess that I am not at all surprised that the jury should have rendered their verdict for the plaintiffs.

The contract is as follows:

Renfrew, 6th January, 1876.

Memorandum of fencing between *Muskrat* river east, to *Renfrew*. *T. W. Murray & Co.*, to construct some next spring for *C. C. R. R. Co.*, to be equal to five boards 6 inches wide, and posts 7 to 8 feet apart, for $1.25 per rod. Company to furnish cars to distribute lumber.

(Signed) *T. & W. Murray.*
A. B. Foster.

(1) 3 App. Cases Pp. 1162 and 1200.

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The evidence describes this Mr. *Foster*, whose name is set to this paper, as a gentleman who controlled nine-tenths of the stock of the company—whose control of the board of directors was overwhelming—who was, in fact, himself the company; who elected the directors, who in turn elected him managing director; who resigned his office of director and put another in his stead—for the sole purpose of receiving—or rather (in view of his control over the board) of giving to himself, a contract to enable him to obtain a subsidy from the *Ontario* Government and to build the road. Who, by his like power of control over the board, had persons in his own private service and employment appointed to be officers and servants of the company, while continuing to be in his own private service and under his control. Who assigned the contract to build the road, which he had given to himself, to one *Haskell*, who does not appear to have ever done anything in performance of it, and procured the board of directors to go through the form of passing a resolution accepting *Haskell* as contractor in his place. Who, thereupon resumed his position at the board as a director, and was appointed formally by the board, but substantially by himself, vice-president and managing director, which offices he held for about two years, when he suffered them to merge into the more modest title of manager. Who upon the 2nd December, 1875, in his character of manager of the company received certain debentures to the amount of $50,000, issued by the town of *Pembroke* in favour of the company from certain trustees in whose hands they had been placed to the amount of $75,000 in the whole, upon trust to be handed over to the company upon the fulfilment by the company of certain conditions, and gave a receipt and guarantee therefor to the trustees, as follows:

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Pembroke, December 2, 1875.

To Messrs. *Andrew Irving*, *Michael O'Meara* and *Duncan McIntrye*,
Trustees of C. C. R. Debentures:—

Gentlemen, in consideration of your handing over to me this day $50,000 worth of debentures of the town of *Pembroke* issued under by-law No. 138, of which you are trustees, I hereby *on behalf of the Canada Central Railway Company*, guarantee that if the extension of the railway from the village of *Renfrew* to the town of *Pembroke* be not fully completed within the time mentioned in said by-law, then that the said Canada Central Railway Company will either return the said municipality the said debentures and coupons attached, or the value thereof in cash.

Yours, &c.,
(Signed,) A. B. FOSTER,
Manager C. C. Railway Co.

Who having taken back to himself from *Haskell* an assignment of the contract to build the road, which about two and half years previously he had assigned to him, procured his agents and nominees, the directors of the company, upon the 14th December, 1875, to pass the following resolution:

A certified copy being produced, signed by *Benjamin A. Haskell* and Hon. *A. B. Foster*, of the retransfer made by *Benjamin A. Haskell*, dated the 21st of October last, to the Hon. *A. B. Foster*, of the two contracts made on the 16th November, 1871, between the Canada Central Railway Co. and Hon. *A. B. Foster*—the said transfer is hereby approved and accepted.

Who, notwithstanding such approval of such retransfer upon the 12th April, 1876, in his character still of manager of the company, received from the trustees of the *Pembroke* debentures the balance of the $75,000 authorized to be issued by the by-law, and gave a receipt therefor as follows:

Received, *Pembroke*, April 12th, 1876, from the trustees for holding of the debentures for the assistance of building the Canada Central road to *Pembroke*, twenty-five thousand dollars worth of debentures, being the balance of the seventy-five thousand dollars granted by By-law No. 138 of the village of *Pembroke*.

(Signed), *A. B. Foster*,
Manager C. C. Railway.

His name also appears to be subscribed as "managing director" to all the bills of lading in use by the company, and by one of his co-directors he is spoken of as a person who as matter of fact was manager of the whole thing, and that they looked upon him as the owner of the road, and by other witnesses, not upon the board with him, but who had dealings with the company through him, and had the opportunity of observing the manner in which he openly acted before the public, he is spoken of as a person who throughout the country publicly appeared to be, and was understood to be, and acted as, managing director or manager of the company, and that if there was a higher officer than manager he was such officer, that he was upon all occasions the mouth-piece of the company—its soul and body—and, in fact, the company itself.

Upon this evidence, it is to my mind by no means surprising, that a jury consisting of men of common honesty and common sense, should come to the conclusion, not only that the plaintiffs in entering into the above contract might well believe that they were entering into it with the company, acting through an agent having full power and authority to act for the company, but that in fact it was as manager of the company and upon behalf of the company that he procured the plaintiffs to build the fence, for the balance of the cost of which this action is brought, and that the company, with full knowledge of the manner in which he was dealing on their behalf, suffered him to be considered to be a person having full power to bind the company.

But upon behalf of the company it is contended that, as by the resolution of the 14th December, 1875, *Foster* was accepted by the company in the place of *Haskell* as the contractor to build the extension of the railway from *Renfrew* to *Pembroke*, and that, as is alleged by the company, to build the fence was part of the contract,

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and that, as they also allege, *Foster's* appointment as manager was confined to the road already open to *Renfrew*, the jury should have come to the conclusion that it was with *Foster* in his character of contractor, and not with him in his character of manager, that the plaintiffs dealt when entering into the contract.

All that need be said to this, is, that it was for the jury to weigh the evidence; but I must say that, in my opinion and to my mind, it seems by no means surprising that intelligent men, judging the acts and intentions of men as they naturally strike ordinary minds should attach but little weight to this contention, for it does not appear that any means were adopted to inform the public of the internal transactions of the board of directors, or of the change effected by the transfer of the contract from *Haskell* to *Foster*, or of the terms of that con tract, or of the change effected by Mr. *Foster* being made manager instead of managing director. There does not appear to be any reasons for supposing that the public or the plaintiffs in particular had upon the 6th January, 1876, any knowledge of the change so recently effected in the status and condition of Mr. *Foster*. The gentleman who succeeded him, and who, at the time of the trial, filled the office of general manager and secretary of the company, and who, as he said, has been in the employment of the company since 1869 as secretary-treasurer, or in some other capacity, tells us that he does not know that anything was done to apprise the public of the change, and he adds that:

It is not customary to apprise the public of changes of that kind —that the public would know nothing of it without examining the books.

He has not said, but I think it not unlikely that if pressed he might have also said, that if any individual of the public had been so inquisitive as to ask to be permitted

to inspect the books of the company for the purpose of seeing how its internal management was conducted, he would have been politely—or otherwise—shewn his way down stairs. Moreover, all force in the objection is further removed by looking at the contract itself, by which we find that the fencing in question formed no part of the work which any person acting under that contract was required to do; but it is said that although it forms no part of the written contract, it was intended it should form part of the work to be done, and Mr. *Abbott* was called by the company to establish this position—whether his evidence, if closely examined, would establish this it is not necessary to enquire, for if it would, then the evidence was wholly inadmissible, as altering the terms of a contract gravely reduced to writing and deliberately executed under seal. Then again, we see, although the company now contends that the powers of Mr. *Foster* as manager were confined to the road already opened to *Renfrew*, a thing not communicated to the public in any way, he nevertheless acted in the character of manager as regards the extension from *Renfrew*, and for and on behalf of the company, when he received for them the debentures of the town of *Pembroke*, on the 2nd December, 1875, and 12th April, 1876; it is therefore not surprising if, upon this evidence, the jury should have regarded him as acting in his character of manager of the company in his dealing with the plaintiffs on the 6th January, 1876.

Then it appears that, as matter of fact, the company did supply the cars to distribute the lumber as stipulated in the memorandum of agreement that they should. Mr. *McKinnon*, who was superintendent of the company, and who says that he knew nothing of *Foster*, except that he was manager, furnished the cars. He says that he himself directed that the cars should be furnished—that he arranged that the cars of the company

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should carry the lumber and distribute it as they required it. He does not know who gave notice when the cars were required. He furnished the cars for everything required on the extension. Now, during the period that the plaintiffs were building the fence, it appears that Mr. *Foster* was in *England*. He went to *England* in May, 1876, and being still absent in September, this witness, in his capacity of superintendent, the manager being still absent, acting upon behalf of the company, made a contract with the plaintiffs for making four miles more of fencing of the same character as that described in the memo. of the 6th January, 1876, and which was paid for by the company at the same price as that stated in the above memo. The force of this evidence in support of the plaintiffs' contention was attempted to be shaken by the suggestion that the cars were supplied by the company to *Foster* as contractor and charged to him, but this suggestion was so little supported by evidence that it is not surprising that the jury should attach little weight to it. No agreement was attempted to be shewn to have existed between the company and *Foster* to the effect that the company should supply the cars to him and charge them to him, and the evidence falls far short of satisfactory proof that any such charge was ever in fact made. Nor, indeed, was there even anything in the evidence to establish that before going to *England* *Foster* ordered *McKinnon* to supply the cars, or, if there had been, that he gave the order in any other character than that of manager, in which character alone *McKinnon* says that he knew him. Upon this evidence it was, I think, very natural and very reasonable that the jury should regard the furnishing the cars by the company to distribute the lumber in the terms of the memorandum of agreement of the 6th January, 1876, as an act of the company in adoption of the terms of that agreement.

Then there was abundance of evidence to prove that the secretary-treasurer of the company gave credit to the plaintiffs for money due by them to the company for freight by applying such money as payments made by the company to the plaintiffs on account of the work performed by them under this contract. The force of this fact in support of the plaintiffs' claim was attempted to be shaken by the secretary-treasurer of the company, who said that these allowances were debited to Mr. *Foster* and settled by him.

This gentleman filled the equivocal position of being Mr. *Foster's* general agent in his private business, and at the same time secretary-treasurer of the company. There was no evidence offered to shew that the secretary-treasurer had any authority from the company to charge to Mr. *Foster* the allowances so made to the plaintiffs, nor if there had been, would that fact have in any respect diminished the weight of the evidence, that the fact of the making the allowance to the plaintiffs was an act of the company in adoption of the agreement of the 6th January, 1876. The evidence, however, failed to shew that in fact any such charge against *Foster* was ever made in the books of the company. Mr. *Baker*, who was the general manager and secretary-treasurer of the company at the time of the trial, swore most distinctly that there is no entry in the books of the company of these allowances made to the plaintiffs being charged against *Foster*, and although the next day, after he had an opportunity of conversing with the secretary-treasurer who had applied those monies due from the plaintiffs for freight as a payment to them upon account of this contract, he attempted to explain away this evidence, it is not, I think, surprising that the jury should have thought the attempted explanation unsatisfactory, and that they should decline to accept it, and that they should arrive at the con-

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clusion that when the secretary-treasurer of the company applied moneys due by the plaintiffs to the company, which moneys therefore constituted assets of the company, as a set-off or payment on account of a claim made by the plaintiffs against the company for work done for the company, and of which they received the full benefit, they should hold the company to the position which such act of their officer indicated, namely, that he was acting as their servant and within the authority conferred upon him by the company.

Upon the whole of this evidence, which displays such a singular relation existing between the company and their manager, who also appears to have held a contract under them, and who had such overwhelming control over the company that he appointed all the directors, and was suffered to appear to the public to have full authority to act in every matter on behalf of and for the company—to appear in fact to be the company itself—it is not at all surprising that a jury, consisting of men endowed only with ordinary capacity, should arrive at the conclusion—indeed, I should think it very strange if they had not—that the work performed by the plaintiff under the agreement of January 6th, 1876, and of which the company have received the benefit, was contracted for by the company through the instrumentality of their manager duly authorized in that behalf; or that at least the company, by their conduct, subsequently ratified and adopted his act as their own, and dealt with the plaintiffs upon that footing, and, I must say, that, in my judgment, it would be a great reproach upon the administration of justice if any technical rule of law should stand in the way of the plaintiffs, who have received from the defendants a portion only of their demand, recovering the balance still due to them for work of which ever since its completion, upwards of six years ago, the defendants have enjoyed, and do still

enjoy the benefit. The law, however, as it is administered in modern times, is, in my opinion, open to no such reproach. In *Crampton* v. *Varna Railway Co.* (1), where the claim, being merely for a money demand, was not enforceable in the English Court of Chancery, the Lord Chancellor, Lord *Hatherley*, refers to the power of the court over a company which should receive the benefit of a contract not entered into under their seal and should refuse to pay for the work. He says (2) :

There might be a contract without seal under which the whole railway was made, and of which the company would reap the benefit, and yet it might be said that they were not liable to pay for the making of the whole line. When such a case comes to be considered, it may be that the court, acting on well recognized principles, will say that the company shall not in such a case be allowed to raise any difficulty as to payment.

Now, by statute law in *Ontario*, the courts of common law, in a common law suit, have the same powers conferred upon them, and the same duty cast upon them, to administer justice upon the same principles of equity as always governed the Court of Chancery in *England* in cases within its exclusive jurisdiction.

For the determination of the case before us, the modern case of *The South Ireland Ry. Co.* v. *Waddle* (3) in the Common Pleas, and in the Exchequer Chamber (4) is ample authority. *Cockburn*, C.J., in delivering the judgment of the Exchequer Chamber in that case, says :

We are asked to overrule a long series of decisions in all the courts, which, in accordance with sound sense, have held, that the old rule as to corporations contracting only under seal, does not apply to corporations or companies constituted for the purposes of trading ; and we are invited to reintroduce a relic of barbarous antiquity. 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

(1) L. R. 7 Ch. App. 562.
(2) P. 569.
(3) L. R. 3 C. P. 463.
(4) L. R. 4 C. P. 617.

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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 to be settled law.

Now, the work performed by the plaintiffs was clearly beneficial to the defendants in securing to them the full enjoyment of the railway for the purposes of constructing and working which they were given their corporate powers, and in fact was necessary for the purposes of the defendants in the successful carrying on of the trade for which they were incorporated, and the verdict of the jury has conclusively established as matter of fact that it was with the defendants through the agency of Mr. *Foster*, and not with Mr. *Foster* in his private character, that the plaintiffs contracted, and that the defendants have ratified and adopted the contract by acting under it and making payments to the plaintiffs on account of it. The defendants, therefore, ought to pay the plaintiffs the balance still due to them for the work of which the defendants enjoy the benefit.

The appeal, therefore, should be dismissed with costs, and judgment entered for the plaintiffs upon the verdict.

Appeal dismissed with costs.

Solicitors for appellants: *Walker & McLean.*

Solicitor for respondents: *Thomas Deacon.*