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*June 22, 23.

*Dec. 13.

THE WATEROUS ENGINE WORKS COMPANY (PLAINTIFFS)..... APPELLANTS;

AND

THE CORPORATION OF THE TOWN OF PALMERSTON (DEFENDANTS)..... RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal corporation—Exercise of powers—By-law—Executory contract.

The Ontario Municipal Act (R.S.O. [1887] c. 184) by s. 480 authorizes any municipal council to purchase fire apparatus of any kind, and by s. 282 the powers of a council must be exercised by by-law.

Held, affirming the decision of the Court of Appeal, Gwynne J. dissenting, that a contract under the corporate seal for purchase of a fire-engine which was not authorized by by-law and not completed by acceptance of the engine, could not be enforced against the corporation. *Bernardin* v. *North Dufferin* (19 Can. S. C. R. 581) distinguished.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of the Chancery Division (2) in favour of the defendants.

This action was for the recovery of the price of a steam fire engine manufactured by the plaintiffs for the defendants, and five hundred feet of fire hose, known as the "Waterous" brand.

The defendants are a municipal corporation incorporated under the Municipal Act of the province of Ontario.

On the 12th of April, 1890, the defendants passed a resolution in council: "Moved by Deputy-Reeve Freeland, seconded by councillor McLean, that this council

*PRESENT:—Strong, Taschereau, Gwynne and Patterson JJ.

(Sir W. J. Ritchie C.J. was present at the argument but died before judgment was delivered.)

(1) 19 Ont. App. R. 47. (2) 20 O. R. 411.

recommend the fire and water committee to ask for the lowest price and terms from the Waterous Engine Works Company, the Ronald Company, or any engine offered for sale for fire engine, and report at the next meeting of this council."

On the 19th of May, 1890, the committee reported as follows : " The Fire and Water Committee beg leave to report that according to instructions we have received communications from the Waterous and Ronald Fire Engine Companies, and would recommend that your committee be empowered to purchase a fire engine and five hundred feet of hose, price not to exceed $2,150.00."

This report was received by the council and adopted.

In pursuance of this report a contract was entered into under the corporate seal of the plaintiffs and of the defendants for the construction of a steam fire engine for the defendant corporation. This contract was signed by the mayor and countersigned by the clerk, and the seal of the corporation attached thereto. The contract was also signed by the plaintiff company and the seal of the company affixed thereto.

Full and particular specifications of this engine were attached to the said contract.

No by-law of the defendant corporation was ever passed sanctioning the purchase of a fire engine, or sanctioning the said contract.

The plaintiffs proceeded to prepare an engine for the defendants pursuant to this contract and specifications attached thereto.

By the terms of this contract the engine and 500 feet of hose was to be delivered free on board the cars at Palmerston on or before the 19th June, 1890.

The engine was duly delivered by the plaintiffs to the defendants free on board the cars at Palmerston before the 19th of June, 1890, pursuant to the contract, and was placed in the town hall of the defendant corporation.

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On the 2nd June, 1890, at a meeting of the council of the defendant corporation, the contract between the plaintiffs and the defendants was read, and the committee reported that they had purchased an engine and 500 feet of hose pursuant to the report adopted at the meeting of the council on the 19th of May. The said report was thereupon adopted by the council. It was thereupon moved and carried that McLean, Robbins and Best, three members of the council, should be a committee to engage experts to investigate the working of the engine on the day of the test.

On June 19th, 1890, the engine was tested in the presence of the experts appointed by the committee, and on June 20th the experts reported favourably upon the test.

On 21st July, 1890, a resolution of the council was passed that all negotiations with the plaintiffs with reference to the fire engine be dropped, and that the plaintiffs be notified to remove the engine from the town hall.

On the trial the presiding judge found as a fact that the engine had answered the test and complied with the requirements of the contract, but he held that plaintiffs could not recover for want of a by-law of the council authorizing the purchase, the Municipal Act, R.S.O., (1887) ch. 184, providing by sec. 282, that "all the powers of the council shall be exercised by by-law unless otherwise expressly authorized or provided for" and the power to purchase fire apparatus, which is expressly given to a municipal council by section 482 of the act, coming under the said provision. The Divisional Court and the Court of Appeal affirmed the decision of the trial judge. The plaintiffs appealed to this court.

Wilkes Q.C. for the appellants. The contract contains all the requirements of a by-law and should be construed as such.

A by-law was not necessary. The powers to be exercised under section 282 are legislative powers only.

The corporation is estopped from setting up want of a by-law. *Agar* v. *Athenæum Life Assurance Society* (1); *Prince of Wales Assurance Company* v. *Harding* (2); *Doe d. Pennington* v. *Taniere* (3); *Bernardin* v. *North Dufferin* (4).

A. M. Clark for the respondents.

STRONG J.—The appellants brought this action to recover the price of a fire engine which, as they allege, the respondents contracted to purchase from them. Mr. Justice Rose, before whom the cause was tried, the Divisional Court of Chancery, and the Court of Appeal, have all successively held that the contract was never executed but was wholly executory. In this conclusion I entirely agree. The much debated question as to the liability of a corporation on an executed contract not entered into with the requisite formalities imposed either by common law or by statute does not, therefore, arise here.

The question we have to determine is whether the municipal corporation of an incorporated town is liable on a contract for the purchase of a fire engine which has been entered into without the authority of a by-law under seal, and which contract has remained unexecuted.

By sec. 480 subsec. 1 of the Municipal Act power is given to a municipal council to purchase or rent for a term of years, or otherwise, fire apparatus of any kind,

(1) 3 C.B.N.S. 725.
(2) E.B. & E. 216.
(3) 12 Q.B. 998.
(4) 19 Can. S.C.R. 581.

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and fire appliances and appurtenances belonging thereto respectively.

A fire engine is manifestly an appliance and apparatus within the meaning of this section.

By sec. 282 the powers of a municipal council shall be exercised by by-law when not otherwise authorized or provided for, and sec. 288 requires that 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 by the clerk of the corporation.

It requires no demonstration to show that the purchase of a fire engine by a municipal corporation is the exercise of a power conferred upon it by the statute. Then no by-law was ever passed authorizing the purchase of the fire engine in question, although the Fire and Water Committee passed a resolution to that effect. This resolution does not, however, appear to have been followed by a by-law with the formalities of signing and sealing required by the statute.

Under the circumstances the result is inevitable that there never was any contract legally binding on the municipality respecting the purchase of this fire engine.

The statute of 1890, authorizing the special fund for fire protection purposes, so far from dispensing with a by-law expressly requires one.

The only possible escape from the conclusion that there never was a contract would be by holding that the formalities presented by secs. 282 and 288 were not indispensable but merely directory.

We cannot, however, do this in the face of such clear and distinct authorities to the contrary as we find in the cases of *Young* v. *Leamington* (1) and *Hunt* v. *Wimbledon Local Board* (2), cases which are express decisions on the point that contracts of a municipal

(1) 8 App. Cas. 517. (2) 4 C.P.D. 48.

corporation are absolutely void, whether executed or executory, unless they comply with all statutory requirements as regards formality of execution, a result which I should have thought clear unless the courts have power to override and dispense with statutory provisions in their discretion. In the cases referred to decisions holding contracts with corporations void for want of statutory formalities were, indeed, unsuccessfully impugned even as regards executed contracts, to which class of contracts, however, this contract does not belong. For further reasons and authorities I refer to my judgment in *Bernardin* v. *North Dufferin* (1) which was, it is true, not in accordance with the opinion of the majority of the court in that case, but the contract there was executed. There is nothing, however, in the judgment of the court in that case against applying the principle of *Young* v. *Leamington* (2) and *Hunt* v. *Wimbledon* (3) to an executory contract such as the present.

The appeal must be dismissed with costs.

TASCHEREAU J. concurred.

GWYNNE J.—Upon 12th April, 1890, a resolution was passed by the municipal council of the corporation of the town of Palmerston, in council assembled, that a committee of the council named the fire and water committee should ask for the lowest price and terms from the Waterhouse Engine Works Company, the Ronald Company or any engine offered for sale for fire engine and report at next meeting of council. Upon the 19th of May following the said fire and water committee, in accordance with the above resolution, reported to the council that they had received communications from the Waterous and Ronald Fire Engine

(1) 19 Can. S. C. R. 581. (2) 8 App. Cas. 517.
(3) 4 C. P. D. 48.

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Companies, and recommended that they, the committee, should be empowered to purchase a steam fire engine and 500 feet of hose at a price not to exceed $2,150.00. This report was based on a proposition in writing which the committee had, and which was signed by the Waterous Engine Works Company by D. J. Waterous, for building a steam engine and for supplying therewith 500 feet of hose for the municipality. Upon the same 19th of May the above report of the fire and water committee was received and adopted by the council and an entry to that effect was made in the minutes of the proceedings of the council. In pursuance of the adoption by the council of the said report a contract bearing date the same 19th May, under the corporate seal of the said municipality thereto attached, was signed and executed by the mayor of the said municipal corporation and the clerk of the municipality and is in the words following:—

This agreement, made this 19th day of May, 1890, by and between the Waterous Engine Works Company, of Brantford, Ont., the party of the first part, and the Corporation of the Town of Palmerston, party of the second part, witnesseth: that the party of the first part agrees to sell to the party of the second part the following fire apparatus, to wit: one No. 2 Waterous steam engine as described in the attached proposal, and 500 feet of 2½ inch cotton rubber lined fire hose known as the "Waterous" brand, all to be in accordance with the specifications and guarantees set forth in the proposal of the party of the first part hereunto annexed and dated this 19th day of May, 1890, the same to be delivered free on board cars at Palmerston on or before the 19th day of June, 1890. The party of the second part agrees to purchase and pay for the aforesaid property delivered as aforesaid, the sum of twenty-one hundred and fifty dollars to be paid in manner following, that is to say: the above amount, viz.: twenty-one hundred and fifty dollars in sixty days from date of delivery. It is further agreed that the parties of the second part will not hold the parties of the first part responsible for delay in delivering the apparatus, such delay being occasioned by fire or other causes unforeseen that could not be prevented by reasonable diligence. In witness whereof the said party of the first part has caused these presents to be executed by

David J. Waterous, its duly authorized agent for that purpose, and the party of the second part has caused its corporate seal to be hereunto affixed attested by its mayor, R. Johnston, the day and year first above written.

RICHARD JOHNSTON, Mayor,
Chairman of Committee.

Seal of Town of Palmerston.

E. A. DUMAS, Clerk.

WATEROUS ENGINE WORKS CO., L'D.,
Per DAVID J. WATEROUS,
General Manager.

Seal of Waterous Engine Works Co., Ltd.

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At the next meeting of the council, namely, on the 2nd June, 1890, the Fire and Water Committee reported that they had purchased a fire engine and five hundred feet of hose from the Waterous Engine Works Company, as per report adopted at the last meeting of council. At this meeting the contract so entered into between the Waterous Engine Works Company and the town of Palmerston was read in council; and the said report of the Fire and Water Committee was read a second time and thereupon a committee of three members of the council was appointed to engage experts to investigate the working of the engine on the day of the test, and entries to the above effect respectively were made in the minutes of the council. The engine with the 500 feet of hose was duly forwarded and delivered free on board the cars at Palmerston within the time specified in the contract for that purpose and delivered to the officers of the corporation to be subjected to the test specified in the proposal attached to the contract, and upon the 19th June, 1890, the engine was subjected by the authorities of the corporation to such test in the presence of experts appointed by the committee of council for that purpose who, upon the next day, reported that the engine fully came up to the specifications of the contract with the exception as to the time taken to get up steam and

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throw water, which was eleven and one-half minutes; the contract specified ten minutes as the limit. But the experts reported that this could be partly accounted for by the fact that 600 feet of hose were attached, whereas the contract specified only 100 feet. Upon this point the learned judge who tried the case found as a fact that the engine did answer the test, and did fully comply with the contract and was capable of getting up steam and throwing water within the ten minutes specified as limit. Upon the close of the test to which the engine was submitted it was taken to and left in the engine house belonging to the municipality where it has ever since remained, and still is, but on the 21st of July, 1890, the council passed a resolution to the effect that all negotiations with reference to the fire engine with the plaintiffs be dropped, or at least,

> so far as this council can legally do so, and that they be notified to remove the engine from the town hall and further that a copy of this resolution be forwarded to the Waterous Engine Works Company properly attested with the signature of the mayor and clerk and the corporation seal attached thereto.

A copy of this resolution was received by the plaintiffs on or about the 6th August, but they, instead of complying with the notification therein to remove the engine from the premises of the municipality where it had been ever since the 19th June, commenced this action on the 6th September, 1890.

Now it cannot be, and has not been, contended that this contract so executed by and under the direction and authority of the governing body of the corporation was not executed in such a manner as to make it a valid contract binding on the corporation unless there be some provisions in the Municipal Institutions Act of Ontario which invalidates it; but it is contended that there is a clause in the Municipal Act, ch. 184 R. S. O. of 1887,

which renders it wholly null, void and *ultra vires*. The section referred to is that numbered 282 of said ch. 184 which is identical with sec. 186 of 22 Vic. ch. 99, an act passed on the 16th day of August, 1858, when it was first introduced; which act is incorporated in the Consolidated Statutes of Upper Canada as ch. 54. The section is as follows :—

> The jurisdiction of every council shall be confined to the municipality the council represents except where authority beyond the same is expressly given ; and the powers of the council shall be exercised by by-law when not otherwise authorized or provided for.

The contention is that this last sentence covers contracts made by the corporation, the power to make which, it is contended, can be exercised by by-law only.

The question thus raised is certainly a very grave one for if the contention be maintained it wholly, as it appears to me, revolutionizes the law as heretofore understood and administered for thirty-four years for then no contract whatever entered into by and with the corporation, even though under the corporate seal, and however trifling or necessary might be the subject of such contract, namely, whether it be for executing absolutely necessary repairs in a highway or sidewalk or for the purchase of fuel or other necessary articles for the use of the officers of the municipality in the discharge of their duties in their offices or elsewhere, or for the employment of menial officers or day labourers, or, in short, for anything whatever, could have any validity whatever unless, in the words of the section, the power of the council to enter into the contract should "be exercised by by-law" and further, the corporation could never be made liable for any work whatever, whether contracted for orally or under the seal of the municipality, though set thereto by direction of the council, and although the work had been executed and the corporation had had and received the

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full benefit and enjoyment thereof, unless the power of the council to enter into such contract should "be exercised by by-law," for this is the principle involved in *Hunt* v. *Wimbledon* (1), affirmed irrevocably to be law by the House of Lords in *Young & Co.* v. *Leamington* (2.) Where a statute requires a contract, in order to its being binding upon a corporation, to be entered into in a particular manner it cannot be entered into validly otherwise than as prescribed by the statute. There can not be recognized any judicial exception from a statutory obligation, so that in the case of municipal corporations not only the doctrine which, after much judicial contention, had become firmly established, to the effect that corporations may be held liable upon oral contracts which have been executed, and of which the corporation had had full benefit and enjoyment, must be expunged from the jurisprudence of the province of Ontario, but contracts also entered into under the common seal of the municipality must be pronounced to have no validity whatever unless the municipal corporation in entering into the contract exercised their power to do so by by-law. The principle upon which the cases that affirm as against corporations the validity of oral executed contracts of which the corporations have received the benefit proceed is that it is competent for the courts to recognize such cases as constituting an exception from the *common law* rule that corporations can contract only under their common seal, but no such exception can be made from a statutory provision which prescribes a particular mode for corporations to enter into valid contracts. *Young & Co.* v. *Leamington* (2) is conclusive authority that such a provision is mandatory and not directory and cannot be dispensed with by any court. If, therefore, the contention of the defendants

(1) 4 C. P. D. 48. (2) 8 App. Cas. 517.

be well founded there can be no contract whatever which shall be binding upon a municipal corporation entered into by the corporation whether orally or under the corporate seal unless by force of a by-law for that purpose first passed. No such construction of the clause in question appears to have been entertained when the clause was first introduced into the act of 1858. In *Perry* v. *The Corporation of Ottawa* (1) an engineer sued the corporation for the value of services rendered by him in making survey estimates and plans, &c., of the necessary expenditure for supplying the city with water, under the following circumstances: In 1860 a committee of the council of the corporation had reported to the council making certain recommendations, among others that the same or some other committee should be appointed with power, among other things, to treat with and recommend to the council an engineer to make the requisite survey, plan and estimates of the intended expenditure for supplying the city with water, for applying to Government to grant a site for a reservoir and water power and generally to superintend the matter. This report was adopted and a committee appointed in June, 1860. In August, 1861, an alderman named Skead being in Quebec wrote to urge the plaintiff to come to that city to assist in pressing for the site for the proposed reservoir and an alderman named Goodwin was a witness at the trial and stated that he was a member of the waterworks committee and acted as chairman and that they (the committee) employed the plaintiff to make plans of the hill and of the reservoir proposed to be constructed on it, to be laid before the Commissioner of Public Works. This witness told the plaintiff to go to Quebec. A Mr. Boucher, chairman of the street committee in 1861, proved that by the authority of that

(1) 23 U.C. Q.B. 391.

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committee he employed the plaintiff to make a copy of a certain plan which was in the registry office, which the plaintiff made but was not paid for. The plaintiff also proved a report prepared by him for the water works committee which they submitted to the council of the corporation with their own report, and he proved the value of those services. For the defendants it was contended that the plaintiff could not recover as the contracts in respect of which the plaintiff brought his action were not executed under the corporate seal of the municipality. But Draper C. J. held that the court, notwithstanding the passing of the Municipal Act of 1858 which contained the clause now under consideration, was bound by the judgment in *Pim* v. *The County of Ontario* (1), and Hagarty J. was of the opinion that the plaintiff was entitled to recover for his plans and reports simply on the ground that he was employed to make them by a duly appointed committee of the council which committee reported what had been done by them and by the plaintiff under their orders, and the council by resolution adopted the action of the committee; as to the plantiff's claim for services in going to Quebec rendered under the direction of the chairman of the committee he doubted, but finally concurred as to the plaintiff's claim for these services also for the reason that in the report of the committee which was adopted by the council in October it appeared that the chairman of the committee and the plaintiff had interviews with the commissioner of crown lands on 17th September, so that the council when adopting the report must have known that those interviews took place at Quebec, and not at Ottawa. Now, if the clause under consideration includes within its purview contracts made by the corporation, it comprehended the contract made with

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

Perry and upon which he recovered in that action, equally as it does the contract entered into with the plaintiff in the present action, yet it never occurred to any one to contend that the contract with Perry was null, void and *ultra vires* because the municipal council of the city of Ottawa had not first passed a by-law for the purpose of giving itself authority to enter into the contract. Again, in *Broughton* v. *The Corporation of the Town of Brantford* (1), it was held by Hagarty C.J. in 1869 that the plaintiff, under and in virtue of a contract entered into with him by the corporation under their corporate seal for the performance of certain services to be rendered to the corporation by him at a salary of $900.00 per annum, was entitled under the contract contained in the instrument executed under the corporate seal to maintain an action against the corporation for wrongful dismissal. Hagarty C.J. giving the judgment of the court said that he considered the plaintiff up to the date of his dismissal held his office "under and upon the terms of his original appointment."

We find, he says, a report of a committee of council to the whole body in December, 1865, recommending plaintiff's appointment at this salary ($900.00 per annum.) We also find a resolution of the council authorizing the mayor to execute the bonds between plaintiff and the town.

And upon this the plaintiff was held entitled to recover against the corporation for a wrongful breach of their contract so made with him. Now, here again if the clause under consideration has the effect now contended for it cannot, I think, be doubted that it applied to the contract in that case equally as it does to the contract in the present case.

Then, in the case of *Brown* v. *The Town of Belleville* (2), it appeared that on the 6th May, 1868, a report of

(1) 19 U. C. C. P. 434. (2) 30 U. C. Q. B. 373.

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a committee of the town council was made to the council which stated that the committee had put themselves in communication with one Alexander Brown, who owned a steam dredge, which was then in the state of New York, and which he had consented to loan to the corporation to use for dredging the harbour, and also to build a scow to receive the dredge when it should arrive, on condition that the corporation would pay the cost of transport to Belleville and pay him for the use of the dredge a sum not exceeding ten per cent per annum on the actual cash value of the dredge and the scow, while the same were employed by the corporation ; the corporation to keep the machinery in good order and to return the dredge in good condition, ordinary wear and tear alone excepted ; the agreement to be subject to a vote of the people to raise funds for dredging the harbour, and all expenses connected therewith, and that the committee considered the offer a very favourable one and recommended the same for acceptance by the council.

This report of the committee was adopted by the council in due form by resolution. After the adoption of the report the chairman of the committee saw Mr. Brown, the plaintiff in the action. The clause in the report that the agreement should be subject to a vote of the people authorizing funds to be raised for dredging the harbour was introduced into the report when it was before the council and before the resolution was passed adopting the report. For this reason the chairman of the committee drew the attention of the plaintiff to the clause and to the risk he ran of the by-law for raising the funds not passing, but assured him he thought it would pass. Finally the chairman concluded the arrangement with the plaintiff and told him to bring the dredge, which the plaintiff thereupon sent for and had it brought to Belleville. The action was for the

expense of bringing it, viz., $373.50. The defendants never used the dredge for the reason that after the above arrangement between the chairman of the committee and the plaintiff was made and entered into, and on the 17th June, 1868, the committee again reported that they had under consideration the cheapest and best mode of carrying out the work of dredging the harbour, and had consulted persons of experience and had recommendations as to the propriety of letting the same out by contract at so much a cubic yard or at a round sum for the whole work, and that the committee was not prepared to recommend the conclusion of any negotiations until the by-law for raising the money for the work was confirmed and finally passed. At this time a by-law for raising the money was provisionally passed and advertised for taking the votes of the people thereon, which were taken on the 6th July, and although it went through the form of being passed by the council on the 15th July, upon which day the committee again reported to the council that they had unanimously decided that it was desirable that the work of dredging the harbour should be let out by contract at a certain sum per cubic yard measured on the scow after the same had been excavated, the work to be executed as the committee might, from time to time, direct, duly reporting to the council as the work progressed; and the committee desired to be authorized to advertise for tenders for the work, requiring those who tendered to state at what price per cubic yard they would perform such work, providing the dredge, scow and all necessary apparatus. This report was in due form adopted by the council. The committee in the meantime had seen a plan of dredge which it was thought would be better for working in saw-dust than the plaintiff's, and they finally decided to let the contract for dredging the har-

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bour to a Mr. Hayden, who used the new style of dredge, and a contract under seal of the corporation was entered into with Hayden. In the meantime the plaintiff's dredge had been brought to Belleville but it was never used by the contractor. The by-law which had been submitted to the vote of the people on the 6th July proved to be defective and a new by-law for raising the necessary funds for drainage of the harbour was introduced into the council and passed in the month of December following. The plaintiff brought his action for the recovery of $373.50 the expense of bringing his dredge to Belleville under the contract for that purpose entered into with him by the chairman of the committee of council. The defence was that the corporation had never used the dredge, had never received it from the plaintiff and that they were not liable as there was no contract made with the plaintiff by the defendants under their corporate seal. Now, here again it is to be observed that there was no by-law passed by the council authorizing the committee or their chairman to enter into any contract with the plaintiff. The plaintiff had done what he had undertaken to do under his contract although the defendants never had received the dredge or intermeddled with it; and he was held to be entitled to recover notwithstanding. The terms in which the judgment of the court was delivered by Richards C. J. impress my mind with the conviction that the defendants would have been held liable in damages for breach of their agreement in not employing the plaintiff and using his dredge if an instrument under the corporate seal had been executed embodying the terms of the agreement as expressed in the plaintiff's proposal reported by the committee to the council notwithstanding that there had been no by-law authorizing

the contract to be entered into. The learned Chief Justice says, delivering the judgment of the court :—

The plaintiff was the owner of a dredge which was then in the United States, the committee persuaded him to offer to send for it and to let them have it on certain terms, the first stipulation in the agreement being that he should send for the dredge and bring it to Belleville, doubtless that there might be no delay in the matter.

Again :

The committee report the offer to the council, say they consider it very favourable and recommend the same for acceptance to the council. The council adopt the report of the committee, and the chairman informs the plaintiff of it and persuades him to send for the dredge at once which he does and expends money to the extent of over $300 in bringing it to Belleville. In the meantime the committee think a more favourable arrangement can be made for the interest of the town and, after the arrival of the dredge, advertise for proposals to do the dredging, the committee furnishing the dredge and all implements, etc., etc. They do not carry out the arrangement to use the plaintiff's dredge, and finally decline paying pay him the money he has expended in good faith in carrying out the arrangement entered into with their express approval.

Again :

There may be some nice distinctions drawn between this case and some of the decided cases, but we think the law now has gone so far that when a contract has been entered into by the express direction of the corporation and has been performed by the party and the corporation has received the advantage of it, the corporation cannot set up as a defence that the contract was not under seal, always assuming, of course, that what was contracted for was a matter within the scope and powers of the corporation to contract for. Now, here the plaintiff did bring his dredge to Belleville to be used by the defendants.

Now these cases, as already observed, must have been all ill decided if the contention of the defendants in the present case be correct. But that the construction contended for by the defendants is not a sound construction of the section, I think the fact that it was not suggested in any of the above cases, nor so far as I have seen since the passing of the clause in the act of 1858 until very recently, is strong evidence of a common consensus of opinion that it is not, and I am of

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opinion that the clause is not open to the construction contended for.

The clause is found inserted under the head or title "general jurisdiction of councils;" so associated the words "powers of the councils" in the section appear to me to refer naturally and reasonably to the governing legislative powers of the councils in the matters over which jurisdiction or legislative authority is vested in them by the Municipal Act, which powers are to be found in part 7 of the act under the title "powers of municipal councils" and nothing there is said as to the mode of entering into contracts. The section under consideration therefore has not, in my opinion, any reference to the mode in which contracts shall be entered into by municipal councils; that is a matter provided for by the common law, namely, by a contract *inter partes*, executed under the corporate seal by authority of the governing body. This is a matter, more properly speaking an executive power of the corporation, incidental to its incorporation, whereas "the powers of the councils" referred to in sec. 282 appear to me to be those governing or legislative powers conferred upon the municipal councils by the Municipal Act itself.

The contention of the defendants has two aspects, namely, that the section either imperatively requires that a contract to be entered into by a municipal corporation with an individual must be entered into by a by-law, that is to say by an instrument to which by reason of its nature the person with whom the contract is to be entered into cannot by possibility be a party, or else that the corporation can by a by-law give to itself a power to contract which before it had not.

As to the first of these propositions I confess to being unable to appreciate what is meant by the expres-

sion, "entering into a contract by by-law." I cannot understand how an agreement between a corporation and an individual can be entered into by an instrument to which such individual can not by possibility be a party, nor can I understand the sense of construing the section as enacting that a municipal corporation can confer upon itself a power, which before it had not, of entering into a contract. Up to the present time it has not been so construed by the courts. Of course, if it be necessary for the corporation to raise money by a rate to pay for the thing contracted for by a municipal corporation that must be done by the exercise by the council of their legislative power, that is to say, by a by-law, but such a by-law might be passed as well after as before the execution of the contract, and if the corporation had funds to pay for the thing contracted for without imposing a rate to pay for it such a by-law would be unnecessary. Now, it sufficiently appears in evidence, I think, that the defendants at one time had control of funds sufficient to have enabled them to pay for the engine built for them by the plaintiffs which funds, however, they seem to have misapplied to other purposes under circumstances, however, which make them responsible to replace the funds so misapplied; but whether the corporation had funds or not when the contract was signed, or would be in funds to pay for the thing contracted for in the terms of the contract when it should be fulfilled by the plaintiffs, does not raise a point affecting the validity of a contract entered into under the corporate seal in respect of a matter for which they had power to contract. Unless, therefore, all contracts of whatsoever nature, and how much soever they may be within the purposes for which the municipal corporation is incorporated, are absolutely null and void unless they are entered into under or in virtue of a by-law first passed

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for the purpose by the municipal council the contract made with the plaintiffs under the corporate seal of the defendants cannot be pronounced to be void. That the corporation had power to enter into that contract is, I think, placed beyond doubt by section 480 of said chapter 184. What greater power the corporation could obtain by a by-law passed by the council than that conferred on them by the legislature by that section I am unable to see. It is argued, however, that this section 480 is limited by the section 282 construed as the defendants construe it. I have already stated my reasons for thinking the section 282 not open to the construction put upon it by the defendants; but the difference between the language of that section and of the sections 479 and 489 and all other sections relating to the exercise of legislative powers seems to show that the legislature intended by section 480 to confer the right to contract in respect of the matters therein mentioned in the ordinary manner; that is to say, that they recognized the distinction between what I think may be properly called an executive power from a legislative power. By section 479 it is said: "The council, etc., may pass by-laws for, etc." In section 480: "Every municipal council shall have power to contract for, etc." And again by section 489 and all other sections relating to legislative power: "The council, etc, etc., may pass by-laws for, etc." So that, as I have already said, the words "powers of the council" in section 282 appear to me to refer solely to the governing or legislative powers vested in the jurisdiction of the council by the Municipal Act, and do not at all refer to the power of entering into contracts, the mode of exercising which is prescribed by the common law to be by an instrument *inter partes* under the corporate seal, which power is a common law incident to the corporation as a corporate body,

and is, more properly speaking, an executive than a legislative power. Upon the whole, I am of opinion that the contract entered into with the plaintiffs under the corporate seal of the defendants set to the contract by the authority of the governing body, the council, and being for a matter for which the corporation had power to contract, is a good and valid contract, and as its terms have been fulfilled by the plaintiffs they are entitled to have judgment for the full amount. Indeed, upon the authority of *Brown* v. *Belleville*, (1) everything appears to me to have been done to give the defendants the benefit of the contract, and to have entitled the plaintiffs to have recovered as upon an executed contract of which the defendants had received the benefit if the contract had been an oral one and not under seal, for the plaintiffs delivered the engine which they had built for the defendants to them at Palmerston free on board; the defendants received the engine and subjected it to the test agreed upon, which the learned judge has found that the engine answered; and after subjecting it to the test the defendants took it and kept it in their engine house (where it still is) although the defendants, upon the 6th August, or thereabouts, communicated to the plaintiffs a resolution of council which substantially was to the effect that they repudiated the contract which they had procured the plaintiffs to enter into and which they had fulfilled.

PATTERSON J.—I do not think that any sufficient reason has been shown for holding that the judgment of the Ontario courts has misinterpreted the Municipal Institutions Act of that province (2). The general doctrine touching the mode in which a corporation can be bound by contract is not really in question.

(1) 30 U. C. Q. B. 373. (2) R.S.O. (1887) c. 184.

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We have to deal with two distinct bodies. One is the corporation, which consists of all the inhabitants of the municipality, and the other is the council which is not a corporation.

By section 8 the powers of the corporation are to be exercised by the council.

By section 282 the powers of the council are to be exercised by by-law.

What is the full scope and extent of this word "powers," and whether it includes all the administrative functions of the council which necessarily embrace the most trivial details of every day affairs as well as more important matters, need not now be discussed. It may be that the discussion of that question, when there arises a necessity for discussing it, may develop some difficulties in working the law in strict obedience to the letter of it, and may throw doubt on the wisdom of maintaining an enactment so sweeping and so imperative.

The English Public Health Acts of 1848 and 1875 have very stringent provisions respecting contracts by local boards of health, requiring them always to be under seal. These statutes were the subject of decision in *Frend* v. *Dennett* (1); *Hunt* v. *Wimbleton Local Board* (2), and *Young* v. *Mayor and Corporation of Royal Leamington Spa* (3), and were construed so strictly as to apply even to executed contracts. I had occasion to refer particularly to those cases in *Bernardin* v. *North Dufferin* (4) But those English statutes did not apply to contracts in small and every day matters. In the act of 1848 the rule was confined to contracts whereof the amount or value should exceed £10. That amount was probably found to be so small as to be too restrictive, and in the act of 1875 it was increased to £50. It may possibly be found expedient to modify

(1) 4 C. B. N. S. 576.
(2) 4 C. P. D. 48.
(3) 8 Q. B. D. 579; 8 App.Cas. 517.
(4) 19 Can. S. C. R. 581, 644.

section 282, or, as the Manitoba legislature has done, omit it altogether.

There is nothing necessarily incongruous in requiring the two things which, it is argued, cannot both be necessary, viz., the contract under seal and the by-law which must also be authenticated by a seal.

The contract is the contract of the corporation. By what authority is the common seal of the corporation affixed to that contract? It must be by the action of the council, and section 282 requires that the resolution of the council shall be evidenced by by-law. The by-law is the by-law of the council not of the corporation. The decision to purchase the fire engine was a matter of sufficient importance to deserve whatever amount of deliberation and care the law aims at securing by requiring the action of the council to take the form of a by-law.

I do not take the first subsection of section 480 of the Municipal Institutions Act to imply any departure from the general rule in making contracts of this kind. It gives power to a council to purchase fire apparatus, &c., and subsection 2 speaks, at the same time, of the powers of a municipal corporation for lighting, &c. The powers under both subsections must be exercised by the council and, as I understand it, in accordance with the rule of section 282.

The argument from the alleged acts of the mayor or the council, which are relied on as amounting to an acceptance of the engine, does not seem to me to advance the appellants' case. It strikes me as being the same discussion of section 282 in a slightly different form.

In my opinion we should dismiss the appeal.

Appeal dismissed with costs.

Solicitors for appellants : *Hardy, Wilkes & Hardy.*

Solicitor for respondents : *Alister M. Clark.*