

defendants to build the bridge which was the subject of the plaintiff's contract.

Waterous Engine Works Co. v. Town of Palmerston (1892), 21 Can. S.C.R. 556, was also distinguished, and many other cases were referred to.

If sec. 249 of the Municipal Act should be construed as requiring that all the powers of a council should be exercised by by-law, it would paralyse the action of municipal councils in their multitudinous duties.

The sound rule to be applied in a case like this is to have regard to the nature and subject-matter of the contract, and where the work to be performed by the contractor falls within the scope of the powers and duty of the corporation, and the contract has been executed, and the corporation has accepted the work, it is liable for the price thereof— and so even where the contract is not under seal.

The appeal should be allowed with costs and judgment should be entered for the plaintiff for \$2,500 with interest and costs.

MULOCK, C.J. Ex., agreed with CLUTE, J.

RIDDELL, J., agreed in the result, for reasons stated in writing. He was of opinion that, because the absence of a by-law was not pleaded, and no amendment was made or asked, the defendants could not succeed upon that ground. Even if an amendment were asked for, it should not be made to enable a litigant to obtain a dishonest advantage. The real issue was, whether the plaintiff had fulfilled his contract; that issue had been found in favour of the plaintiff; and on that finding the plaintiff should recover.

SUTHERLAND, J., agreed with RIDDELL, J.

KELLY, J., agreed in the result, for reasons stated by him in writing.

Appeal allowed.