[HIGH COURT OF AUSTRALIA.]

JOHNSONS TYNE FOUNDRY PROPRIETARY LIMITED . . . . . } APPELLANT;
PLAINTIFF,

AND

PRESIDENT, RATEPAYERS AND COUNCILLORS OF THE SHIRE OF MAFFRA . . } RESPONDENT
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 13-15; SYDNEY, *Dec.* 16.

Latham C.J., Starke, Dixon, McTiernan and Williams JJ.

Local Government—Power of municipal corporation to make contracts—Statute providing that council of municipality "may" make contracts in manner prescribed—Whether statute exhaustive of power—Contract by officer of council on its behalf—Claim by other contracting party on common count for work and labour done—Local Government Act 1928-1946 (*No.* 3720—*No.* 5119) (*Vict.*), *s.* 501 (1) (*c*).

Costs—Alternative claims against two defendants—Plaintiff succeeding as against one, failing as against other, defendant.

The *Local Government Act* 1928 (Vict.), s. 501 (1), provided: "The council of every municipality may in the name and on behalf of the municipality enter into contracts for the purposes of this Act and every such contract may be made . . . as follows . . . (*c*) any contract which if made between private persons would be by law valid although made by parol only and not reduced into writing the councillors or any two of them acting by the direction and on behalf of the council may make by parol only without writing."

A shire council passed a resolution that its steam roller should be repaired; then, while the council was still in session, the shire president, with the assent of the other councillors, directed the shire engineer to ascertain whether the plaintiff company was willing to do the work and, if so, to send the roller to the company. The engineer delivered the roller to the company with a request for its repair. The company repaired the roller and returned it to the council. The council relied on s. 501 (1) (*c*) of the *Local Government Act* 1928 and refused to pay for the work done. The company brought an action against

the corporation of the shire and its engineer, claiming payment on a common count for work and labour done, and, in the alternative, as against the engineer, damages for breach of warranty of authority. The trial judge gave judgment for both defendants with costs.

Held that the company was entitled to recover from the shire payment for the work done—

By *Latham* C.J., *Starke*, *McTiernan* and *Williams* JJ., because a contract binding on the municipality in accordance with s. 501 (1) (*c*) of the Act for the execution of the work had been made by the councillors through the agency of the engineer.

By *Dixon* J., because, for a purpose for which the municipal corporation was established, it had obtained the benefit of the work done by the plaintiff company in pursuance of a simple contract made under the authority of the council and the acceptance of the executed consideration implied a promise to pay which was enforceable by a common money count notwithstanding s. 501 of the Act.

Per Dixon and *Williams* JJ.: Section 501 is permissive merely and is not an exhaustive statement of the manner in which municipal corporations may enter into binding contracts.

Shire of Gisborne v. *Murphy*, (1881) 7 V.L.R. (L.) 63, *President, &c., of Shire of Leigh* v. *President, &c., of Shire of Hampden*, (1882) 8 V.L.R. (L.) 370, *Mayor &c. of Richmond* v. *Edwards*, (1883) 9 V.L.R. (L.) 348, *London* v. *Shire of Wodonga*, (1885) 6 A.L.T. 271, and *Jenkins* v. *Mayor &c. of Melbourne*, (1890) 16 V.L.R. 182, discussed.

Held, further, that the plaintiff was entitled to recover from the shire the amount of the costs payable by the plaintiff under the judgment in favour of the engineer.

Bullock v. *London General Omnibus Co.*, (1907) 1 K.B. 264, applied.

Decision of the Supreme Court of Victoria (*Lowe* J.) reversed.

APPEAL from the Supreme Court of Victoria.

Johnsons Tyne Foundry Pty. Ltd. brought an action in the Supreme Court of Victoria against the municipality of the shire of Maffra and the shire engineer, H. J. Hallows. As against the shire the plaintiff claimed £1,470 3s. 6d. for work done, materials provided and money paid for the shire at its request in repairing and rebuilding the shire's steam roller.

In its statement of claim the plaintiff alleged that the request was in writing, verbal and implied, and was constituted as follows :—

So far as it was in writing, by a resolution of the council of the shire on 4th September 1945 which was thus recorded in its minute book : " That the roller be repaired. Estimated cost £300," and by correspondence between the parties. The correspondence relied

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upon included two letters to the plaintiff from the defendant Hallows as shire engineer. The first, dated 5th September 1945, was as follows: "I am forwarding to Spencer Street per train steam roller for repair. Would you please contact Mr. Balstrup" (district boiler inspector) "and see what he wants done to the roller and return same as soon as possible." The second, dated 26th of the same month, said: "Would you please carry out the repair as outlined by our roller driver when he visited your works last Tuesday." Subsequent correspondence included a letter from the plaintiff to the shire engineer, dated 1st October 1945, stating: "We acknowledge receipt of your official order No. 2115 covering the supply of:—Repairs to steam roller" (then followed an itemized list of the repairs to be effected); a letter of 9th October 1945 from the shire engineer to the plaintiff stating: "With reference to your letter of" 1st October "setting out in detail the extent of the repair, I would be glad if you would expedite same and let me have the roller back by the end of this month"; a letter from the plaintiff to the shire secretary, dated 30th April 1946, referring to further repairs which had been found necessary (i.e., in addition to those mentioned in the letter of 1st October 1945), and, in particular, to the repair of a scarifier which was attached to the roller when delivered to the plaintiff.

So far as the request was verbal, it comprised requests made to the plaintiff by Balstrup and the roller driver.

So far as it was implied, it was to be implied from the fact of delivery of the roller to the plaintiff, from the fact that the shire, its servants or agents, were aware that the plaintiff was executing the work and made requests to the plaintiff to expedite the same and from the fact that the shire accepted redelivery of the roller with the knowledge that the plaintiff had executed the work.

The plaintiff repeated this claim, in the alternative, against Hallows and made further alternative claims against him for damages for breach of warranty of authority on the basis that he had no authority from the shire to procure the work to be done or that his authority was limited to repairs not exceeding £300.

The shire, in its defence, declared that it would rely on the provisions of ss. 501 and 502 of the *Local Government Act* 1928 (Vict.), denied that it had made the request alleged by the plaintiff and also made the following allegations: The prices claimed by the plaintiff were not agreed prices and they were exorbitant and unfair; in the alternative, if the shire made any request, it was limited to certain repairs "for which the estimated cost was £300"; the shire had no power to delegate to any person the duty of procuring the repairs.

Hallows, in his defence, pleaded that he had acted solely as agent for the shire and with its authority, and, in the alternative, that he had purported to act solely as agent and the plaintiff knew or was legally deemed to know that he was not legally authorized so to act because s. 501 and/or s. 502 of the *Local Government Act* had not been complied with.

From the evidence given at the trial of the action it appeared that Hallows was present at the meeting of the shire council on 4th September when the resolution above-mentioned relating to the repair of the roller was passed. Immediately after the resolution was passed, while the council was still in session, the president asked Hallows who could be got to repair the roller. On being told that Johnsons Tyne Foundry might do the work, the president asked Hallows to get in touch with the Tyne Foundry and, if they would do the work, send the roller to them. In answer to a question addressed to the meeting by the president, some councillors (it was not clear how many) intimated assent to the president's suggestion; none dissented. No further resolution was passed.

Lowe J., who tried the action, found that the plaintiff had in fact effected the repairs as alleged in the statement of claim and that its charges were reasonable, that there was a request by Hallows but it was limited to the items set out in the plaintiff's letter of 1st October 1945 and therefore did not cover certain items in the claim, the value of which his Honour assessed at £53, and that Hallows in fact had the authority of the council to make this request (it not being limited by the reference in the resolution to an estimated cost of £300). Accordingly, Hallows had not warranted an authority which he did not in fact have, and the action as against him must fail. As against the shire the plaintiff failed by reason of the provisions of s. 501 of the *Local Government Act* construed in accordance with prior decisions of the Full Court of the Supreme Court. It was necessary for the plaintiff to establish a contract for the doing of the work which complied with s. 501 (1) (*c*), and this the plaintiff had failed to do.

Judgment was therefore entered for both defendants with costs.

From this decision, in so far as it gave judgment for the shire, the plaintiff appealed to the High Court.

Hudson K.C. (with him *Winneke*), for the appellant. A contract complying with s. 501 (1) (*c*) in fact existed in this case. It was constituted by the actions of Hallows coupled with the authority given to him by the council. He acted as agent for the council

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with its authority, and the section permits the appointment of an agent for the purpose of making a parol contract (*Morrison* v. *Shire of Morwell* (1)). Further, even if there was no contract made in the manner provided by s. 501 (1) (*c*), there was a contract at common law within the principle of *Lawford* v. *The Billericay Rural District Council* (2). The decisions of the Full Court of the Supreme Court by which *Lowe* J. felt bound do not give a reasonable construction to the section, and they should be overruled. They read the word "may" in s. 501 as meaning "shall", treating the section as intended to restrict the power of the municipal corporation to enter into contracts. This view was taken in *Shire of Gisborne* v. *Murphy* (3) ; *President, &c., of Shire of Leigh* v. *President, &c., of Shire of Hampden* (4) ; *Mayor &c., of Richmond* v. *Edwards* (5) ; *London* v. *Shire of Wodonga* (6). It is much more reasonable to read the section as an enabling provision, empowering the council to make contracts on behalf of the corporation, but not derogating from the common law : cf. *Wilson* v. *West Hartlepool Railway Co.* (7). The authority of Hallows was a general one, not limited to any particular repairs, and, if the plaintiff is entitled to judgment against the shire, it should be for the full amount claimed.

Dean K.C. (with him *Adams*), for the respondent. Except that a contract can be made under seal even if it is of a kind which could be made by parol under s. 501 (1) (*c*), the section is mandatory. The view of the Supreme Court of Victoria, as shown in the decisions already cited and subsequently in *Jenkins* v. *Mayor &c. of Melbourne* (8), is consistent with English decisions on similar provisions : see *Cope* v. *Thames Haven Dock & Railway Co.* (9) ; and cf. *Company of Proprietors of Leominster Canal Navigation* v. *Shrewsbury and Hereford Railway Co.* (10). The last-mentioned case was decided on s. 97 of the *Companies Clauses Consolidation Act* 1845, which, although otherwise similar to the present Victorian section, did not contain the vital provision appearing in the Victorian s. 501 (1) (*c*). The English section has been the subject of conflicting decisions. The Victorian section, which first appeared in its present form in 1874, appears to have been taken from the English *Commissioners Clauses Act* 1847, s. 56. The Local Government Acts have been repeatedly amended and consolidated (see, particularly,

(1) (1948) V.L.R. 73.
(2) (1903) 1 K.B. 772.
(3) (1881) 7 V.L.R. (L.) 63.
(4) (1882) 8 V.L.R. (L.) 370.
(5) (1883) 9 V.L.R. (L.) 348.
(6) (1885) 6 A.L.T. 271.
(7) (1865) 2 De G. J. & S. 475 [46 E.R. 459].
(8) (1890) 16 V.L.R. 182.
(9) (1849) 3 Ex. 841, at p. 844 [154 E.R. 1085, at p. 1086].
(10) (1857) 3 K. & J. 654, at p. 672 [69 E.R. 1272, at p. 1279].

the *Local Government Act* 1903) since the decisions of the Supreme Court that what is now s. 501 was mandatory; yet, no alteration has been made to that section. The legislature must be taken to have adopted that view of the meaning of the section (*Barras* v. *Aberdeen Steam Trawling and Fishing Co.* (1)). Accordingly, no such contract as the appellant relies upon can be implied as against the respondent.

Winneke, in reply. Until 1863 there were no statutory provisions as to contracts by municipalities. When such provisions were made, it is unlikely that the intention was to take away the common-law powers which the municipal corporations previously had. Section 501 seems to be directed rather to the council than to the corporation. An assumption of legislative adoption should not be made merely because a section had been re-enacted in consolidations, which, in general, are not intended to alter the law. Something would be needed to show that Parliament had had this subject matter under consideration. The re-enactment without alteration of the provisions as to contracts while there have been repeated and extensive amendments of other parts of the legislation rather points the other way. [He referred to *Williams* v. *Dunn's Assignee* (2); *Melbourne Corporation* v. *Barry* (3); *White* v. *Johnstone* (4).] If the appellant is entitled to judgment against the respondent, it should have its costs of the action, including the costs awarded against it in favour of the defendant Hallows. This case is a proper one for the application of the rule in *Bullock* v. *London General Omnibus Co.* (5): see, also, *Besterman* v. *British Motor Cab Co. Ltd.* (6); *Riches* v. *London General Omnibus Co.* (7).

Dean K.C., by leave. The appellant knew all the relevant facts before it issued its writ; that being so, the rule in *Bullock's Case* (8) is not applicable.

Hudson K.C., by leave. It was only when evidence was given at the trial as to what took place at the council meeting on 4th September 1945 that the appellant knew what authority had been given to Hallows. When it began the action, it acted reasonably in joining him as a defendant.

Cur. adv. vult.

(1) (1933) A.C. 402, at pp. 411, 412, 432, 433, 438.
(2) (1908) 6 C.L.R. 425, at p. 441.
(3) (1922) 31 C.L.R. 174, at pp. 183, 185.
(4) (1927) V.L.R. 310, at p. 321.
(5) (1907) 1 K.B. 264.
(6) (1914) 3 K.B. 181, at p. 186.
(7) (1916) W.N. 86.
(8) (1907) 1 K.B. 264.

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Dec. 16.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment of the Supreme Court of Victoria (*Lowe* J.) in which the appellant company sought to recover payment for work done in repairing a steam roller belonging to the respondent municipality. The learned judge gave judgment for the defendant shire upon the ground that the contract upon which the plaintiff relied was not made in accordance with s. 501 (1) (*c*) of the *Local Government Act* 1928, and that that provision was mandatory, so that the municipality was not bound by a contract which was not made in accordance with the section, even though the municipality had received the benefit of the contract.

Section 501 of the *Local Government Act* 1928 is in the following terms :—" The council of every municipality may in the name and on behalf of the municipality enter into contracts for the purposes of this Act and every such contract may be varied or discharged as follows (that is to say) :—

(*a*) Any contract which if made between private persons would be by law required to be in writing and under seal the council may make in writing and under the common seal of the body corporate and in the same manner may vary or discharge the same.

(*b*) Any contract which if made between private persons would be by law required to be in writing signed by the parties to be charged therewith the council may make in writing signed by the councillors or any two of their number acting by the direction and on behalf of the council and in the same manner may vary or discharge the same.

(*c*) Any contract which if made between private persons would be by law valid although made by parol only and not reduced into writing the councillors or any two of them acting by the direction and on behalf of the council may make by parol only without writing and in the same manner may vary or discharge the same."

Sub-section (2) provides that all contracts made in accordance with these provisions shall be effectual in law and shall be binding on the municipality and all other parties thereto.

It was proved that at a meeting of the council it was decided to have the steam roller repaired and a resolution to that effect was duly passed. The shire engineer (H. J. Hallows) had given an estimate of £300 for the work but the resolution of the council did not limit the expenditure to that amount. The engineer was told by the mayor in the presence of the other councillors to see whether

the plaintiff company would do the work. The engineer communicated with the company and it agreed to do the work. The learned judge found that all the work done was necessary to put the steam roller into working order. It included work done in order to comply with requirements of the boiler inspection authorities, which had to be satisfied before the steam roller could be used. The amount claimed was £1,470 3s. 6d. This was found to be a reasonable charge for the work done. But the learned judge disallowed an amount of £53 because it related to work which was not specifically included at the outset in a list of necessary repairs which the company sent to the council. The authority of the engineer was to get the roller repaired so that it could be used and the list supplied by the company should not, in my opinion, be regarded as an exhaustive statement of maximum requirements. If the company is entitled to succeed in the action it is, in my opinion, entitled to succeed for the full amount claimed.

Independently of statutory provisions, a non-trading corporation at common law was bound by the general rule that its contracts must be made under seal. But there were exceptions to this rule in the case of trivial matters of daily occurrence, or matters of urgent necessity; and a non-trading corporation could bind itself by a contract not under seal if the contract related to matters incidental to the purpose for which the corporation existed and also in cases where the consideration had been executed by the other party: see *Halsbury's Laws of England*, 2nd ed., vol. 8, pp. 101-102 and the authorities there cited. In the case of *Lawford* v. *The Billericay Rural District Council* (1) it was held that, where work was done which was necessary for the purposes for which a non-trading corporation was created in accordance with orders given by the corporation, if the work was accepted by the corporation so that the whole consideration was executed, a contract to pay for the work could be implied from the acts of the corporation, notwithstanding the absence of a contract under seal. But if a statute requires that contracts of a corporation shall be made in a particular manner the statutory provisions necessarily supersede the common law. Thus in *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa* (2) it was held that where a statute provided that every contract made by an urban authority the value or amount of which exceeded £50, should be in writing and sealed, the urban authority was not bound by any contract not so made, and was not bound even by an executed contract of which the authority had the full benefit and enjoyment

(1) (1903) 1 K.B. 772.

(2) (1883) 8 App. Cas. 517.

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where that contract was not made in the prescribed manner: see also *John Mackay & Co.* v. *Toronto City Corporation* (1).

It is argued for the appellant in the present case that the word used in s. 501 is "may" and not "shall," and therefore that the rule laid down in *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa* (2) is not applicable. It is true that there is no provision in the present case, as there was in *Young's Case* (2) requiring the contract sued upon to be under seal. But if s. 501 of the Act is mandatory, notwithstanding the use of the word "may" the principle of *Young's Case* (2) is applicable.

It was further argued that the decision in *Lawford's Case* (3) was applicable. But in *Lawford's Case* (3) there was no statutory provision relating to the manner in which contracts should be made. The decision in that case gives no assistance in the present case.

Section 501 is in terms substantially identical with s. 56 of the *Commissioners Clauses Act* 1847 (10 and 11 Vict. c. 16) which adopted (with a variation corresponding to the provision with respect to two councillors contained in s. 501 (1) (*c*)) the provisions of the *Companies Clauses Consolidation Act* 1845 (8 and 9 Vict. c. 16) s. 97. Under the latter section it was held in *Company of Proprietors of Leominster Canal Navigation* v. *Shrewsbury & Hereford Railway Co.* (4) that the provisions of s. 97 must be strictly complied with and that, where there was no contract under seal, and no contract signed by two of the directors of the railway company as required by s. 97, and notwithstanding that the other party to an agreement which had actually been made had performed its part of the agreement, the railway company was not bound by the agreement. Vice-Chancellor Sir W. *Page Wood* said (5): "as there was no agreement signed by the directors in the manner I have described, and stipulating that [upon a relevant event] they would bind the company, it does not appear to me that what had then been done amounted to a complete and binding agreement on the railway company." But the decisions show marked conflicts of opinion. For example, in *Wilson* v. *West Hartlepool Railway Co.* (6) the decision was based upon the fact that though s. 97 enacted that all contracts made according to its provisions should be binding (cf. s. 501 (2) of the *Local Government Act*), it did not enact that contracts otherwise entered into should not be binding. It was held that a company which was subject to the Act was bound by a contract

(1) (1920) A.C. 208.
(2) (1883) 8 App. Cas. 517.
(3) (1903) 1 K.B. 772.
(4) (1857) 3 K. & J. 654 [69 E.R. 1272].
(5) (1857) 3 K. & J., at p. 670 [69 E.R., at p. 1729].
(6) (1865) 2 De G. J. & S. 475 [46 E.R. 459].

of its agents which it had ratified although there was no contract executed in any of the modes mentioned in s. 97. The state of the English authorities is unsatisfactory.

But in Victoria the interpretation of s. 501 has been settled for a long period. The section was included in its present form in the *Local Government Act* 1874. In 1881 in *Shire of Gisborne* v. *Murphy* (1) *Higinbotham* J. said that the terms of s. 169 of the Act of 1874 (which were the same as those of s. 501 in the present Act) were in form permissive only, but that, as no other mode or form was provided by the Act and as the corporation derived its power to make contracts wholly from the Act, the words must be regarded as mandatory. The result was that " a contract made otherwise than in the manner prescribed, cannot be sued on, at least in a court of law," though if a contractor could bring himself within the equitable doctrines of part performance, and the claim was not " simply for payment of a sum of money," he might have a remedy in equity. (In the present case the claim is a claim simply for a sum of money.) In 1882 in *President, &c., of Shire of Leigh* v. *President, &c., of Shire of Hampden* (2) the same rule was applied by *Holroyd* J., speaking for the Full Court. In 1883, in *Mayor &c of Richmond* v. *Edwards* (3) it was again held by the Full Court that contracts by municipal corporations must be made in one of the modes or forms prescribed by the Act and that if they were not so made they were not binding upon the corporation. In 1885 in *London* v. *Shire of Wodonga* (4) it was said : " it is absolutely necessary that a person who seeks to enforce in a court of justice a claim founded upon an alleged contract with a municipality, should prove that a valid contract, based on good consideration, has been made with him by the council, that such contract is for a purpose authorised by the Act, and lastly, that it has been made in the form or mode prescribed by the Act, as an essential condition of contracts by which the ratepayers shall be bound." Again in 1890 in *Jenkins* v. *Mayor &c. of Melbourne* (5) it was held by the Full Court that the section was mandatory. It is more than sixty years since the first of this series of decisions was given.

The *Local Government Act* was repealed, and consolidated, and amended, and re-enacted, several times—in 1890, 1903, 1915, 1928 and 1946. Upon each occasion the provisions of s. 501 were maintained unaltered. In *Ex parte Campbell* ; *In re Cathcart* (6) *James* L.J. said : " Where once certain words in an Act of Parliament have received a judicial construction in one of the superior

(1) (1881) 7 V.L.R. (L.) 63, at p. 72.
(2) (1882) 8 V.L.R. (L.) 370.
(3) (1883) 9 V.L.R. (L.) 348.
(4) (1885) 6 A.L.T. 271.
(5) (1890) 16 V.L.R. 182.
(6) (1870) L.R. 5 Ch. 703, at p. 706.

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courts, and the legislature has repeated them without any alteration in a subsequent statute, I conceive that the legislature must be taken to have used them according to the meaning which a court of competent jurisdiction has given to them.

This Court has the power to overrule these authorities, but, in view of the fact that the Act has been re-enacted so frequently after those decisions without any change affecting s. 501, the Court should hesitate to do so unless it is thought to be absolutely clear that the decisions were wrong. I have referred to the decisions given in England for the purpose of showing that s. 501 presents difficulties which cannot be said to have been solved satisfactorily. Each of the conflicting views can be supported by substantial arguments. The legislature has been content to re-enact s. 501 on several occasions without alteration and in my opinion this Court should not reconsider the question decided in the cases mentioned unless it is necessary to do so for the determination of a particular case.

I find it unnecessary to examine those decisions because I am of opinion that the requirements of s. 501 (1) (*c*) (whether it is or is not regarded as mandatory) have been satisfied in the present case. This is not, in my opinion, properly to be regarded as a case of acceptance by a corporation of an executed consideration. The fact that the council took and used the repaired roller does not establish such a case. One person A cannot, by doing work upon the property of another person B, put B to the choice of either abstaining from using his own property or paying A for the work done. The use of property by its owner is not in such a case an "acceptance" of the work done. So in this case when the council took delivery of the repaired roller it was not "accepting" an executed consideration.

In my opinion the councillors made a contract with the plaintiff company for necessary repairs to the roller. The council decided that the repairs should be done and the engineer had the authority of the council to ask the plaintiff company to do the repairs. The contract with the company was made through the agency of the engineer, but it was nevertheless made by the councillors, the offer to the company being made on behalf of the councillors, and not on behalf of the engineer himself. If a servant of the owner of a motor car is authorized to arrange for the car to be put into running order and he does so, the contract is made by the owner though he acts through an agent, and even though he did not specify the person who was to be employed for the purpose of doing the repairs. (In fact, in the present case, the mayor, in the presence of the

councillors, told the engineer to see whether the plaintiff company would undertake the work of repairing the roller—but this was done without any formal resolution to that effect and it cannot be regarded as truly the act of the councillors in a council meeting.) Here the councillors who gave the authority to the engineer made a contract by making the offer to the company through the engineer, which offer the company accepted. The contract was made before the work began. It was not made when the repaired roller was re-delivered to the council. It was a parol executory contract. I hesitate to refer to further English authorities because of the division of opinion which they manifest. But in *Pauling* v. *London and North Western Railway Co.* (1), a decision upon s. 97 of the *Companies Clauses Consolidation Act*, a company was held liable upon a contract made by parol where the actual contract was made by a servant of the company in accordance with authority given to him. Section 97 provided that the directors might contract by parol on behalf of the company where private persons could make a valid parol contract and it was held that the servant of the company acted within his authority and therefore bound the company by a parol contract. The basis of the decision was that in such a case the directors made the contract.

Accordingly I am of opinion that the councillors in the present case made an executory contract with the company through the agency of the shire engineer and accordingly that the contract became binding upon the municipality. The contract was made when the company was asked to do the work necessary to repair the steam roller and agreed to do it. On this ground I am of opinion that the plaintiff is entitled to succeed in the action and that judgment should be entered accordingly.

Various questions were raised as to some of the details of the work done. I have already expressed my opinion with reference to the disallowed items in respect of which a sum of £53 was claimed. As to the other items I adopt the reasons for judgment of *Lowe* J. without repeating them.

A question arises as to costs. The plaintiff company sued the municipality as already stated and alternatively sued the engineer for work done and materials provided and for damages for breach of warranty of authority to make the alleged contract. The learned judge held that the latter claim against the engineer failed because it was shown that in fact he had authority and the company was accordingly ordered to pay the engineer's costs. The company now contends that, in the circumstances, it

(1) (1853) 8 Ex. 857 [155 E.R. 1605].

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was reasonable for the company to sue the engineer as well as the municipality because, when proceedings were instituted, the company was not in possession of full evidence of what had taken place at the council meeting or subsequently. The company therefore asks for an order that the defendant shire should pay the amount which the company has been ordered to pay for costs to the engineer—an order that is to say, in the form in *Bullock* v. *London General Omnibus Co.* (1). In my opinion this order should be made.

The result is that, in my opinion, the appeal should be allowed with costs, the judgment of the Supreme Court set aside and there should be substituted therefor a judgment for Hallows with costs against the company and for the company against the municipality for the amount claimed (£1,470 3s. 6d.) with costs, including the costs of Hallows in the Supreme Court.

STARKE J. The appellant sued the respondent in this appeal in the Supreme Court of Victoria on a common count for work and labour done and materials provided by the appellant for the respondent at its request in repairing and rebuilding a steam roller.

The learned trial judge dismissed the action, against his will, by reason of the provisions of s. 501 of the *Local Government Act* 1928 and the construction placed upon a section in the same terms in prior Local Government Acts by the Supreme Court in Full Court.

So far as material the provisions of s. 501 are as follows: The council of every municipality may in the name and on behalf of the municipality enter into contracts for the purposes of this Act . . . as follows. . .

(*a*) Any contract which if made between private persons would be by law required to be in writing and under seal the council may make in writing and under the common seal of the body corporate . . .

(*b*) Any contract which if made between private persons would be by law required to be in writing signed by the parties to be charged therewith the council may make in writing signed by the councillors or any two of their number acting by the direction and on behalf of the council . . .

(*c*) Any contract which if made between private persons would be by law valid although made by parol only and not reduced into writing the councillors or any two of them acting by the direction and on behalf of the council may make by parol only without writing . . .

(1) (1907) 1 K.B. 264.

And all contracts made according to the provisions herein contained shall be effectual in law and shall be binding on the municipality and all other parties thereto . . .

Now the Supreme Court of Victoria thus construed s. 169 of the *Local Government Act* 1874, now s. 501 of the *Local Government Act* 1928 :—" The 169th section of the ' Local Government Act 1874 ' prescribes the manner in which municipalities may make contracts. It was pointed out by Mr. Justice *Higinbotham* in a recent case, *Shire of Gisborne* v. *Murphy* (1) that the language of the section is in form permissive, but that the Act provides no other mode in which the corporation may contract. The permission, moreover, is to the Council. ' The Council may, in the name and on behalf of the municipality, make contracts for the purposes of this Act ' ; and then the mode is detailed, and the section enacts that all contracts made according to the provisions therein contained shall be effectual in law, and binding on the municipality. If contracts so made are to bind the municipality, others not so made are not to bind it. We agree, therefore, that the 169th section is really mandatory " (*President, &c., of Shire of Leigh* v. *President, &c., of Shire of Hampden* (2)).

That decision has been challenged upon this appeal. But it has stood for many years and, in my opinion, this appeal can be resolved without disturbing it (cf. *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa* (3)).

The present claim is for repairing and rebuilding at the request of the shire, its council and councillors a steam roller used by it for the purposes of the *Local Government Act* at its request.

This is a description of contract which if made between private persons would be valid although made by parol (cf. *Pollock* on *Contracts*, 12th ed. (1946), pp. 8-11). And the evidence established that the councillors of the shire of Maffra made a parol contract or agreement with the appellant for the repair and rebuilding of the steam roller. A report was made to the council that the boiler inspector had condemned the roller as dangerous, that the estimated cost of repairs was £300 and that the repairs would take about two months. On 4th September 1945 the council carried a resolution as follows :—Reconditioning of steam roller : That the roller be repaired : Estimated cost £300.

So soon as the resolution was passed the president of the shire in the presence of the councillors and without any dissent being expressed turned to the engineer of the shire and asked who could

(1) (1881) 7 V.L.R. (L.) 63, at p. 72.
(2) (1882) 8 V.L.R. (L.) 370, at p. 377.
(3) (1883) 8 App. Cas. 517.

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do the necessary work. The engineer replied that the Johnsons (that is the appellant) had done all the shire work and would possibly do the work. The president instructed the engineer to ring up Johnsons and see if it could do the work and if it could to send the roller down. Apparently the engineer did ring up the appellant and was informed that the work would take about six weeks. On 5th September 1945 the engineer wrote to the appellant that he was forwarding the steam roller for repair and return as soon as possible. Answers to interrogatories on the part of the shire admit that the roller was so forwarded with the authority of the shire. On 6th September the engineer requested the appellant to carry out the repair as outlined by the shire roller driver when he visited the appellant's works. He added that the appellant's manager had informed him when he first 'phoned that the repairs would take six weeks. And he asked for an approximate date when the repairs would be completed. On 1st October 1945 the appellant acknowledged the letter of 5th September and set forth various repairs that were required. On 9th October the engineer requested that the work be expedited and the appellant replied that the roller could not be completely repaired before the end of the month but that every effort would be made to have the job completed.

It would seem that this correspondence between the engineer and the appellant was handed to the shire secretary but whether it was laid before the council does not appear. In April 1946, however, a minute of the council records a report by the engineer that the roller was not completely repaired but that it should be completed by the end of the month. The repairs had been completed by the appellant about June 1946 for in that month there is a minute of the council which records another report of the engineer that the roller had been returned.

In July 1946 the appellant's account for £1,470 3s. 6d., repairs to steam roller, came before the council and it was resolved that the account be submitted to the Prices Commissioner and that a detailed statement of costs of labour and material be obtained. This statement was obtained from the appellant.

Further correspondence took place but the shire declined to make any settlement until the decision of the Prices Commissioner was obtained. The shire communicated with the Prices Commissioner and requested him to consider the account which it considered excessive.

Ultimately in February 1947 the shire denied liability and intimated that it would defend any proceedings brought against it.

All this makes it abundantly plain that the shire, its council and councillors were not disputing the making of a contract or agreement with the appellant for the repair of the steam roller but the amount of its charges which were considered excessive having regard to the estimate of £300 placed before it by the engineer.

The inference is irresistible that a parol contract or agreement had been entered into between the shire, its council and councillors and the appellant for the repair and rebuilding of the steam roller.

But it was submitted that the provisions of s. 501 of the *Local Government Act* 1928 did not permit the shire, its council and councillors to avail themselves of the services of their officers in communicating with the appellant and that they were required by the Act to do so personally.

The contention is untenable.

The section requires that the councillors make the contract: they must be the real parties to the contract. But there is no reason why they should not be bound by contracts made by their officers and servants acting on their behalf and with their authority in the same way as private persons are bound (see *President, &c., of Shire of Leigh* v. *President, &c., of Shire of Hampden* (1); *Morrison* v. *Shire of Morwell* (2); *Lowe* v. *London and North Western Railway Co.* (3); *Hudson* on *Building Contracts* 7th ed., pp. 156-158).

There is no stipulation in the contract as to the cost of the repairs. The sum of £300 mentioned in the council's minute was only an estimate. But, as the agreement makes no express provision for the cost of the repairs, the law imports a reasonable charge. And the learned trial judge has found that the charges made by the appellant were reasonable. But he has rejected three items on the ground that they stood outside the request made by the shire. The request required that the steam roller be put in a proper state of repair. The cost of the repairs in connection with the water spray and the smoke-box door which the learned judge rejected fall, as it appears to me, within the request. The cost of the repairs in connection with the scarifier is more doubtful but the scarifier was attached to the roller and was used with and as part of the roller in connection with road making and other purposes of the shire. Therefore, I think that the cost of repairing the scarifier should also be allowed.

A claim was made by the appellant in the alternative against the shire engineer for the cost of the repairs. The appellant's solicitors advised the shire's solicitors that in view of the shire's denial of

(1) (1882) 8 V.L.R. (L.), at p. 377.
(2) (1948) V.L.R. 73, at p. 84.
(3) (1852) 18 Q.B. 632 [118 E.R. 239].

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liability that it would be necessary to join the shire engineer as a party to the action. And he was joined accordingly.

The action against him was dismissed with costs. These costs should be included in the amount recoverable by the appellant.

The appeal against the judgment entered for the shire should be allowed and the judgment so far as it dismisses the action against the shire with costs should be set aside and judgment entered for the appellant for the sum of £1,470 3s. 6d. with costs here and below including pleadings, interrogatories, discoveries and short-hand notes of the evidence and proceedings at the trial and further any costs which the appellant may pay the shire engineer, Hallows, under the judgment of the Supreme Court of 20th May 1948 (see *Sanderson* v. *Blyth Theatre Co.* (1); *Annual Practice* 1946-1947, p. 1460).

DIXON J. In my opinion the evidence establishes that the appellant company was employed under the express authority of the council of the respondent shire to put the shire's road roller in proper repair and, except for what is implied in such an instruction or employment and except that the appellant company was required to inform itself as to what was necessary by consultation with the driver and with the district boiler inspector, the appellant company was not under any restriction with respect to the work it should execute in order to put the roller in repair. Nor was there any limitation in respect of the sum of money for which the shire might become liable. The reference at the council to an estimated cost of £300 was never translated into a limitation of the amount to be incurred. I do not think that the list of items which the appellant company set out in their written acknowledgement of the shire's order operated to place any of the repairs in fact done by the company outside the ambit of the request or employment, and I do not think that the work done with reference to the scarifier, the water spray and the smoke-box door or any of the further items challenged by the respondent shire can be regarded as work done by the appellant company beyond or outside what it was instructed or employed to do.

I think too that the attack made upon the fairness or reasonableness of the charges claimed by the appellant company fails and that the finding that the amount claimed as a *quantum meruit* for the work done and materials supplied was fair and reasonable should be sustained.

(1) (1903) 2 K.B. 533.

The appeal depends I think altogether on the effect of s. 501 of the *Local Government Act* 1928 (Vict.). The transaction took place while that Act was still in operation but the section bears the same number in the *Local Government Act* of 1946.

There are two questions arising with respect to s. 501 (1). The first is whether upon the facts of this case it should be held that within the meaning of par. (*c*) the contract was made by the councillors or any two of them acting by the direction and on behalf of the council.

The council decided at a meeting that the roller be repaired and it may be taken to have agreed that the appellant company be requested to undertake the work. But it was left to the engineer to make the arrangements to carry out the decision. It is not clear what par. (*c*) means when it speaks of the councillors or any two of them acting by the direction and on behalf of the council "making" a contract by parol. It is hard to believe that provision contemplates the making of such contracts by the councillors in their own proper persons as principals, using no one as an agent except if they so choose the two councillors expressly referred to. But I think that the mere decision that the road roller should be repaired and that the appellants should be asked to do it falls short of what the paragraph requires. It amounts to no more than an authority to the engineer to have the road roller repaired making on behalf of the shire what contract he thought proper, preferably with the appellant. I am the less inclined to take the view that such a general authorization satisfies the paragraph, because I think that the whole section is directed to the manner in which executory contracts may be made if they are sufficiently outside the routine of the day to day operation of a municipality to make it necessary or desirable that they should come before the council. That consideration is connected with the second of the two questions I have mentioned.

The second question is whether s. 501 excludes the application to municipal corporations of the ordinary common-law principles by which corporations are enabled to bind themselves contractually.

This case is concerned only with the liability of a corporation and it is unnecessary to discuss how far these rules of the common law operate conversely, namely to enable a corporation to enter into contracts so that the other contracting party incurs an enforceable obligation to the corporation.

At common law a contract to which the seal of a corporation was regularly affixed bound a corporation whatever the nature

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of the contract. There were of course doubts about the possibility of a bill of exchange or promissory note retaining its negotiable quality if it were sealed by a corporation but that is another matter.

But at common law although it was always possible for a corporation to contract by using its seal, it was not by any means invariably indispensable. There was an early recognition that unless the purposes of the corporation were to be defeated it must in some situations be able to make simple contracts through its servants and agents. Thus in matters by their nature of such immediate urgency that they could not await the formality of a seal it was not necessary. The example given is that of an authority to a bailiff to distrain cattle damage feasant. But, to take another example, it could be hardly supposed that at common law a chartered corporation that sent ships to sea would not be bound by a salvage agreement, otherwise valid, because the seal was not affixed. Another case in which a corporation may be bound by a simple contract made by its servants or agents acting within the scope of their general authority is when the subject of the contract is a matter of daily or regular occurrence and of no special significance. Thirdly, a trading corporation from its very nature must contract through its servants and agents in the ordinary course of its business as other traders do and the common law always recognized that such a corporation might be bound by contracts not under seal made in the course of trade. Fourthly, gradually it came to be settled that any corporation might become liable if for a purpose for which the corporation was established it obtained the benefit of goods or services in pursuance of a simple contract made by or under the authority of the managing body. The acceptance of the executed consideration was treated as implying a promise to pay enforceable by a common money count. The course of authority under which this application of the general principle came to be established can be seen in the two lists of cases given by counsel in *Nicholson* v. *Bradfield Union* (1) and from *Lawford* v. *The Billericay Rural District Council* (2); *Douglass v. Rhyl Urban Council* (3); *Craven-Ellis* v. *Canons Ltd.* (4).

If the application of these principles to the respondent shire is not excluded by s. 501 it is in my opinion quite clear that under the fourth of them the respondent shire has become liable to the appellant.

(1) (1865) L.R. 1 Q.B. 620, at pp. 622-623.
(2) (1903) 1 K.B. 772.
(3) (1913) 2 Ch. 407, at p. 414.
(4) (1936) 2 K.B. 403, at pp. 411-412.

The question therefore is whether s. 501 (1) is an exhaustive statement of the law with respect to the manner in which a municipality may incur a contractual liability or on the contrary is intended not to displace and abrogate but to add to the common law on the subject.

In my opinion the provision is not intended as an exhaustive statement of the manner in which a municipal corporation can contract excluding common-law principles but is intended as an enlargement of or addition to the law prescribing the forms and occasions by which a municipal corporation may incur contractual liabilities and acquire contractual rights. My reasons for this conclusion may be briefly stated under three headings, namely, (1) the construction of the text of the section; (2) its source and history and the effect of English cases; (3) the force to be attributed to Victorian decisions to the contrary.

(1) Section 501 (1) is facultative or permissive in form and contains no expressions suggesting an intention to exclude the common law in so far as it enabled a corporation to contract. It is to be noticed that it is in the form of a power to the council to bind the municipality. A consideration telling strongly against construing s. 501 (1) as exhaustive is that in terms it is so expressed that upon that footing a contract which might be made by parol could not be made under seal. Some violence must be done to the language to give any validity under the sub-section to a contract of a description falling under any one of the three pars. (*a*), (*b*) and (*c*) unless it is made in the manner specified by that very paragraph. Of course clearly enough it was the intention of par. (*a*) that a contract which if made between private persons must be under seal should be made under the corporate seal. But pars. (*b*) and (*c*) are in the same form. Yet there is no reason at all for the legislature refusing validity to other contracts if they are made under the corporate seal, although they might have been made in writing or orally. If on the other hand s. 501 (1) is not treated as an exhaustive statement of the law, this difficulty vanishes. Even though par. (*a*) would not apply to a contract under seal which, if made between natural persons, might be made orally, the common law would then operate to give it validity.

(2) The source of s. 501 is s. 56 of the *Commissioners Clauses Act* 1847 (10 and 11 Vict., c. 16). (*Halsbury's Statutes*, vol. 13, pp. 434-5). It is a provision very similar to but not identical with s. 97 of the *Companies Clauses Consolidation Act* 1845 (8 and 9 Vict., c. 16). Upon the latter there has been more than one decision tending to show that the provision is not exhaustive. *Turner* L.J. said of s. 97

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that in it the legislature had pointed out modes in which the powers of directors to contract might lawfully be exercised and had enacted that all contracts made according to those provisions should be binding and effectual; but it had not said that contracts made in other modes should not be binding and effectual where there is power to so make them: *Wilson* v. *West Hartlepool Railway Co.* (1).

The material difference between s. 97 of the *Companies Clauses Act* 1845 and s. 56 of the *Commissioners Clauses Act* 1847 lies in the fact that the first refers to a committee (the appointment of which was enabled by s. 95) and authorizes the making of an oral contract by the directors or the committee while the second authorizes the commissioners or any two of their number acting by the direction and on behalf of the commissioners to contract. It is suggested that these words in s. 56 show that two commissioners are the only agents permitted and that in the same way under s. 501 (1) (*c*) two councillors may alone be used as agents. But, whatever weight may be given to this on the question whether the facts of the present case satisfy the requirement of s. 501 (1) (*c*), and on that question I have already said that I do not think the facts do satisfy it, it does not appear to be a consideration supplying an argument that the provision is exhaustive.

Section 56 of the *Commissioners Clauses Act* 1847 was copied into the Victorian *Municipal Corporations Act* 1863 (No. 184) as s. 147 and into the *Road Districts and Shires Act* 1863 (No. 176) as s. 148 the changes being only those necessary to adapt the provisions to boards and councils or councillors. The respective sections opened with a requirement that may have been imperative in all cases of contracts for the execution of any work, a requirement that the contract should be in writing, should specify the work &c., the price, the time for completion and the penalties for default. But after that s. 56 proceeded " and the power hereby granted . . . to enter into contracts may lawfully be exercised as follows—" then ensued the pars. (*a*), (*b*) and (*c*). This is not the language of an exhaustive statement but of a facultative or permissive provision. In the *Shires Statute* 1869 s. 159 and in the *Boroughs Statute* 1869, s. 139, the provisions were reproduced but with a notable omission namely, what is par. (*c*) of s. 501 (1) was omitted. That of course could mean nothing else than that as to contracts which between natural persons might be oral the common law relating to the contracts of corporations should govern.

In the *Local Government Act* 1874 (No. 506) s. 169 the provision was incorporated, par. (*c*) being this time included. The intro-

(1) (1865) 2 De G. J. & S. 475, at p. 496 [46 E.R. 459, at p. 467].

ductory words were left out and substantially the provision stood in its present form. It has stood in that form in the consolidations of 1890, 1903, 1915, 1928 and 1946. The considerations arising from its history appear to me to point to the provision being cumulative upon and not substitutional for the principles of the common law governing the manner in which corporations might incur contractual liabilities and for that matter acquire contractual rights.

(3) In *Mayor &c. of Richmond* v. *Edwards* (1) and *London* v. *Shire of Wodonga* (2) the Supreme Court decided that the provision did exclude the possibility of a municipality incurring a contractual liability at common law unless the section had been pursued.

In so deciding the court followed dicta in *Shire of Gisborne* v. *Murphy* (3) and *President, &c., of Shire of Leigh* v. *President, &c., of Shire of Hampden* (4) cases in which the question did not enter into the decision. I have considered these decisions and I am of course very much alive to the considerations which tell in favour of following them, in spite of the view which I hold that they are erroneous. But there are several considerations upon the other side. First great injustice as well as inconvenience arises from a rejection of the common-law rules. Second the full consequences of the rejection of those principles and of treating the provision as exhaustive have not been worked out, in spite of the time that has intervened. For example, as has been shown above there is a difficulty if a contract is sealed that might be made by parol. Yet this difficulty had not been foreseen. Another example is the question whether a municipality might be made liable on a count of money paid or money had and received. Thirdly there are many trading functions that may now be performed by councils: see for instance the powers of councils with respect to power and lighting (s. 648 (1) (*d*)) baths (s. 719), the manufacture and the supply of ice (s. 766) and bush nursing centres (s. 775) (the 1946 Act). It is very difficult to conduct such enterprises or undertakings unless there is some power of contracting outside s. 501. Fourthly the above-mentioned Victorian decisions are based on a misapplication of English cases decided on provisions of other statutes that were not really analogous.

The foregoing appear to me to be reasons for overruling the Victorian decisions notwithstanding their age, the frequency of consolidation and the copying of the provisions *mutatis mutandis* in a number of Acts dealing with other subjects. After all the

(1) (1883) 9 V.L.R. (L.) 348.
(2) (1885) 6 A.L.T. 271.
(3) (1881) 7 V.L.R. (L.) 63.
(4) (1882) 8 V.L.R. (L.) 370.

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subject is not one where vested rights are in question. In my opinion for the reasons I have given the appeal should be allowed with costs and the judgment of the Supreme Court discharged. In lieu thereof I think that judgment in the action should be entered for the plaintiff for £1,470 3s. 6d. with costs including interrogatories and discovery (if any). The plaintiff joined as a defendant the defendant shire's engineer, Hallows, and claimed alternatively against him either as a person liable directly or for breach of warranty of authority. This was because the defendant shire disowned the transaction. Judgment was given for the defendant Hallows with costs. In all the circumstances of this case I think the plaintiffs took a reasonable and proper course in joining Hallows as a defendant and they were induced to do so by the erroneous attitude adopted by the defendant shire. I therefore think that the costs which the plaintiff has been ordered to pay the defendant Hallows should be recovered over from the defendant shire. The order for costs against the defendant shire should therefore include the costs paid or payable by the plaintiff to the defendant Hallows.

McTIERNAN J. I agree with the reasons of his Honour the Chief Justice. The appeal should be allowed.

WILLIAMS J. This is an appeal in an action brought in the Supreme Court of Victoria in which the appellant as plaintiff sued the respondent, the President, Ratepayers and Councillors of the Shire of Maffra, to recover as a debt from the shire the sum of £1,470 3s. 6d. for repairs done by the appellant to its steam roller at its request. The appellant also sued in the same action H. J. Hallows, the shire engineer, to recover the same sum as a debt for repairs done to the steam roller at his request or alternatively for the same amount as damages for breach of warranty of authority from the shire to request the appellant to do these repairs. The action was tried by *Lowe* J. without a jury and resulted in his Honour giving judgment for both defendants with costs. The appeal is from the judgment in favour of the defendant shire, but should this appeal succeed the appellant asks for an order that the costs which it has been ordered to pay to the defendant Hallows should be added to the costs which the shire should be ordered to pay to it. It is evident that *Lowe* J. would have given judgment for the appellant against the respondent shire for the full amount claimed less £53 if he had not felt constrained by certain decisions of the Full Court of Victoria to hold that the shire, although it had received the benefit of the work, was not liable because there was

no contract which complied with the requirements of s. 501 (1) of the *Local Government Act* 1928 (Vict.).

The origin of the litigation was a meeting of the shire council held on 4th September 1945 at which it was resolved that the roller should be repaired, there being a notation in the minutes of the meeting that the estimated cost was £300. But the matter was the subject of considerable discussion which was not recorded in the minutes, and there is ample evidence that the councillors authorized the engineer, who was present at the meeting, to instruct the appellant to repair the roller if it was willing to do the work, and that the words " estimated cost £300 " were not intended to place any limit on the amount to be expended on repairs. On the following day the shire engineer wrote to the appellant stating that he was forwarding the roller to Spencer Street per train for repair. The letter said " Would you please contact Mr. Balstrup " (that is the district boiler inspector) " and see what he wants done to the roller and return same as soon as possible." The driver of the roller then visited the appellant's works and subsequently the shire engineer again wrote to the appellant on 26th September 1945 requesting the appellant to " carry out the repair as outlined by our roller driver when he visited your works last Tuesday." On 1st October 1945, the appellant wrote to the shire engineer: " We acknowledge receipt of your official order No. 2115 " (that was the letter of 5th September 1945) " covering the supply of repairs to steam roller." Then followed a number of items comprising the particular repairs which had been discussed with the roller driver.

The appellant dismantled and proceeded to repair the roller, which had been forwarded with a scarifier welded on behind it so that the whole formed a single unit, and in the course of doing so found that repairs other than those itemized in the letter of 1st October 1945 were required in order to put the roller and scarifier into a proper state of repair. The appellant did these repairs in addition to the work covered by these items. His Honour disallowed this work as being beyond the repairs specified in the letter of 1st October 1945, and quantified the disallowance at £53. But, in my opinion, the work that the appellant was requested to do was to repair the roller, and the items mentioned in the letter of 1st October 1945 were not intended to be exhaustive. The appellant was therefore authorized to do any further work that was required to put the roller and scarifier into a proper state of repair. His Honour found that the charges made for the work done and materials used were reasonable. This finding was attacked, but I see no reason to differ from it. Accordingly, in my opinion, if the appellant is

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entitled to succeed, judgment should be entered for the full amount claimed.

The substantial questions that arise are (1) whether the provisions of s. 501 (1) of the *Local Government Act* are mandatory; and if they are (2) whether the contract made between the appellant and the shire for the repair of the roller by the shire engineer, pursuant to a resolution of the shire council, forwarding the roller to the appellant for repair and the appellant repairing the roller was a contract within the meaning of s. 501 (1) (*c*) of that Act. Apart from s. 501 the respondent, as a non-trading corporation, would be liable at common law upon contracts connected with the purposes for which it was created whether executed or executory if made under seal; upon contracts whether executed or executory not made under seal if relating to trivial matters of daily occurrence or to matters of urgent necessity; and upon implied contracts to pay a *quantum meruit* upon orders for work to be done or goods supplied given by the shire at a meeting of the shire council where as here the purposes for which it was created rendered it necessary that the work should be done or the goods supplied to carry such purposes into effect and the work done or the goods supplied were accepted by the shire and the whole consideration for payment was executed: *Lawford* v. *The Billericay Rural District Council* (1); *Douglass* v. *Rhyl Urban Council* (2); *Halsbury's Laws of England*, 2nd ed., vol. 8, pp. 96 *et seq.*

(1) Section 501 first appeared in Victoria as s. 169 of the *Local Government Act* 1874. It was obviously copied from s. 56 of the *Commissioners Clauses Act* 1847 (Imp.) (10 and 11 Vict., c. 16). This section appears to have been copied *mutatis mutandis* from the *Companies Clauses Consolidation Act* 1845 (Imp.) (8 and 9 Vict., c. 16), s. 97. The sections of these English Acts, like the Victorian Act, employ the word "may." "May," unlike "shall," is not a mandatory but a permissive word, although it may acquire a mandatory meaning from the context in which it is used, just as "shall" which is a mandatory word, may be deprived of its obligatory force and become permissive in the context in which it appears. But I can find nothing in the language of the particular sections or general context of the English or Victorian Acts which requires that the word "may" should be read in a mandatory sense, and the provision which appears in the second sub-section of each of the sections of these Acts that all contracts made in accordance with the first sub-section shall be effectual in law is in terms non-exclusive and therefore tends to the contrary. It has been decided in several cases that s. 97 of the *Companies Clauses Consolidation Act* is permissive

(1) (1903) 1 K.B. 772. (2) (1913) 2 Ch. 407.

and not mandatory: *Homersham* v. *Wolverhampton Waterworks Co.* (1). *Lowe* v. *London and North Western Railway Co.* (2). *Pauling* v. *London and North Western Railway Co.* (3); *Wilson* v. *West Hartlepool Railway Co.* (4). In the last-mentioned case (5) *Turner* L.J. said: "There remains, then, the question whether this contract ought to be held binding on the company, having regard to the statutory provisions as to contracts by companies. . . . These provisions are contained in the 8 and 9 Vict., c. 16, s. 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 those 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 this 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." Committees occupy the same place in the *Companies Clauses Consolidation Act* as the two commissioners and two councillors occupy in the other two Acts. The former Act allows the directors of a company to delegate their powers to make contracts to committees of their members just as the latter Acts authorize the commissioners and councillors to delegate their powers to make contracts to two or more commissioners or councillors.

In the *Shire of Gisborne* v. *Murphy* (6) *Higinbotham* J. said, in reference to s. 169 of the *Local Government Act* 1874, that "The terms of this section, which appears to have been taken from the '*Companies' Clauses Consolidation Act*,' 8 and 9 Vict., c. 16, sec. 97, are in form permissive only . . . But no other mode or form is provided by the Act, and as the corporation derives its power to make contracts wholly from the Act, the words must, I think, be regarded as mandatory; and if mandatory, they operate as a condition, and a contract made otherwise than in the manner prescribed, cannot be sued on, at least in a court of law: *Frend* v. *Dennett* (7); *Hunt* v. *Wimbledon Local Board* (8)." With all respect to his Honour, I am quite unable to accept this statement. The Shire of

(1) (1851) 6 Ex. 137 [155 E.R. 486].
(2) (1852) 18 Q.B. 632 [118 E.R. 239].
(3) (1853) 8 Ex. 867 [155 E.R. 1605].
(4) (1865) 2 De G. J. & S. 475 [46 E.R. 459].
(5) (1865) 2 De G. J. & S., at pp. 495, 496 [46 E.R., at p. 467].
(6) (1881) 7 V.L.R. (L.) 63 at p. 72.
(7) (1858) 4 C.B. (N.S.) 576.
(8) (1878) 4 C.P.D. 48.

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Gisborne did not derive power to make contracts wholly from the Act. In the absence of a statutory provision to the contrary the shire had the ordinary common-law capacity of a non-trading corporation to make contracts. The terms of s. 169 were not taken from the *Companies Clauses Consolidation Act* 1845 but from the *Commissioners Clauses Act* 1847. Further his Honour did not cite the cases relating to the *Companies' Clauses Consolidation Act* 1845 which would have been in point. But he did rely on two cases *Frend* v. *Dennett* (1) and *Hunt* v. *Wimbledon Local Board* (2) to which may be added *Young & Co.* v. *Mayor, &c., of Royal Leamington Spa* (3) which related to sections of the English *Public Health Acts* which provide that *every* contract above a certain value or amount *shall* be in writing and sealed (the italics are mine) and were therefore plainly distinguishable.

The same view of the operation of s. 169 was taken in *President &c., of Shire of Leigh* v. *President, &c., of Shire of Hampden* (4); *Mayor &c. of Richmond* v. *Edwards* (5); *London* v. *Shire of Wodonga* (6); *Jenkins* v. *Mayor, &c., of Melbourne* (7). But all these decisions appear to be based on the passage which I have cited from *Shire of Gisborne* v. *Murphy* (8). In *President, &c., of Shire of Leigh* v. *President, &c., of Shire of Hampden* (4) *Holroyd* J., delivering the judgment of the Full Court, referred at p. 377 to a passage in the judgment of *Cotton* L.J. in *Hunt* v. *Wimbledon Local Board* (9) relating to the passage which I have cited from the judgment of *Turner* L.J. in *Wilson* v. *West Hartlepool Railway Co.* (10) and said that "*Cotton* L.J., alluding to the analogous section (97) of the '*Companies' Clauses Consolidation Act* 1845' (8 and 9 Vict., c. 16), assumes it to be permissive in substance as well as in form . . .; but this was only a *dictum*, unconsidered, and offered as a possible explanation of a judgment of Turner L.J., of which his lordship evidently disapproved." With all respect to *Holroyd* J., I cannot find in the judgment of *Cotton* L.J. any suggestion that he disapproved of the opinion of *Turner* L.J. that s. 97 of the *Companies Clauses Consolidation Act* 1845 was permissive and not mandatory. His criticism is directed to the suggestion that even if the section was mandatory the Court of Equity could give relief if the contract was capable of being specifically performed and there had been part performance of the contract. One can understand this criticism, because it would seem to be clear that a contract which can only be

(1) (1858) 4 C.B. (N.S.) 576.
(2) (1878) 4 C.P.D. 48.
(3) (1883) 8 App. Cas. 517.
(4) (1882) 8 V.L.R. (L.) 370.
(5) (1883) 9 V.L.R. 348.
(6) (1885) 6 A.L.T. 271.
(7) (1890) 16 V.L.R. 182.
(8) (1881) 7 V.L.R., at p. 72.
(9) (1878) 4 C.P.D., at p. 62.
(10) (1865) 2 De G. J. & S. 475 [46 E.R. 459].

effectual if made in a certain form would not be a contract at all unless it was made in that form and would not be enforceable either at law or in equity: *Hoare* v. *Kingsbury Urban Council* (1); *W. Higgins Ltd.* v. *Northampton Corporation* (2). I read the remarks of *Cotton* L.J. as approving the opinion of *Turner* L.J. in relation to the permissive character of s. 97 of the *Companies' Clauses Consolidation Act*, but pointing out the vital distinction between the word " may " in that section and the word " shall " in the *Public Health Act* with which he was concerned.

Accordingly I am of opinion that s. 501 is permissive and is not intended to replace but to supplement the capacity of municipal corporations to contract at common law. I am also of opinion that there is no reason why this Court should not overrule the decisions of the Supreme Court of Victoria to the contrary although they have stood for many years and in the meantime the *Local Government Act* has been consolidated on three occasions and a section similar to s. 501 has been incorporated in several other Victorian Acts. These decisions appear to me to be manifestly wrong and it is clear that they operate to place a meaning on the section which in many instances may lead to grave injustice. No titles will be upset and in these circumstances the proper course is for this Court to place its own interpretation on the section: *Robinson Bros. (Brewers) Ltd.* v. *Durham County Assessment Committee* (3); *Concrete Constructions Pty. Ltd.* v. *Barnes* (4); cf. *Platz* v. *Osborne* (5).

(2) Section 501 (1) (*c*) provides that the councillors (which means the council at a meeting of the council at which a quorum is present) or any two of the councillors authorized by the council may make a valid contract without writing where the same contract could be validly made by private persons without writing. The section refers to the making of a contract which binds the council as a principal. Such a contract may be made by the council as a council or by any two authorized councillors. But this does not mean that the contract must be made by the council or the two councillors and the other party to the contract present at the same time. All that is necessary is that the council or the two councillors should agree to make the contract with the other party and agree with the other party upon the terms of the contract. Any ordinary channel by which the offer and acceptance could be communicated between the contracting parties would be sufficient. Here the councillors at a meeting of the council at which a quorum was present instructed the engineer to send the roller to the appellant

(1) (1912) 2 Ch. 452.
(2) (1927) 1 Ch. 128.
(3) (1938) A.C. 321.
(4) (1938) 61 C.L.R. 209.
(5) (1943) 68 C.L.R. 133.

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to be repaired if it was willing to undertake the work. The roller was sent and the repairs were done. No price was mentioned so that the law would imply a reasonable price. In this way, an oral contract was made between the appellant and the councillors which was, in my opinion, a contract with the respondent within the meaning of s. 501 (1) (*c*).

There remains the question of costs. The appellant asks for what has come to be known as a Bullock order. This is an order which is sometimes made where a plaintiff joins two defendants and claims that one or other is liable jointly or in the alternative for the amount or part of the amount claimed. If the plaintiff succeeds against one defendant and fails against the other, the order relieves the plaintiff from having to bear the costs of the successful defendant either by ordering the unsuccessful defendant to pay to the plaintiff the costs which the plaintiff is ordered to pay to the successful defendant or alternatively, and this is the modern form of order, by ordering the unsuccessful defendant to pay the costs of the plaintiff and of the successful defendant. Here the appellant is suing to recover the sum to which it claims to be entitled for repairing the roller. The respondent was not content to rely on its statutory defences. It pleaded that it did not request the appellant to do the alleged work or to provide the alleged materials or any part thereof or to pay the money alleged or any part thereof. In its particulars it stated that Hallows reported to a meeting of the councillors of the shire that the boiler needed a new throat plate and complete set of boiler stays for which the estimated cost was £300, and the shire at such meeting resolved that this work should be undertaken at such estimated cost. Part of the case for the respondent was therefore that at most Hallows only had authority to order very limited and specific repairs to be done to the roller. But Hallows had sent the roller to the appellant, according to the letter of 5th September 1945 for repair, and had at least authorized the appellant to do the repairs itemized in its letter of 1st October 1945, and these repairs represented the major part of the appellant's claim. In these circumstances it was reasonable for the appellant to sue both the respondent and Hallows. The latest case where a Bullock order is discussed would appear to be *Hong* v. *A. & R. Brown Ltd.* (1). In that case the Court of Appeal said that it is a matter of discretion for the judge whether or not such an order should be made, and the fact that it was reasonable for the plaintiff to join the successful defendant when the action started does not entitle the plaintiff to such an order if in the opinion of the judge it is not reasonable that the unsuccessful defendant should be penal-

(1) (1948) 1 K.B. 515.

ized by having to pay two sets of costs. In the present case, in view of the respondent's attempt to limit its liability in any event to a liability to pay for a small part of the repairs and its claim that Hallows had no authority to order the balance, it was reasonable for the appellant to join both defendants in the action and not unreasonable that the respondent if it failed, as in my opinion it did, on this issue should be penalized by having to reimburse the appellant for Hallow's costs. In several cases where it was doubtful whether the agent was authorized by the principal to make the contracts sued on claims against the principal have been joined with claims against the agent for damages for breach of warranty of authority: *Honduras Inter-Oceanic Railway Co.* v. *Lefevre & Tucker* (1); *Bennetts & Co.* v. *McIlwraith & Co.* (2); *Sanderson* v. *Blyth Theatre Co.* (3). A Bullock order was made in the last-mentioned case. An example of such an order made on appeal is afforded by *Riches* v. *London General Omnibus Co.* (4).

For these reasons I am of opinion that the respondent was liable for the full amount claimed both upon an implied contract within the principles laid down in *Lawford* v. *The Billericay Rural District Council* (5) and upon a contract that complied with s. 501 (1) (*c*) of the *Local Government Act*. I would allow the appeal with costs, set aside the judgment for the respondent in the court below, and in lieu thereof order that judgment be entered for the appellant against the respondent for £1,470 3s. 6d. with costs, such costs to include the costs in the court below which the appellant was ordered to pay to the defendant Hallows.

Appeal against judgment of Supreme Court for defendant shire allowed with costs. Judgment for defendant shire set aside. Judgment entered for appellant company for £1,470 3s. 6d. against defendant shire with costs, including costs of pleadings, interrogatories, discovery, shorthand notes of evidence and proceedings at the trial and any further costs which the appellant has paid or may pay to the defendant Hallows under the judgment of the Supreme Court.

Solicitors for the appellant: *Gillott, Moir & Ahern.*
Solicitor for the respondent: *J. P. Rhoden.*

E. F. H.

(1) (1887) 2 Ex. Div. 301.
(2) (1896) 2 Q.B. 464.
(3) (1903) 2 K.B. 533.
(4) (1916) W.N. 86.
(5) (1903) 1 K.B. 772.