

THE CITIZENS LIGHT AND POWER } APPELLANTS;
COMPANY (PLAINTIFFS)..... }

1904

•March 1.

*March 25.

AND

THE TOWN OF SAINT LOUIS (DE- } RESPONDENT.
FENDANT)..... }

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL
SIDE, PROVINCE OF QUEBEC.

*Contract by municipal corporation—Powers—By-law or resolution—Right
of action—Confession of judgment—Evidence—Admissions—Pleading
—Estoppel by record—Art. 1245 C. C.—Concurrent findings of fact.*

A confession of judgment for a portion of the amount claimed is a
judicial admission of the plaintiff's right of action and constitutes
complete proof against the party making it. *The V. Hudon Cotton
Co. v. The Canada Shipping Co.* (13 Can. S. C. R. 401) followed);
The Great North-West Central Railway Co. v. Charlebois et al. ([1899]
A. C. 114 ; 26 Can. S. C. R. 221) distinguished.

Upon issues raised as to matters of fact, the court refused to disturb
the concurrent findings of the courts below.

Judgment appealed from (Q. R. 13 K. B. 19) reversed and judgment
at the trial (Q. R. 21 S. C. 241) restored.

* PRESENT :—Sir Elzéar Taschereau C.J. and Sedgewick, Girouard,
Nesbitt and Killam JJ.

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APPEAL from the judgment of the Court of King's Bench appeal side (1), reversing the judgment of the Superior Court, District of Montreal, (2) and dismissing the plaintiff's action with costs.

The action was for the recovery of \$3,235.68, under a contract between the parties for lighting the streets by electricity in the Village of Saint Louis du Mile End, subsequently erected into a town municipality under the name of the "Town of Saint Louis" by Act of the Quebec Legislature, 59 Vict. ch. 55. The amount sued for consisted of three quarterly instalments which fell due under the contract in January, April and July, 1900, and for which the municipality denied liability. The defendant, before pleading, confessed judgment in favour of the plaintiffs for \$2,633.95, but the plaintiffs refused to accept this amount in satisfaction of their claim. The defendant then pleaded to the action, persisting in the confession and praying for the dismissal of the plaintiffs' action as to the balance of the claim, denying liability under the contract, alleging that it had been executed in virtue of a simple resolution, whereas the municipality could act only by by-law in such matters; that no proper by-law had ever been passed in relation to the contract and that, consequently, the contract sued upon was null and void. The plea also set up non-performance of the obligations undertaken by the company, under the contract, in respect to the establishment of a system of electric lighting in certain streets of the town, outages, inferiority of the system, operation etc. The plaintiffs answered, alleging that the contract had been legally entered into, acquiesced in by the defendant and confirmed and validated by the statute above cited; that the outages were inevitable, resulting from *vis major* and that the

(1) Q. R. 13 K. B. 19.

(2) Q. R. 21 S. C. 241.

defendant had admitted this fact and made settlements of accounts rendered in respect thereto.

In the trial court, Mr. Justice Archibald found the facts in favour of the plaintiffs (1); held that the contract was valid and entered judgment in favour of the plaintiffs for the amount claimed, less deductions for outages, with costs. The Court of King's Bench (2) reversed this judgment, reduced the amount to the \$2,633.97, (admitted by the confession of judgment), with \$50 for costs and condemned the company to pay all costs incurred subsequently to the filing of the confession. Justices Bossé and Hall dissented from the latter judgment, from which the company now appeals.

R. C. Smith K.C. for the appellants. The contract was *intra vires* of the Village of Saint Louis du Mile End; Arts. 4, and 638, Quebec Municipal Code; Art. 358 C. C.; and it is an executed contract. The municipality could exercise its powers by mere resolution of the council; Arts. 460, 464, 525, 616 Que. Mun. Code; *Légaré v. Town of Chicoutimi* (3); *Bernardin v. Municipality of North Dufferin* (4); Art. 1177 C. P. Q.; *Kellond v. Reed* (5), *per* Ramsay J. at page 313; *Town of Rat Portage v. Citizens' Electric Co.* (6).

The contract was, moreover, ratified by the Act 59 Vict. ch. 55, (Que.) secs. 2 and 5.

The defendant is also estopped by its conduct in respect to the contract, settlements of disputes in respect to it and the confession of judgment for part of the amount claimed under it. It cannot say that

(1) Q. R. 21 S. C. 241.

(4) 19 Can. S. C. R. 581.

(2) Q. R. 13 K. B. 19.

(5) 18 L. C. Jur. 309.

(3) Q. R. 5 Q. B. 542; 27 Can. S. C. R. 329.

(6) 1 Ont. W. R. 44.

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the contract is valid as to part of the claim and otherwise a nullity. 20 Am. & Eng. Encyc. 1182; *Simard v. County of Montmorency* (1); *Parent v. Paroisse ae St. Sauveur* (2); *Village of Frelighsburgh v. Davidson* (3); *Girard v. Comté d'Arthabaska* (4); *St. Geneviève v. Charest* (5).

We also refer to *Simpson v. Paroisse de Ste Malachie d'Ormstown* (6); *Vincent v. County of Beauharnois* (7); *Marquis v. Couillard* (8); *Canadian Pacific Railway Co. v. Township of Chatham* (9); *Town of Richmond v. Lafontaine* (10); Brice (3 ed.) p. 710, No. 289; Spelling, Private Corporations, "Executed Contracts," pars. 766 and 767; Morawetz, pars. 648, 650, 653, 678, 686, 689 and 635.

The plaintiffs were not in default in the fulfilment of any of the conditions specified and had never been put *en demeure*. Consequently, there can be no ground for the cancellation of the contract. The resolution of the council to terminate the contract can have no effect.

Bisaillon K.C. and *H. R. Bisaillon* for the respondent. At the time of the contract the Municipal Code ruled as to the powers of the municipality and, under its provisions, (Arts. 451, 460, 464, 616, 638), it could act in such matters only by by-law. Tiedman, Municipal Corporations, No. 146, 165; Dillon, Municipal Corporations, pp. 307, 309, 769; *Marchildon v. Baril* (11); *Hull Electric Co. v. Ottawa Electric Co.* (12); *Waterous Engine Works Co. v. Town of Palmerston* (13); Art. 1214 C. C.

(1) 4 Q. L. R. 208.

(7) 3 Rev. de Jur. 7.

(2) 2 Q. L. R. 258.

(8) 10 Q. L. R. 98.

(3) Q. R. 2 S. C. 371.

(9) 25 Can. S. C. R. 608.

(4) 16 R. L. 580.

(10) 30 Can. S. C. R. 155.

(5) 33 L. C. Jur. 116.

(11) Q. R. 15 S. C. 499.

(6) 14 R. L. 485.

(12) Q. R. 16 S. C. 1.

(13) 21 Can. S. C. R. 556.

In regard to the questions of fact, the quality and the quantity of light supplied to the town by the appellants were not what they should have been, according to the contract and the specifications annexed thereto. Their installations were imperfect and insufficient; their materials poor and their operation faulty. The usual and necessary precautions against storms and atmospheric conditions were neglected by the appellants. There was no *vis major* sufficient to excuse them for the large percentage of outages nor for failing to comply with their obligations. The resolution in cancellation of the contract was, consequently, fully justified and authorized under the resolatory clauses therein contained. The settlements made on the disputed accounts, from time to time, can have no effect upon the right of the municipality to put an end to the contract for cause assigned; they were not a waiver as to any other claims. So far as the executed portion of the appellants' obligations is concerned, it is covered by the sum for which the confession of judgment was made, and, as to the balance, the action must fail. We also refer to *Armstrong v. Portage, Westbourne and Northwestern Railway Co.* (1); *Wigle v. Village of Kingsville* (2); *Young & Co. v. Mayor and Corporation of Royal Leamington Spa.* (3); *Hunt v. Wimbledon Local Board* (4); Story on Contracts (5 ed.) par. 22.

The judgment of the court was delivered by :

THE CHIEF JUSTICE.—This is an action by the appellants claiming \$3,235.68, under a contract for supplying to the respondent municipality the lighting by electricity required for its streets. Before pleading, the respondent filed a confession of judgment for

(1) 1 Man. L. R. 344.

(2) 28 O. R. 378.

(3) 8 App. Cas. 517.

(4) 4 C. P. D. 48.

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\$2,633.97. Upon the appellants' refusal to accept such confession of judgment in full satisfaction of their claim, the respondent pleaded that, as the said contract had not been authorized by a by-law, but simply by resolution of the municipal council, it was *ultra vires*, and that, therefore, the appellants' action could not be maintained; reiterating, however, in the said plea, the confession of judgment for \$2,633.97, and asking for the dismissal of the action only as to the difference between the *demande* and the amount for which judgment had been so confessed.

The judgment of the Superior Court maintained the action for the full amount demanded, less deductions for outages, but the Court of King's Bench reversed that judgment upon the ground taken by the respondent, that the contract upon which the action was based was *ultra vires* of the municipality respondent, as it had not been previously authorized by a by-law, and dismissed the action as to \$591.71, condemning the respondent, however, to pay \$2,633.97 for which judgment had been confessed.

The appellants now appeal from that part of the judgment which deducted \$591.71 from their claim. I am of opinion that their appeal should be allowed.

The confession of judgment and the judgment entered upon it stand unimpeached. It is, therefore, a matter of record, by that judgment, that the contract is one upon which the appellants are entitled to recover. A defendant who confesses judgment admits the plaintiff's right of action; *The V. Hudon Cotton Company v. The Canada Shipping Company* (1); and the appellants could not have had a right to their action brought upon the contract if that contract had been *ultra vires*, so that the judgment against the respondent upon its confession is *res judicata* that the

(1) 13 Can. S. C. R. 401.

contract was not *ultra vires*, and if it was not *ultra vires* for the \$2,633.97, the amount of the judgment, it cannot be held *ultra vires* for the remaining \$591.71.

When the appellants refused to accept the confession of judgment, the respondent might have withdrawn it, but instead of doing that, persisted in it by the plea and a judgment was accordingly entered upon it in the appellants' favour. The respondent cannot, and does not attack that judgment and it stands in full force. Art. 1245 C. C. The respondent was, therefore, debarred from further impeaching the validity of the contract and the judgment appealed from should have so determined.

The case of *The Great North-West Central Railway Company et al. v. Charlebois et al.* (1) reported in this court *sub nom. Charlebois et al. v. Delap et al.* (2) has no application. Far from impeaching the confession of judgment and the judgment entered upon it, as was done in that case, the respondent here asks that the judgment be affirmed.

The controversy raised by the respondent, upon the alleged non-fulfilment by the appellants of their contract relates merely to questions of fact upon which the two courts below have unanimously found against the respondent's contentions, a finding with which nothing in the case would justify us in interfering.

This appeal is allowed with costs and the judgment of the Superior Court is restored.

Appeal allowed with costs.

Solicitors for the appellants: *Smith, Markey & Montgomery.*

Solicitors for the respondent: *Bisaillon & Brossard.*

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(1) [1899] A. C. 114.

(2) 26 Can. S. C. R. 221.