

As to objection No. 3, I am inclined to think that strictly a by-law is necessary. . . . That the point was open to the appellants without the leave of the Referee appears to be doubtful, for, among all the 25 objections set out in the notice of appeal, nothing is said about the absence of a by-law. And, indeed, its absence was apparently not even known to the appellants until after the hearing before the Referee had been entered upon; in the course of which, on his suggestion, a by-law was passed, and the objection, so far as it could be, cured. There is, therefore, now a by-law which fully commits the respondents to the scheme; and the appellants, failing on the merits, should not be allowed, under the circumstances, to succeed upon this objection, now so purely formal.

As to objection No. 4, this, in my opinion, fails upon the evidence. . . .

There is nothing in objection No. 5. The right to obtain drainage against a Dominion railway is now regulated by secs. 250 and 251 of the Railway Act, R. S. C. 1906, ch. 37. And it was in no way the duty of the respondents to have made any application under these sections before serving the report upon the appellants, if their proceedings had been otherwise regular.

The remaining objections do not, I think, call for extended remark. . . .

Appeal dismissed.

MOSS, C.J.O., and MEREDITH, J.A., each gave reasons in writing for the same conclusion.

OSLER and MACLAREN, J.J.A., concurred.

DECEMBER 31ST, 1909.

DEWEY AND O'HEIR CO. v. DEWEY.

*Covenant—Restraint of Trade—Breach — Evidence—Damages—
Extent of Business Done — Profits — Reference—Scope of —
Judgment.*

Appeal by the plaintiffs from the order of a Divisional Court, 13 O. W. R. 32, varying the order of ANGLIN, J., 12 O. W. R. 726, made upon an appeal to him from a report of the local Master at Hamilton.