

action with costs and awarding the defendant \$165 and costs upon his counterclaim.

The action was brought to obtain a declaration that certain land claimed by the defendant in reality formed part of a public highway in the township of Harvey, and for damages and an injunction in respect of obstruction by the defendant. The counterclaim was for trespass.

The appeal was heard by MEREDITH, C.J.C.P., MAGEE and HODGINS, J.J.A., and CLUTE, J.

E. D. Armour, K.C., for the appellants.

D. O'Connell, for the defendant, respondent.

The judgment of the Court was read by MEREDITH, C.J.C.P., who said that the County Court Judge was perhaps right in considering that the plaintiffs' claim could not be supported alone upon a certain by-law passed by the township council, owing to a defect in registration. The legislation respecting the validity of such a by-law was not passed for the purposes of the registry law and was not enacted in the Registry Act only; it was contained also in the Municipal Act, and was passed to control generally the compulsory powers of municipalities in acquiring land for highways: see 31 Vict. ch. 20, sec. 63 (O.); 36 Vict. ch. 17, sec. 6 (O.); *ib.* ch. 48, sec. 445; and *Rooker v. Hoofstetter* (1896), 26 S.C.R. 41.

But it is not needful to consider that question for the purpose of determining the right of the parties, because the substantial question involved—the question whether the highway is a way 66 feet or only 20 feet in width—can easily be determined on other grounds and upon the defendant's testimony alone, in connection with the indisputable circumstances of the case.

The defendant's contention was, that he knew that there was an old trail where the road now is, and that he had no notice, when he bought the land, that the way over it extended beyond the width of the trail that had been commonly used, which, he says, was just wide enough for two teams to pass each other upon it.

Upon all the facts of the case, however, the finding should be that the defendant bought with notice of the existence of a highway, dedicated to the public by the municipality, over the land purchased by the municipality for the purposes of such a highway, that is, a highway of the common width of 66 feet.

The appeal should be allowed, and judgment entered in favour of the plaintiffs, enjoining the defendant from encroaching upon the highway in question, 66 feet in width.