FALCONBRIDGE, C.J.K.B. JULY 13TH, 1918.

TOMPKINS v. TOWNSHIP OF HARWICH.

Highway — Encroachment — Action for Mandamus to Township Corporation to Restore Road to Original Width—Fences—Non-feasance—Remedy.

An action for a mandamus to the Corporation of the Township of Harwich to restore a road.

The action was tried without a jury at Chatham.

R. L. Brackin, for the plaintiffs.

J. M. Pike, K.C., for the defendants.

FALCONBRIDGE, C.J.K.B., in a written judgment, said that the three plaintiffs were adjoining proprietors, Tompkins and Brown owning parts of lot 19 in the 2nd concession and McAllum owning lot 19 in the 3rd.

There was an original road allowance between 18 and 19 in the 2nd concession, and between 18 and 19 in the 3rd. The plaintiffs complained that the defendants had laid out and were using for public travel a highway not of the required statutory width. In their statement of claim they asserted that the highway was partly on their lands, without any expropriation. They abandoned at the trial their claim for damages on this latter head, and proceeded only to ask for a mandamus as set out in the proposed amendment of the statement of claim, which should be allowed (as it most clearly set out the plaintiffs' claim). It was, shortly, to direct the defendants to restore the road to its original width, as it was formerly fenced off, and to restore highway fences to the lines originally occupied by them.

Mosey and Huffman, proprietors on the opposite side of the road, moved their fences in on the road some 13 feet; and the plaintiffs thought the council ought not to stand aside and allow this to be done.

Mosey's encroachment was only temporary, while he was building a new fence, and he had now removed the objectionable fence and gone back to his original boundary. Huffman's fence still encroached, and it was about 200 rods in length.

There was no deprivation of ingress or egress. The road was in about the same condition as the ordinary country side-road, and the travelled part thereof was of about the same width.