

opposed to those of the father, the principal matter to be considered is the welfare of the children. It certainly could not be for the welfare of such of the children as were under five years, that they should be removed from the custody of their mother; and that being so, it was impossible to give the custody of any of the children to the father, for it is wrong to separate the children: *Warde v. Warde*, 2 Ph. 786; *Re Ellerton*, 25 Ch. D. 220; *Smart v. Smart*, (1892) A.C. 425. Order made that the mother should retain the custody of the children, and that the father should have access to them at such times as might be agreed upon, or in case of failure to agree at such times as should be fixed by the Chief Justice. Costs to be paid by the father.

L. F. Heyd, for father. *J. H. Moss*, for mother and maternal grandfather.

Armour, C.J.] IN RE HENDERSON AND CITY OF TORONTO. [Oct. 15.

Municipal corporation—By-law—Registration—Non-conformity with plans—“Instrument”—Notice.

Motion by James Henderson to quash by-law 3519, of the corporation of the city of Toronto, being a by-law “to provide for borrowing money by the issue of debentures secured by local special rates on the property fronting or abutting on Rosedale Valley road, between Yonge street and the River Don, in Ward 2, for the cost of opening the said street.” By-law 2164 provided for the opening of the Rosedale Valley road, and one of the grounds upon which it was sought to quash by-law 3519, was that by-law 2164 was never registered, and the road was therefore never validly opened, and no assessment could be made for its cost. By-law 2164 was passed on the 27th July, 1888, and the law then, as now, was that “every by-law passed since the 29th March, 1873, or hereafter to be passed by any municipal council under the authority of which any street, road, or highway has been, or is opened upon any private property, shall, before the same becomes effectual in law, be duly registered:” R.S.O. 1887, c. 184, s. 547. A duplicate original of by-law 2164, certified under the hand of the clerk and the seal of the city corporation, was received at the proper registry office on the 22nd August, 1888, and a \$2 fee for registry was then and there paid, but it was never registered or entered in any of the books of the registry office, because it did not conform and refer to the plans filed with the registrar of the lands through which the road was opened, as required by R.S.O. 1887, c. 114, s. 84, s.-s. 2.

Held, that this by-law came within the prohibition of the last mentioned enactment, for the reason assigned by the registrar, and also because the by-law was an “instrument” within the meaning of that section, and as defined by section 2 of the Act. Section 96 of R.S.O. 1897, c. 136, must be read with section 100 of the same Act, and so reading it the effect of section 100 is not diminished, for this by-law was not, under the circumstances, capable of registration. And the by-law, never having been registered, never became effectual in law for any purpose. The provision for the registration of such a by-law did not at first appear in any Registry Act, but in a Municipal Act, 29 & 30 Vict., c. 51, s. 348, and it is not to be qualified by holding that the registration is only required for the purpose of notice under the registry laws. And this by-law