

THE MASTER:—By 63 Vict. ch. 108 (O.) a by-law of defendants providing for the permanent improvement of the principal streets in Windsor, according to a scheme set out in schedule A. to the Act . . . was validated. The general scheme was to use macadam, and the whole plan proceeds on that basis. But by sec. ix. it was provided that if the majority of the owners on any street desired asphalt or brick or other durable material rather than macadam, and signed and presented a petition to that effect 6 months before the date when, according to schedule B., such street was to be paved, and gave certain security for the difference in cost, then it should be the duty of the council to comply with such prayer.

Pursuant to clause ix., on 15th August, 1904, a petition was presented to the city council by certain persons, asserting themselves to be the majority in number and value of the owners on Pitt street, requiring asphalt instead of macadam. This petition was referred by the city to their assessor and solicitors, who reported that the same was sufficiently signed and in proper form. . . . On 27th February, 1905, the council passed a resolution to purchase from the Ontario Asphalt Block Co. the necessary material. On 11th March plaintiff Fulmer commenced his action to restrain defendants from paving Pitt street with asphalt. And, certain persons who had signed the petition having notified the council that they withdrew their names so far as they were able, the council on 13th March passed a resolution requiring those who were in favour of asphalt "to take action towards that end within 7 days," and determining that otherwise macadam would be laid and not asphalt.

The petitioners took no steps, and on 27th March the council repealed their resolution of 27th February, and passed a resolution declaring their intention to lay macadam pavement upon Pitt street.

On the following day plaintiff Bangham commenced his action to restrain the use of macadam. In order to facilitate this action, defendants appeared on the same day, and statement of claim was served and statement of defence delivered in both actions on 31st March, and on the same day defendants moved in both actions to have them consolidated, or that the action of Bangham be stayed until that of Fulmer is decided, defendants submitting to be bound by such judgment, or that one of the plaintiffs should be made plaintiff and the other a defendant to decide their rights in the above action. . .