

work, there having been no by-law authorizing it till after this action was begun.

J. P. Mabree, K.C., for plaintiff.

J. Idington, K.C., for defendant corporation.

J. W. Graham, St. Mary's, for individual defendants.

FALCONBRIDGE, C.J., held that, in view of secs. 402 and 435 of the Municipal Act (R. S. O. ch. 223), it was doubtful if the debt was a valid debt of the corporation, and that this doubt was sufficient reason for dismissing the action, since the holders of the note given for the liability in question were not parties. Action dismissed. No order as to costs as between plaintiff and the defendant corporation, but plaintiff to pay the costs of the individual defendants, except those incurred on the proceedings for the interlocutory injunction.

JANUARY 9TH, 1903.

DIVISIONAL COURT.

RE PHELAN.

Will—Construction of—Validity of Restriction on Devise—Res Judicata—Case Stated by Master of Titles.

Case stated by the Master of Titles and referred to the Divisional Court by order of a Judge (1 O. W. R. 741). The question was whether Ellen Phelan was entitled to be registered as owner of certain lands free from a provision restrictive of alienation contained in the will of one D. T. O'Sullivan, whereby he devised the land to two nephews (O'Sullivan) subject to the condition that "neither of my said nephews is to be at liberty to sell his half of the said property to anyone except to persons of the name of O'Sullivan in my own family. This condition to attach to every purchaser of the said property." Ellen Phelan was a sister of one of the nephews. The Master asked whether the provision in the will was valid, and, if not, whether the applicant was entitled to be registered as owner free from the condition. The Judge who referred the case was of opinion that the condition was void, but that he was bound by the decision of Robertson, J., in O'Sullivan v. Phelan, 17 O. R. 730.

W. Proudfoot, K.C., for Ellen Phelan.

F. W. Harcourt, for infants.

THE COURT (BOYD, C., MEREDITH, J.) held that as, upon investigation, it appeared that the case relied upon as an estoppel had gone to the Court of Appeal, by which the judgment of Robertson, J., was vacated, but that no final judgment was ever pronounced, the case having been remitted by the Court of Appeal for want of parties, the Master of Titles was, therefore, free to decide untrammelled by any decision binding upon him, but guided by the opinion expressed