(1854), 5 De G. M. & G. 851; In re Prittie and Toronto (1892), 19 A.R. 503.

The right to build the sewer is not in strictness an easement, but an hereditament: Metropolitan R.W. Co. v. Fowler, [1892] 1 Q.B. 165; but in the statute of 1892 the Legislature followed the Court in the Davis case in calling the right taken an easement; and, if necessary, it should be held that the intention was to enable the municipality to take the right to construct a sewer through land without taking the land itself.

Reference to the Pinchin case, supra; Halsbury's Laws of England, vol. 11, paras. 470, 471; Rex v. Hall (1892), 1 B. v. C. 123, 136.

There was no hardship in allowing the defendants to construct the sewer across the plaintiff's land without acquiring the absolute ownership. Compensation must be paid. No advantage would accrue to the plaintiff if the defendants were compelled to take an absolute title to the strip occupied by the sewer. Such a severance of the entire estate would do grievous harm and compel the defendants to pay heavy damages instead of a comparatively small sum. See Roderick v. Aston Local Board (1877), 5 Ch. D. 328.

Why should a municipality charged with the duty of maintaining a sewer system be compelled to acquire absolute title to land at a great expense and serious damage, when an underground passage doing little harm was all that was needed? Why not impute a reasonable rather than an unreasonable intention to the Legislature?

It should be declared that the by-law was within the powers of the council; that the plaintiff was entitled to compensation, to be determined under the Municipal Act, for all that was authorised by the by-law, and to damages for anything done beyond what was authorised, this damage to be assessed and determined by the Official Arbitrator, as a special referee, in the arbitration proceedings.

Costs reserved until after report.