

MIDDLETON, J.

JANUARY 2ND, 1919.

*SNOW v. CITY OF TORONTO.

Municipal Corporations—Land Entered upon and Excavated for Sewer—Drainage System—By-law—Intra Vires—Municipal Act, 1903, secs. 2 (8) and 554—Expropriation of "Easement"—Compensation and Damages.

Action for a mandamus to the defendants, the Corporation of the City of Toronto, to compel the closing of a sewer, for an injunction restraining them from operating the sewer, and for damages for trespass to the plaintiff's land.

The action was tried without a jury at a Toronto sittings.

W. J. Elliott, for the plaintiff.

Irving S. Fairty, for the defendants.

MIDDLETON, J., in a written judgment, said that the plaintiff owned land on the east side of Balsam avenue, fronting on Lake Ontario. In the spring of 1913, the defendants, as part of the East Toronto drainage system, entered upon the plaintiff's land and excavated a trench across it from east to west, a distance of 100 feet, and constructed a sewer; filling in the trench, and in some measure restoring the surface of the ground.

The defendants justified the entry under a by-law, No. 6347, passed on the 10th February, 1913, intituled "A By-law to acquire an Easement over certain Lands."

It was admitted that compensation-money must be paid under the Municipal Act, and it was agreed that a claim for damages for things done beyond what the by-law authorised should be dealt with by the tribunal charged with fixing the compensation, if the by-law should stand.

The plaintiff contended that the by-law was ultra vires the city council.

Reference to *Re Davis and City of Toronto* (1891), 21 O.R. 243, decided under sec. 479 (15) of the Municipal Act, R.S.O. 1887 ch. 184, and the amendment made in 1892 (in consequence of the decision in the *Davis* case), 55 Vict. ch. 43, sec 1.

It was argued that the amendment had not the effect attributed to it, as all that the municipality could do under the statute as it now stands (see the Municipal Act, 1903, 3 Edw. VII. ch. 19, secs. 2 (8) and 554) was to expropriate an existing easement, and that it could not now, any more than it could before the amendment, take any lesser estate than that owned.

Reference to *Pinchin v. London and Blackwall R.W. Co.*