

MIDDLETON, J., IN CHAMBERS.

NOVEMBER 20TH, 1919.

FAIR v. VILLAGE OF NEW TORONTO.

Municipal Corporations—Construction by Village Corporation of Sewer through Lands of Plaintiff—Absence of Expropriating By-law—Action for Trespass and other Relief—Pleading—Statement of Defence—Allegations that By-law Passed since Action and Money Paid into Court to Answer Compensation, Trespass, and Costs—Motion to Strike out Allegations—Advantage of Having Compensation under By-law and Damages for Trespass Ascertained by same Tribunal—Consent Judgment.

An appeal by the plaintiff from an order of the Master in Chambers refusing to strike out certain paragraphs of the statement of defence.

T. J. Agar, for the plaintiff.

W. A. McMaster, for the defendants.

MIDDLETON, J., in a written judgment, said that the plaintiff was the owner of certain lands, through which the defendants, a municipal corporation, without taking any expropriation proceedings, constructed a storm-sewer. The action was to recover damages for the wrongful act, and for a mandatory order directing the removal of the works constructed, and an injunction restraining any further trespass. By the statement of defence it was not suggested that the defendants had the right to do what they did; but it was said that, after the bringing of the action, a by-law was passed expropriating the lands, and that the defendants had now offered the plaintiff \$2,000 as being the value of the land, \$250 as compensation for the trespass, and \$100 for costs; and, the offer being rejected, the sum of \$2,350 was now brought into Court. The paragraphs containing these allegations were the paragraphs attacked.

The action of the municipality in passing the by-law was proper: *Sandon Water Works and Light Co. v. Byron N. White Co.* (1904), 35 Can. S.C.R. 309. But the passing of the by-law would not relieve the defendants from the liability to pay damages sustained by reason of the trespass between the time of the commission of the trespass and the expropriating by-law. It was argued that the defendants ought not to be permitted to pay into Court, in this action, the amount that had been offered as compensation in the expropriation proceedings; but the learned Judge could not see that the plaintiff was in any way prejudiced by this, and did not think that the paragraphs should be struck out.