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*Oct. 23.

*Dec. 9.

THE CORPORATION OF THE CITY OF TORONTO .... } APPELLANTS;

AND

THE CANADIAN PACIFIC RAILWAY COMPANY.... ..... } RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO.

Municipal Corporation — By-law—Assessment — Local improvements — Agreement with owners of property—Construction of subway—Benefit to lands.

An agreement was entered into by the corporation of Toronto with a railway company and other property owners for the construction of a subway under the tracks of the company ordered by the Railway Committee of the Privy Council, the cost to be apportioned between the parties to the agreement. In connection with the work a roadway had to be made running east on King Street to the limit of the subway, the street being lowered in front of the company's lands which were, to some extent, cut off from abutting as before on certain streets; a retaining wall was also found necessary. By the agreement the company abandoned all claims to damages for injury to its lands by construction of the works. The city passed a by-law assessing on the company its portion of the cost of the roadway as a local improvement, the greater part of the property so assessed being on the approach to the subway.

Held, that to the extent to which the lands of the company were cut off from abutting on the streets as before the work was an injury, and not a benefit to such lands and therefore not within the clauses of the Municipal Act as to local improvements; that as to the length of the retaining wall the work was necessary for the construction of the subway and not assessable; and that the greater part of the work, whether or not absolutely necessary for the construction of the subway, was done by the corporation under the advice of its engineer as the best mode of constructing a public work in the interest of the public, and not as a local improvement.

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*PRESENT:—Sir Henry Strong C.J. and Gwynne, Sedgewick, King and Girouard JJ.

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Notice to a property owner of assessment for local improvements under sec. 622 of the Municipal Act cannot be proved by an affidavit that a notice in the usual form was mailed to the owner; the court must, upon view of the notice itself, decide whether or not it complied with the requirements of the Act.

In the result the judgment of the Court of Appeal (23 Ont. App. R. 250) was affirmed.

APPEAL from a decision of the Court of Appeal for Ontario (1), affirming the judgment of MacMahon J., who quashed a by-law no. 3245 of the city assessing the railway company for a portion of the cost of certain work as a local improvement.

Three by-laws, nos. 3244, 3245 and 3246 were quashed by Mr. Justice MacMahon, but the city only appealed in respect to no. 3245. Mr. Justice Osler, who delivered the judgment of the Court of Appeal, thus states the material facts:

"Appeal from the judgment of MacMahon, J., quashing city by-laws 3244, 3245, and 3246.

"These by-laws were passed in connection with the work known as the King Street Subway. No. 3244 was for the construction of a sewer, no. 3246 for the construction of a plank sidewalk, and no. 3245 for the construction of a scoria and tamarac block roadway on King Street, between the east limit of the King Street Subway and Dufferin Street. On the argument the appeal was abandoned as to the sewer and sidewalk by-laws, and confined entirely to so much of the judgment as dealt with the roadway by-law no. 3245. Broadly stated the contention on the part of the city was that the whole work was a mere local improvement, the cost of which was chargeable to the frontagers by force of the city by-law providing that all works of that description should be executed and

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charged for as local improvements under the local improvement clauses of the Municipal Act.

"The railway company on the other hand contended that the work being a part of the works connected with the construction of the subway, and a necessary part of the subway and works, no part of the cost could be directly thrown upon them as for a local improvement. The construction of these works became necessary, it was said, in consequence of an agreement between the city and the several railway companies interested, and of an order in council passed under section 74 of the Railway Act, R. S. C. ch. 109, and that to a work so done the local improvement clauses of the Municipal Act were inapplicable.

"For some years previous to 1887 it had become evident that the great danger to the public caused by the level railway crossing on King Street West would by some means have to be effectually provided against, and on the 21st of October, of that year, an agreement was made between the several railway companies and others interested, and the City of Toronto, reciting that in the interest of the public safety it was necessary that the railway tracks should be altered, etc., and that certain of the tracks should be removed from their then location and placed elsewhere, 'thereby bringing the several railway tracks crossing King Street West together as closely as possible, and facilitating the crossing of the same by an overhead bridge, or a subway, or other improved crossing.' The agreement then went on to provide for carrying out that preliminary by means of mutual conveyances of the necessary land, and the city and the Canadian Pacific Railway thereby consented and agreed to the removal and re-adjustment of the railway tracks and other works upon and in King Street West, as provided in the first clause of the agreement.

"It was then agreed that 'in the event of the alteration of the railway crossing upon or over King Street at any time or times hereafter, under or pursuant to any order or orders in council made on the report of the Railway Committee of the Privy Council of Canada, and whether such alteration shall consist of a level crossing and the erection and maintenance of a gate and guards, or of the construction of an overhead bridge upon, over and along, or a subway upon, in and under' King Street aforesaid, and the necessary works connected therewith, no one of the said several parties should be entitled to claim compensation for injury or damages which might be done to or suffered by them in respect of their lands or other property by reason of the construction, making or maintenance of any such changes, alterations or improvements. On the 28th of November following, a report of the Railway Committee of the Privy Council was approved by the Governor General, setting forth that the Council had had under consideration a report from the Railway Committee with reference to certain representations of the City Council of Toronto and others with regard to the dangerous character of the present level railway crossings of King Street West, and that after hearing the parties interested at a meeting called for the purpose when a proposition was made on the part of the City Council to construct the necessary works for carrying the street under the railway tracks, provided the railway companies paid a fair proportion of the cost, the Railway Committee declared it necessary for the public safety, and recommended that the Corporation of the city of Toronto be authorized and required to carry the said street under the tracks of the said railway companies by a bridge and subway with necessary approaches, and to execute all the works required to that end, said bridge and subway to be built in accordance

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with plans and specifications to be prepared by the Corporation and approved by the Minister of Railways and Canals.

"The report then proceeds to apportion the cost of the work; so much to be paid by each railway company; so much to be paid by the Municipality of Parkdale; and the City of Toronto to contribute the sum of $80,000, or such other sum in excess of or below the estimate of the cost of the works (deducting the payments made by other parties), as should cover the whole expenditure on the works. It was further recommended with respect to the maintenance and repair of the said bridge, subway and approaches, that the City of Toronto be required to maintain and repair the masonry work and all work appertaining to the public roadway and sidewalks

"In the course of the next few years following the passage of the order in council, the bridge and subway and approaches were constructed by the City, and the respondents duly paid their share of the cost thereof. The roadway for the cost of the construction of part of which they are assessed commences at Dufferin Street, and runs east on King Street a distance of 896 ft., to the easterly limit of the east incline of the subway. On the north side of King Street a frontage of 449 ft. of the respondent's property is assessed, of which all but 157.10 feet is on the incline or approach of the subway, King Street being for that distance lowered by excavations for the purpose of the subway in front of their property. Going further east it is of course lowered much more until at the extreme west end of the subway itself the excavation reaches a depth of 17 feet, but here the respondent's property has not been assessed."

Robinson Q.C. and *Caswell* for the appellant.

Armour Q.C. and *MacMurchy* for the respondent.

GWYNNE J.—This is an appeal from the judgment of the Court of Appeal for Ontario affirming an order of Mr. Justice MacMahon quashing a by-law of the City of Toronto, number 3245, passed on the 23rd April, 1894, and intituled:

A by-law to provide for borrowing money by the issue of debentures secured by local special rates for the construction of a Scoria and Tamarac Block Roadway on King Street between the east limit of King Street Subway and Dufferin Street in wards nos. 5 & 6.

The order of Mr. Justice MacMahon quashed also two other by-laws numbered respectively 3244 and 3246 and passed on the same day, the one for issuing debentures secured by local special rates for the construction of a sewer and the other for the construction of sidewalks on King Street in the city of Toronto within the same limits as those mentioned in by-law 3245. From the order quashing the other two by-laws there has been no appeal; the material however upon which Mr. Justice MacMahon proceeded in the motion before him is before us and although we are only dealing with the appeal which is limited to the by-law 3245, the evidence before us which relates to all of the by-laws may throw light upon the contention of the appellants and the respondents respectively, that of the former, in substance, being that they were in due form exercising their legal rights in providing for the construction of the works mentioned in the by-laws as what are termed local improvements, while that of the respondents is that the appellants, wholly illegally and under colour merely of the powers vested in them by the Ontario Municipal Act as to local improvements, passed the by-laws for the purpose of evading thereby responsibilities which as the respondents contend the appellants had themselves assumed and undertaken in respect of a work constructed wholly in the interest of the public and wholly outside of the line of lands benefited by what are called local improvements.

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On the argument of this appeal before us it was admitted by the learned counsel for the appellants that if the block pavement of King Street as altered in accordance with the terms of the order in council of the 28th November, 1887, comes within the work as described in that order to be performed by the appellants, as to so much and such part of the work mentioned in the by-law 3245, as comes within the said order in council the by-law cannot be supported and this appeal must fail, but it is contended by the appellants that as to so much, if any, of the pavement work within the limits mentioned in the by-law as does not come within the description of the work mentioned in the said order in council as to be undertaken and executed by the appellants, the by-law should be maintained and this appeal allowed.

The whole question involved in the appeal therefore is: Should the by-law have been quashed in whole or only in part?

In determining this question we must read the order in council in the light of and in connection with the agreement of the 21st of October, 1887, which was in evidence and is before us There can, I think, be no doubt that by the excavation of King Street to the depth as appears of 17 feet for the purpose of constructing the subway where the railway bridge over the street has been erected, such depth gradually deminishing to the summit of the approaches on either side constituted, to a greater or less extent the cutting off of the lands there, which formerly had their frontage abutting on the street from fronting and abutting on the street as altered.

This so cutting off of those lands from fronting and abutting on the street constituted as is apparent not a benefit but a very plain and manifest damage to those lands for which all the owners thereof would have

been entitled in law to compensation, all claim for which compensation the Canadian Pacific Railway Company and all the other parties to the indenture of the 21st October, 1887, who were owners of land fronting and abutting on the street, released and abandoned.

Now, the first question which arises here is: Can the block pavement of the street as lowered to the extent which has been necessary for constructing the subway in the interest of the general public, the natural and direct effect of which work has been to inflict special damage upon the adjoining lands by cutting them off from the frontage and abuttal which they formerly had upon the street, be held to be a work of local improvement within the meaning of the Municipal Act and for the construction of which the corporation had any authority to impose and levy a special tax for the purpose of paying for such work upon the adjoining lands as being lands specially benefited by the work? The tax which in a case of local improvement they are authorized to impose is a special rate, to be assessed upon real property specially *benefited* by a work, proportional to the *benefit* conferred by the work upon the lands assessed. Now although the Municipal Act provides means for ascertaining and determining *the amount* of the rate which is fairly chargeable upon the respective lands upon which the special tax is authorized to be charged, it is impossible in my opinion for us to hold that the Act gives any authority to the corporation to levy upon the land of the railway company, or of any other persons as owners of lands similarly situate, a special tax for paving with wooden blocks, stone, or otherwise a street from fronting and abutting upon which the lands proposed to be assessed have been so cut off as the respondents' lands have been by the excavation necessary for the construction of the subway constructed by the appellants in accordance

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with the terms of the order in council of the 28th November, 1887.

The appellants admit, that for the distance of 300 feet on either side of subway work, and for which distance it was necessary to construct a stone or brick retaining wall for the purpose of preventing the lands outside the limits of the street from falling down into the roadway, the adjoining lands are not chargeable; but the paving of the roadway with blocks for the distance to which the retaining wall extends is no more within the terms of the order in council than is the paving of any other part of the approaches to the subway, and the true reason, as it appears to me, why the lands of the respondents cannot be charged with any part of the cost of the pavement for the distance to which the retaining wall extends is that, for this distance at least, the lands sought to be charged have been so cut off from the street as to be no longer within the category of lands fronting and abutting upon the street and liable to a special tax as for a benefit specially conferred upon the lands. The question now arises: Is the responsibility of the appellants to bear the cost of the pavement to be limited to the distance to which the retaining wall extends or does it extend for any and if any what distance further? To the extent to which damage is done to adjoining lands by the excavation to form the approaches they must be, and for the same reason as the lands within the limits of the retaining wall are held to be, removed from the category of lands assessable as for local improvement for benefit conferred upon the land by the pavement done upon the street. The subway was a work plainly designed and constructed as a public work in which the general public, the corporation as representing the inhabitants of the city, and the railway companies were the sole parties interested. The corporation, in consideration

of the moneys paid and payable by the railway companies as prescribed by the order in council as their contribution to the cost of the work, undertook to construct and when constructed to maintain the subway and its approaches as such public work, the respondents and all others the owners of adjoining lands abandoning and releasing all claims for damage done to their lands by the excavation of the street necessary for the performance of the work. It seems but reasonable therefore to hold that to the full extent of the space between the summit of the approaches on either side of the subway proper, the work is, as being a work designed and constructed in the interest of the general public, wholly removed from the application of the clauses of the Municipal Act as to local improvements and the imposition of a special tax upon lands benefited by such improvement. The Court of Appeal for Ontario, as appears by the judgment of Mr. Justice Osler who read the judgment of the court, were of opinion that the evidence shews that the paving work done within the limits mentioned in the by-law was work done as part of the subway and was not, in fact, undertaken under the clauses of the Municipal Act relating to local improvements. There is much in support of this view as to the whole work, while as to the work upon the subway proper and its approaches there can, I think, be no doubt entertained. The city engineer in charge of the construction of the subway made his report to the city council dated the 27th of August, 1890, while the construction of the subway and its approaches was in progress, recommending the construction of the pavement, as a scoria block and wooden block pavement between Dufferin Street and a point 3,000 feet easterly. The only part of this distance not included within the space occupied by the subway and

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its approaches was, as appears by the evidence offered by the appellants, 1,126 feet of roadway upon the former level of King Street measured easterly from Dufferin Street in front of 941 feet of frontage belonging to the city corporation and of 185 of frontage belonging to the respondents. The above report of the city engineer was adopted by the council on the 1st September, 1890, and the by-law was not passed until the 25th April, 1894. Now the scoria block pavement included in the by-law is shown to have been put upon the subway proper, that is to say, the space under the railway bridge, and though included in the estimate of the engineer as for local improvement and in the by-law passed in April, 1894, was in the month of October, 1893, charged by the city corporation to the subway as part of its cost amounting to the sum of $13,327.97. Then again the roadway on the approaches was paved with squared tamarac block sawn to a size so as to be fitted close together. This material and this mode of paving the approaches were adopted as best suited to the steep grade in the approaches, and but for that grade round cedar blocks which are those in ordinary use would have been used. King Street upon its former level extending from Dufferin Street in front of the 1,126 feet above mentioned to the summit of the western approach to the subway was paved with the round cedar blocks. The whole distance was constructed as one work by day labour, the corporation determining as they thought fit the cost of the scoria block pavement and charging it to the subway and determining in like manner the pavement of the roadway both on the approaches and on the level and charging the cost so determined of the roadway between the tracks of the street railway to the street railway company under an agreement with them and the balance to the by-law

3245, but making no difference as to the cost upon approaches where the squared tamarac blocks were used, and upon the part of King Street the level of which remained unaltered between Dufferin Street and the summit of the western approach to the subway. This evidence is sufficient, I think, to warrant the conclusion that, in fact, both the scoria pavement of the subway proper, and the tamarac block pavement on the approaches were works which, whether absolutely necessary or not to be done as in compliance with the order in council, were done by the city corporation under the advice of the engineer for the purpose of constructing in the most perfect manner the work which they had undertaken to construct and maintain as a public work designed in the interest of the general public, and not at all under the clauses of the Municipal Act relating to local improvements.

It only remains to consider the point urged by the learned counsel for the appellants—that although the by-law should be quashed as to the work done upon the subway and its approaches it should be maintained as to the 185 feet of the respondents' property fronting on the level street west of the western approach; but a by-law which must be quashed as regards about three-fourths of the distance purported to be affected by it cannot possibly be maintained as to the residue which might have been assessable if it had not been wrongfully coupled with work not assessable under the clauses relating to local improvements. But there is another objection urged by the respondents affecting the validity of the by-law, namely, they insist that they never had any notice served upon them as required by the 622nd section of the Act. It is of the utmost importance that the corporation when professing to exercise the very extensive powers given by the Act to the council in those local improvement clauses

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should be prepared always to prove strict compliance with the provisions of the Act requiring notice to be given to the parties intended to be affected by the proposed assessment. In the present case the only evidence upon the point offered by the appellants is contained in an affidavit of a person who deposes that on the 11th February, 1891, he posted notices in the usual form, of the sitting of the Court of Revision with regard to the assessment for a scoria and wooden block pavement on King Street between Dufferin Street and the King Street Subway, to all parties, including the Canadian Pacific Railway Company, whose names are on a list annexed to his affidavit. Evidence of this nature is plainly defective, for it is the province of the court upon view of the notices said to have been mailed, and not of a deponent, to decide whether they do or do not comply with the requirements of the Act. The evidence produced constitutes a deposition as to a point of law and cannot be accepted as evidence that the notices said to have been mailed were in fact such as the law required.

The appeal must be dismissed with costs as the by-law must be quashed *in toto*.

Appeal dismissed with costs.

Solicitor for the appellant: *Thomas Caswell.*

Solicitors for the respondent: *Wells & MacMurchy.*