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costs, but with leave to the defendant to withdraw his demurrer and answer upon the payment of costs.

All concurred.

Interlocutory judgment affirmed, with costs, with leave to defendant to withdraw his demurrer and answer upon payment of costs of the demurrer and of this appeal.

THE VILLAGE OF CANANDAIGUA, by CHARLES F. ROBERTSON and Others, Constituting the Board of Water Commissioners of said Village, Respondent, *v.* ROBERT M. BENEDICT, Appellant, Impleaded with Another, Defendant.

Eminent domain—where a village takes possession of lands by force, it is improper to continue it in possession thereof—purpose of the order authorized by § 3379 of the Code of Civil Procedure—laches.

Where it appears that a village has, without having made any agreement with the owner of lands through which a highway runs, forcibly taken and used a strip of the highway for the purpose of laying water pipes and for the erection of poles for electric power, and that the only steps which the village has taken to acquire the property consist in the fact that, a few days before its violent acts, it had begun condemnation proceedings, which were subsequently resisted by the landowner and were referred but not further prosecuted by the village, the case presented is not one in which the court should exercise the powers specified in section 3379 of the Code of Civil Procedure and continue the village in possession of the property.

There is no statute which authorizes the courts to protect a municipal corporation (having the right to acquire title to property by condemnation) in the possession of property which it has acquired by trespass, force or fraud.

The order, authorized by section 3379 of the Code of Civil Procedure, is not designed for the permanent protection of a corporation in a possession which it may have acquired even peaceably, but is designed to temporarily protect its possession *pendente lite*, while it is actively engaged in prosecuting a proceeding for the condemnation of the property. Where the corporation has been guilty of *laches* in prosecuting the proceeding, such an order should be set aside.

APPEAL by the defendant, Robert M. Benedict, from an order of the Supreme Court, made at the Monroe Special Term and entered in the office of the clerk of the county of Ontario on the 23d day of August, 1895, as resettled by an order entered in said clerk's office on the 9th day of September, 1895, authorizing the plaintiff to con-

tinue in possession of certain premises described in a petition in condemnation proceedings, pursuant to section 3379 of the Code of Civil Procedure, during the pendency of the proceeding, and staying all proceedings on the part of the defendant in certain actions brought and proceedings instituted by him against the plaintiff.

J. H. Metcalf, for the appellant.

James C. Smith, for the respondent.

FOLLETT, J. :

Robert M. Benedict, the defendant in these proceedings, is the owner in fee and in possession of a farm containg 134 acres of land situate on the west side of Canandaigua lake, and about one mile south of the village of Canandaigua. A public highway known as the Lake Shore road extends through the farm in a northerly and southerly direction. The village of Canandaigua is a municipal corporation of this State, situated at the north end of this lake, and in 1895 was engaged in constructing a system of water works, through its board of water commissioners, pursuant to chapter 181 of the Laws of 1875.

June 10, 1895, the plaintiff filed a map describing a strip of defendant's land 20 feet wide and 1,070 feet long, lying within the bounds of this highway, on which the plaintiff desires to acquire the right to construct and forever maintain a line of iron pipes twelve inches in diameter, laid under the surface, for conducting water to the village; and also the right to erect and maintain a line of poles upon this strip of land to support a wire cable to be used for transmitting power by means of electricity, for the purpose of pumping water from the lake into a reservoir which is connected by the water main with the distributing pipes in said village. Before the map was filed and the extent of the easement required defined, negotiations for the purchase of an easement had been carried on between the litigants, but no contract was entered into. On the 5th of June, 1895, Mr. Benedict, apprehending that the village would by force enter on his land without acquiring any right, open a trench, lay the pipes therein and construct its electrical line, began an action in the Supreme Court to restrain the village from carrying out its purpose. A temporary injunction was granted restraining the pro-

posed action of the village, which, however, was shortly afterwards vacated before answer and on the *ex parte* application of the village. The injunction being vacated, the board of water commissioners and the contractors engaged in the construction of the works entered, June 22 and 23, 1895, on Benedict's land with a large force of men—100 it is alleged and not denied—and by force overpowered Benedict and his employees (who resisted until a breach of the peace was imminent), opened the trench, laid the pipes therein, covered them, erected the poles, and strung the cable thereon. This is the only possession which has been acquired, and this is the way in which it was acquired, except that early in April, 1895, the pipes were distributed on the ground within the bounds of the highway, without the assent or dissent of Benedict.

July 16, 1895, the village, by its board of commissioners, began these proceedings to acquire by condemnation the rights which it had so taken possession of. On July 26, 1895, Benedict answered, denying the right of the village to acquire these rights by condemnation. August 13, 1895, upon the application of the plaintiff, an order was granted pursuant to section 3379 of the Code of Civil Procedure, authorizing the village, its officers and agents to continue in possession of the premises described in the petition, and to use them for its purposes. The order also restrained Benedict from prosecuting his action in the Supreme Court, and from prosecuting summary proceedings in the County Court to recover possession of his premises. From this order Mr. Benedict has appealed. On the day when it was granted, the issue joined in this proceeding was referred to a referee to hear and determine, since which the village has taken no steps to appraise and acquire the rights which it seeks permanently to enjoy. It has contented itself with the possession so acquired and the protection of this order, which, as before stated, restrained the land owner from seeking redress for his alleged wrongs in the courts of this State. The Constitution provides that private property shall not be taken for public use without just compensation, and there is no statute in this State authorizing the courts to protect a municipal corporation (having the power compulsively to acquire lands or easements by condemnation) in the possession of property which it has acquired by a trespass, or by force, or by fraud. This was so determined in *Matter of St. L. & A. R. R. Co.* (133 N. Y. 270).

There is no material dispute over the facts in this case. It is not asserted that the possession of the village was acquired pursuant to any agreement or understanding with the land owner, nor was possession taken through mistake, or through any misapprehension of the rights of the village; but it was taken by force, and, as held in the case cited, the village is not in possession of the property sought to be condemned within the meaning of section 3379, and it cannot be protected in such possession under the provisions thereof.

Again, the order authorized by this section is not designed for the permanent protection of a corporation in the possession which it may have peaceably acquired, but for temporarily protecting its possession *pendente lite*, and while actively engaged in prosecuting a proceeding for condemning the property sought; and when it appears that the corporation is guilty of *laches* in the prosecution of its proceeding, the order should be set aside. It is true that the land owner may prosecute the proceedings, but he is not required to press proceedings to a conclusion instituted for the purpose of depriving him of property or rights with which he does not wish to part. The corporation is the actor, and it is its duty to be diligent in acquiring the property or rights which it seeks. It cannot, though it has acquired peaceable possession, protect its possession indefinitely under this section and restrain the land owner from prosecuting his legal remedies. Unless the corporation prosecutes its proceedings with diligence the restraining order should be vacated on that ground.

The order appealed from should be reversed, with costs.

All concurred, except ADAMS, J., not voting.

Order reversed, with costs.