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*Mar. 1, 2.
*Mar. 13.

ST. MICHAEL'S COLLEGE (PLAINTIFF) . . . APPELLANT;

AND

THE CORPORATION OF THE CITY OF TORONTO (DEFENDANT) . . . . . RESPONDENT.

APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

Municipal corporation—Land of college taken for city street—Statutory exemption from expropriation—Possession taken under supposed agreement and street constructed—Compensation to be determined by arbitration—Dispute as to terms of agreement for compensation—Basis of compensation—Equitable considerations.

The defendant city, desiring, for purposes of a street extension, certain land of the plaintiff college, proposed to expropriate, the college, claiming, under s. 15 of the *University Act*, R.S.O., 1914, c. 279, that

the city had no right to expropriate, sued to restrain it. Negotiations took place, resulting, as the parties believed, in a settlement, the action begun by the college was dismissed by consent and the city took possession and constructed the street which became an important thoroughfare. A board of arbitrators was appointed, as had been agreed, to fix the amount of compensation to the college, but the parties, on appearing before it, were unable to agree as to the principle upon which compensation was to be assessed under the settlement agreement, and in the result the college brought this action, asking for specific performance of the agreement as it conceived and alleged it to be, and alternatively a judgment setting aside the consent order dismissing its former action, on the ground that the order was founded upon a supposed agreement which had never, in fact, been concluded. At trial Riddell J. held the agreement had been made on the terms asserted by the college and was binding on the city. The Appellate Division varied this judgment, holding that, as the parties had differently understood what the terms of the agreement were, they were never *ad idem*, there had, therefore, been no agreement, and as, under the circumstances, the parties could not be restored to their former position, what had been done should stand and the city should compensate the college on certain basis laid down (see statement of the case *infra*) and directed a reference to the Master. The college appealed to the Supreme Court of Canada.

Held, that although there were disputes in certain respects as to the terms of the agreement, both parties understood that the college was to be fairly compensated; if there was no agreement the college must be compensated on equitable terms; so in the practical result it mattered little whether the right to compensation was considered as springing out of a specific agreement or resting upon equitable considerations; fair compensation would include payment of the value of the lands taken, not necessarily limited to the market value, but the value to the college in view of the purposes for which the land was used, and to which it had been dedicated; also compensation for any loss in respect of the diminution in value to the college of the remaining property in view of the purposes for which the property was in use or had been dedicated, whether caused by the construction or maintenance of the street or the severance of the lands taken; also indemnity for any loss consequent upon changes necessitated by the severance of the lands taken, such, for example, as the destruction and re-erection of buildings, in so far as this head of compensation was not included under the next preceding head; the value of the lands taken and the diminution in value of the property retained should be ascertained as of the date when the city took possession, and interest should be allowed from that date.

The judgment also provided for the closing of a certain street under certain conditions, and of a lane, and conveyance to the college, as had been agreed; for certain allowances to the city; and for assessment of compensation by the board of arbitrators which had been already constituted. It not having been explicitly agreed that the city should bear the expense of providing additional lands for the site of an Arts College, the question whether the cost of re-instatement in that sense would be a proper measure, in whole or in part, of the loss caused by the construction and maintenance of the street opened by the city must be one for the arbitrators.

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The difficulties usually attending an action to compel specific performance of an agreement to refer to arbitration did not arise. The action was strictly an action founded upon the equity vested in the college, in consequence of the acceptance of possession by the city and its subsequent acts, to have the terms upon which possession was given carried into effect. In such a case, the absence of statutory formalities touching the evidence of those terms is not an answer, as it would be in a common law action—for services, for example, as in *McKay* v. *Toronto* ([1920] A.C. 208)—and the court will not hesitate to exert its powers as far as possible to see that the agreement is carried out, even though some of its terms should not be susceptible of enforcement by process *in personam*. *Wilverhampton & Walsall Ry. Co.* v. *London & N.W. Ry. Co.* (L.R. 16, Eq. 433). In view of the fact that the board of arbitrators had been constituted, it was a proper case for a declaratory judgment.

APPEAL by the plaintiff college from the judgment of the Appellate Division of the Supreme Court of Ontario, dated June 27, 1925, varying the judgment of Riddell J., the trial judge, dated June 9, 1924, in favour of the college.

The city of Toronto (defendant, respondent) had provided by by-law for a certain street extension and for the expropriation of part of the land occupied by the college lying on the line of projected extension. After certain communications had taken place between the city's assessment commissioner and the college, the city proposed to take expropriation proceedings, whereupon the college, which is a "federated college" associated with the University of Toronto, relying upon the exemption from compulsory taking of real property of federated colleges created by s. 15 of the *University Act*, R.S.O., 1914, c. 279, sued to restrain the city from interfering with its possession and enjoyment of its lands, and procured an interim injunction, which was dissolved upon an undertaking by the city to expedite the trial. Negotiations were resumed, resulting, as the parties believed, in an agreement of settlement, the action begun by the college was dismissed by consent, and the city went into possession and constructed the street (now known as Bay street), which became an important thoroughfare. A board of arbitrators was appointed, as had been agreed, to fix the amount of compensation to the college, but the parties, on appearing before it, were unable to agree as to the principle upon which compensation was to be assessed, the college contending, and the city denying, that certain letters between Rev. Father Carr, acting

for the college, and the city's assessment commissioner formed part of the settlement agreement, and the arbitration, therefore, did not proceed. The college then brought this action, asking for specific performance of the agreement as it conceived and alleged it to be, and alternatively a judgment setting aside the consent order dismissing the former action, on the ground that the order was founded upon a supposed agreement which had never, in fact, been concluded.

The trial judge, Riddell J., gave judgment for the college, declaring that the agreement had been made on the terms asserted by it and was binding on the city. He also held that the college land was not liable to expropriation by the city, his holding in this respect being not disturbed on appeal and its soundness not contested upon the present appeal.

Upon appeal by the city the judgment of Riddell J., was varied by the Appellate Division, which held (under its formal judgment based on reasons of the majority of the court, certain varying views being expressed on certain questions), that the former action was dismissed under a mistaken belief of both parties that a settlement had been agreed upon, the college believing that the city had assented to the terms stipulated for by the college and the city believing that the college had assented to the terms stipulated for by the city, whereas the parties were never *ad idem;* that in the belief aforesaid the parties delivered possession of certain lands and made changes, alterations and expenditures thereon and on the remaining lands of the college; that the parties could not be restored to their former position, and that what had been done should stand; the city should retain the lands possession of which had been delivered to it by the college; the college should retain the land formerly part of a certain lane which the city had closed and given to it; that the college was entitled to receive from the city by way of compensation for the lands possession of which was delivered to the city, the market value thereof on November 11, 1921 (the date of taking possession) and interest thereon from that date, and such damages, if any, as it sustained by reason of the severance of the said land from the remaining lands of the college, or by reason of the remaining lands of the college being in-

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juriously affected by reason of the city's public work for the purposes of which the lands of the college were taken, less the value of any benefit or advantage which the college had derived or might derive from the said public work for which the lands were taken, and less the value of the land formerly part of the lane aforesaid, and less the value to the college of any changes, alterations and expenditures made by the city on the remaining lands of the college or on the buildings and erections thereon. A reference was directed to the Master to inquire and report on the amount of compensation. The college appealed to the Supreme Court of Canada.

N. W. Rowell K.C. for the appellant.

G. R. Geary K.C. and *W. G. Angus* for the respondent.

The judgment of the court was delivered by

DUFF J.—In 1920, by-laws were passed by the proper authority of the respondent corporation, providing for the extension northward of Terauley street and for the expropriation of part of the land occupied by the appellant college between Ste. Mary and St. Joseph streets lying on the line of the projected extension. Communications took place between the college and the respondent's assessment commissioner first on the subject of a possible deviation, in order to avoid any interference with the college property, and afterwards, that being abandoned, on the subject of compensation to the college. Some months after the opening of these communications, the corporation announced that it would proceed in the ordinary way, under the expropriation by-law, to take possession of so much of the college property as might be necessary to allow the street extension to proceed. Thereupon, the college, which is a "federated college," associated with the University of Toronto within the meaning of the *University Act*, R.S.O. 279, took proceedings, relying upon the exemption from compulsory taking of real property of such federated colleges created by s. 15 of that statute, and procured an interim injunction, which was dissolved upon an undertaking by the corporation to expedite the trial. Negotiations having been resumed, by consent the action was dismissed, and the corporation went into possession, and since then the street has been constructed according

to the projected plan, and, with the usual concomitants of a city thoroughfare (including two tramway lines), is now and has been for some time in use as a highway.

The dismissal of the action and the entry upon the college lands were concurred in by both parties under the belief that they had agreed upon the terms of a complete settlement. One of the stipulations about which there was no dispute was that the question of compensation was to be passed upon by three arbitrators, one of whom, the chairman, was to be Sir Thomas White, the others to be appointed by the College and the corporation respectively. These appointments having been made and the board having been duly constituted, the parties, upon appearing before it, were unable to agree as to the principle upon which compensation was to be assessed under the arrangement, and in the result the action out of which this appeal arose was brought, in which the college prayed specific performance of its agreement with the corporation as it conceived and alleged it to be, and alternatively, a judgment setting aside the consent order dismissing its former action, on the ground that the order was founded upon a supposed agreement which had never, in fact, been concluded.

As already mentioned, the first action of the college was founded upon the contention that, being a "federated college," associated with the University of Toronto, the corporation, by force of the enactments of the *University Act*, was debarred from taking any part of its lands compulsorily; and the soundness of this position was not contested upon the appeal before us. Without the assent of the college, therefore, the assumption of possession by the corporation would have been wrongful. Possession, however, was assumed, and, under the belief that a valid assent had been given, works were constructed which have become affected with a public interest, and private rights have been acquired on the faith of the permanence of the altered situation, and it is not now suggested that restoration to the College of the property taken would be a practicable or permissible solution of the difficulties that have arisen. But the maintenance of the *status quo* necessarily involves one of two consequences; either the corporation must carry out the agreement under which it entered, if

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there was such an agreement, or, if there was none, the college must be compensated on equitable terms, in view of the prejudice its interests have suffered in consequence of the extension of the street.

The college puts its case alternatively, but in the practical result it would appear to matter little whether the right to compensation is considered as springing out of a specific agreement or resting upon equitable considerations. Up to a certain point, there is little room for dispute. The burden of the communications between the parties is that the college is to be fairly compensated. Proposals as to specific methods for reaching this end are put forward, and are in part or wholly rejected, but there is nothing in the communications to suggest that the college ever abandoned this position, or that on part of the corporation the college was supposed to have abandoned it. The college authorities were trustees of the college property. They were masters of the situation in a legal sense, and, while a stiff and uncompromising stand on the *apex juris,* with the possibility of an acrimonious discussion, would no doubt have been distasteful, and possibly inadvisable in the larger interests of the college, still it was their duty to protect the College patrimony, not to set up extortionate or extravagant claims, but, on the other hand, to require just and reasonable compensation. The corporation must have recognized this, and no doubt did so, and Mr. Forman's report, construed in light of the information in his possession and in that of the Board of Control, as to Father Carr's attitude, and of the subsequent conduct of the parties, seems to be fairly capable of a reading in harmony with this.

Fair compensation would include payment of the value of the land taken, not necessarily limited to the market value but the value to the college in view of the purposes for which the land was used, and to which it had been dedicated. It would also include compensation for any loss in respect of the diminution in the value to the college of the remaining property in view of the purposes for which the property was in use or had been dedicated, whether caused by construction or maintenance of the street or the severance of the lands taken. It would also include indemnity in respect of any loss consequent upon

changes in the college grounds or in the property purchased for an arts college site necessitated by the severance of the lands taken, such, for example, as the destruction and re-erection of buildings, in so far as this head of compensation is not included under the next preceding head.

The value of the lands taken and the diminution in value of the property retained should be ascertained as of the date when possession was taken by the corporation, the 11th of November, 1921, and interest should be allowed from that date. It was specifically agreed that the northerly 315 feet of the lane bounding the old college grounds on the west, running from St. Mary street to St. Joseph street, should be closed, and possession of the site delivered to the college. This, apparently, has been done. It was also a term of the agreement that in the event of the college acquiring the property on both sides of Elmsley Place, the corporation would close that street, and the residue of the lane above mentioned, extending from St. Joseph street to St. Mary street, both parcels to be conveyed to the college.

It was also specifically agreed that the corporation should pay the difference in value between the lands taken and such part of the lands acquired by the college for the site of an arts college as it might be obliged to use for any extension of its playgrounds to the west caused by the severance, if the value to the college of the property required for this extension were found to be greater than the value of the property taken by the corporation. This item, however, would appear to be sufficiently provided for by the second of the heads of compensation already mentioned.

There seems to be no obstacle in the way of giving effect to what appears to have been in substance the understanding between the parties as to the terms upon which possession was to be taken. As already stated, one term of the arrangement was that compensation should be assessed by a board of three arbitrators, and the members of the board have been appointed, and the board has been duly constituted. The difficulties usually attending an action to compel specific performance of an agreement to refer to arbitration do not arise. The action is strictly an action founded upon the equity vested in the college, in

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consequence of the acceptance of possession by the corporation and its subsequent acts, to have the terms upon which possession was given carried into effect. In such a case, the absence of statutory formalities touching the evidence of those terms is not an answer, as it would be in a common law action—for services, for example, as in *McKay* v. *Toronto* (1)—and the court will not hesitate to exert its powers as far as possible to see that the agreement is carried out, even although some of its terms should not be capable of enforcement by process *in personam*. *Wolverhampton* v. *Walsall* (2). In view of the fact that the board of arbitrators has been constituted, it seems a proper case for a declaratory judgment.

It may prove to be a task of delicacy and difficulty to ascertain the value to the college of the lands taken and the diminution in value of the property retained, whether caused by the severance or by the construction and maintenance of the street; it will be for the arbitrators to decide what that value or diminution in value is, in so far as it can be appraised in pecuniary terms with reasonable certainty.

To prevent misconception, it should be stated that it was no part of the explicit understanding between the parties that the corporation should bear the expense of providing additional lands for the site of an arts college. Whether the cost of reinstatement in that sense would be a proper measure, in whole or in part, of the loss caused by the construction and maintenance of Terauley street, must be a question for the arbitrators.

The judgment of the Appellate Division should be varied in accordance with the subjoined minute. The appellant college to have the costs of the action and of the appeal to this Court; the corporation to have the costs of the appeal to the Appellate Division.

JUDGMENT:

Declare that the corporation took possession under an agreement (*a*) that, in the event of the college acquiring the property on both sides of Elmsley Place, as shewn on plan 65-e, the corporation should close the street known

(1) [1920] A.C. 208. (2) L.R. 16 Eq. 433.

as Elmsley Place and, likewise, the balance of the lane to the east extending northerly from St. Joseph street to connect with the lane to be closed southerly from St. Mary street, a distance of three hundred and fifteen feet, both parcels to be conveyed to the College free of cost; and (*b*) that the college was to be compensated for the loss caused by the construction and maintenance of Terauley street, through the college property, such compensation to be determined by a board of arbitrators, which has since been constituted. Declare that such compensation ought to include:—

(1) Compensation in respect of the value to the college of the land taken.

(2) Compensation in respect of the diminution in value to the college of the college property retained by it, including the lands recently acquired for an arts college site, caused by the construction and maintenance of Terauley street, and by the severance of the lands taken, allowance to be made for the value of the site of the lane vested in the college and of any beneficial expenditures made by the corporation on the college grounds.

(3) Interest on the sums allowed in respect of the two preceding heads of compensation from the 11th of November, 1921.

(4) Indemnity in respect of loss incurred in consequence of the removal of buildings and erections, and otherwise in alterations in the college property necessitated by the severance of the lands taken, in so far as this is not allowed for under the second head above mentioned. Further directions reserved, and all parties to have liberty to apply.

The judgment of the Appellate Division is to be varied in accordance with this minute.

Appeal allowed in part with costs.

Solicitors for the appellant: *Day, Ferguson & Walsh.*
Solicitor for the respondent: *C. M. Colquhoun.*