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*Mar. 22.

BOARD OF TRUSTEES OF THE ROMAN CATHOLIC SEPARATE SCHOOLS FOR THE CITY OF TORONTO (PLAINTIFF). } APPELLANT;

AND

THE CITY OF TORONTO (DEFENDANT) . . RESPONDENT.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ONTARIO

*Municipal law—By-law—Building restrictions—Prior status of owner—Deposit of plans—Legal right to permit—Municipal Act, 11 Geo. V, c. 63, s. 10.*

The Municipal Act of Ontario by section 399a passed in 1921 empowers the council of a city, *inter alia*, to pass a by-law to prohibit, within a defined area, the erection of any building other than a private dwelling but such by-law is not to apply to any building the plans for which were approved by the city architect before it was passed. The city of Toronto passed such a by-law in respect to part of a street on which the Separate School Board owned two lots on which it intended to erect a school house and had filed the plans therefor with the architect who refused to grant the permit to build by direction of the Board of Control in view of the contemplated by-law.

*Held*, reversing the judgment of the Appellate Division (54 Ont. L.R. 224) and applying *Cridland* v. *City of Toronto* (48 Ont. L.R. 266) Idington J. dissenting, that the architect had no right to refuse to issue the permit; that under the law as it stood the Board was entitled to have its plans considered and approved if in conformity with the law; and the by-law in this case was not a valid exercise of the statutory authority.

APPEAL from a decision of the Appellate Division of the Supreme Court of Ontario (1) affirming the order of Middleton J. (2) in favour of the respondent.

The facts are not in dispute. The only question raised on the appeal is whether or not the city by-law, prohibiting the erection on a part of Arthur street of buildings other than private dwellings, applied to the Separate School property owned by the Board when the by-law was passed and on which it proposed to build a school house, the plans for which had been filed with the city architect. Under the

PRESENT:—Sir Louis Davies C.J. and Idington, Duff and Mignault JJ. and Maclean J. *ad hoc*.

(The Chief Justice presided at the hearing but died before judgment was given).

(1) [1923] 54 Ont. L.R. 224. (2) [1922] Ont. W.N. 518.

Act empowering the city to pass such by-law it would not have applied if the plans had been approved and the permit to build issued.

The courts below held that the by-law applied and the school house could not be built. The Board has appealed to the Supreme Court of Canada.

*Tilley K.C.* and *Day K.C.* for the appellant. The architect had no rights to refuse the permit. *Cridland* v. *City of Toronto* (1). The city cannot use the statutory against an individual, *City of Toronto* v. *Virgo* (2)

*Geary K.C.* and *Colquhoun* for the respondent referred to *City of Toronto* v. *Williams* (3); *Commissioners of Taxation* v. *St. Marks* (4).

IDINGTON J. (dissenting).—This appeal is brought by leave given in an order of the Appellate Division of the Supreme Court of Ontario, but only upon the two following grounds:—

1. That the user of the property in question was such that the by-law did not apply thereto and that the non-user of a part of the property was no ground for holding that as to that part of the by-law did apply; and

2. That the passing of the by-law after application for a permit had been made was not a proper exercise of the power conferred by the statute.

This restricted form of leave is a novelty which there is room for doubting the efficacy of under the powers given the court below under the Supreme Court Act, as amended recently. I assume, however, for the present, that it is herein effective.

The litigation herein in question arises out of the facts that one of the Board's schools, consisting of four rooms, having been partly expropriated in the course of extending Terauley street by said city, the Board had to look elsewhere for new school grounds, and acquired two parcels of ground fronting on Prince Arthur avenue, a residential district in Toronto, and proceeded to turn the building on one of said parcels into a school-house of four rooms, and part of the other parcel into a playground for use by the scholars attending same, and fenced that part of the said second

(1) [1920] 48 Ont. L.R. 266.
(2) [1896] A.C. 88.
(3) [1912] 27 Ont. L.R. 186.
(4) [1902] A.C. 416.

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parcel off from its front part, which was at that time used as a dwelling-house wherein boarders were kept.

That front part of said parcel, known as No. 18, had been under lease when so acquired by the Board and so continued and, according to one of the formal admissions made by these litigants for the purposes of the trial and of these causes in appeal, had never been in the possession of the Board, or used as school property.

The questions raised must turn upon the correct interpretation of an amendment made to the Municipal Act, by section 399 (*a*) of said Act, 1921, 11 Geo. V, c. 63, section 10, which provided as follows:—

399a. By-laws may be passed by the councils of cities, towns and villages, and of townships abutting on an urban municipality;

Establishing restricted districts or zones.

1. For prohibiting the use of land or the erection or use of buildings within any defined area or areas or abutting on any defined highway or part of a highway for any other purpose than that of a detached private residence.

2. For regulating the height, bulk, location, spacing and character of buildings to be erected or altered within any defined area or areas or abutting on any defined highway or part of a highway, and the proportion of the area of the lot which such building may occupy.

(*a*) No by-law passed under this section shall apply to any land or buildings which on the day the by-law is passed is erected or used for any purpose prohibited by the by-law so long as it continues to be used for that purpose, nor shall it apply to any building in course of erection the plans for which have been approved by the city architect prior to the date of the passing of the by-law, so long as when erected it is used for the purpose for which it was erected.

The city council, on the 26th September, 1921, passed the by-law now in question which, as required by said Act, before becoming valid, got the approval of the Ontario Railway and Municipal Board on the 28th of November, 1921, over three months before the Board of School Trustees got possession of said part of lot 18, now in question.

That by-law enacted as follows:—

No. 8834. A by-law

To prohibit the use of land or the erection or use of buildings on the property fronting or abutting on either side of Prince Arthur Avenue between Avenue Road and Huron Street, for any other purpose than that of a detached private residence.

(Passed September 26, 1921.)

The Council of the Corporation of the city of Toronto enacts as follows:

1.

No person shall use the land fronting or abutting on either side of Prince Arthur Avenue, between Avenue Road and Huron Street, or erect or use any buildings on the said land for any other purpose than that of a detached private residence.

The exception in subsection (*a*) above, is what is relied upon as entitling the Board appellant to claim exemption from the operation of said by-law.

I cannot convert the word " used " into the word " owns " as we are asked to do here under the foregoing facts. To do so would violate the plain meaning of the language.

I agree with the reasoning of the judgment of the Appellate Division, written at length by the late lamented Chief Justice Sir William R. Meredith, and need not repeat same here.

I cannot see any ground upon which to hold, as we are asked to do, that the passing of the by-law after a permit to build was asked by appellant, can be held in law not to have been a proper exercise of the powers given.

Suppose a person had bought but had never got possession of a lot in a residential district and had intended to erect thereon a building to be used by him as a business place that would destroy the value of all surrounding residences if insisted on, would his ownership be held as a user of it for such purpose simply because he had absolutely determined to do so, and had applied for a permit? I submit not.

I confess appellant's case at first blush seemed a hard one, and I approached the consideration of it from that point of view for they were driven out of one place because of public needs. But on seeing how much better they are off now I do not see why we should, by a metaphysical train of reasoning, set aside the plain reading of the act and thus strain the law.

I think this appeal should be dismissed with costs.

The judgment of Duff, Mignault and Maclean JJ. was delivered by Duff J.

DUFF J.—In August, 1921, the appellants, who for many years had conducted a school on St. Vincent street in Toronto, having been deprived by compulsory proceedings of

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their school premises, which were required for the *situs* of a street, purchased for school purposes, pursuant to their statutory duty to provide schools for the children of separate school supporters, numbers 14 and 18 on Prince Arthur avenue. On the nineteenth of that month work was commenced on number 14 to convert the building, a dwelling house, into a temporary school-house, the intention of the Board being to erect a new school building upon the premises acquired. On the 9th September an application was made to the city architect for a permit authorizing the necessary alterations in number 14. On the 14th September the residents of the street (they appear to have acted with unanimity) requested the Board of Control to submit a by-law to the council regulating the character of buildings to be erected on the street in such a way as to prevent the erection of the projected school-house. On the following day the plans of a new school building to be erected on numbers 14 and 18 were filed with the City Architect, and a permit requested.

Neither of these applications for a permit was considered, the architect having received instructions from the Board of Control not to consider them, in view of the contemplated by-law, and applications for mandamus made by the appellants were dismissed. On the 28th September, the City Council passed by-law 8834, in these terms:—

1. No person shall use the land fronting or abutting on either side of Prince Arthur Avenue, between Avenue Road and Huron Street, or erect or use any buildings on the said land for any other purpose than that of a detached private residence.

This by-law shall take effect from and after receiving the approval of the Ontario Railway and Municipal Board.

This by-law was passed in professed execution of the authority given to the council by 11 Geo. V, 1921, c. 63, section 10, which is in these words:—

The Municipal Act is amended by inserting after section 399 the following section 399a:

399a. By-laws may be passed by the councils of cities, towns and villages, and of townships abutting on an urban municipality.

1. For prohibiting the use of land or the erection or use of buildings within any defined area or areas or abutting on any defined highway or part of a highway for any other purpose than that of a detached private residence.

2. For regulating the height, bulk, location, spacing and character of buildings to be erected or altered within any defined area or areas or

abutting on any defined highway or part of a highway, and the proportion of the area of the lot which such building may occupy.

(*a*) No by-law passed under this section shall apply to any land or building which on the day the by-law is passed is erected or used for any purpose prohibited by the by-law so long as it continues to be used for that purpose, nor shall it apply to any building in course of erection or to any building the plans for which have been approved by the city architect prior to the date of the passing of the by-law, so long as when erected it is used for the purpose for which it was erected.

(*b*) No by-law passed by this section shall come into force or be repealed or amended without the approval of the municipal board; * * *

Applications for mandamus, made by the appellants, were refused.

The by-law having been approved by the Ontario Railway and Municipal Board by a majority of two to one, the chairman dissenting, an action was brought by the appellants, praying a declaration that the by-law was invalid, or, in the alternative, a declaration that it did not apply to the lands of the appellants, and that the appellants were entitled to a permit to erect a school-house; and for a mandatory injunction requiring the city architect to issue a permit; and damages.

This action was tried by Mr. Justice Middleton, who dismissed it. Mr. Justice Middleton had already held in *Cridland* v. *City of Toronto* (1), that the city architect ought not to delay the approval of plans with a view to effectuating the purpose of a proposed restrictive by-law. "Had this course been adopted," in relation that is to say to the application of the appellants, he observed in his judgment,

> and had the plans been approved before the by-law was passed, the rights of the Board would have been saved, but the situation is now governed by the law which I have quoted,

the statute above set out, "and I can grant no relief." The Court of Appeal dismissed the appellant's appeal.

The statute on which the by-law rests endows the councils of municipalities of the designated classes with authority to restrict, in a material degree, the exercise by an owner of land of his rights of ownership. The legislature no doubt thought that, under the conditions nominated, a municipal council might not unreasonably consider that a landowner ought, in the general interest, to submit to some

(1) 48 Ont. L.R. 266.

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abridgement of his freedom. But it is very evident that when such a power is put into execution in an occupied street or district, there must be some provision for the protection of the existing status in order to avoid the possibility of serious, if not intolerable, injustice. Accordingly we find that the legislature, as might have been expected, has provided that no by-law, enacted under the authority of the statute, shall affect the use of any existing building for any purpose for which it is in use, at the date of the passing of the by-law, or the completion of any building then in process of erection, or the erection of any building, the plans of which, before that date, have been approved by the city architect.

The right of the owner of land, therefore, to make use of it, subject to the existing by-laws, in the erection of such buildings upon it as he thinks proper to erect, is preserved inviolate down to the point of time when the restrictive by-law is actually passed, and thereafter, in the limited degree prescribed, in the special cases mentioned. That right, as Mr. Justice Middleton held in the case already cited, includes the right to receive the necessary permit for the erection of a building proposed to be erected in conformity with the law in force for the time being. It is quite manifest that in the result, if effect be given to the judgments of the Ontario courts, this right is denied the appellants.

The by-law producing this result cannot, in view of the circumstances, in our opinion, be sustained as a valid exercise of the authority given by the statute. The protection of the existing status is a substantive element in the purpose of the enactment. The by-law, passed in the circumstances in which it was passed, necessarily had the effect (and it was so designed) of depriving the appellants of the benefit of a status of which the statute guaranteed the protection. That, in our opinion, is not according to the tenor of the authority created.

The appeal should therefore be allowed and there should be a declaration in the sense of the opinion just expressed. The judgment will include a declaration that the appellants are entitled to have their plans considered by the architect, and, if they conform to the law, approved. An injunction

is probably unnecessary; nor would it appear to be necessary to make any order as to the mandamus proceedings except as to the costs, but these points may be spoken to, if desired, on the settlement of the minutes. The appellants will have leave to apply, and they will have their costs throughout.

The appellants having succeeded in establishing their legal rights, we cannot refrain from expressing a hope that even now with the co-operation so far as necessary or useful of all parties concerned, it may be possible to make other arrangements which will relieve the residents of the street of the very grave detriment and hardship arising from the presence of the school, the existence of which is not disputed. In saying this we have no intention of intimating any doubt that the appellants acted in what they conceived to be their duty in the execution of the important functions entrusted to them by the law, but we hope it is not impossible that, having established their legal rights, they may find it consonant with their duty to make a serious effort to this end.

*Appeal allowed with costs.*

Solicitors for the appellant: *Day, Ferguson & Walsh.*
Solicitor for the respondent: *William Johnston.*