CENTRAL JEWISH INSTITUTE (DEFENDANT) ..... APPELLANT;

AND

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

1947 *Dec. 3, 4

*1948 *Feb. 3

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal Law—The Municipal Act, R.S.O. 1937, chapter 255, as enacted by the Statutes of Ontario, 1941, chapter 35, section 13—Part of building and lands appurtenant used for school purposes on date of passing of by-law setting up restricted area—Whether exempt from by-law under provisions of section 406 (2) of the Municipal Act.

Held: On the date of the passing of the by-law the building and the lands appurtenant, were being used for a purpose not permitted by the by-law and therefore under the provisions of The Municipal Act, section 406 (2), the by-law did not apply.

Held: In considering the application of subsection 2 of section 406 of The Municipal Act, the important date is the date of the passing of the by-law, and not the date such by-law is approved by the Municipal Board. If on the date of the passing of the by-law a part of a building is used for a purpose prohibited by the by-law, the building as a whole is exempt.

Toronto Corporation v. *Roman Catholic Separate Schools Trustees* [1926] A.C. 81 and *Re Hartley and the City of Toronto* (1925) 56 O.L.R., 433, considered and distinguished.

APPEAL from a decision of the Court of Appeal for Ontario (1) affirming the judgment of Barlow 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 use on Avenue Road of any land for any purpose except a detached one-family dwelling house or the office of a physician or dentist located on the first floor of a detached one-family dwelling house used by such physician or dentist as his private residence, applied to the property owned by the Central Jewish Institute when the by-law was passed and on which it purported to carry on a school. Under the Act empowering the city to pass such by-law it would not have applied if the premises on the date of the passing of the by-law were in fact used for school purposes.

*PRESENT: Kerwin, Taschereau, Rand, Kellock and Locke JJ.

(1) [1947] O.R. 425. (2) [1947] O.W.N. 318.

1948

CENTRAL JEWISH INSTITUTE v. CITY OF TORONTO

The trial judge held that on the date of the passing of the by-law the appellant only used a very small portion of the premises for a summer school for small children and the actual use of the premises on that date was as a residence and guest house. The Court of Appeal, held that the building was used to a very limited extent for school purposes and the principal use was that of a rooming or guest house. Both courts held that the use made by the appellant of the premises did not come within that contemplated by subsection 2 of section 406 of The Municipal Act.

J. R. Cartwright K.C. and *S. Allen* for the appellant.

F. A. A. Campbell K.C. and *J. N. Herapath* for the respondent.

The judgment of Kerwin and Locke, JJ. was delivered by

KERWIN J.:—The appellant, Central Jewish Institute, is the defendant in an action brought by the respondent, the Corporation of the City of Toronto, claiming an injunction restraining the appellant from using certain premises known as 561 Avenue Road, in the City of Toronto, as a school or as a nursery school, contrary to the provisions of By-law 16654, passed by the Council of the Corporation on July 24, 1946, and approved by the Municipal Board, September 24, 1946. This by-law was passed and approved in conformity with the provisions of section 406 of *The Municipal Act,* R.S.O. 1937, chapter 255, as enacted by the Statutes of Ontario, 1941, chapter 35, section 13. As thus enacted, section 406, so far as pertinent, is as follows:—

406 (1) By-laws may be passed by the Councils of local municipalities—

1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law, within any defined area or areas or abutting on any defined highway or part of a highway.

2. For prohibiting the erection or use of buildings, for or except for such purposes as may be set out in the by-law, within any defined area or areas or upon land abutting on any defined highway or part of a highway.

(2) No by-law passed under this section shall apply to any land or building which, on the day of the passing of the by-law, is used or erected for any purpose prohibited by the by-law, so long as it continues to be used for that purpose * * *

(3) No part of any by-law passed under this section shall come into force without the approval of the Municipal Board.

The appellant had for some years operated on University Avenue in the City of Toronto what is described in the evidence as a "progressive" school for children from two to ten years of age. According to one of the teachers, the term "progressive" indicates that the children "are allowed to progress at their own speed, they are allowed a little more freedom." The classes ran from nursery, pre-school (junior kindergarten and kindergarten) to grade school. No summer school had ever been held there. It became necessary for the appellant to acquire new premises for its school and by a written document of June 25, 1946, the appellant offered to purchase the premises known as 561 Avenue Road, Toronto, from one Greenhill with the purpose of carrying on its school there. This offer was accepted on June 27, 1946, at which date the property was not subject to any restrictions nor was the use to which it might be put limited in any way by any by-law. Greenhill was then using the house on the premises as a boarding house or rooming house, described in the evidence as a guest house. One thousand dollars was paid as a deposit, a mortgage of $26,500 was to be assumed, and the balance was to be paid on September 1, 1946, when possession was to be taken.

Presumably hearing of an agitation by adjoining owners to have the council of the Corporation pass a restrictive by-law, the appellant, on July 12, 1946, made a supplementary agreement with Greenhill by which the deposit on the property was increased by $5,000, which was immediately paid. Clauses 2, 3 and 4 of the supplementary agreement provide as follows:—

2. Possession of the whole of the premises without prejudice to the rights of the Parties to be given to the Purchaser July 15, 1946, with right to re-model in its discretion; provided that the present occupants of the premises may be allowed to remain undisturbed until the 1st day of August, 1946.

1948

CENTRAL JEWISH INSTITUTE v. CITY OF TORONTO

Kerwin J.

3. Mr. Greenhill to be allowed the use and occupancy of one room and kitchen and garage apartment for his personal use and such space in addition as he may require for furniture, etc., until the 31st day of August, 1946.

4. Date for closing this transaction to be August 31, 1946.

In accordance with clause 2 of this supplementary agreement, a number of children and three teachers went on the property on July 15, 1946, and from then until the by-law was passed, the grounds and part of the building were used by teachers and children as a nursery school for very young children. As the trial judge finds, at least five children were brought to the premises, although some witnesses put the attendance between the relevant dates as high as fifteen or eighteen, and what was conducted was really a summer school—most of the time being spent outdoors and only inside when the weather was inclement. The trial judge states:—

> Certain of the defendant's witnesses gave evidence to the effect that prior to the 24th of July, 1946, the kitchen and a ground floor room was used. Their demeanour, however, does not impress me. Furthermore, during this time the vendor was still carrying on a guest house with a full complement of furniture in the house.

There is no doubt that Greenhill still had a considerable part, if not all, of his furniture in the house but he was disposing of it from time to time and, at the most, there were only about three to five guests and they were under notice to leave. Furthermore, in addition to the witnesses for the appellants, Mrs. Ferguson, called by the respondent, testified that when it rained she thought there was a basement to which the children went.

The appellant argued that the use made by the appellant of the premises should be taken to be that of the date of the approval of the by-law by the Municipal Board. If that contention were sound, it would be sufficient to dispose of the matter and allow the appeal because it is not denied that by September 24, 1946, the date of the Municipal Board's order, the appellant was using the premises for every kind of a school conducted by it. It has been assumed in all the cases to which we were referred that the important date was the passing of the by-law. That this is the proper conclusion is apparent in my view from a comparison of the provisions of subsection 2 and

subsection 3 of section 406 of the Act. The former refers to the use of any land or building on the day of the *passing* of the by-law, while the latter provides that no part of any such by-law passed under the section shall *come into force* without the approval of the Municipal Board.

The trial judge (1), and the Court of Appeal (2), seem to have proceeded on the ground that the principal use of the premises on July 24, 1946, the date of the passing of the by-law, was as a residence and guest house and that, therefore, the appellant was not within the exception in subsection 2, section 406, of *The Municipal Act*. Mr. Justice Hogg, speaking for the Court of Appeal, states:—

> The building, number 561 Avenue Road, was used to a very limited extent for school purposes on July 24, 1946; the principal use of the house was, on that date, that of a rooming or guest house.

In my view this is not the determining factor. The extent of the user of premises as a school would vary from time to time and in the months of July and August it is well-known that the pupils in the ordinary classes are on vacation. It is true that the appellant had not conducted a summer school on University Avenue but there was nothing to prevent it commencing such a school as part of its curriculum. According to the evidence, a nursery school is part of the course provided by the appellant and the mere fact that no grade classes were held on the Avenue Road premises prior to the date of the passing of the by-law does not prevent the application of subsection 2 of section 406 of *The Municipal Act*. It is not necessary that the entire premises, that is every room in the building, be used. While a bona fide intention to use is not sufficient, as has been decided by the Judicial Committee in *Toronto Corporation* v. *Roman Catholic Separate Schools Trustees* (3), it is an important element in considering the evidence as to actual user. There is no doubt, in the present case, as to the purpose of the appellant in purchasing the premises nor, I think, is there any real doubt on the evidence as to what it did. This is not a case of disturbing concurrent findings but of accepting the facts as found and of drawing the proper legal conclusions therefrom. The appellant took steps during the summer vacation,

(1) [1947] O.W.N. 318.
(2) [1947] O.R. 425.
(3) [1926] A.C. 81.

1948

CENTRAL JEWISH INSTITUTE v. CITY OF TORONTO

Kerwin J.

in an endeavour to bring itself within subsection 2 of section 406 of the Act and, in my opinion, has succeeded in so doing. It actually used the premises as a school and the mere fact that it was a nursery summer school does not prevent the appellant increasing the number of pupils or enlarging the scope of its activities so as to conduct classes not in operation at the relevant time. We are not concerned, in the present appeal, with any question of erecting new buildings.

A similar result was arrived at by Middleton, J., in *Re Hartley and City of Toronto* (1), and his decision was affirmed by the Court of Appeal for Ontario (1925) 56 O.L.R. 433. It is argued that this decision is in conflict with that of the Privy Council already mentioned but I am satisfied that this is not so. The *Separate Schools* case had also been decided in the first instance by Middleton, J., and his judgment had been affirmed by the Court of Appeal (1923) 54 O.L.R. 224, when the *Hartley* case came before him and he found no conflict. Later, the decision in 54 O.L.R. was reversed in this Court (1924) S.C.R. 368, and to some extent at least the decision of the majority of the Court of Appeal in the *Hartley* case, delivered by Hodgins, J. A., was based upon the reasons for judgment of this Court. This latter judgment was subsequently reversed by the Judicial Committee. However, there is no conflict between the judgment of the Privy Council and the decisions of the trial judge and the Court of Appeal in the *Hartley* case and in my opinion the latter were correctly decided. In any event, I can find nothing inconsistent between what I have suggested is the proper construction of the word "used" in subsection 2 of section 406 of the *Municipal Act* and the reasoning and decision of the Judicial Committee. In fact the latter were concerned with a separate piece of property that was fenced off from the remainder of what had been purchased by the Trustees, and that was in the separate possession of a third party and that had not been used at all at the relevant time by the Trustees.

There remains but to add that in my view the decisions referred to in the judgment of the Court of Appeal as to

(1) (1924) 55 O.L.R. 275.

the meaning of the words "actually used and occupied" in various Assessments Acts have no application to the present case. The appeal should be allowed and the action dismissed with costs throughout.

TASCHEREAU J.:—I agree that this appeal should be allowed and the action dismissed with costs throughout.

RAND J.:—The facts of this case, for the purposes of decision, are virtually identical with those in *re Hartley and City of Toronto* (1). But the Court of Appeal has held that that judgment, based, as it is said, on reasoning of this Court in *Board of Trustees of Roman Catholic Separate Schools* v. *City of Toronto* (2), rejected by the Judicial Committee, [1926] A.C. 81 was, in effect, by the last judgment reversed; and whether that conclusion is sound is a question raised at the threshold of the appeal.

In the earlier case, the issue was whether the school board was within the exemption that applied "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". The school board had purchased two adjoining lots with a building on each. Plans had been prepared for the construction of one school building on both lots. They were submitted to the City Architect on September 15, 1921. On September 20th, a mandamus to the Architect was sought for the issue of a permit for the building. On September 26th the restrictive by-law was passed. The question was this: for the purposes of the exemption, assuming the "right" to the permit as being intended to be preserved, was the Court to take as done what should have been done and treat the situation as if the permit had issued before the passing of the by-law? Speaking for the majority in this Court, Duff, J. (as he then was) at p. 374, used this language:

> 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

(1) (1925) 56 O.L.R. 433. (2) [1924] S.C.R. 368.

1948

CENTRAL JEWISH INSTITUTE v. CITY OF TORONTO

Rand J.

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.

In the Judicial Committee, Lord Chancellor Cave at p. 86 comments on this:

With the greatest respect for the opinion of the learned judges composing the majority of the Supreme Court, their Lordships are unable to concur in this reasoning. No doubt it is true that, unless and until a by-law restricting the building upon any land is passed, the owner of the land has a right, subject to the existing by-laws, to erect upon it such buildings as he may think proper. But the whole object and purpose of s. 399A is to empower the city authority, acting in good faith, to put restrictions upon that right with a view to the protection of neighbour owners against that "grave detriment and hardship" to which the learned judge referred; and the "status" or proprietary right of the owner is limited by the powers of the city to be exercised for the protection of his neighbours. If the reasoning of the learned judge is to be taken literally, then in every case the "status" of the building owner is to prevail, and that whether he has or has not deposited plans with a view to building upon his land; and even if the sentences quoted refer only to a case where plans have been deposited before the by-law is passed, they yet go beyond the express terms of the statute.

What the Judicial Committee held was that notwithstanding the wrongful refusal to issue a permit, the fact that the plans had not been approved when the by-law was passed rendered the exemption unavailable to the owner.

In *re Hartley and Toronto* (1), Hodgins, J.A., with whom Magee J.A. concurred, begins his reasons with the excerpt from the judgment of Duff, J. already quoted and the additional sentence:

The protection of the existing status is a substantive element in the purpose of the enactment.

Then he proceeds:

The application of this reasoning may create difficulties in the future for the municipality, and it assumes that the city architect is bound and entitled to act irrespective of any instructions to the contrary given to him by the city council. Into that phase of the question it is not necessary to enter, as it does not arise in concrete form here. But the broad principle that the *status quo* is protected may stand irrespective of that point, and it is our duty to adopt and apply it in the present case, nowithstanding that the user of a building and not its erection is in question.

The case before us is "use" and I see nothing in the language of Duff, J. used as it was by Hodgins, J.A. as a general statement of the intendment of the statute, which is misleading in relation to that particular exemption.

(1) (1925) 56 O.L.R. 433 at 434.

What is emphasized uniformly in the Ontario court, including the judgments in this case, is that it is the actual use at the moment of the by-law, the "status quo" in the use, as Hodgins, J.A. would say, that is preserved: and the reasoning of Duff, J. goes no further. In this respect I see not the slightest difference in the reasoning of the Court of Appeal in the two cases. In both the same enquiry was made: what was the actual use at the critical time? The case of *re Hartley* remains then untouched by the judgment of the Judicial Committee; but it is, of course, open to be considered whether the mode of applying the exemption in that case was a proper one.

The precise language of the statute is important:

> No by-law passed under this section shall apply to any land or building which, on the day of the passing of the by-law, is used or erected for any purpose prohibited by the by-law * * *

It will be seen that the exemption is not to the existing use but to the building; and there is no implication that it is the whole of the building that must be so used or that the use must be the sole use. The language would be satisfied by a partial use as if, for instance, an owner was carrying on a grocery store on the ground floor and using the second storey for his home: could it seriously be questioned that the use of the lower floor in such a case would be protected by the exemption? If that same business were extended to the upper storey, could it be said that the exemption did not continue or was lost? The building would still be used on the ground floor for the prohibited purpose; the building as a whole would be exempt; and I think it would necessarily follow that no such extension could bring about a forfeiture of the exemption. In any case the question is whether a real use, in good faith, is being made of the building, a use not merely incidental to some other use, but possessing an individuality of its own. That view of the statute seems to me to underlie the decision of both Middleton J. and the Court of Appeal in *re Hartley,* and I think it sound.

There is substantially no conflict of evidence as to the use here. The appellant purchased the premises for the school activities that were then being carried on in other premises. They consisted of the training of the

1948

CENTRAL JEWISH INSTITUTE v. CITY OF TORONTO

Rand J.

children from two to ten years of age, and the different stages are denominated nursery or junior kindergarten, kindergarten and grade. Admittedly they had not before been carried on in summer, and I will assume that what was done here in July when the grade department was on holiday, was done to establish rights ahead of the move then under way to bring about the restriction. That was precisely the case in *re Hartley* and it was treated as the unobjectionable exercise of rights of an owner. But it was part of the existing or intended school establishment, carried on appropriately to the season, and obviously it is not necessary that there be use of all departments contemporaneously.

Mr. Cartwright raised also the point that the by-law itself contains a clause to the effect that it "shall come into force upon receiving the approval of the municipal board". That, in substance, is the language of the statute providing that "No by-law passed under this section shall come into force or be repealed or amended without the approval of the *Municipal Board*". What *The Municipal Act* contemplates is the "passing" of the by-law by the municipality and its "coming into force" upon the approval of the Municipal Board. Here, the by-law itself contains an endorsement, "(Passed July 24, 1946)". That shows on its face the distinction between "passing" and "coming into force" and I cannot agree that the clause containing the latter is intended to suspend the time when the by-law is to be deemed to be "passed".

I would, therefore, allow the appeal and dismiss the action with costs throughout.

KELLOCK J.:—On June 27, 1946, the appellant entered into an agreement with the then owner, one Greenhill, to purchase premises, described as street number 561 Avenue Road in the City of Toronto. Those premises consisted of a substantial dwelling and lands occupied therewith. The agreement provided for the closing of the purchase on or before September 1, 1946, on which date vacant possession was to be given to the purchaser.

On June 27th the premises were occupied by Greenhill, his family and certain roomers, as he conducted on the

premises what is described in the evidence as a "guest house". On July 12th, no doubt in view of the imminence of the passing of the by-law subsequently passed, the appellant and Greenhill executed a further agreement in writing which provided, inter alia, as follows:

1. The deposit to be increased by $5,000, payable forthwith.

2. Possession of the whole of the premises without prejudice to the rights of the Parties to be given to the Purchaser July 15, 1946, with right to re-model in its discretion; provided that the present occupants of the premises may be allowed to remain undisturbed until the 1st day of August, 1946.

3. Mr. Greenhill to be allowed the use and occupancy of one room and kitchen and garage apartment for his personal use and such space in addition as he may require for furniture, etc., until the 31st day of August, 1946.

4. Date for closing this transaction to be August 31st, 1946.

The appellant had been conducting elsewhere in the city what is referred to in the evidence as a "progressive" school for children from two to ten years of age and acquired the premises here in question with the intention of transferring this school to it. In its original premises the scope of the appellant's school was a "nursery school, pre-school and grade school."

On July 15th the appellants brought from its other premises certain of its school furniture and equipment and began to operate in the new premises a summer school for the younger children and it is this use being made of the premises on July 24th which is relied upon as bringing the case within subsection 2 of section 406 of *The Municipal Act*.

The by-law passed on July 24th and subsequently approved by the Municipal Board on September 24th, provided:

1. No person shall use any land within the areas of the City of Toronto hereinafter described, for any purpose except a detached one-family dwelling house or the office of a physician or dentist located on the first floor of a detached one-family dwelling house used by such physician or dentist as his private residence * * *

2. No person shall erect or use upon any land within the areas described in section 1, any building for any purpose except a detached one-family dwelling house or the office of a physician or dentist located on the first floor of a detached one-family dwelling house used by such physician or dentist as his private residence.

1948

CENTRAL JEWISH INSTITUTE v. CITY OF TORONTO

Kellock J.

Section 406 of *The Municipal Act*, as enacted by 5 Geo. VI, cap. 35, section 13, as amended by 7 Geo. VI, cap. 16, section 11, is as follows:

406—(1) By-laws may be passed by the councils of local municipalities:

Restricted Areas

1. For prohibiting the use of land, for or except for such purposes as may be set out in the by-law, within any defined area or areas or abutting on any defined highway or part of a highway.

2. For prohibiting the erection or use of buildings, for or except for such purposes as may be set out in the by-law, within any defined area or areas or upon land abutting on any defined highway or part of a highway.

* * *

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

(3) No part of any by-law passed under this section shall come into force without the approval of the Municipal Board, and such approval may be for a limited period of time only, and the Board may extend such period from time to time upon application made to it for such purpose.

Under the amending agreement of July 12th the possession retained by Greenhill of that part of the premises which he continued to occupy was exclusive and this possession was of right and in no sense permissive. The extent to which the appellant had obtained possession from him is clearly defined in the evidence of the respondent's witness, Klebanoff, who testified:

Q. Now carrying on from the 15th July, 1946, to the 24th July, 1946, what part of the building was occupied from time to time during that period by the school?

A. The lower floor and the kitchen.

Q. Was there any reason for that?

A. Well, as Mr. Greenhill moved out, we occupied the rooms that he moved from.

The "lower floor" was the basement. The kitchen was on the ground floor.

It is to be observed also that the amending agreement of the 12th of July, 1946, was expressly made "without prejudice to the rights of the parties". This provision

was made no doubt to protect the right of the appellant, under the main agreement, to rescind the purchase by reason of any objection to title it had raised which the vendor might be unable or unwilling to remove, which right would be lost by taking possession. Had such a situation subsequently developed out of any requisitions on title made by appellant, it could hardly have been said that Greenhill in such circumstances would have lost his right under the statute to carry on his business in the premises which he in fact continued to use on July 24th for the purpose of a guest house. Different parts of the premises here in question were actually being used for two distinct purposes not permitted by the by-law on the day of its passing. This is by no means an unusual situation. In my opinion, with respect, there is no warrant under the legislation for any inquiry as to which is, as between two or more actual uses of different parts of any given premises, the predominating or most substantial and to ascribe the entire use to the latter.

I agree with the view of the statute taken by my brother Rand that the use being made of the building here in question on the day of the passing of the by-law was sufficient to bring it within the very words of section 406 (2) and as the building and the lands appurtenant were being used by the appellant for a purpose not permitted by the by-law, the by-law does not apply to them.

As said by Middleton, J. in the *Separate Schools* case (1), at 519:

> Paragraph (*a*) (now s. 406 (2)) defines precisely the effect of the by-law upon the situation existing at the date of its passing, and leaves nothing to the discretion of the council or of the Court.

I think there is nothing in the *Separate Schools* case, 1926 A.C., 81, which is to the contrary of the view of the statute above expressed. The building and the lands of No. 14 and that part of No. 18, which was fenced off, were being used on the day of the passing of the by-law for school purposes, while the building on No. 18, together with the remainder of the land, was being used for the purposes of a boarding-house. Consequently the by-law affected neither with respect to these particular uses. Of

(1) (1922) 22 O.W.N. 518.

1948

CENTRAL JEWISH INSTITUTE v. CITY OF TORONTO

Kellock J.

course neither the building nor the remainder of the lands of No. 18 could be later converted to school purposes. Neither was being so used at the critical date.

In the *Hartley* case, 56 O.L.R., 433, the view taken of the facts seems to have been that the purchaser was really in possession of the whole building. That was not the situation on the facts in the case at bar, but in my view that makes no difference in the result.

I do not think that the use made of the premises by the appellant after the school term recommended in September was for a different purpose within the meaning of the statute from the use being made of them on July 24th. On the latter date the appellant was in possession of the parts of the premises already referred to, including the appurtenant land, with its furniture and equipment and was operating therein and thereon one department of its school, the other scholars being on holidays. In my opinion that was sufficient to entitle the appellant to continue to use the premises on July 24th and subsequently for its school.

Counsel for the appellant further submitted that the critical date was not July 24th, when the by-law was passed, but the 24th of September of that year, when the by-law was approved by the Municipal Board and came into force pursuant to the provisions of subsection 3 of section 406. In my opinion this submission is not entitled to prevail. The language used in subsection 2 is perfectly plain by itself and when contrasted with the language used in subsection 3 it is clear, I think, that the legislature intended the language used in subsection 2 to have its prima facie meaning.

For these reasons I would allow the appeal and dismiss the action with costs throughout.

Appeal allowed with costs.

Solicitors for the appellant: *Samuel Cohen.*

Solicitor for the respondent: *W. G. Angus.*