ONE CHESTNUT PARK ROAD LIMITED, PAUL F. McGOEY, DONALD B. MORAN, WILLIAM E. HALL, ANTHONY CECUTTI, ANNJANE CARTER, MARJORIE SWANSON, JOHN G. EVANS, WILLIAM J. HORSEY, MARY N. SAURIOL (*Defendants*) ..... APPELLANTS;

1964

*Feb. 6, 7
Mar. 12

AND

THE CORPORATION OF THE CITY OF TORONTO (*Plaintiff*) ..... } RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Municipal corporations—Use of building in contravention of zoning by-law—Injunction—Whether municipality had status to maintain action —The Municipal Act, R.S.O. 1950, c. 243, s. 497—The Planning Act, 1955 (Ont.), c. 61, as amended by 1960 (Ont.), c. 83, s. 5.

The defendants used certain premises as offices for doctors and a physiotherapist in contravention of a zoning by-law of the plaintiff municipality. The infringement of the by-law was clear and had been persistent, continuous and defiant since 1957. The defendants attempted to have the by-law amended but their efforts were without success. Finally, on October 24, 1960, the city issued a writ for an injunction and obtained judgment on October 30, 1961. This was affirmed by the Court of Appeal on September 14, 1962.

The zoning by-law was invalid because it lacked the approval of the Ontario Municipal Board before it was passed, but this defect was overcome by an amendment to *The Planning Act* by 1960 (Ont.), c. 83, s. 5. The defendants' claim that their rights were preserved by subs. (2) of s. 5 was rejected. The defendants had no acquired rights as defined in subs. (2) and there were no pending proceedings commenced on or before the date specified in that subsection.

*PRESENT: Cartwright, Abbott, Martland, Judson and Ritchie JJ.

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The main issue in the present appeal was a new submission by the defendants that s. 497 of *The Municipal Act,* R.S.O. 1950, c. 243, gave the city no status to maintain this action and that the action could only be maintained by the Attorney General as plaintiff or as plaintiff on the relation of any interested person. The defendants sought to draw an analogy between the action authorized by s. 497 of the Act and one for the abatement of a public nuisance.

Held: The appeal should be dismissed.

Section 497 of *The Municipal Act* should be construed according to its plain terms so as to give the municipality a right of action. The municipality, acting within the limits of its legislative power, had an interest in the specific performance of its by-laws and was the logical plaintiff to enforce them.

Township of Scarborough v. Bondi, [1959] S.C.R. 444; *City of Toronto v. Solway* (1919), 46 O.L.R. 24; City of Toronto v. Rudd, [1952] O.R. 84; *City of Toronto v. Hutton,* [1953] O.W.N. 205; *City of Toronto v. Ellis,* [1954] O.W.N. 521, referred to; *Wallasey Local Board v. Gracey* (1887), 36 Ch. D. 593; *Tottenham Urban District Council v. Williamson & Sons Ltd.,* [1896] 2 Q.B. 353; *Boyce v. Paddington Borough Council,* [1903] 1 Ch. D. 109, distinguished.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Aylen J. Appeal dismissed.

F. A. Brewin, Q.C., for the defendants, appellants.

M. E. Fram and *D. D. MacRae,* for the plaintiff, respondent.

The judgment of the Court was delivered by

JUDSON J.:—The appellants are under an injunction to refrain from using 1 Chestnut Park Road, Toronto, as offices for doctors and a physiotherapist. The injunction is based upon a continuous violation of the City of Toronto Zoning By-law No. 18642, as amended by By-laws Nos. 18878 and 19093. The injunction was granted on October 30, 1961.

The unlawful user began in 1957 after the appellant Paul F. McGoey purchased a large residential building containing about thirty rooms and converted it into offices. The infringement of the by-law is clear and has been persistent, continuous and defiant since 1957. The details are set out in the reasons for judgment of Aylen J.

Every possible step seems to have been taken by the appellants to obtain an amendment to the by-law but they

[1] (1962), 35 D.L.R. (2d) 106.

have all failed. Finally, on October 24, 1960, the city issued a writ for an injunction and obtained judgment on October 30, 1961. This was affirmed by the Court of Appeal[1] on September 14, 1962.

The claim for the injunction was based on s. 497 of *The Municipal Act*, R.S.O. 1950, c. 243, which reads:

> 497. Where any by-law of a municipality or of a local board thereof, passed under the authority of this or any other general or special Act, is contravened, in addition to any other remedy and to any penalty imposed by the by-law, such contravention may be restrained by action at the instance of a ratepayer or the corporation or local board.

The substantial defence at trial and before the Court of Appeal was based upon the effect of the decision of this Court in *Township of Scarborough v. Bondi*[2], and the validating legislation of 1960. The result of the decision in *Township of Scarborough v. Bondi* was that the zoning by-law 18642 was invalid because of the lack of the approval of the Ontario Municipal Board before it was passed. To overcome this defect, the Legislature enacted an amendment to *The Planning Act* by 8-9 Eliz. II (1960), c. 83, s. 5, which reads:

> 5. (1) A by-law repealing or amending a by-law passed under section 390 of *The Municipal Act* or a predecessor of that section is not invalid and shall be deemed never to have been invalid solely because of the lack of approval by the Ontario Municipal Board prior to the passing thereof by the municipal council.
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> (2) Subsection 1 does not apply to a by-law that never at any time received approval by the Ontario Municipal Board and does not affect the rights acquired by any person from a judgment or order of any court prior to the day on which this Act comes into force, or affect the outcome of any litigation or proceedings commenced on or before the 23rd day of March, 1960.

The appellants claimed that their rights were preserved by subs. (2). This submission was rejected by Aylen J. and the Court of Appeal and at the conclusion of argument of counsel for the appellants, we were all of the opinion that this decision was correct and so notified counsel for the respondent. The appellants had no acquired rights as defined in subs. (2) and there were no pending proceedings commenced on or before March 23, 1960.

The main issue in this appeal was a new submission by counsel for the appellants that s. 497 of *The Municipal Act*

[1] (1962), 35 D.L.R. (2d) 106. [2] [1959] S.C.R. 444, 18 D.L.R. (2d) 161.

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Judson J.

gave the city no status to maintain this action and that the action could only be maintained by the Attorney General as plaintiff or as plaintiff on the relation of any interested person. The appellants seek to draw an analogy between the action authorized by s. 497, above quoted, and one for the abatement of a public nuisance. In the case of a public nuisance, the Attorney General may, on the information of a private individual, maintain an action for nuisance. A private individual can only maintain an action for a public nuisance if he can show some particular and special loss over and above the ordinary inconvenience suffered by the public at large. Then the nuisance becomes a private one and he can sue in tort. The reason for the rule is to prevent multiplicity of actions.

I can see no analogy between the right of action given by s. 497 for the enforcement of a municipal by-law and the enforcement of a remedy for a public nuisance. The principal cases on which the appellants rely are: *Wallasey Local Board v. Gracey*[1]; *Tottenham Urban District Council v. Williamson & Sons, Limited*[2]; *Boyce v. Paddington Borough Council*[3]. These are based on this principle. When public health legislation in the 19th century began to create nuisances by statute, at the same time it gave local authorities the right to cause proceedings to be taken against any person in any superior court of law or equity to enforce the abatement or prohibition of any nuisance under the Act. The Courts held that these were public nuisances and would have to be restrained in the usual way at the suit of the Attorney General.

This procedural technicality, for which there was sound reason in the case of a public nuisance, has no application to a proceeding by a municipality to enforce its own by-law. Municipal by-laws usually provide for a penalty for non-observance but the legislature has recognized that unless there is a stronger remedy, a penalty may become a mere licence fee. Something equivalent to s. 497 may be traced back in the legislation to 4 Edw. VII (1904), c. 22, s. 19.

The Ontario Court of Appeal had held in *City of Toronto v. Solway*[4] that the infringement of a by-law relating to the location, erection and use of buildings for stables for horses

[1] (1887), 36 Ch. D. 593.
[2] [1896] 2 Q.B. 353.
[3] [1903] 1 Ch. D. 109.
[4] (1919), 46 O.L.R. 24, 49 D.L.R. 473.

for delivery purposes, could be restrained by injunction. The section itself has been invoked with the city as plaintiff in *City of Toronto v. Rudd*[1]; *City of Toronto v. Hutton*[2], and *City of Toronto v. Ellis*[3]. There is every reason why the section should be so construed according to its plain terms so as to give the municipality a right of action. The municipality, acting within the limits of its legislative power, has an interest in the specific performance of its by-laws and is the logical plaintiff to enforce them.

There are no equitable defences available to the appellants in this case. The granting of the injunction should be affirmed and the appeal dismissed with costs. I would allow the appellants three months, and no more, for the purpose of arranging their affairs. They have been acting in defiance of this by-law since 1957.

Appeal dismissed with costs.

Solicitors for the defendants, appellants: Cameron, Weldon, Brewin, McCallum & Skells, Toronto.

Solicitor for the plaintiff, respondent: W. R. Callow, Toronto.

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[1] [1952] O.R. 84, 2 D.L.R. 578. [2] [1953] O.W.N. 205.
[3] [1954] O.W.N. 521.