THE CITY OF MONTREAL (PLAINTIFF)..... APPELLANT;

1920
Mar. 5, 8.
May 4.

AND

JAMES MORGAN (MIS-EN-CAUSE). RESPONDENT.

ON APPEAL FROM THE COURT OF KING'S BENCH, APPEAL SIDE, PROVINCE OF QUEBEC.

Municipal Corporation—By-law—Validity—Residential Street—Garage—Constitutional law—Construction—Appeal—Jurisdiction—(Que.) 1 Geo. V., 2nd secs., c. 60—(Que.) 3 Geo. V., c. 54—(Que.) 62 Vict., c. 58—"Charter of the City of Montreal," ss. 299, 300, s.s. 44, 44a, 55, and 300c—"Ontario Municipal Act," R.S.O., 1914, c. 192, s. 406, s.s. 10—Arts. 406, 407, 1065, 1066. C.C.

Subsection 44a of section 300 of the "Charter of the City of Montreal" empowers the municipal corporation "to regulate the kind of buildings that may be erected on certain streets * * * ." By-law No. 570, passed by the appellant, enacts that "the following streets are reserved exclusively for residential purposes" and that "every person offending against the above provision shall be liable to a fine * * * and in default of immediate payment, * * * to imprisonment. * * * ."

Held, Idington and Duff JJ. dissenting, that such by-law is valid and effectual, as a regulation passed under s.s. 44a, to prevent the construction, on the streets named in the by-law, of any buildings other than residential ones and to prohibit the erection there of a public garage.

Per Anglin, Brodeur and Mignault JJ.—The recovery of the penalties prescribed in the by-law was not meant to be the sole remedy available for its enforcement; and the demand for the demolition or undoing of anything done in breach of the obligation which it imposes falls within the purview of art. 1066 C C. Idington J. *contra.*

Per Anglin J.—Power to regulate does not imply, generally, power to prohibit (*City of Toronto* v. *Virgo*, [1896] A.C. 88); but it necessarily implies power to restrain the doing of that which is contrary to the regulation authorized, and, in that sense and to that extent, involves the power to prohibit.

Per Anglin, Brodeur and Mignault JJ.—There is jurisdiction in the Supreme Court of Canada to entertain this appeal, as the matter in controversy affects the future rights of the respondent as to the use and employment of his property. Idington J. *dubitante.* Judgment of the Court of King's Bench, (Q.R. 29 K.B. 124) reversed, Idington and Duff JJ. dissenting.

* PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ.

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APPEAL from the judgment of the Court of King's Bench, appeal side, Province of Quebec (1) reversing the judgment of the Superior Court (2) and dismissing the appellant's, plaintiff's, action.

The material facts of the case and the questions in issue are fully stated in the above head-note and in the judgments now reported.

Charles Laurendeau K.C. and *Paul Lacoste K.C.*, for the appellant.

T. P. Butler K.C. and Geo. H. Montgomery K.C., for the respondent.

IDINGTON J. (dissenting).—In this case the appellant by its declaration seeks to have a building valued at $50,000 or over, demolished because someone had in mind the intention to use it when erected as a public garage which it is claimed would be an offence against a by-law of appellant.

No other relief is sought by the conclusion of the declaration.

Counsel for appellant is unable to cite any statutory authority for such a drastic method of enforcing obedience to the requirements of the prohibition of a by-law.

The by-law itself contains none but the ordinary money penalty for the breach thereof and imprisonment as an alternative and in case of persistent breaches imprisonment. An argument is attempted to be founded upon articles 1065 and 1066 of the Civil Code and other articles relevant to obligations.

(1) Q.R. 29 K.B. 124. (2) Q.R. 54 S.C. 481.

I am of the opinion that there is nothing in any one or all of the articles referred to which can be made relevant to what is involved herein, and hence for that sole reason that there is no statutory authority for such a drastic remedy for infringing an alleged by-law, this appeal should be dismissed.

The case has been argued in all its aspects at great length and hence in deference thereto I should perhaps express my opinion as to some of the leading contentions set sp.

The by-law in question it is alleged is founded upon the powers given the appellant by the general comprehensive sections of its charter to enact by-laws for its good government, and of which section 299 gives the specific powers to be exercised by the way of by-law. None of the grounds set forth cover that question.

Then section 300 is relied upon but none of the specific provisions therein seem to touch upon what is involved herein unless it fall within paragraph 44a of section 300 of the Charter, or 55 which read as follows:—

44a. *To regulate the kind of buildings that may be erected on certain streets, parts or sections of streets or on any land fronting on any public place or park* to determine at what distance from the line of the streets, public places or parks the houses shall be built, provided that such distance shall not be fixed at more than twenty-five feet from the said line, or *to prohibit the construction, occupation and maintenance of factories, workshops, taverns, billiard-rooms, pigeon-hole rooms, livery-stables, butcher's stalls or other shops or similar places of business in the said streets, parts or sections of certain streets or on any land fronting on any public place or park,* saving the indemnity, if any, payable to the proprietors, tenants or occupants of the buildings now built or being built or who have building permits, which indemnity shall be determined by three arbitrators; one to be appointed by the city, one by the proprietor, tenant or occupant interested and the third by the two former, and, in default of agreement by a judge of the Superior Court.

55. *To prohibit offensive or unwholesome business* or establishments within the city or within one mile of the limits thereof; to prohibit *the erection or occupation of any offensive buildings in any place or site where they will damage the neighbouring property, and determine the localities where certain manufactories or occupations* may be carried on.

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The by-law 570 relied upon herein to found the claim for demolition, is as follows, as set forth in the appellant's factum:—

> Besides the Penal Clause, By-law No. 570 contains only the following clause:—
>
> "The following streets are reserved Exclusively for residential purposes:—
>
> Durocher, Hutchison, Mance, St. Famille and St. Urbain Streets, between Sherbrooke Street and Pine Avenue."

I can find nothing in this to prohibit such an erection as in question. And I can find no reason founded thereon for the demolition of a building which, admittedly, as to part of it fronting on Mance Street, might be converted into and used as an apartment house.

And as to the major part of it, fronting on another than any of those streets named, by no stretch of imagination can those parts be defined as within the area defined in the by-law.

It is to be observed that this action is not to prohibit the use of the said building or any part of it as a public garage, but solely because it may be adaptable therefor, or any other like purpose, that the desire to demolish it is sought to be gratified.

The attempt founded upon such powers as given to remove factories or workshops from residential districts or prohibit their operation therein must, if ever, be dealt with in a much more specific manner than is done by this by-law.

I need not follow the curious question of a licence having been given expressly to build a public garage and work done on faith thereof, and a lease therefor made of the premises a month before the appellant's authorities changed their minds and attempted to object thereto, and prevent the building being completed.

I see no ground upon which such an action can be founded and enforced resting upon no other right than said by-law; and that itself founded only on such legislative provisions as presented above.

I incline to the opinion that the appeal taken by appellant is not within our jurisdiction but the case having been, subject thereto, fully argued out, I need not form a definite opinion thereon which might be found more difficult to dispose of than the want of legal merits in the appeal itself.

This appeal should be dismissed with costs.

DUFF J. (dissenting).—This appeal should be dismissed with costs.

ANGLIN J.—The facts of this case are fully stated in the judgments rendered in the Superior Court (1) and in the Court of King's Bench (2) and in the opinion to be delivered by my brother Mignault, which I have had the advantage of reading.

I concur in the disposition made by my learned brother of the motion to quash this appeal.

Much was made in argument of alleged permits to construct the public garage in question granted to the respondent by civic officials. I agree with Mr. Justice Carroll when he says:—

> Aucune autorité ne pouvait lui conférer le droit de construire en violation des prescriptions de la loi, et aucune autorité municipale ne pouvait acquiescer à pareille illégalité. Les actes des officiers municipaux ne sont valides que s'ils sont conformes à la loi.

See *Yabbicom* v. *The King* (3).

(1) Q.R. 54 S.C. 481. (2) Q.R. 29 K.B. 124.
(3) [1899] 1 Q.B. 444, at p. 448.

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It may be said that if the respondent is obliged to demolish his building or sustain loss in converting it into a structure to be made use of for some less profitable purpose he will have a legal right to recover damages from the municipal corporation owing to the conduct of its officials and representatives. On that point I express no opinion. But any equitable considerations which he can invoke arising out of what occurred in regard to the granting of the building permits, approval of plans, etc., are more than offset by his acquiescence in the demand of the city that he should change the character of the building in Jeanne Mance St. so as to make it conform to by-law No. 570, his taking out of a permit to complete it as an apartment house and his undertaking that, if not fined in the Recorder's Court (where a prosecution was instituted and carried to conviction) for a breach of by-law No. 570, he would complete the building in accordance with the permit so obtained. I am quite unable to assent to the view of Mr. Justice Martin that the equities of this case are all against the appellant. If not equally balanced, they seem to me rather to preponderate in its favour.

But the question we have to decide cannot be disposed of on equitable grounds. We have to determine whether by-law No. 570 of the City of Montreal is valid and effective to prevent the erection and maintenance of a public garage on Jeanne Mance Street just above Sherbrooke Street. I respectfully adopt the following passage from the judgment of the learned Chief Justice of Quebec.

> Je désire écarter immédiatement du débat la considération du montant des dommages que l'appelant pourra souffrir par cette démolition, ainsi que le montant des dommages que les propriétaires voisins pourraient souffrir par suite du maintien du garage—si ce n'est pour souligner l'importance de la cause. Ce point de vue fait appel à

des sentiments auxquels les juges doivent fermer leur coeur. La cour est en face d'une question de loi—et non d'une question d'équité. Si le règlement civique N°. 570 a force de loi, si ce règlement a été violé, il nous faut le dire sans regarder aux consequences.

I also agree with that learned judge that the objections founded on Jeanne Mance Street being called "Mance Street" in the by-law, and on the fact that the frontage of lot 43, of which lot 43-1 (on which the building in question is erected) is a subdivision, is on Sherbrooke street, lack substance. There is no room for any doubt that Jeanne Mance Street is the street intended to be designated in the by-law and the respondent's garage as constructed in fact fronts on that street.

The only questions of real importance to be determined are: (a) whether by-law No. 570 is authorized by the charter of the city of Montreal; (b) whether that by-law is sufficiently clear, precise and definite; and (c) to what consequences a breach of it will subject the respondent.

Paragraph 44 of article 300 of the city charter, set out in the judgment of my brother Mignault, empowers the municipal corporation to regulate the height, construction and materials of all buildings and their architecture, dimensions, symmetry, etc. Paragraph 44 (a)—an amendment of 1 Geo. V. (2 Sess. c. 60)—confers power to pass by-laws

to regulate the kind of buildings that may be erected on certain streets, parts or sections of streets or on any land fronting on any public place or park; to determine at what distance from the line of the streets, public places or parks the houses shall be built, provided that such distance shall not be fixed at more than twenty-five feet from the said line, or to prohibit the construction, occupation and maintenance of factories, workshops, taverns, billiard-rooms, pigeon-hole rooms, livery-stables, butcher's stalls or other shops or similar places of business in the said streets, parts or sections of certain streets or on any land fronting on any public place or park, saving the indem-

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nity, if any, payable to the proprietors, tenants or occupants of the buildings now built or being built or who have building permits, which indemnity shall be determined by three arbitrators: one to be appointed by the City, one by the proprietor, tenant or occupant interested and the third by the two former, and, in default of agreement, by a judge of the Superior Court.

In view of the specific provisions of the charter, I incline to think that any general power to pass by-laws for the good government, etc., of the city conferred by Arts. 299, 300, and 300 (c), cannot be invoked to sustain by-law No. 570, although the article last cited—an amendment of 3 Geo. V. (c. 54)—may, as my brother Mignault suggests, furnish a strong argument against giving a restrictive effect to any of the provisions of the specific clauses—*inter alia*, of paragraph 44 (a) of art. 300.

No other authority than *City of Toronto* v. *Virgo* (1) need be cited for the general proposition that power to regulate does not imply power to prohibit. Thus, under the first clause of Art. 44 (a) the city could not entirely prohibit the erection of any buildings whatsoever on any named street nor could it entirely prohibit the erection within the city limits of any particular kind of building, in the sense in which that phrase is used in paragraph 44 (a). But every power to regulate necessarily implies power to restrain the doing of that which is contrary to the regulation authorized, and in that sense and to that extent involves the power to prohibit. As Rousset says in his work "Science Nouvelle Des Lois," Tôme I, at p. 224:

> Restreindre le champ de la *liberté naturelle*, lui interdire *certains actes déterminés*, c'est en cela et en cela seulement que consiste le pouvoir régulateur de l'autorité législative sur l'exercice des droits individuels des citoyens.—A ce point de vue la loi ne peut être qu'une *prohibition d'action*. La formule de sa rédaction sera donc nécessairement *prohibitive*.—C'est ce qu'il s'agissait de constater.

(1) [1896] A.C. 88, at p. 93.

Compare *Kruse* v. *Johnston* (1). The word "exclusively" in by-law 570, expresses the prohibition of the erection of buildings not suitable for a residential street. Effective regulation of the kind of buildings that may be erected on certain streets necessarily involves the right to authorize the erection of buildings of some descriptions and to prohibit the erection of those of other descriptions on such streets.

The legislature in passing art. 44 (a) certainly did not intend senselessly to repeat the enactment of paragraph 44. It had in that paragraph dealt exhaustively with such matters as materials, height, dimensions, architecture, symmetry and stability. By the phrase "kind of buildings" in art. 44 (a) must therefore be meant something quite different. As the context shews it is with the destination of the building—the use for which it is designed—that that paragraph deals—the kind of building, i.e., industrial, commercial, residential, educational, religious. Of that I cannot conceive any reasonable doubt.

The first clause of paragraph 44 (a) in my opinion, taken by itself, is quite broad enough to empower the municipal corporation to prescribe that in certain streets no buildings other than residences (i.e. private dwelling houses) shall be built, or to enact that from certain streets commercial and industrial buildings shall be excluded. Does anything in the rest of the paragraph require that the *ex facie* generality of the power so conferred should be restricted? The clause immediately following, which deals with the distance of houses from street lines, certainly does not. But it is said that the next succeeding clause

(1) [1898] 2 K.B. 91, at p. 99.

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or to prohibit the construction, occupation and maintenance of factories, workshops, taverns, billiard-rooms, pigeon-hole rooms, livery-stables, butcher's stalls or other shops or similar places of business in the said streets, parts or sections of certain streets or on any land fronting on any public place or park—

clearly indicates that any power of prohibition involved in the right to regulate conferred by the first clause of the ordinance must be restricted to the particular classes of buildings enumerated in such later clause—factories, workshops, etc.—or, if not, that the presence of this express provision for prohibition precludes the implication of any power to prohibit being involved in the right of regulation first conferred, because if such a power to prohibit exists under the first clause, the later clause, "or to prohibit, etc.," is unnecessary and useless. This argument of course assumes that the subject matter of the two clauses is the same.

On an analysis of the paragraph the force of these contentions disappears. In the first place the separation of the clause "to regulate, etc.," from the clause "to prohibit, etc.," by the intervening clause dealing with the distances of houses from street lines, in itself goes far to negative the idea that the latter could have been intended as a particularization of the subjects to which any prohibitive power conferred by the former should be restricted. But the two clauses really deal with different subject matters. The earlier clause has to do only with the erection of buildings; the latter with the construction, maintenance, and operation of a number of things, some of which (e.g. billiard-rooms and butcher stalls) may occupy a comparatively small part of a building. Original erection of buildings is dealt with by the first clause. Reconstruction and occupation of existing buildings come under the second.

In regard to new buildings the legislature has seen fit to confer an unlimited power of regulation. The municipal corporation is given complete discretion as to the kind of new buildings which it will allow to be erected on streets designated by it. But in the case of existing buildings only certain uses of them may be prohibited; and here the power is properly extended to prohibition of occupation and maintenance as well as construction.

The use of the word "construction" in the later clause at first presented some difficulty; but it is properly used in connection with such things as butcher stalls and pigeon-hole rooms in the fitting up of which work of construction is necessary; and in other cases it may well be taken to mean reconstruction or alteration. I find nothing in the subsequent clauses of paragraph 44 (a) which can properly be invoked to restrict the generality of the power conferred by its opening clause.

The concluding provision for indemnity in paragraph 44 (a) obviously refers to cases in which the operation of the by-law would interfere with the use made of structures already built, or to be made of structures in course of erection, or for which permits had issued at the date of its passing. There is nothing to shew that any such cases exist in regard to the streets named in the by-law. Moreover, the statute itself preserves or confers the right to indemnity in such cases and an express provision for it in the by-law would scarcely seem to be required.

Section 1 of by-law No. 570 reads as follows:—

Section 1.—The following streets are reserved exclusively for residential purposes:—

Durocher, Hutchison, Mance, St. Famille and St. Urbain Streets, between Sherbrooke and Pine Avenue.

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It seems to have been practically common ground in the courts below, as it was at bar in this court, that the erection of any building other than a dwelling house fronting on any of the streets named in the by-law would contravene it. I am far from being satisfied, however, that this construction of the words "for residential purposes" is not too narrow. I rather incline to the view that "residential" is used in contra-distinction to "business and industrial" and that such buildings as churches and schools would not necessarily be excluded—that buildings not of a business or industrial character, such as are ordinarily found in exclusively residential districts, are not prohibited. *Wright* v. *Berry* (1).

Nor does this imply such vagueness or indefiniteness in the by-law as would render it invalid.

I fully recognize the force of the general rules that the language of by-laws should be explicit and free from ambiguity, and that by-laws in restraint of rights of property as well as penal by-laws should be strictly construed. But the very statement of the latter rule implies that a by-law is not necessarily invalid because its terms call for construction—as does also another well recognized rule, viz., that a by-law of a public representative body clothed with ample authority should be "benevolently" interpreted and supported if possible. *Kruse* v. *Johnston* (2) It may be a counsel of perfection that in drafting by-laws the use of words susceptible of more than one interpretation should be avoided; but it is too much to exact of municipal councils that such a degree of certainty should always be attained. It would be

(1) 19 Times L.R. 259. (2) [1898] 2 Q.B. 91, at p. 99.

going quite too far to say that merely because a term used in a by-law may be susceptible of more than one interpretation the by-law is necessarily bad for uncertainty.

As Lord Alverstone said in *Leyton Urban Council* v. *Chew* (1)

> I quite agree that a man ought to know what he is required to do, but the answer is that the by-law gives him sufficient information.

Exception had been there taken to the presence in a construction by-law of the words

> or otherwise in a suitable manner and with suitable materials.

See too *Dunning* v. *Maher* (2).

During the course of the argument I directed attention to s. s. 10 of s. 406 of the Ontario Municipal Act, which empowers councils of cities and towns to pass by-laws

> for declaring any highway or part of a highway to be a residential street,

and I put to counsel the question: "Could a by-law passed by the council of an Ontario town in these terms—'B Street is hereby declared to be a residential street'—be successfully attacked as too vague and indefinite to be enforced?" In the application of such a by-law it would of course be necessary to determine just what class of buildings should be permitted in a residential street. But I cannot think that the by-law should therefore be held invalid. That business and industrial establishments are excluded by by-law No. 570 there would seem to be no room for reasonable doubt. Nor can there be any question that a public garage is a business establishment, if indeed it is not industrial as well.

(1) [1907] 2 K.B. 283, at p. 289. (2) 106 L.T. 846.

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I am, for these reasons, of the opinion that by-law No. 570 is valid and effectual, as a regulation passed under the first clause of paragraph 44 (a) of Art. 300 of the charter of the City of Montreal, to prohibit the erection on the part of Jeanne Mance Street here in question of a public garage.

To what consequences has the defendant's contravention of by-law No. 570 subjected him? He argues that he is merely liable to the penalty which the by-law provides and that the plaintiffs have no other means of enforcing it. But a person prepared to do so cannot thus purchase the right to disobey the law. The public interest forbids that the enforcement of the penalty should be the sole remedy for the breach of such a by-law and requires that the regulation itself should be made effective. The general rule of construction that where a law creates a new obligation and enforces its performance in a specific manner, that performance cannot be enforced in any other manner (*Doe d. Murray* v. *Bridges* (1) is of course well established. But that rule is more uniformly applicable to statutes creating private rights than to those imposing public obligations. *Atkinson* v. *Newcastle Waterworks Co.* (2). Moreover whether the general rule is to prevail or an exception to it should be admitted must depend on the scope and language of the act which creates the obligation. *Pasmore* v. *Oswaldtwistle Urban District Council* (3) per Lord Macnaghten. The provisions and object of the Act must be looked at. *Vallance* v. *Falle* (4); *Brain* v. *Thomas* (5).

(1) 1 B. & Ad. 847, at p. 849.
(2) 2 Ex. D. 441, at p. 448.
(3) [1898] A.C. 387, at pp. 397-8.
(4) 13 Q.B.D. 109, at p. 110.
(5) 50 L.J.Q.B. 662, at p. 663.

Here the object and scope of by-law No. 570 make it clear, in my opinion, that the recovery of the penalties prescribed was not meant to be the sole remedy available for its enforcement. A breach of the obligation which it imposes falls within the purview of Art. 1066 C.C., as my brother Mignault points out.

I entirely agree however that the demolition of a costly building should be ordered only as a last resort, and if the owner persists in defying the law, and I concur in the allowance of a further period of six months to permit of compliance by the defendant with the by-law.

The appeal should be allowed with costs here and in the Court of King's Bench and the judgment of the Superior Court should be restored subject to the modification that if within six months the defendant converts the building on lot 43-1 into something permissible under by-law No. 570, the order for its demolition shall not be enforced.

BRODEUR J.—Je suis d'opinion que la motion pour casser l'appel devrait être renvoyée et que l'appel devrait être maintenu avec dépens de cette cour et de la cour d'appel et que le jugement de la cour supérieure devrait être rétabli. Je partage l'opinion de mon collégue, le juge Mignault.

MIGNAULT J.—At the hearing the respondent moved to quash this appeal for want of jurisdiction. In my opinion this motion cannot be granted for the simple reason that the matter in controversy affects the future rights of the respondent as to the use and enjoyment of his property. Mr. Montgomery urged that the interest of the appellant alone was to be considered,

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but here the appellant seeks to have the respondent's building demolished and therefore the matter in controversy relates to a title to lands, to wit the right of the respondent to build on his property, as he has done, and the right of the appellant to demand the demolition of the building so erected. If the appellant is right, the respondent's title and right of use of his land is materially restricted. The motion should be dismissed with costs.

On the merits, the main question is whether the appellant had the right to pass by-law No. 570, and, if this right exists, whether the by-law prohibits the erection of a public garage on Mance Street, so that the appellant would be justified in asking for the demolition of the public garage erected by the respondent.

By-law No. 570, passed in 1915, enacts as follows:—

Section 1.—The following streets are reserved exclusively for residential purposes:

Durocher, Hutchison, Mance, St. Famille and St. Urbain Streets, between Sherbrooke and Pine Avenue.

Section 2.—Every person offending against the above provision shall be liable to a fine, with or without costs, and in default of immediate payment of said fine, with or without costs, as the case may be, to an imprisonment, the amount of said fine and the term of imprisonment to be fixed by the Recorder's Court of the City of Montreal, at its discretion, but such fine shall not exceed forty dollars, and the imprisonment shall not be for a longer period than two calendar months, the said imprisonment, however, to cease at any time before the expiration of the term fixed by the said Recorder's Court upon payment of the said fine, or fine and costs, as the case may be, and if the infringement of this by-law continues, the offender shall be liable to the fine and penalty provided by this by-law for each day during which the infringement is continued.

The first question is whether this by-law was authorized by the appellant's charter, 62 Vict. (Que.) ch. 58, and amendments.

The appellant cites several of the provisions of this charter to which I will briefly refer.

Section 299 of the charter gives the city council the right to pass by-laws for the peace, order, good government and general welfare of the city, and for all matters and things whatsoever that concern and affect the city as a city and body politic and corporate, provided always that such by-laws be not repugnant to the laws of the Province of Quebec or of Canada. And the section adds

for greater certainty, but not so as to restrict the scope of the foregoing provision, or of any power otherwise conferred by the charter,

a list of eighteen subjects, none of which cover the matter now under consideration.

Subsection 44 of section 300 of the charter gives the city council the power

to regulate the height, construction and materials of all buildings * * * to regulate the architecture, dimensions and symmetry of buildings in certain streets * * * to prohibit the construction of buildings and structures not conforming to such regulations, and to direct the suspension, at any time, of the erection of any such building as does not conform to such regulations, and to cause the demolition of any building not conforming to such regulations, if necessary.

Subsection 44a of the same section, as amended, gives the council the power

to regulate the kind of buildings that may be erected on certain streets, parts or sections of streets or on any land fronting on any public place or park; to determine at what distance from the line of the streets, public places or parks the houses shall be built, * * * or to prohibit the construction, occupation and maintenance of factories, workshops, taverns, billiard-rooms, pigeon-hole rooms, livery stables, butcher's stalls or other shops or similar places of business in the said streets, parks, or sections of certain streets or on any land fronting on any public place or park * * *

Subsection 55 of section 300 also enacts that the council shall have the power

to prohibit offensive or unwholesome businesses or establishments within the city or within one mile of the limits thereof; to prohibit the erection or occupation of any offensive buildings in any place or site where they will damage the neighbouring property, and determine the localities where certain manufactories or occupations may be carried on.

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Section 300 c. added by 3 Geo. V., ch. 54, section 9, provides as follows:—

> 300 c. In order to give full effect to articles 299 and 300 and to extend and complete the same, so as to secure full autonomy for the city and to avoid any interpretation of such articles and their paragraphs which might be considered as a restriction of its powers, the city is authorized to adopt, repeal or amend and carry out all necessary by-laws concerning the proper administration of its affairs, peace, order and safety as well as all matters which may concern or affect public interest and the welfare of the citizens; provided always that such by-laws be not inconsistent with the laws of Canada or of this Province, nor contrary to any special provision of this charter.

I think the statutory provisions which I have cited—and they are the only ones on which the appellant relies—must be read together. Section 300 gives to the city specific powers enumerated in considerably more than a hundred subsections. Paragraph one of section 299 and section 300c are of the same class of enactments, and, standing by themselves, would probably not allow the city to prevent the construction by the respondent of a building for commercial purposes on his own property, (*City of Toronto* v. *Virgo*) (1), although section 300c. shews that it was not intended that sections 299 and 300 should be restrictively construed. Of course the general powers given to the city are not to be repugnant to or inconsistent with the laws of Canada or of the province, and therefore the respondent may, not unreasonably, contend that his right to make full use of his title of ownership under articles 406 and 407 of the Civil Code ought not to be regarded as taken away or restricted by these mere general enactments. But while this is no doubt true, the question still remains whether the respondent's right to make any use he desires of his property is not restricted—and the legislature could undoubtedly restrict it—

(1) [1896] A.C. 88, at pp. 93, 94.

by the specific enactments of section 300 of the charter. I will therefore endeavour to answer this question by considering subsections 44, 44a and 55 of section 300.

Subsection 44 speaks about regulating the height, construction and materials of all buildings as well as the architecture, dimensions and symmetry of buildings in certain streets, and the city is authorized to prohibit the construction of buildings not conforming to such regulations and to cause their demolition if necessary. In my opinion this subsection does not help the appellant.

Subsection 55 concerns the prohibition of "offensive or unwholesome" businesses, establishments or buildings which the city is empowered to prohibit "within the city or within one mile of the limits thereof." It surely cannot be contended that this subsection would apply to a commercial building or a public garage on a street like Mance Street, for if it does the appellant could prevent the erection of public garages or commercial buildings anywhere within the city or within a further radius of one mile. And as to the power to determine the localities where certain manufactories or occupations may be carried on, it seems sufficient to say that By-law No. 570 does not profess to do anything of the kind. The appellant in his factum cites by-law No. 551, which prohibits the erection on either side of Sherbrooke Street between St. Denis and City Councillors Streets, of any public garage, but the by-law here under consideration goes much further and purports to reserve a part of Mance and other streets for residential purposes exclusively.

There remains only subsection 44*a* which allows the city to regulate the "kind of buildings" (in the French text "le genre des constructions") that may be erected on certain streets, parts or sections of streets or on

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any land fronting on a public place or park. It was suggested that by "kind of buildings" is meant the regulation of the mode of construction, architecture, materials, dimensions, height, etc. But that matter is already dealt with in subsection 44, which exhausts the subject in so far as the mode of construction, materials, and the architectural properties of buildings are concerned, so the "kind of buildings" referred to in subsection 44*a*, which was added to the charter by a subsequent amendment, must be the kind, either residential, commercial or industrial, of buildings which may be erected in certain locations. The description of these localities as being certain streets or parts or sections of streets or land fronting on any public place or park would indicate that it was intended to preserve to certain locations a more select or refined character, which, it is urged, is eminently desirable in a large modern city. The evidence shews that Mance Street, above Sherbrooke Street, was an exclusively residential street before the construction of the respondent's garage, and that after the opening of this garage, the neighbours were awakened at all hours of the night by the tooting of motor cars for admission to the garage, which of course was a decided nuisance to the immediate vicinity. The evidence is also that there is a repair shop in connection with this garage, and this would well come within the description of a "workshop" which is among the buildings or establishments which subsection 44*a* permits the city to prohibit in certain streets, parts or sections of streets or land fronting on any public place or park.

I have not lost sight of the possible suggestion that the words "the kind of buildings" should be restricted to the kind enumerated below, to wit, factories, workshops, etc. It may also be said that the word "con-

struction" in connection with the enumeration would be useless if the regulation of the "kind of buildings" that may be erected applies to all buildings that could be constructed in the localities indicated. I think however that the two clauses are severable and bear on different subjects. In the first the question is of the kind of new buildings that may be erected, in the second of the fitting up of existing buildings for the enumerated purposes, and in the latter case I understand the word "construction" in the sense of "alteration" or "fitting up" for a certain purpose. There obviously can be no "construction" of billiard-rooms, pigeon-hole rooms or butcher stalls, in the same sense as the "construction" of a new building. I consequently think that the introductory clause of subsection 44*a* is not cut down by the enumeration, from which moreover it is separated by an independent provision.

I would therefore conclude that under subsection 44*a* the appellant could prevent the construction of any buildings other than residential ones on the part of Mance Street mentioned in the by-law, and this would exclude the public garage which the respondent claims to have the right to build there.

We now have to consider the terms of By-law 570.

The vital enactment of this by-law is contained in the words:—

> The following streets are reserved exclusively for residentia[1] purposes:
>
> Durocher, Hutchison, Mance, St. Famille and St. Urbain streets, between Sherbrooke Street and Pine Avenue.

It is contended that this enactment is too vague to have any meaning. I cannot agree with this contention. The reservation of these streets exclusively for residential purposes means that no buildings other than what can properly be considered as residential

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ones may be erected on them. It is said that this would exclude buildings such as churches or schools. It is unnecessary to express any opinion on this point, for it is obvious that the respondent's public garage is not a residential building. And I may add, merely as an apt illustration, that the Municipal Act of Ontario (R.S.O. 1914, ch. 192, section 406, subsection 10), empowers cities and towns to pass by-laws for declaring any highway or part of a highway "to be a residential street," and this language would certainly prevent the erection, on a street declared residential, of a public garage such as that of the respondent.

I am therefore of opinion that By-law 570 is sufficiently supported by subsection 44*a* and that it suffices to render the respondent's public garage an unlawful one.

It is said that the by-law provides a penalty and that this penalty only, and not the demolition of the building, can be claimed. There are no doubt cases where this argument has successfully been made, but I do not think that here the imposition of a penalty deprives the appellant of any other remedy to prevent the erection of a building in violation of the by-law; on the contrary, Art. 1066 of the Civil Code clearly allows the demand for the demolition or undoing of anything done in breach of an obligation. The facts here are that as soon as it was discovered that the respondent intended to build a public garage fronting on Mance Street, the appellant notified him to desist and he then promised to convert his building into an apartment house, and actually asked for, and obtained, a building permit for this purpose, and wrote to the appellant that he had not proceeded with the work on the Mance Street end of the building except in accordance with the new plans and permit. The

respondent subsequently decided to complete the building as a public garage, but he did so at his own risk, and his pretext that his tenant refused to consent to its being converted into an apartment house, is certainly no excuse for the violation of the by-law.

It is said that the appellant authorized by the building permits which it gave to the respondent the construction of a public garage on Mance Street. The building permits do not bear this construction, for they are limited to the construction of a public garage on lot 67, which is not on Mance Street, and do not allow the construction of a public garage fronting on Mance Street and situate on the rear part (looking from Sherbrooke Street) of lot 43-1 which abuts both on Sherbrooke and Mance Streets.

Objection is also made to the name of "Mance Street" in the by-law, the real name being "Jeanne Mance Street." But there is no doubt as to the identity of the street meant to be dealt with, and the objection cannot be entertained.

I think therefore that the appellant is entitled to succeed, but I would allow the respondent six months to change the destination of his building so as to conform with the by-law, and on his failure to do so I would grant the prayer of the appellant for the demolition.

The appeal should be allowed with costs here and in courts below.

Appeal allowed with costs.

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Solicitor for the respondent: *T. P. Butler.*