LOUIS RIOPELLE (PLAINTIFF) .....APPELLANT;

AND

THE CITY OF MONTREAL (DEFENDANT) ..... } RESPONDENT.

1911

*March 15.
*May 15.

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

Municipal corporation—Building by-law—Dangerous constructions—Abatement of nuisance—Condition precedent—Notice—Order to repair—Demolition of structure—Trespass—Forcible entry—Tort—Damages—Construction of statute—Montreal city charter—37 Vict. c. 51 (Que.).

In the exercise of extraordinary powers conferred by legislation authorizing interference with private rights all conditions precedent to the exercise of such powers must be strictly complied with prior to the performance of acts which, if done without special authority so conferred, would be tortious.

In virtue of authority conferred by the legislature the municipal council enacted "The Montreal Building By-law" making regulations in respect of dangerous structures and providing that if, after notice by the inspector of buildings, the owner of any such structure should fail, as speedily as the nature of the case might require, to comply with the requisition in such notice, the inspector might order its demolition and, upon default of demolition within the time specified in the order, he might cause the structure to be demolished. The inspector gave notices to the plaintiff with respect to his buildings, alleged to be dangerous, but failed to give him definite orders with regard to the nature of the demolition required and, subsequently, entered upon the plaintiff's property and demolished the buildings on his default to comply with the requisitions contained in the notices.

Held, Davies J. dissenting, that the conditions prescribed as necessary before the exercise of the right of forcible entry and demolition of the structure had not been fully observed, and

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

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that, in consequence of omission strictly to comply with the conditions, the municipal corporation was responsible for the damages sustained by the plaintiff through the unauthorized destruction of his property.

APPEAL from the judgment of the Court of King's Bench, appeal side, affirming the judgment of the Superior Court, District of Montreal, by which the plaintiff's action was dismissed save and except as to the amount of $394, awarded to him, with costs.

The circumstances of the case are stated in the judgments now reported.

McAvoy K.C. for the appellant.

J. L. Archambault K.C. for the respondent.

THE CHIEF JUSTICE.—This is an action of damages for trespass to land. It is admitted that the servants of the corporation defendant (respondent here) entered upon the plaintiff's (now appellant's) property against his will and there demolished a building in course of erection. The forcible entry is justified on the ground that the building was defectively constructed with improper materials and by incompetent workmen; that the respondent had legal authority for what it did, and that it acted throughout in conformity with the directions or allowance of the legislature. There is no evidence of imminent danger or of immediate and urgent necessity for the protection of the public and the respondent does not base its defence to the action on that ground. Certain sections of the municipal charter, to which I will later more fully refer, were invoked in the written pleadings and at the argument here to justify the proceedings of the municipal employees.

Since the statute, 5 Richard II., st. I., ch. 7 (1389), it is a criminal offence to enter, in a manner likely to cause a breach of the peace, upon the property of another (sections 102 and 103 of the Criminal Code).

It is true that if the buildings in course of erection by the plaintiff on his land were in such a state as to constitute a nuisance it would have been permissible for any one having a sufficient interest to take such steps as were necessary to abate the nuisance. The conditions subject to which this right may, in English law, be exercised are stated with admirable clearness by Adrien Gérard in his recent book on "Les torts ou délits civils en droit anglais," at pages 355 and 356:

> Avec l'"abatement of nuisance" nous revenons à une question touchant la propriété immobilière. La "nuisance" consiste à causer préjudice à autrui en le troublant dans la jouissance de sa propriété; le propriétaire peut alors détruire l'état de fait qui lui cause préjudice, et c'est ce qu'on nomme "abatement of nuisance."
>
> Si l'état de fait préjudiciable a son siège, sa cause, sur le terrain d'autrui, le propriétaire lésé par la "nuisance" doit d'abord sommer son voisin d'en faire disparaître la cause; puis, s'il n'agit pas, peut pénétrer sur son terrain pour se faire justice à soi-même. Si, par exemple, mon voisin construit sur son terrain une maison qui fait obstacle à l'exercice de mon droit de passage, je dois d'abord le sommer de la démolir, et s'il l'obtempère pas, je puis la faire démolir, pourvu que je ne lui cause pas de dommage inutile et que je ne trouble pas la paix publique. Remarquons, cependant, que ce n'est pas là un procédé à conseiller, qu'il est toujours dangereux de pénétrer ainsi sur le terrain d'autrui pour se faire justice, et qu'enfin nous ne trouvons pas de décision moderne sur ce point.

Pollock, "Torts," says, at page 421:

> It is a hazardous course at least for a man to take the law into his own hands and, in modern times, it can seldom, if ever, be advisable.

In the Province of Quebec the law does not permit a citizen to do justice to himself. "Il n'est pas permis de se faire justice à soi-même" is still the law there. M. Demogue in the "Revue Trimestrielle" of 1898, at

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page 690, writing of a then recent judgment in the Cour de Cassation, says, however,

> un arrêt de la chambre des requêtes semble vouloir ramener le vieil adage qu'on ne peut se faire justice à soi-même à une portée raisonnable; on ne doit pas faire d'actes troublant l'ordre matérial, pouvant occasioner des rixes, des luttes, mais le surplus reste permis.

Article 529 of the Civil Code lays down the rule as to the limits within which it is permitted to interfere with the property of one's neighbour. I may cut the roots of my neighbour's tree which grow into my land, but, contrary to the rule of English law (*Earl of Lonsdale* v. *Nelson* (1)), I may not touch the branches of the same tree that grow over my property. The most I can do is to call upon my neighbour to remove the branches.

The municipality does not pretend to have, in the circumstances of this case, the right to enter upon the plaintiff's property, except in so far as authority to do so is found in its charter. Before referring to the provisions of that charter it may be proper to state that there are certain general principles which should be kept in mind. When the law invests a person with authority to do an act which, if done without express legal sanction, would be an offence, the conditions subject to which the act is authorized must be complied with literally. In other words, where the legislature has thought fit to direct the doing of something which but for that direction or authority would be an actionable wrong it is incumbent on the party who professes to exercise the power conferred by the statute to prove beyond all doubt that he strictly complied with the conditions subject to

(1) 2 B. & Cr. 302; 26 R.R. 363, at p. 370; and see *Lemmon* v. *Webb*, [1895] A.C. 1.

which the power has been conferred. The statute relied upon by the respondent provides very clearly, as I shall point out, that the alleged wrong-doer should first be warned and required to abate the nuisance complained of; and it is only after notice and refusal that entry on the land to abate the nuisance can be permitted.

The city is authorized by 37 Vict. ch. 51, sec. 123, sub-sections 51 and 52, and subsequent amendments, to make by-laws to provide for the inspection of all buildings and to require the demolition of any that may endanger the lives of the citizens; and, by-law No. 107 was passed under the authority of that statute. It is there provided (section 56) that when an inspector finds, by actual survey of the premises, that any structure is in a dangerous state he should, after taking preliminary steps for the protection of passers-by, cause *notice in writing to be given to the owner of such structure requiring him to take down or to repair it, as the case may require;* and, if the owner fails to comply as speedily as the nature of the case permits with the notice, the inspector may order him to take down or demolish the building, in whole or in part. The by-law further provides that in cases of improper construction which do not come within section 56 the owner may, after notice from the inspector, be summoned before the recorder and there condemned to the penalty provided by section 103 of the by-law. Two different proceedings are, therefore, contemplated; — one applicable to the case of a dangerous structure which imperils the safety of the public; the other referable to the case of a building which is being defectively constructed and which may, when completed, become a source of danger. In the first

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case the inspector may enter upon the premises and there take such steps as are necessary to prevent the imminent danger; but, when the complaint is that the building is being defectively constructed without, however, danger of immediate injury being done, the offending owner is liable to be proceeded against for a pecuniary penalty before the Recorder's Court. In either case notice must previously be given to the owner and that notice should be so framed as to give him full information of the nature of the complaint against him and of the proceedings which it is intended to adopt. And this appeal must succeed because the notices required by the statute were not given.

The building in question was demolished on the 17th of August, 1898, and the notices given are to be found printed at pages 356 to 362 of the case on appeal, and at page 3 of the respondent's factum.

The first notice was given on the 7th of March, 1898, requesting the appellant to make certain changes in the building which are set out in detail and the owner is informed that, in default of compliance with that notice, he will be proceeded against for the penalty provided by the by-law. I quote the terms of that notice.

> Vous êtes en conséquence requis d'avoir à remédier à ces défectuosités dans les quarante-huit heures à compter de la signification du présent avis, à *défaut de quoi vous serez poursuivi et encourrez la pénalité imposée par le dit règlement.*

This notice was followed by three other notices, dated respectively the 20th of May, the 20th of June, and the 8th of August. The concluding words of the notices of the 20th of May and 8th of August are as follows:

Vous êtes en conséquence requis d'abbatre, démolir, reparer ou renforcer la dite maison, *suivant qu'il en sera requis*, etc. * * * à défaut de quoi vous serez poursuivi et encourrez la pénalité imposée par le dit règlement,

and no further information as to what was required by the inspector was given to the appellant. The notice of the 20th of June is somewhat more definite; but it also concludes with the words

à défaut de quoi vous serez poursuivi et encourrez la pénalité imposée par le dit règlement.

Proceedings were taken on this notice in the Recorder's Court and the appellant was condemned, under section 103, to pay a fine for having neglected to conform to the instructions of the inspector. On appeal, the judgment was, subsequently, set aside.

The chief reason why I feel, most reluctantly, constrained to allow this appeal is that no such notice as the statute requires was given by the inspector. The vague words used in the notices of the 20th of May and the 8th August, served on the appellant and on which the inspector acted, are:

vous êtes en conséquence requis d'abbatre, démolir, réparer, etc. * * *suivant qu'il en sera requis.*

The appellant is not told whether he is to take down the building, to alter it in part, or, simply, to strengthen it. A notice couched in such vague and uncertain terms does not give to an owner the information as to the defects found in the building which the inspector requires him to remedy, and which the statute contemplates, before the civic officials may venture to exercise their exorbitant right to enter upon the property of a citizen and, with force, demolish his buildings. In its terms the notice leaves the owner under the impression that the particular

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thing the inspector requires to be done will be subsequently indicated to him. The words used are:

> Vous êtes en conséquence requis d'abattre, démolir, reparer ou renforcer la dite batisse, *suivant qu'il en sera requis.*

Could anything be more indefinite, vague and uncertain ? It would appear as if it was intended merely to puzzle and embarrass the owner.

As my brother Duff says, "this is a case in which form is substance." The principle at issue is of the highest importance, affecting the right of property. It would be extremely unwise to establish in this court a precedent which might be invoked by every municipal officer to justify the right to enter upon the property of private citizens and there demolish their buildings on the ground that they are, in his opinion, defectively constructed. The legislature has, in the case of the respondent, thought wise to give the city officials very large powers, it is true, but it has coupled with the exorbitant right conferred a duty to give notice, and that duty must be literally and strictly complied with.

The appeal must be allowed and the record sent back to the court below to assess the damages. I am confident, however, that, in assessing those damages, the trial judge will have in mind the suggestions made by my brother Anglin, which have the full approval of this court.

An interesting note by Planiol, to Dalloz, 1905, 1, 298, gives a valuable suggestion as to the rules that should be followed in cases like the present, where the defendant acted honestly but under a mistaken apprehension as to its rights; and the conduct of the plaintiff is far from being commendable.

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DAVIES J. (dissenting).—This appeal is one without any merits whatever. The only point argued, or indeed arguable, was that the notices given to the appellant requiring the demolition of the building complained of as constituting a public danger were not sufficiently full or explicit.

I have reached the conclusion that the judgment of the trial judge and that of the court of appeal on this point were correct and think, therefore, that this appeal should be dismissed.

From the time he began the erections complained of until their demolition by the civic authorities the appellant's actions and conduct in connection with the building were utterly indefensible and an open and flagrant repudiation of all civil control over him or his building operations. He refused to recognize as binding upon him the by-laws of the city respecting the construction of buildings within its limits. He declined to take out a permit for the erection of the buildings and proceeded with their erection without such permit. The evidence clearly established the fact that not only was their construction not in conformity with the by-laws and regulations but that they were constructed with bad and rotten materials and in an improper and defective manner, and at the time they were ordered to be demolished, as stated by Mr. Justice Lavergne, they "constituted an imminent danger to the public."

In point of fact the evidence satisfied the courts below and satisfies me that the buildings demolished by the city officials were of the most imperfect and faulty description, and that to allow them to remain in the condition in which they were on the 6th of August, 1898, when the last and final notice was given

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to the appellant, or to allow the appellant to continue them to completion, would be dangerous not only to those who might occupy them, but also to the public using the street on which they fronted. Three independent surveyors appointed by the Recorder's Court to examine the condition of the buildings for the information of the court reported that:

> the faults in construction and defects in materials used in this building are so flagrantly in violation of the city building by-law and of all rules for safe building that we are of the opinion that it should be condemned as a public nuisance, and we have no hesitation in recommending that, in the interest of public safety, it be entirely demolished.
>
> The internal supports and joists of floors and roof are not properly placed and are not of a sufficient strength.
>
> Nearly all the timbers used are unsound and rotten and wholly unfit for use.
>
> The portion of the front, marked F. B. H. I. J. K., on the drawing, is carried to a greater height than allowed by the by-law, and much higher than is safe for plank-framing. About one-half of this portion of the building is carried on three slight posts, marked L. M. N., which are quite insufficient in strength for the load they have to sustain, and do not rest upon proper foundations.

The findings of fact of the trial judge and of the court of appeal are substantially in accordance with the report of the surveyors and represent, in my opinion, the proper conclusion to be drawn from all the evidence.

I am glad to have been able to concur with the courts below in holding that the notices to the appellant requiring demolition of these dangerous structures were sufficient, because, apart from this one technical question, the appeal is without merits of any kind whatever.

There was nothing arbitrary or high-handed in the proceedings taken by the civic authorities to compel the demolition of this "public nuisance." The amplest possible notice was given to him of the danger

the buildings were to the public and the necessity for their demolition, and it was only when and after he defiantly refused to comply with these notices that the buildings were demolished and the nuisance abated.

As my colleagues, however, think the notices insufficient, and have allowed the appeal and remitted the case for another trial, I feel somewhat at a loss to understand how, in the circumstances and facts with reference to the utterly bad and dangerous condition of the buildings at the time when they were demolished, any damages could be awarded other than merely nominal ones.

If it could be shewn that the manner of demolition was negligent, and in itself caused damages, I can understand these being assessable as against even a technical wrong-doer. But, if the facts, as proved at the first trial, with respect to the utterly faulty and dangerous condition of the buildings, are accepted, what real damage was sustained by the appellant in consequence of their demolition? If the buildings did not fall from their own inherent defects they would certainly have, for the public safety and as constituting a public nuisance, to be demolished either by the appellant himself or by the public authorities after a further order complying with the by-laws had been made.

Demolition was necessary and inevitable. To justify the city authorities in demolishing the building better and fuller notices than those given were, it is held, required. But there cannot be any doubt whatever that the condition of the buildings and the manner in which and the material with which they were being constructed was so bad and indefensible

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that the buildings, in their then state, constituted an imminent danger to the public which it was alike the right and the duty of the city authorities to have removed. The manner in which they proceeded, so far as the notices are concerned, is held to have been technically wrong and not to afford complete justification for the demolition; but if all the facts and conditions demanded demolition; if, under these facts, it was the duty of the city to have the nuisance abated — if demolition was inevitable any way — then, surely, a failure technically to comply with the form of notice would not justify any damages beyond nominal ones, unless, indeed, as I have said, the manner in which demolition took place was, in itself, improper and negligent and so caused damages to the owner.

IDINGTON J.—Certainly the appellant who disregarded the safety of others and defied the law for securing such safety, is not an object of sympathy; yet one of the surest means of inducing law breakers to respect the law, is to have it administered in a due and orderly manner according to the methods prescribed for enforcing it.

The law touching the questions raised herein is almost entirely comprehended in two sections of the respondent's charter and two sections of by-law No. 107 resting thereon and passed by respondent's council.

The two sub-sections of section 140 of the charter (1) are as follows:

58. To prescribe and define the duties and powers of the inspector of buildings and to authorize him and such other officers as may

(1) 52 Vict. ch. 79 (Que.).

be appointed by the council for that purpose, to visit and examine, in the performance of their duties, as well the interior as the exterior of any house or building;

59. To authorize the said inspector to demolish any house or building that may endanger the lives of the citizens; and to cause such house or building to be temporarily vacated, if he deems it necessary; and to do and perform such work of repair as he may deem necessary for the safety of the structure, and to authorize the recovery, from the proprietor, of the cost so incurred.

The by-law I have referred to contains the following:

Sec. 56. Whenever the inspector finds by actual survey of the premises that any structure (including in such expression any building, wall, chimney or other structure and anything affixed to or projecting from any building, wall or other structure) is in a dangerous state, the inspector shall cause the same to be shored up or otherwise secured, and a proper board or fence to be put up for the protection of passengers; and he shall cause notice in writing to be given to the owner of such structure requiring him to take down, demolish, secure or repair the same as the case may require.

Sec. 57. If such owner fails to comply, as speedily as the nature of the case permits, with the requisition of such notice, the inspector may order him to take down, demolish, repair or otherwise secure, to the satisfaction of the said inspector, such structures or such part thereof as appears to the said inspector to be in a dangerous state, within a time to be fixed by said inspector; and in case the same is not taken down, repaired or otherwise secured within the time so limited, the said inspector may, with all convenient speed, cause all or so much of such structure as is in a dangerous condition, to be demolished, repaired or otherwise secured, in such manner as may be requisite; and all expenses incurred by the said inspector in so doing may be recovered by him from the owner of such structure in any court having jurisdiction in the matter.

Then follow these sections, one of which is applicable to the case of an owner who cannot be found, which is not this case.

The next two sections are as follows:

Sec. 59. If in erecting any building, or in doing any work to, in or upon any building, anything is done contrary to any of the provisions of this by-law, or anything required by this by-law is omitted to be done, in every such case, the inspector shall give to the builder engaged in erecting such building, or in doing such work, notice in writing requiring him, within forty-eight hours from the

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date of such notice, to cause anything done contrary to the provisions of this by-law, to be amended, or to do anything required to be done by this by-law, but which has been omitted to be done.

Sec. 60. If the builder to whom such notice is given makes default in complying with the requisition thereof within the time specified in such notice, he shall incur the penalty provided in section 103 of this by-law.

The only remedy contemplated by these sections 59 and 60, seems to be to give notice and in default a prosecution for the penalty. Section 61 is as follows:

Sec. 61. In all other cases not hereinbefore specified, where the inspector may detect any imperfection, improper construction or defect, by which any building or any part thereof, may become dangerous to the public safety, either by fire or otherwise, he shall immediately notify the owner of such building to repair or remove such defects or imperfection within a reasonable delay to be specified in the notice, and in default of the said owner complying with said notice, he shall be liable to the penalty provided in section 103 of this by-law.

This section seems to have no sanction as an alternative to that of a penalty and may as well be eliminated from our present subject of consideration.

These references to sections 59, 60 and 61, are solely for the purpose of appreciating correctly the bearing of the notices given by the inspector to appellant relative to the business in hand.

Before considering the notices given and effect thereof let us try to correctly apprehend first what the true import of sections 56 and 57 may be.

Let us assume that the inspector found by actual survey of the premises that the structure was in a dangerous state, did he act as section 56 of this by-law required ? Did he shore the building up or otherwise secure it ? Or put a proper board or fence to protect passengers ?

None of these acts are conditions precedent to exercising the authority to demolish, but they indicate

the nature of the danger to be avoided thereby; and which must exist as a condition precedent to the exercise of such authority.

It indicates moreover the deliberate judgment required to be taken in such an emergency. Demolition is a desperate remedy and only to be resorted to in cases such as this when neither altering nor repairing nor strengthening can avail, and, in such alternative, only when the man on whom the obligation rests to do so makes clear default after having been duly ordered to do some such specific thing as the inspector's survey justifies him in ordering.

What is the "dangerous state" to be found before acting? Is it a dangerous state with regard to passers-by on the street or elsewhere that people have a right to go or are permitted as of apparent right to go? Or is it the prospective danger arising from fire or possibly unsanitary conditions as regards the habitation of the building?

All that section 59 of the statute seems to contemplate as ground for demolition is that the building "may endanger the lives of the citizens." And the by-law can go no further. Its attempted execution of the purpose of the statute must be restricted within the express authority of the statute.

The inspector or other authority named may, as section 56 of the by-law signifies, be properly authorized to do as specified.

Now, what are the facts relative to this building which has been demolished? And what was done?

The structure was unfinished, incapable of occupation, and hence it cannot properly be said to have endangered the lives of those in it.

And as there are two, and only two possible ways,

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by which the statute seems to contemplate a danger; one to the citizens generally, and the other to the occupants, any special danger to workmen engaged in its erection seems beyond the purview of the enactment.

It would seem, therefore, as if a "dangerous state" relative to passers-by on the street or possible lanes where people were accustomed to go was all that could be considered by way of justifying demolition in this particular case.

Did the inspector feel under need of shoring it up ? If so, he does not seem to have acted upon his convictions in that regard.

I cannot find he either did that or fenced it in or placarded it as dangerous, and these were his instructions by the by-law.

And if it was in a dangerous state, when did it become so, and what measures did he take to protect the citizens ? A notice was served in March, clearly inapplicable and indeed only indirectly relied upon.

Another notice was served on the 20th of May, 1898. That pretends to rest on sections 56, 57 and 61 of the by-law number 107, but ends up as follows:

> Vous êtes en conséquence requis d'abattre, démolir, réparer ou renforcer la dite maison, suivant qu'il en sera requis, immédiatement, à compter de la signification du présent avis; à défaut de quoi, vous serez poursuivi et encourrez la pénalité imposée par le dit règlement.

That clearly does not point to demolition, but to a prosecution for a penalty imposed by the by-law.

And an abortive prosecution ensued.

On the 20th of June, 1898, a more specific notice is given, but rests only upon sections 59 and 61, which I have already shewn are outside the scope of demolition, and sections 12 and 14 still further beyond same

scope and the notice like its predecessors only threatens prosecution for penalties under the by-law.

It seems pursuant to this the appellant was prosecuted with some greater success than on the first occasion.

On the 9th of August, 1898, he is served with a notice addressed to him in the following terms.

Monsieur:—

Avis vous est, par les présentes, donné que la bâtisse sur votre propriété, portant le numéro 755, du plan cadastral et généralement connu sous le numéro civique, avenue Hôtel-de-Ville et rue St. Norbert, quartier St. Louis, de la cité de Montréal, et présentement, est dans une condition dangereuse, et cela en contravention aux sections 56, 57 et 61 du règlement No. 107 de la dite cité de Montréal.

Vous êtes en conséquence requis d'abattre, démolir, réparer ou renforcer la dite bâtisse, suivant qu'il en sera requis, dans les 24 heures, à compter de la signification du présent avis; à défaut de quoi, vous serez poursuivi et encourrez la pénalité imposée par le dit règlement.

The clerk serving this made a note that Riopelle answered he would not demolish.

There does not seem to be in this any implication that he would not do one or other of the other alternatives presented to him.

I need not pursue the further steps taken or the facts which might, if a proper notice had been served, have given rise to considerations relative to demolition.

I cannot think that such an autocratic power as this ever was intended to be executed by means of such an ambiguous series of alternatives as this notice presents.

The man may have been as wrong-headed as you please, but surely the form of notice might at this fourth attempt have become a little more specific.

It is simply the same from first to last, a threat of prosecution for the penalty incurred.

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Now, how can such a vague threat resting upon three sections by no means relative to an identical offence or species of remedy be a proper foundation for an act of demolition such as this ?

But more than that the man was actually prosecuted in the Recorder's Court as threatened in June by the like notice, and then for the first time there appears in an architect's report something in detail pointing out on the 6th of August at a trial where he was convicted, what were the defects from which, if the building continues as it was, or proceeded to its completion on such a plan, might render it dangerous to the public.

It is suggested this report was read as part of the evidence in the Recorder's Court in appellant's presence, and that hence these details as ground of complaint can be imported into the effect to be given the notice of the 8th of August.

Clearly the proper thing for the inspector to have done was when armed with this report to have made a proper use of it by his deciding how much of this defective building could be rectified by reparations or strengthening and what of each was to be attributed to either branch of his notice and if action was required to be taken thereunder respectively.

A puzzling alternative notice such as given was unjustifiable if demolition was intended.

A forty-eight hour's notice of demolition, when alterations could have been made and charged to the appellant, producing probably at a moderate cost quite as effective a remedy for the protection of the passing citizens who travelled the streets or adjacent lanes, would also have been unjustifiable. What did this notice mean ? It was vague and misleading and

in light of its several predecessors of the same sort quite insufficient to found demolition upon. It was the same old threat of prosecution for penalty.

The demolition was not ordered in such a specific manner begotten of such a specific necessity or requirement as seems to me can alone justify it in law.

And the alternatives presented were not so specified as both statute and by-law express and imply ought to have been made clear before resorting to demolition.

I think appellant entitled to recover, but am embarrassed to find exactly the lines upon which an inquiry as to damages may proceed.

I am clear upon one point, that a man who builds a house not in conformity with but in violation of the law, has not a house that can be estimated as worth its cost, or worth anything as if a finished building. Hence he has no right to reckon upon rents as part of his damages.

I should say the defects pointed out by the architects may be a guide yet may not.

I rather incline to think the proper way to estimate his damages would be to consider just how much of the structure could have been used and made conformable to the by-law by discarding the parts clearly useless as in violation of the building regulations.

And then having ascertained that, estimate its value as it stood, and deduct from that the value of the material left after the demolition. The balance should be the damages to be allowed.

If the conclusion to be reached is that there was, to begin with, no value if these lines were to be proceeded upon, or in other words, no structure that could be rendered conformable to the requirements of

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the building regulations, then there was no value, and in such case the damages should be assessed, if any exist, at the difference between the material as left and what a prudent owner might have rescued, if necessary for him to have demolished.

If nothing in that, then the only thing the appellant can be entitled to, would be damages for the illegal entrances upon his premises and costs of this suit and this appeal, as well as the appeal in the court below.

The unfortunate delay in reaching an end to this litigation will make it difficult to proceed upon such lines as I have indicated. The act having been found illegal, it would be the part of wisdom for the parties to agree upon a sum upon the lines indicated as properly payable, and have it inserted in this judgment as an end of the matter.

Thirteen years old hasty happenings ought to have got so cooled by this time as to render this last method appear reasonable to all concerned.

The appeal should be allowed.

DUFF J.—This is one of those cases in which a public authority having the power on certain conditions to do acts which otherwise would be an invasion of private property fails to observe the prescribed conditions upon which alone the power is exercisable. In such cases, to use the well-known words of Lord Halsbury, "form is substance," and the municipality by their unauthorized destruction of the plaintiff's property have brought themselves under a liability to pay the damages the plaintiff has suffered by reason of their act.

In estimating these damages it would be necessary,

of course, to take into consideration all the circumstances. The premature destruction of a building which the authorities had the power to destroy on proper notices being given and which they had decided was one that ought to be destroyed might very well appear to a court not to be the occasion of any great loss to the owner. This, as well as other considerations suggested by the evidence, will no doubt be present to the mind of the court when assessing the damages to be awarded. There should be a new trial on the question of damages.

ANGLIN J.—With reluctance, because the conduct of the appellant was wholly indefensible and most provoking to the city officials, who appear to have been considerate and indulgent to him almost to a fault, I find myself obliged to concur in allowing this appeal, on the ground that the *order,* prescribed by section 57 of by-law No. 107 of the City of Montreal as a condition precedent to the right of the building inspector to demolish an offending structure, was never made. The "notice in writing" prescribed by section 56 was apparently given by him to the appellant several times — on the 7th March, the 20th May, the 20th June and the 8th August. No doubt the official thought he had fully complied with the requirements of the by-law. But its scheme is that a notice shall first be given to the owner of the obnoxious structure requiring him "to take down, demolish, secure or repair the same as the case may require" (section 56), and that, in the event of non-compliance with such notice, the inspector shall then *order* the owner to do what he deems requisite within a time to be fixed by him; and it is only upon disobedience to this order

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that the inspector is authorized himself to execute it; (section 57).

The power conferred on this municipal officer is somewhat extraordinary, yet it seems not to be greater than is needed for such a case as that now before us. But legislation which places the citizen and his property so completely under official control should be utilized with great caution. If the courts did not insist that the conditions imposed by such a by-law upon the exercise of the powers which it confers should be fully observed, and that the procedure for which it provides should be strictly followed, though designed as a salutary measure for the protection of public interests, it might easily be made an instrument of oppression destructive of personal liberty — any person whose property is interfered with has a right to require that those who interfere shall comply with the letter of the enactment so far as it makes provision on his behalf: *Herron* v. *Rathmines and Rathgar Improvement Commissioners*(1), at page 523, *per* Lord Macnaghten.

I have little doubt that the notice of the 8th August, which fixed twenty-four hours as the delay within which the plaintiff was required to conform to it, was meant by the inspector to be an order under section 57 of the by-law. But it was in form merely a notice, and the building was not subject to demolition by the inspector until an order, made by him after non-compliance by the owner with a notice previously given by him, had been disobeyed.

For these reasons I feel constrained to allow this appeal and to remit the action to the Superior Court for assessment of the plaintiffs' damages.

(1) [1892] A.C. 498.

It by no means follows that, because his buildings have been demolished without full compliance with the provisions of the municipal by-law, the appellant is entitled to recover as damages their full cost price. He succeeds upon a technical ground. The buildings would appear to have been flimsily and defectively constructed.

If on the 8th August an order under section 57 had been made and served on the plaintiff, instead of a notice under section 56, it would seem probable that he would have had no cause of action against the city. In these circumstances, if the inspector, upon fully complying with the conditions of the statute, would have been within his right in demolishing the plaintiff's buildings as he did, and if the demolition was carried out with reasonable care, a court properly advised would award comparatively small damages. If, on the other hand, the buildings as erected could have been made to fulfil the requirements of the municipal building by-law and could have been put into such a condition as would render them safely habitable, while their demolition might not be justified, the cost of such repairs, alterations and additions as would be necessary to make them safe and in conformity with the requirements of the by-law should be taken into account in assessing the plaintiff's damages. Again, it may be that only partial demolition was necessary. All these matters should be carefully considered in estimating the damages which the plaintiff is entitled to recover. Moreover, it should not be forgotten that he built without a permit. If the character of his buildings was such — if they were so radically and fundamentally bad that he would not be entitled to a permit for them whatever alterations he

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made in them, however he strengthened and improved them, they had no real value and he sustained no substantial damages by their demolition, unless indeed it was so carried out that reckless and unnecessary injury was done to the building materials.

The appellant is entitled to his costs in this court and to his costs already incurred in the provincial courts. The costs of the assessment of damages will be dealt with in the Superior Court.

Appeal allowed with costs.

Solicitors for the appellant: *McAvoy, Handfield & Handfield.*

Solicitors for the respondent: *Ethier & Co.*