ALFRED JOYCE, - - - - - - APPELLANT;

AND

DAME CONSTANCE H. HART, ET VIR, - - RESPONDENTS.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE.)

Right of Appeal by Defendant (P.Q.)—Prepayment necessary to exercise Mitoyenneté—Demolition of Works.

The 38th Vic., c. 11, sec. 17, enacts that no appeal shall be allowed from any judgment rendered in the Province of Quebec, in any case wherein the sum or value in dispute does not amount to two thousand dollars. H. brought an action against J., praying that J. be ordered to pull down wall, and remove all new works complained of, &c., in the wall of H.'s house, and pay £500 damages, with interest and costs. H. obtained judgment for $100 damages against J., who was also condemned to remove the works complained of, or pay the value of "*mitoyenneté.*"

Held:—That in determining the sum or value in dispute in cases of appeal by a Defendant, the proper course was to look at the amount for which the declaration concludes, and not at the amount of the judgment (Strong, J., dissenting.)

Held:—That an owner of property adjoining a wall cannot make it common, unless he first pays to the proprietor of the wall half the value of the part he wishes to render common, and half the value of the ground on which such wall is built.

Held also:—That demolition of works completed may properly be demanded in a petitory action for the recovery of property and that the present action is one in the nature of a petitory action.

This was an appeal from a judgment of the Court of Queen's Bench for Lower Canada (Appeal side), compelling the Appellant to pay one hundred dollars damages for acts of trespass complained of by the Respondent, and ordering the Appellant to remove, within four months, all the works he had made in the gable wall of Respondent's house, in order to join his own house with the said wall, and to restore the wall in the state it was when the Appellant begun his works; unless,

PRESENT:—The Chief Justice, and Ritchie, Strong, Taschereau, Fournier, and Henry, JJ.

within the same delay of four months, the Respondent did proceed to have the wall and ground valued by experts named according to law, and pay to the Respondent the amount of indemnity required as would be determined by the Superior Court, on the report of the said experts, to render the wall a common or mitoyen wall; and, in case the Appellant failed to comply with this order, the Respondent was given power to remove the works complained of and restore his own wall in its original condition, at the costs and charges of Appellant.

The action was first instituted in the Superior Court for the District of Montreal, on 7th September, 1874, under the following circumstances :—

Mrs. Hart had acquired, in 1872, a lot of land on Durocher Street, in the City of Montreal, and had erected thereon a two-storey stone house, with mansard roof; later, the Defendant Joyce acquired the two lots of land on Durocher Street, adjoining Plaintiff's property, and, in the spring of 1874, proceeded to erect a three-storey brick building, divided into tenements, and, in the course of erection, joined his building to that of the Plaintiff, and used her north-west gable wall, which he desired to make a common wall.

In the declaration, the Plaintiff alleged that the Defendant had trespassed upon her property, by erecting his building contiguous thereto, using her wall as a division wall, and by piercing holes therein, and by destroying a portion of a water-spout and removing a console, thus changing the architectural appearance of the house; the whole being done against her will and formal protest, and without first having the matter settled by experts, in conformity with Art. 519 of the Civil Code; and concluded for the demolition of these new

works, and that Defendant be held to place the wall in the same state it was prior to the making of these works, and to pay the sum of five hundred pounds currency for damages.

The Defendant met the action, first, by a demurrer, *defense en droit*, denying any right of action on the part of Plaintiff to obtain the demolition of the works, which, as appeared from the allegations of Plaintiff's declaration, were completed before the action was brought; and also denying any right of action, other than for the indemnity fixed by law, for rendering the wall of Plaintiff's house common. Defendant also pleaded the same law-grounds by a second plea, of *Exception peremptoire en droit;* and, thirdly, answered specially, denying all the allegations of Plaintiff's declaration save as expressly admitted in their answer, alleging that in using the wall of Plaintiff's house as he had done, Defendant acted only as by law and custom he was allowed to do, said gable wall not being built entirely on Plaintiff's property; that before erecting his said building, the Defendant did request Plaintiff to have the indemnity determined and fixed, and did offer to pay such indemnity, but that Plaintiff refused to name an expert or have an *expertise* for said purpose; that Defendant acted in good faith and in accordance with the custom and practice of builders, and in a manner to cause no damage to Plaintiff; and that he, Defendant, deposited in Court, with his plea, the amount of indemnity as fixed by his own expert, after action brought, although such indemnity was not demanded of him by Plaintiff's action. Defendant also pleaded the general issue.

The Plaintiff answered generally: the parties were then heard upon the demurrer, which was dismissed by the judgment of the Superior Court, Montreal, of the thirtieth day of November, one thousand eight hundred and seventy-four.

The case was then inscribed for proof, and the evidence being finished, the case was heard upon the merits; and on the thirtieth day of April, one thousand eight hundred and seventy-five, the Superior Court at Montreal rendered judgment, dismissing Plaintiff's *demande*, in so far as it asked for the demolition of the works complained of, as the building of the Defendant with respect to which the Plaintiff complained, was done and completed before the institution of the action, and ordering an *expertise* for the determination of the question of damages.

From this judgment, as an interlocutory one, the Plaintiff obtained leave to appeal to the Court of Queen's Bench of Lower Canada, which Court, on the twenty-second of June last, rendered the judgment from which the present appeal arises.

JANUARY 16th, 1877.

Mr. *M. A. Hart*, on behalf of Respondent, made a motion to quash the appeal for want of jurisdiction, on the ground that the amount in dispute was settled by the judgment of the Court below, and did not exceed $2,000. In support of his motion he cited: *McFarlane* v. *Leclaire* (1); *Cuvillier* v. *Aylwin* (2) and Stats. L. C. (3).

Mr. *L. H. Davidson*, Q. C., *contra*, referred to *Richer* v. *Voyer* (4); *Buntin* v. *Hibbard* (5); and *In re Louis Marois* (6).

The Court reserved judgment on this point until after the argument of the appeal on the merits.

JANUARY 20, 22, 1877.

Mr. *L. H. Davidson*, Q. C., for Appellant:—

The action brought is one *en demolition de nouvel*

(1) 6 L. C. Jur. 170, & 15 Moore P. C. C. 181; (2) 2 Knapp's P. C. C. 72; (3) 34 Geo. III., c. 6, sec. 30; (4) 2 Rev. Leg. 244; (5) 1 L. C. L. J. 60; (6) 15 Moore P. C. C. 189.

œuvre, and when brought the new works complained of were completed. No action *en demolition de nouvel œuvre* lies when works are completed. It is only necessary to refer to the following authorities to establish the truth of this proposition. Carou *Actions Possessoires* p.p. 30, 31, 33, 40; Daviel, "Cours d'Eau," *Du Domaine Public*, par. 471; Ferriére (Dict.) *Verbo Denonciation de nouvel œuvre. Brown* v. *Gugy* (1) shows that authorities commenting the French code are inapplicable to this case. The French code is different from what the old French law was, and it is that law which prevails in Canada.

Appellant contends that in this action the conclusions of the declaration ask for the demolition of the whole wall, from top to foundation, and are strikingly like those given by the authors as conclusions in an action *en denonciation*, and dissimilar to those of an action *possessoire*. In a possessory action it is necessary to allege expressly, and prove positively, Plaintiff's possession for a year and a day before the *trouble*. *Cardinal* v. *Belanger* (2); C. C. L. C., Art. 946; 2 Doutre Proc. Civ., p. 258, Art. 1468; *Jourdain* v. *Vigereux* (3).

Nor can the Plaintiff's demand be maintained as one in the nature of an action *petitoire*. In that case the plaintiff would ask to recover the absolute and free ownership of her gable wall, and not demolition of works and damages. (4).

By Art. 518, C. C., Plaintiff's ownership is affected by the equal right of her neighbor to make use of the wall.

(1) 2 Moore, P. C. C. N. S., p. 341; (2) 10 L. C. J., p. 251; (3) Robertson Digest, p. 12; (4) See Ferrière (Dict.) *Verbo Petitoire*; 2 Demolombe, liv. II, tit. IV, Cap. II, No. 367.

Neither is prepayment of the indemnity mentioned in Art. 518 absolutely required. This article is a reproduction of Art. 594 of the *Coutume de Paris*, but the word *prepayment* is left out.

The Appellant therefore claims that the only action left to Plaintiff after completion of the works, was a personal action for damages. The decisions given in Louisiana under Art. 680 of the Louisiana Code, which is almost a copy of Art. 518 of our Code, are favorable to Appellant's contention that prepayment is not necessary, and that the only action which could be maintained is one of damages. *Graihle* v. *Hown* (1); *Murrell* v. *Fowler* (2); *Davis* v. *Graihle* (3).

Lastly, can this action be maintained as one of damages? The Appellant respectfully submits that it cannot. There was no wrongful act committed. By Art. 514, C. C., all the works complained of are allowed, and moreover by the judgment no special damages have been appropriated for the alleged trespass.

[The learned Counsel also referred to *Beck* v. *Harris* (4), Duranton, Vol. 5, p. 337 on Art. 657 of C., and Washburne on Easements, p. 472]

Mr. A. M. Hart, of the Montreal Bar, on the part of Respondent:—

Plaintiff, before being interfered with her acquired rights, and before the new works were proceeded with, was entitled, under Art. 518 and Art. 519, to be asked her consent and, on her refusal, Defendant could have caused to be settled by experts the necessary means to prevent the new work from being injurious to the rights of the other.

The decisions under Art. 661 of French Code, of

(1) 1 Louis Rep., p. 149; (2) 3 Louis Rep., p. 165; (3) 14 Louis Rep., p. 338; (4) 6 L. C. J. p. 206; (5) 13 L. C. J., p. 108.

which our Art. 518 is a reproduction, prove beyond all controversy that prepayment was necessary, and that Plaintiff can have an action not only after works were completed, but also an action in *rem.* against any subsequent purchaser of Defendant's property. *Pochet* v. *Des Rocher* (1); Demolombe (2); and Ferrot (3); *Odiot* v. *Rousseau* (4) is expressly in point. Although this case was not cited in any of the Courts below, your Lordships will be surprised to find how strikingly similar are the *considerants* of the judgment in that case with those of the judgment in this case given by the learned Chief Justice Dorion.

Now, as to the nature of this action, it is immaterial to Plaintiff whether the action of the Appellant for the removal of the works made on his gable wall is considered as of the nature of an action, *petitoire* or of an action *possessoire* and *en denonciation de nouvel œuvre.* By Art 20 of the C. C. P., it is sufficient that the facts and conclusions be distinctly and fairly stated, without any particular form being necessary, and, by referring to the following authorities, it will be seen that an action *en denonciation de nouvel œuvre,* can be merged into a petitory or possessory action. *Vide* Merlin, *Question de Droit* (5); Curasson, *des Actions possessoires* (6); Troplong (7).

The case of *Gugy* v. *Brown*, cited by Appellant, is not in point. In that case the question of *denonciation de nouvel œuvre* was only casually touched upon in a dissertation,and there was no adjudication as to whether an action asking for the removal of works illegally

(1) 40 Jour. du P., p. 638; (2) P. 408, No. 367, liv. 11; (3) Lois du Voisinage, p. 364; (4) 26 Jour. du P., p. 76; (5) Denonciation de nouvel œuvre, p. 6; (6) No. 23, p. 30 and p. 32; (7) Vol. I., Des Prescriptions Nos. 313, 328, 479 and 487.

placed on a Plaintiff's property could be maintained after the works were completed.

The contention that Plaintiff cannot recover damages for the trespass is not warranted. The English, as well as the French authorities, are clear on this point.

See *Shadman* v *Smith*, (1) and Fisher's Common Law Digest, p. 8384.

Mr. L. H. Davidson in reply :—

The evidence proves that Appellant acted in good faith, and that Plaintiff had no objection that the works should be proceeded with. The protest was insufficient, if she really objected to the works, she should have obtained an injunction, or, rather, instituted her action before the works were completed. The judicial interpretation given to the law on this point, in France, is different from that given by the Judicial Privy Council in *Gugy* v. *Brown*.

June 28, 1877.

THE CHIEF JUSTICE :—

In this case I have felt considerable difficulty as to the question of jurisdiction, but we have been referred to the Code of Lower Canada, which contains words relative to appeals either from the Circuit Court or from the Superior Court, similar to those used in the Statute establishing this Court in relation to appeals from the judgments of the Court of Appeals in the Province of Quebec.

The general rule is, that when the words of a Statute have received a judicial interpretation and the Legislature subsequently passes an Act on the same or a similar subject, using the same words, then you hold that the Legislature approved of the meaning affixed to the words by the Judicial decision.

(1) 3 Vol. Jurist, N. S. p. 1248.

I understand that the Judges and Courts in the Province of Quebec, before the passing of the Appeal and Exchequer Court Act, decided under the code that it is the amount claimed in the Declaration which gives the right to appeal and not the amount of the judgment.

I think we may here hold that such is the effect of the Act of the Dominion Parliament and that the Legislature so intended by the words used. We must, I apprehend, assume to a certain extent that the Dominion Parliament is aware of the proceedings and matters which are being transacted in the Provinces which compose the Dominion, and particularly as to the decisions of the Courts of Justice; and being aware of the decisions as to Appeals in Quebec, when the same legislative language as to Appeals from the Court of Appeals of Quebec is used, we may apply the rule referred to and hold this Appeal will lie.

The case seems to me to turn on two questions:

1. Whether the wall of Plaintiff's house was built wholly on her own land; and, 2nd, if so, whether the Defendant had a right to use it as a common wall, without first paying her for the same, or taking the steps necessary to make it a common wall, under sec. 578 of the Civil Code of Quebec.

The evidence called by the Plaintiff shewed the wall was erected three inches within the line of her lot; that this line was ascertained by the posts that had been planted by the surveyors, and the fence that then stood on the premises. The witnesses called by the Plaintiff were architects. The Defendant called a surveyor, and by his measurement, taking the house on the opposite side of Prince Arthur Street to be on the line of that street, then the wall of the Plaintiff's house was six inches off the line of Portland Street,

and, giving her lot 31 feet front, it would bring the north-west gable wall of Plaintiff's house directly on the line between Plaintiff's and Defendant's lots. Supposing the Plaintiff's lot thirty feet in rear, the wall would be somewhat in on Defendant's land.

He said he took no precise measurement of the rear of Plaintiff's house, and was not certain with regard to the excess in the rear of the house.

Mr. Justice Tessier, in his judgment as to this point, said Mrs. Hart had built her house wholly on her own land.

Mr. Justice Sanborn said the wall of Respondent's house was wholly on her own land, and was not mitoyen under article 518 C. C.

Chief Justice Dorion said the Plaintiff has established that she was proprietor of the wall when the works were made.

I should draw the same inference from the evidence that these learned Judges have, that the wall in question was built wholly on Plaintiff's land.

The decision on the demurrer in the Superior Court was in favor of the Defendant as to the right of Plaintiff to demand the demolition of the work of which she complained. Mr. Justice Johnson, in his judgment says: "that she built up to the limits of her lot, and, of course, the Defendant had the right to the *mitoyenneté*; but no experts were named to value it, and it is now too late to ask for the demolition. It would be obviously absurd to condemn this Defendant to demolish what he would have a right to build again the next day, upon the observance of the proper formalities."

The Plaintiff contends that the evidence shows that the wall in question was built wholly on her land, and

no agreement or understanding was had with the adjoining proprietor as to the expense of building; she, therefore, was the owner of the wall in question, and the Defendant was the owner of property adjoining a wall which he had the privilege of making common under article 518 of the C. C. of Lower Canada.

That article reads as follows:

"Every owner of property adjoining a wall has the privilege of making it common, in whole or in part, by paying to the proprietor of the wall half of the value of the part he wishes to render common, and half of the value of the ground on which such wall is built."

The Defendant contends that he had the right to make this a common wall, and to use it as such without first paying for it, and that the only way Plaintiff could prevent him from proceeding with the work or to have it demolished was to institute proceedings against him whilst the work was in progress, and before it was finished. That this must be done by an action of *dénonciation de nouvelles œuvres;* that, having failed to do so, the only remedy left was to sue for the value of half the wall, and the land on which it stands.

He also contended that there had been no trespass or damage done to Plaintiff, and that in resting the building against the gable wall of the Plaintiff's house he only exercised the right of making the wall common.

I think the Defendant's contention in this respect cannot be sustained, but that before he can exercise any rights as to this wall as a common wall, he must make it a common wall, which he has not done. Even if it had been a common wall under Article 519 he could not make any recess in the body of the wall or rest any work thereon without the consent of the neighbour or without, on refusal, "having caused to be settled by

experts the necessary means to prevent the new work from being injurious to the rights of the other."

It was further urged by Defendant that the action could not be considered as a possessory action, because it was not shewn that the Plaintiff was in possession a year and a day before the *trouble*, and it is not so alleged in the declaration.

It is alleged in the declaration that she purchased the property in December, 1872; that about the first of May, 1873, she began to build her house on the lot, and it was finished and occupied on the 15th December, 1873. The action was commenced in September, 1874, certainly more than a year and a day after the Plaintiff had taken possession of her lot by beginning to build upon it. The only person who speaks of the time Defendant began to encroach on Plaintiff's wall was Plaintiff's son; he said it was in the beginning of July, 1874. The learned Chief Justice Dorion, in his judgment, seems to think she was in possession of the wall more than a year and a day before the commencement of Defendant's works. However that may be, it is not necessary to maintain the action against the Defendant, that she should state in her declaration or shew in evidence that she was in possession for a year and a day before the *trouble*. It is not denied she was in possession at the time the trespass was committed, and that she was the owner of the premises. The action seems to be in substance that the Defendant, the Appellant, had taken upon himself illegally to make in the north-west wall of Plaintiff's house holes and recesses which had caused her damage, and had applied and rested his works on her property without her consent and without having first notified her or taken and observed the formalities required in such cases. That he had trespassed on her

property for about six inches, had broken and taken away ten feet of the water spout of her house; had raised the wall five feet in height, and made thereon a work in brick and cut stone which altered the appearance of her house and rendered it of less value than it was before; the whole without her consent, and without having placed her *en demeure* to name experts to establish the means to render the works as little injurious to her as possible.

The Plaintiff Respondent contended for the demolition of the new works, that Defendant be held to fill up the holes and recesses which he had caused to be made in the wall, to place the whole in the state it was prior to the making of these works, and to pay £500 for damages for the trespass in question.

This shows a trespass on Plaintiff's property, and she claims damages for the injury.

The ground on which Defendant urges that Plaintiff could not maintain a petitory action, is that the wall was a common wall, but as that is not the case and no other objection is urged, I think the petitory action proper.

The Defendant contends also that the article 518 of Civil Code does not require the prepayment to the proprietor of half the value of the part of the wall he wishes to render common. If it were a case of first impression, I should be prepared to hold that the article conferred the privilege of making the wall a common wall, the paying half of the value of the wall and land to be considered a condition precedent to the wall becoming *mitoyen*. This, I think, is the proper interpretation of the article. Mr. Davidson referred to No. 154 of the Custom of Paris: "If "anyone wishes to build against a wall *non-mitoyen*,

" he can do so on paying the half as well of the said " wall as of the foundation thereof, as far as the height " of the wall *non-mitoyen*; this he is held to pay " before either demolishing anything or building."

I think this is, in effect, the same as article 518 of the Code.

The only ground for contending that the Defendant might use the wall, if it was wholly on Plaintiff's land, was that conferred by the 518th article of the Code, and as that neither in terms or by implication confers the right of making it *mitoyen* until it was paid for, I fail to see how it can justify trespassing on it. Even if it were *mitoyen*, he could not make holes in it nor rest his works thereon without consent, unless he settled by experts the means of preventing the new work from being injurious to the other owner under Art. 519.

Mr. Justice Tessier, in his judgment, refers to the appropriation, by the Defendant, of the half of his neighbor's wall, and of the ground on which it stands, as a kind of forced expropriation. He says: "It is a general principle of expropriation that the individual is paid beforehand, and he cited article 407 of the Code: 'No one can be compelled to give up his property, except for public utility and in consideration of a just indemnity previously paid.' If it were otherwise, Mrs. Hart would lose her right *in rem*, and nothing would be left her but a recourse *ad personam* against Mr. Joyce, who might be solvent or insolvent. It, therefore, follows that Mrs. Hart should pursue her right of action *in rem* for the demolition of the new work, or the replacement of her wall in the state it was without innovation."

The learned Chief Justice Dorion said the Plaintiff

does not complain that the Defendant erected his building on his own lot, but that he has appropriated one-half of the wall of her house, by erecting his building on it and over it. It is not an action *en dénontion de nouvel œuvre*, the conclusions of which are that the party, Defendant, should discontinue his works, but an *action petitoire*, by which Plaintiff says: "I am sole owner of the gable wall of my house; you have committed a trespass by building upon it; I ask that you be ordered to remove your building from it, and to restore the wall to its original state." There is not an author or judicial decision to be found to show that this is not a proper action, and that it ought to be dismissed, because the works were completed when the action was brought."

I think this is the proper view to take of Plaintiff's case, and that the action is maintainable.

Mr. Davidson referred to Demolombe, (1) to show the only action Plaintiff could take was a personal action for the value of the wall. The first part of the citation reads thus (translated): "But if the "proprietor of a wall, for any reason whatever, has "not received the price of the *mitoyenneté* acquired, "could he claim the privilege of his debt in a case "where the circumstance would render the exercise of "this privilege possible? The Court of Paris has "adjudged in the negative, holding that article 661 "gives him only a personal action." But the author further continues: "It is a fact, however, that the pro-"prietor has sold an immoveable, and we cannot see "why he could not, as well as any vendor of an "immoveable, claim the privilege of his debt. Article "661 does not give him a personal action, for it has

(1) Vol. II., No. 367, p. 408.

" been decided, and correctly, in our opinion, in 1843, " in the case of Pochet, Desrocher's Journal du Palais " Vol. 40, p. 368, that an action would lie against a " subsequent purchaser."

The case of *Rousseau* v. *Odiot*, referred to by Mr. Hart, well sustains the view that an action will lie similar to this, though the work complained of has been completed; having reference to Article 661 of Code Napoleon, which is to the same effect as Article 518 of Civil Code of Lower Canada.

The report is to the following effect (translated):—

DeCourt had built a house adjoining the wall of a house belonging to Odiot, and Rousseau bought it at a public sale. Odiot sued DeCourt and Rousseau to have the building demolished or to pay the value of the wall and charges. The judgment was "considering that " when a party has taken his neighbour's wall the abso- " lute owner has a right to get back possession if he " has not been paid the value of the *mitoyenneté*, and that " it gives him a right to an action *in rem* against any " subsequent holder of the property; the claim of M. " Odiot is, therefore, well founded against DeCourt and " Rousseau, saving to the latter his rights against " DeCourt." The concluding part of the judgment was: "The Court doth condemn DeCourt and Rousseau to " demolish within a fortnight after the notification of " the judgment, the works erected alongside of the wall " of Odiot's house, and on their failing to comply with " this order Odiot is authorized to do so at the expense " and cost of Rousseau, provided always Rousseau " refuses to pay, after the amount has been settled by " experts, the value of the *mitoyenneté* and interest and " costs."

This was appealed and judgment affirmed.

At the time the case of *Gugy* v. *Brown* (1) was decided in the Privy Council, the Civil Code was not in force in Lower Canada, if that would make any difference. This action, however, is not at all like the case of *Gugy* v. *Brown*, for the Plaintiff complains here of acts done by Defendant on her property, whereas in *Gugy* v. *Brown* what was complained of was done on the Defendant's own property, or at all events not on the property of the Plaintiff.

I see no reason why the judgment of the Court of Queen's Bench should be interfered with.

RITCHIE, J:—

As to the jurisdiction of this Court in this case, I will say that I would be very much impressed with the line of argument taken by Mr. Justice Strong, but for the fact that a judicial construction was given to these terms by the Lower Canada Bench before the Supreme Court Act was passed. I am, therefore, of opinion that the appeal is properly before us. I entirely agree with the judgments delivered in the Court of Appeal. Respondent in Court below (Appellant in this Court) had no right to use Plaintiff's wall without having taken the necessary legal steps to secure the right, and having first indemnified Plaintiff, by paying for one half the value of the wall and ground on which erected; pre-payment being, in my opinion, expressly required before the owner of a property adjoining a wall obtains the privilege of making it common.

STRONG, J.:—

I am of opinion that the motion to quash this appeal which was made by the Respondent ought to be granted unless the Appellant, within a reasonable time, files

(1) 2 M. P. C. C., N. S., p. 341.

an affidavit shewing that the Defendant's works, which the judgment orders the demolition of in the event of the Defendant not making the wall common are of the value at least of $1,900, which, with the damages ($100), would make up the sum of $2,000.

I feel bound by Lord Chelmsford's judgment in *McFarlane* v *Leclaire*, (1) to hold that to ascertain if this Court has jurisdiction in appeals from the Province of Quebec, under Sect. 17 of Supreme Court Act, we are, in cases of appeals by a Defendant. to take the amount awarded by the judgment as the amount in dispute.

If the judgment deals in any way with property of which the value is not ascertained by the judgment itself, I am of opinion that an affidavit should be filed shewing the value of the property. This was the practice followed in the Supreme Court of the United States in the case of appeals from the Circuit or District Courts, which were limited to cases in which "*the matter in dispute exclusive of costs*" exceeded the sum or value of $2,000. The Supreme Court adopted precisely the same rule as that laid down in the Privy Council, and held that, if a judgment was recovered against a Defendant for a less sum than $2,000, there was, on the part of the Defendant, nothing in controversy beyond the sum for which the judgment was given, and that consequently he was not entitled to appeal or bring a writ of error. (2). In an old case in the Supreme Court, the question arose where the judgment appears not to have been for the recovery of damages but *in rem*, and the Court there made an order that the Plaintiff in error should be at liberty to shew by affidavit that the matter in dispute

(1) Curtis Comment: Vol. 1, p. 220, *Columbian Insurance Company* v. *Wheelwright*, 7 Wheat, 534;

exceeded in value $2,000 (1). I refer to several authorities on this question (2).

The majority of the Court being, however, of opinion that the value of the matter in dispute is to be ascertained by reference to the amount of the damages for which the declaration concludes, my opinion is overruled.

I therefore proceed to state briefly my judgment on the merits:

I consider this case does not call for any adjudication upon the question whether the action of "*dénonciation de nouvel œuvre*" is or is not a possessory action distinct from the ordinary possessory action of "*complainte*"; or whether it lies for works erected on the Plaintiff's land or only on the Defendant's own land to the prejudice of the Plaintiff; or whether demolition may be ordered after the works are completed or only when they are in an unfinished state; all subjects of much controversy, though they seem now to be settled by the general consent of commentators and authors who have written on the subject.

The declaration contains no allegation of possession for a year and a day before the "*trouble*", which would be fatal to it as a possessory action.

It is, as far as I am able to give an opinion, a petitory action brought to recover property of the Plaintiff of which the Defendant has illegally possessed himself; it libels all the facts necessary to such an action and the conclusions are adapted to it. That demolition of works completed, as well as works unfinished, may properly be

(1) *Course* v. *Stead's* Executors, Curtis, Commentaries on U. S. Courts, in Append. 4, p. 577. (2) 1 Abbott's Practice, U. S. Courts, par. 336; 2 Abbott's Practice, U.S. Courts, par. 263; *Winston* v. *U.S.*, 3 How., 711; *Lee* v. *Watson*, 1 Wallace, p. 337; Powell on Appeals, pp. 87, 88; *Hagar* v. *Foison*, 10 Pet., 160; *Ex. p. Bradstreet*, 7 Pet., 634, 647; Conkling's Practice, pp. 42, 54, 654, 655.

made an incidental demand in a petitory action for the recovery of property is very clear on many authorities (1).

When the Plaintiff, by his conduct, has induced the Defendant to proceed with his works in error, or in the belief that the Plaintiff acquiesced in the prejudice caused to his rights, I take it for granted that an exception, analogous to an exception of fraud, might be opposed to the action. Take, for instance, the case of the Defendant making a large expenditure in building on his own lands to the prejudice of an insignificant servitude of the Plaintiff, the Plaintiff could not, after passively awaiting the termination of the work, in either a possessory or petitory action, insist on the demolition of the buildings. Again, if the Defendant believed himself to be building on his own land, whilst the Plaintiff knew he was on the Plaintiff's land, it would be conduct amounting to fraud on the part of the Plaintiff silently to permit the Defendant to complete his erections and then turn round, assert his title, and ask to have the buildings destroyed.

In the present case nothing of this kind occurred, for the protest made by the ministry of a notary, in due form of law, gave early notice to the Defendant that he was infringing on the Plaintiff's rights, and put him in such a position that all he did subsequently was done with full knowledge, and at his own risk and peril.

Then the Court of Appeals, having it in their power to award immediate unconditional demolition, thought fit to interpose a delay and conditions in favor of the efendant, by giving the Defendant an opportunity of making the wall common. The Defendant's Counsel

(1) Belime Act: Poss: No. 369; Molitor, Vol. 3, La possession, pp. 219, 220, 221, No. 122 *et seq.*; Curasson, t. 2, No. 2; Troplong de la Prescription: No. 325; Bioche Act: Poss., p. 29.

however, insists that this had already been done, for that under Art. 518, Civil Code of Lower Canada, which corresponds with Article 661 of Code Napoleon, the payment of half the value of the wall and of the soil on which it was built, was not a condition precedent to making it common, as it was expressly under Art. 194 of the Custom of Paris. This, however, cannot possibly be so; this right of a proprietor to make his neighbour's wall "*mitoyen*," is a species of expropriation for purposes of public utility, and prior indemnity is always a condition of such a mode of forced acquisition, which, indeed, the words of Article 518, though not so explicit as the article of the Custom, seem to contemplate.

If any authority were wanting to negative such a proposition, it is to be found in the case cited in the Journal du Palais (1), an arrêt of the Paris Court of Appeals, corresponding exactly with the judgment of the Court of Queen's Bench in the present case. This arrêt also shows that the demolition may be awarded in such an action as this, for the case of *Odiot* v. *Rousseau* could not have been a possessory action, since it appears to have been originally instituted in the civil tribunal.

I am, therefore, of opinion the appeal should be dismissed with costs.

TASCHEREAU, J. :—

La première question que nous devons décider en cette cause, est celle de savoir si l'appelant avait droit d'appel. Les intimés prétendent que le montant que l'appelant

(1) *Odiot* v. *Rousseau*, 26 Jour. du Palais, p. 76. Also *Desrochers* v. *Blanchette* 40 Jour. du Palais p. 638.

a été condamné à leur payer n'étant que de $100, en sus d'une condamnation à défaire certains ouvrages par lui érigés sur la propriété des intimés et dont la valeur n'est ni alléguée ni prouvée être d'un montant suffisant pour couvrir les $2,000, montant requis par la section 17 du statut érigeant la Cour Suprême pour donner droit d'appel, ce droit d'appel n'appartient pas a l'appelant et que son appel devrait être renvoyé. En un mot les intimés prétendent que ce n'est pas le montant demandé par l'action originaire qui doit régler le droit d'appel, mais bien le montant accordé par le jugement.

Nous n'adoptons pas dans le même sens que les intimés, la section 17 de l'acte de la Cour Suprême qui règle le droit d'appel quant à ce qui concerne la province de Québec qui est en ces termes : " Pourvu que nul " appel d'un jugement rendu dans la province de " Québec, ne sera permis dans les causes où la somme " ou la valeur de la chose en litige ne s'élève pas à deux " mille piastres."

De son côté l'appelant prétend que le droit d'appel n'est pas réglé par le montant ou la valeur de la matière en litige.

Cette question n'est pas nouvelle et elle a déjà été soulevée devant nos tribunaux civils en la province de Québec, à propos du droit d'appel de la Cour du Banc de la Reine au Conseil Privé de Sa Majesté. L'article 1178 du Code de Procédure Civile qui permet ces appels est, à peu de chose près, dans les mêmes termes que ceux de la section 17 de l'acte de la Cour Suprême savoir : " Il y a appel à Sa Majesté en son Conseil Privé de tout " jugement dans une cause où la matière en litige " excède la somme ou valeur de £500 sterling." On voit qu'il n'y a de différence que dans le montant.

Pendant quelque temps en la province de Québec, les

tribunaux par quelques majorités ont adopté la manière d'interpréter ces section et article dans le sens que leur donnent les intimés ; mais ces décisions n'ont pas été confirmées ni approuvées, je crois au contraire qu'elles ont été sévèrement blâmées, et en effet depuis plusieurs années les tribunaux civils de la province de Québec les ont renversées ; ils ont interprété ces articles du Code de Procédure Civile comme réglant que le droit d'appel serait déterminé par le montant réclamé ou la valeur de la matière en litige, donnant ainsi le droit d'appel à l'une ou l'autre des parties qui se croirait lésée par le jugement. La même question soulevée quant aux appels de jugements de la Cour de Circuit à la Cour Supérieure, et quant à ceux de la Cour Supérieure à la Cour du Banc de la Reine a été jugée dans le même sens.

En la présente cause, il est indubitable qu'il est demandé deux mille piastres de dommages, et de plus, que le défendeur soit condamné à démolir certains travaux de grande valeur. La somme ou la valeur de la chose en dispute est évidemment d'au moins deux mille piastres ; les demandeurs, présents intimés, ont fait leur position et ont admis que la chose en litige était d'au moins $2,000, mais le jugement de la Cour d'Appel ne leur accorde que $100 de dommages et les oblige à remettre la maison des intimés dans le même été qu'elle était avant les voies de fait dont ils se sont plaints. Et les intimés qui très probablement auraient eu droit d'appel de ce jugement qui ne leur accorde que $100 lorsqu'ils en ont demandé $2,000 pourraient refuser à l'appelant le même droit d'appel sur le principe que pour *lui seul*, la valeur de la matière en litige n'est que de $100.00 ? Comme je l'ai déjà dit les décisions du plus haut tribunal de la province de Québec, ont fait justice de

ces prétentions, et aujourd'hui il n'y a plus de doute que le droit d'appel est reglé tant en faveur d'un demandeur qu'en faveur d'un défendeur par le montant originairement réclamé par l'action et non par le montant adjugé. Il serait singulier qu'un demandeur qui prétendrait avoir un bon droit d'action pour un montant de $2,000 pût être forcé de renoncer à son droit d'appel sous prétexte que n'ayant obtenu que $100, la matière en litige ne représente pas un montant suffisant pour lui donner droit d'appel et qu'il lui faut accepter ce verdict comme final. Un défendeur poursuivi pour $2,000.00 mais condamné seulement à payer $1,999.99 se verrait également privé de son droit d'appel parce qu'il aurait plu à une autorité quelconque de ne le condamner que juste pour un montant qui lui enlèverait son droit d'appel, droit qu'un centin de plus dans le chiffre de sa condamnation lui assurerait. Je crois que le montant réclamé doit régler le droit d'appel et non pas le montant de la condamnation.

Quant au mérite de la demande et de la défense, je dirai que les faits qui y ont donné lieu sont peu compliqués et se réduisent à la plainte que forment les intimés contre l'appelant d'avoir commis certaines voies de fait contre la propriété des intimés, savoir, de s'être emparé du mur du pignon de leur maison, d'y avoir fait des surcharges, d'y avoir fait des trouées et des ouvertures en bâtissant lui-même à côté et d'avoir traité ce mur comme mitoyen tandis qu'il ne l'était pas, et surtout d'avoir fait tous ces empiètements sans avoir pris les moyens d'acquérir la mitoyenneté et d'en avoir payé la valeur.

Les faits sont incontrovertibles et ne font aucune difficulté, et l'Appelant a été condamn épar la Cour du Banc de la Reine à défaire ses travaux et à payer $100 de

dommages aux Intimés. Je crois le jugement bon, tout en déclarant que lors de la plaidoirie devant nous, mon impression était en faveur de l'Appelant, et ce qui contribuait alors à me faire considérer la position des intimés sous un jour très défavorable était le fait (lequel ne semblait pas nié par eux) que les travaux dont les intimés se plaignaient avaient été commencés et complètement terminés par l'Appelant au vu et su des Iintimés et sans protestation de leur part. Je me disais et je crois avec raison qu'après avoir vu l'Appelant faire les ouvrages en question, sans objection de leur part, il y avait consentement tacite, sinon formel de leur part à ce que l'Appelant acquit ainsi la mitoyenneté et que la question de l'indemnité n'était que secondaire entre des voisins et devait se régler à l'amiable ;—et dans ce cas il me semblait remarquer une grande rigueur dans le jugement dont est appel, lequel condamnait l'Appelant à payer des dommages pour avoir fait ce qu'il pouvait faire sous certaines conditions préalables, il est vrai, mais dont les Intimés me semblèrent le dispenser en ne s'y opposant pas, ou en ne protestant pas. Mais la lecture du dossier m'a convaincu que l'Appelant a été protesté dès le commencement des travaux faits par lui, et que sous le prétexte que le protêt notarié qu'il avait reçu était rédigé en langue française, il avait renvoyé ce protêt aux Intimés. L'Appelant a eu grand tort en agissant ainsi: si vraiment il ne pouvait comprendre le français il devait se faire expliquer ce protêt et discontinuer ses opérations. Dès ce moment il était constitué en mauvaise foi et ne pouvait plus se méprendre sur le silence des Intimés : il violait la propriété de son voisin et agissait en contravention de l'article 518 du Code Civil de la province de Québec qui l'obligeait de payer, avant que de rien entreprendre contre le mur des

intimés, la valeur du droit de mitoyenneté qu'il prétendait acquérir et la valeur du sol dont il s'emparait.

Il a été condamné et je crois avec raison, et quoique les dommages me paraissent un peu au-dessus de la réalité, je considère que sa conduite a été précipitée et blâmable. Je suis d'opinion de renvoyer l'appel au mérite et de confirmer le jugement de la Cour du Banc de la Reine.

FOURNIER, J:

La preuve en cette cause démontre de la manière la plus convaincante le fait que l'Intimée, Mde. Hart, a bâti le mur de sa maison entièrement sur son terrain, dans la ligne de division.

Son voisin l'Appelant, Joyce, sans avoir payé ou fait aucune offre réelle de payer la valeur de la moitié de ce mur et le prix de la moitié du terrain sur lequel il est bâti, a exercé, comme s'il les avait légalement acquis, les droits de mitoyenneté dans le mur en question, en y faisant pratiquer les ouvrages dont l'Intimée se plaint dans sa déclaration. Le pouvait-il ? Il le prétend dans sa défense, alléguant qu'il n'a fait qu'user de la faculté donnée par la loi, d'acquérir la mitoyenneté et qu'il a toujours été prêt à payer la moitié du mur. Suivant lui, la loi n'exige pas le paiement préalable de l'indemnité pour devenir mitoyen. Cette prétention est évidemment erronée. L'article 518 C. C., quoique moins explicite que l'article 194 de la Coutume de Paris, n'en contient pas moins la même condition de paiement préalable. Cet article donnant "au propriétaire joignant un mur la faculté de le rendre mitoyen *en remboursant* au propriétaire la moité de la valeur de la portion qu'il veut rendre mitoyenne et moitié de la valeur du sol sur lequel le mur est bâti," est identique avec l'article 661

du Code Civil français. Bien que dans ce dernier article, comme dans le nôtre, il y ait omission des expressions de l'article 194 de la Coutume de Paris au sujet du paiement du droit de mitoyenneté "*ce qu'il est tenu payer paravant que de rien démolir, ni bâtir*," on n'a cependant pas cessé en France, depuis le Code, d'exiger le paiement préalable;—le privilége n'étant donné qu'en *remboursant* la moitié de la valeur, etc., dépend par conséquent de l'accomplissement de cette condition. Ce droit n'est pas acquis avant ce paiement. Cela résulte bien clairement des termes des deux articles. C'est ainsi que les commentateurs du Code français ont interprété l'article 661, et c'est aussi, sans doute, l'interprétation que nous devons adopter pour l'article 518 puisque la rédaction est la même. Si elle laissait un doute sur sa signification, ce que je ne pense pas, on pourrait alors recourir à l'article 407 exigeant l'indemnité préalable dans le cas d'expropriation forcée pour cause d'utilité publique. Puisque c'est pour cette raison que la législation française a adopté cette modification du droit de propriété, on pourrait donc sans inconséquence appliquer à l'acquisition du droit de mitoyenneté la disposition de l'article 407. Mais l'accord des commentateurs sur l'interprétation de l'article 661 C. N. (Article 518 de notre code) nous dispense d'aller au-delà de l'article lui-même pour trouver la solution de cette question.—*Toullier, Droit Civil*, vol. 3., No 195. "Le prix (de la mitoyenneté) est fixé par des experts, si les deux voisins ne peuvent s'accorder, et le prix doit être payé *préalablement* à toute entreprise." *Demolombe*, vol. 11, No. 367. "L'indemnité doit être payée au propriétaire du mur préalablement à toute entreprise." Plus loin il ajoute: "L'article 661 d'ailleurs a si peu voulu lui accorder une action purement personnelle que l'on a décidé fort justement, à

notre avis, que son action pouvait être formée contre tout tiers détenteur de l'héritage voisin." Il cite plusieurs arrêts à l'appui de cette proposition.

Solon, Servitudes réelles, No. 145. "La vente de la mitoyenneté d'un mur ne peut être forcée que moyennant une juste et préalable indemnité."

No. 146. "Les parties peuvent fixer d'un commun accord, le montant de l'indemnité, si elles ne peuvent s'accorder sur ce point, il faut qu'elles conviennent au moins, de la nomination d'un ou de trois experts, et si enfin leur caprice va jusqu'au point de ne pouvoir s'entendre sur cette nomination, il faut que l'acheteur fasse désigner les experts par la justice et à ses frais."

No. 147. "Dans tous les cas, celui qui veut acheter la mitoyenneté ne peut prendre possession du mur, c'est-à-dire qu'il ne peut y adosser aucune construction, y adosser aucun appui, sans avoir préalablement payé le prix d'achat. C'est bien assez de forcer un individu de vendre, contre son gré, la chose qui lui appartient, sans l'exposer à perdre le prix ou à plaider pour l'obtenir." Voir aussi : *Pardessus, Traité des servitudes*, No. 153, p. 365.

Duranton, vol. 5, No. 328. "Lorsque la mitoyenneté n'est pas cédée à l'amiable, celui qui la réclame doit aire signifier une sommation de cession avec offre d'un prix suffisant." * * * Un peu plus loin l'auteur ajoute que l'expertise judiciaire n'est pas de rigueur.

"Nous pensons, dit-il, sans difficulté que l'acquéreur pourrait faire offre réelle de l'indemnité, et forcer ainsi le vendeur à l'accepter telle qu'elle serait faite ou à soutenir son insuffisance. Le procès qui aurait lieu sur ce point serait à la charge de l'acquéreur, s'il n'avait point fait une offre suffisante, tandis qu'au contraire, les frais en seraient supportés par le propriétaire du mur, si son refus n'était pas fondé."

Par ce qui précède on voit qu'avant de toucher au mur de l'Intimée, la loi traçait à l'Appelant une conduite toute différente de celle qu'il a suivie. Ayant négligé d'avoir recours aux procédés indiqués pour l'acquisition de la mitoyenneté, il n'a pu sans violation du droit de propriété de l'Intimée, faire les travaux dont elle se plaint à bon droit. Mais il répond à celle-ci que l'action qu'elle a portée contre lui et qu'elle désigne sous le nom d'*action en démolition de nouvelles œuvres*, ne lui compète point, parce qu'elle aurait dû être émanée avant la fin des travaux dont elle demande la démolition. Sous le droit antérieur au code cette objection eût été fatale, mais il n'en peut être de même aujourd'hui. Sous le Code Civil de la province de Québec, comme sous le Code Napoléon, cette action a perdu le caractère particulier qu'elle avait autrefois. Ce n'est plus aujourd'hui, en France comme ici, qu'une action possessoire ordinaire qui peut être exercée avant ou après la fin des travaux considérés comme trouble. Ce changement résulte du silence du code comme le dit *Daviel*, "*Cours d'Eau*": "Sous notre nouveau droit la dénonciation de nouvel œuvre est assimilée aux autres actions possessoires, parce que les lois n'ont pas reproduit les conditions particulières qui la caractérisait autrefois." Cette omission a également lieu dans notre code. Concourant pleinement dans les vues exprimées sur la nature d'une telle action dans les savantes dissertations des honorables juges de la Cour du Banc de la Reine, je regrette cependant d'avoir à ajouter que je ne les crois pas toutes applicables à l'action de l'Intimée que je considère comme étant seulement de la nature d'une action pétitoire.

Pour en faire une action possessoire la déclaration manque d'un élément essentiel: l'allégation d'une possession légale pendant l'an et jour avant le trouble qui

donne lieu à la plainte. D'accord avec l'honorable juge qui a renvoyé la défense en droit par laquelle l'Appelant prenait avantage de cette objection, je trouve, comme d'ailleurs la Cour du Banc de la Reine l'a fait aussi, des allégations suffisantes, pour accorder la plupart des conclusions prises par cette déclaration.

Je considère cette action comme bien portée parce qu'elle contient les éléments de l'action pétitoire. La dénomination erronée donnée par l'Intimée à son action ne peut avoir aucun effet. J'adopte entièrement sous ce rapport l'opinion ainsi exprimée par l'honorable juge en chef Dorion, sur le caractère de l'action : " The action " of the appellant is not an action *en dénonciation de* " *nouvel œuvre*, the conclusion, of which are that the " party defendant should discontinue his works, but an " *action pétitoire* by which appellant says : I am the " the sole owner of the gable wall of my house, you " have committed a trespass by building upon it, I ask " that you be ordered to remove your building from it, " and to restore the wall in its original state. There is " not an author or a judicial decision to be found to " show that this is not a proper action and that it ought " to be dismissed, because the works were completed " when the action was brought." Cette manière d'envisager l'action de l'appelant est conforme aux principes posés dans le jugement de la Cour Royale à Paris le 22 juin 1834, dans la cause de *Odiot* v. *Rousseau*. (1) Les faits ont tant de similitude avec ceux de la cause actuelle que je crois devoir la citer en entier pour en faire voir la parfaite application à la cause maintenant sous considération.

" COUR ROYALE DE PARIS, 22 JANVIER 1834."

" *Lorsque le voisin a pris le mur de son voisin pour le*

(1) 26 Jour. du Palais, p. 76.

" *rendre mitoyen, celui à qui le mur appartient exclusive-*
" *ment a le droit de le reprendre, s'il n'est pas payé de la*
" *valeur de la mitoyenneté.*

" *Ce droit donne lieu à une action réelle qui peut être*
" *exercée contre tout détenteur de l'immeuble en quelques*
" *mains qu'il passe C. C., art.* 661.

ODIOT *v.* ROUSSEAU.

" Decourt avait construit une maison contre le mur de
" la maison voisine appartenant à Odiot.

" Rousseau achète la maison de Decourt par adjudica-
" tion publique.

" Le contrat était transcrit et les notifications faites aux
" créanciers inscrits, lorsqu'Odiot assigna Rousseau et
" Decourt à l'effet de démolir les constructions adossées à
" son mur, sinon à payer les droits de mitoyenneté et de
" surcharge.

" Le 23 Mars 1833, jugement du tribunal civil de la
" Seine qui admet cette demande. ' Attendu qu'aux ter-
" ' mes de l'art. 658 et 661, C. Civ., tout propriétaire joi-
" ' gnant un mur a la faculté de le rendre mitoyen en tout
" ' ou en partie, en remboursant au maître du dit mur les
" ' droits de mitoyenneté et de surcharge. Attendu que
" ' lorsque le voisin a pris le mur de son voisin pour le
" ' rendre mitoyen, celui à qui il appartient a le droit de le
" ' reprendre s'il n'est pas payé de la valeur de la mitoy-
" ' enneté ; que ce droit donne lieu à une action réelle, qui
" ' peut être exercée contre tout détenteur de l'immeuble,
" ' en quelques mains qu'il passe, qu'il en résulte que la
" ' réclamation du sieur Odiot est fondée tant contre De-
" ' court que contre Rousseau, sauf le recours de ce dernier
" ' contre Decourt : Par ces motifs condamne Decourt et
" ' Rousseau à faire démolir dans la quinzaine de la signi-
" ' fication du présent jugement les constructions élevées
" ' contre le mur de la maison d'Odiot ; sinon et faute de

" ' ce faire dans le dit délai, et icelui passé, autorise dès
" 'à présent le sieur Odiot à faire faire les démolitions aux
" ' frais, risques et périls des défendeurs, si mieux n'aiment
" ' ces derniers payer au dit sieur Odiot dès après le règle-
" ' ment contradictoire, la somme à laquelle montent les
" ' droits de mitoyenneté et de surcharge, plus les intérêts
" ' à compter du jour de la demande.' "

Par le dispositif du jugement qui n'est sans doute que la répétition des conclusions prises par le demandeur, il est évident que l'action d'Odiot devait être semblable à celle de l'Intimée. Les arrêts et jugements consacrant ce principe sont nombreux.

Le jugement de la Cour du Banc de la Reine adjugeant les conclusions de démolition, sous l'alternative de payer, étant conforme à la jurisprudence et aux opinions des commentateurs, doit être confirmé avec dépens.

HENRY, J. :—

A motion was made in this case to set aside the appeal, on the ground that the judgment being under $2,000 an appeal does not lie and we have, therefore, no jurisdiction.

We have heard the arguments on the merits in this case, but we must first dispose of the preliminary question, as upon it depends our power to deal with the subject-matter.

The case is not without some difficulties.

The Statute says the appeal shall not be had in the Province of Quebec in any case wherein the sum or value in dispute does not amount to two thousand dollars. When the writ and declaration are served, the amount claimed in the latter as debt or damage is clearly the amount then in dispute, and so remains, at least till verdict. It has been held by high authorities that the sum or value of the matter in dispute is then

affected by the verdict, and if the amount the Defendant would then have to pay to settle the Plaintiff's demand be under $2,000, he would not be entitled to an appeal, although the Plaintiff, if dissatisfied with the judgment, would be entitled to one. A manifest inequality between the position of the parties would be thus established that ought not, I think, to exist if it can be properly avoided. The Plaintiff, by the operations of that system, qualifies himself, by the insertion of a large sum as a claim in his declaration, to ask for an appeal, in case the judgment should be against him, or he should be dissatisfied as to the damages awarded him. On the trial, however, he might feel it his interest to deprive his opponent of the appeal by taking means to have a verdict for less than an appeal would lie for, if that would avail to prevent the Defendant's appealing. He could do this by asking damages only to a certain amount, and no Judge or Jury would in that case be likely to give him more. Construing the Statute in a manner to permit of this being done, would, I think, be unjust to a Defendant, and I am of opinion that where a Plaintiff, by claiming over two thousand dollars, secures to himself the right to appeal, in such a case an appeal should lie also at the instance of the Defendant. If the Plaintiff thus secures to himself the right of appeal, and the right to go before the highest legal tribunal, he should not complain that his adversary should, if necessary, do the same. In regard to the legal rights of the parties, they are thus placed on an equal footing, and if the Plaintiff, when bringing his suit, is to take his chance of being satisfied with the judgment the Court of last resort in the Province of Quebec may give, he has the power, by limiting the claim in his declaration, of confining the final decision of his case

to that tribunal. It has not been done so in this case, and I am of opinion the appeal is therefore regular.

With all due deference to those entertaining an opposite opinion, I cannot bring myself to the conclusion that the Legislature intended to apply the restriction to cases where but one party could avail himself of the privilege of appealing. I feel bound, therefore, to construe the provision of the Statute in question as intended by the Legislature not to give an absolute right to one party and leave that of the other dependent, it may be, on the finding, upon doubtful evidence, of a Judge or Jury, or, what would be worse still, the contrivance or cunning management, on the trial, of the Plaintiff himself. Being clearly of the opinion that justice and equity favour this view, I am, I think, bound to declare that the Legislature so intended it. The views I have expressed have been, as far as I can learn, those unanimously for some time held and acted upon by all the Courts in Quebec. Several judgments founded on those views have been recently given in accordance with them when the Act establishing this Court was passed, and I think myself fully justified in holding, in view of that fact, independently of other considerations, the provision in question was intended as, and should be adjudged, a Legislative sanction of those judgments. We should not, I think, restrict the right of appeal in Quebec more than we are compelled by the Act to do, when in the other Provinces no restriction whatever of that right exists.

The Respondent (Mrs. Hart) was, in 1874, the owner of a stone house in Durocher Street, in the City of Montreal. The Appellant became owner of the lot next adjoining the north-west gable wall of her house, which, at that time, seems admitted on all sides not to have been

mitoyen under Article 518 of the Civil Code, or indeed in any other way. It is even contended that her lot extended six inches beyond the line of the wall in question. In view, however, of the law bearing on the case as I look at it, the fact last referred to is of no consequence. The Appellant, in the spring of 1874, while Mrs. Hart so owned and possessed the premises in question, committed the injuries complained of. Was he in any way justified? If not, what redress is Mrs. Hart entitled to, and by what means can she obtain it? I think I am safe in starting with the proposition that the wall in question, when the injury to it was done was not *mitoyen*. How, then, could the Appellant make it so? By Article No. 518, Civil Code, by *paying* to the proprietor of the wall half the value of the part he wished to make common and the value of the ground on which said wall is built. The Code requires "*payment*" to be made and a "*tender*," but if not sufficient it fails to provide the means of ascertaining the amount to be paid. He might possibly have an *expertise*, although the code does not provide for it; at all events, unless he made previous *payment*, he, I think, was not justified in doing what is complained of. Article 519 provides for calling in the aid of experts, but that provision only applies to cases where one neighbor wishes to make "any recess in the body of a common wall" (*mitoyen*) or to "apply or rest any work there," but the provision does not in any way apply to Article 518. The latter article is, to my mind, of better help to the applicant, or to any other situated as he was previous to the commencement of his works. If that course was not open to him, then he should not have committed the trespass complained of. This it appears was not done. The Appellant committed a trespass on the Plaintiff's pro-

perty, for which, as far as I can see, there is no justification. He is consequently answera ble for such damages as may be shewn to have been done.

The Respondents, however, not only seek to recover damages for the injury but *démolition des nouvelles œuvres*. The question is therefore raised as to their right to that remedy, as awarded by the Court of Queen's Bench (Appeal side), over-ruling the judgment of the Superior Court, Montreal, which declares, that although no *expertise* was had respecting the value of the right of *mitoyenneté* existing between parties, Plaintiff and Defendant, yet, as the building of the Defendant was done and completed before the institution of the present action, "the Plaintiffs have therefore no right to obtain the demolition of the same."

The fact that the Defendant's wall was finished before the proceedings herein were commenced, is found by the Court of first instance, and such conclusion I feel bound by. The fact is hardly disputed and the evidence satisfies me of the soundness of that conclusion. I am of opinion that in the old action *en dénonciation de nouvel œuvre*, the Respondents cannot recover for the appropriation of their wall by building on it, although a doubt may exist that such is the law, for certainly by many, if not all the authorities, it is alleged to apply to cases only where the erection is on the land of the party himself and not on his neighbor's.

The learned Chief Justice of the Queen's Bench, says: "The action of the Appellant (now Respondent) is not one *en dénonciation de nouvel œuvre*, the conclusions of which are that the party Defendant should discontinue his works; but an action *petitoire*, by which Appellant says, 'I am the sole owner of the gable wall of my house; you have committed a trespass by building a wall on it,

I ask that you be ordered to remove your building from it and to restore the wall to its original state.' There is not an author or judicial decision to be found to show that this is not a proper action, and it ought to be dismissed because the works were completed when the action was brought."

If, therefore, the action is not one *en dénonciation de nouvel œuvre* but *petitoire*, and not a jumbling up of both, we must see, before concluding, whether, in the action *petitoire* the Respondent can ask for a judgment for *demolition*. The learned Chief Justice again says: "It is true that in the action *en dénonciation de nouvel œuvre* proper, under the Roman law, no order could be obtained to remove the works when once completed," but he denies that the French jurisprudence adopted that principle. With all due deference, I am warranted in the statement that the French jurisprudence, until an alteration of the Code, fully adopted the principle of the Roman law, and that, under that jurisprudence, the action *en dénonciation de nouvel œuvre* was available up to any time before the completion of the work, and, but for the alteration by the Code or otherwise, it would still be the law in Lower Canada. Let me quote, in proof of this position, portions of the judgment of the Privy Council in *Brown* v. *Gugy* (1864), (1). "In *Daviel* '*Cours d'eau,*' (2) it is distinctly laid down that by the old French law, that is by the law now prevailing in Lower Canada, the *dénonciation de nouvel œuvre* could only be maintained if instituted before the work was completed, though by an alteration introduced by the French Code the law is in this respect altered, and the action may be maintained in respect of a work either *fait ou commencé.*' "

(1) 14 L. C. R. 213; (2) Tit. '*Du Domaine Public*' par. 471.

"In this case," the judgment proceeds, "there is no doubt that the work was completed before the action was commenced and the relief sought is different from that which, according to Daviel, could be granted in an action *en dénonciation de nouvel œuvre*." I have thus the highest and most controling authority for the position, that in 1864 the action *en dénonciation de nouvel œuvre* would not lie where the works had been completed, and I have sought for a legislative change in that law in Lower Canada by the Code of 1866, or otherwise.

Article 20, Code Civ. Proc., L. C., provides, that "in judicial proceeding it is sufficient that the facts and any conclusions be distinctly and fairly stated, without any particular form being necessary, and such statements are interpreted according to the meaning of words in ordinary language."

Article 17 of the same Code provides that "the Court cannot adjudicate beyond the conclusions of a suit, but it may reduce them and grant them only in part."

Article 20 may be said to have done away with the *forms* of actions, and therefore the peculiar form of the action *en dénonciation de nouvel œuvre* is no longer necessary.

Does it in any way affect the subject-matter of that peculiar remedy so as to entitle a party in an action *petitoire* or *possessoire*, according to his title or possession, to the remedy or judgment now, under circumstances in which previously to the Code, he was not entitled? Or, indeed, could a party, before the Code, either by an action *en dénonciation de nouvel œuvre*, or otherwise, have a judgment *en démolition* for a work *done* and *completed* on his land before action brought? From a careful study of the matter I cannot see that Article 20 of this Code

establishes any new or different rights or relations between the parties, and gives any new remedy in the shape of *démolition*, and as the Respondent's claim cannot be sustained by a remedy *en démolition*, as the work was finished before the action was brought, and the only remedy, previous to the Code, being by action *en dénonciation de nouvel œuvre* where the work was unfinished, I do not see my way clear to adjudge that remedy to the Respondent in that peculiar action; but, according to reliable authorities, a party in an action *petitoire* would be entitled, in case of a trespass to his property, to recover damages for the injury; and, in case of a building erected upon his land, to a judgment or *démolition*, irrespectively of the principles which governed in actions *en dénonciation de nouvel œuvre*, and that as well before as since the Code. I am of opinion that the judgment appealed from should be confirmed, and the appeal dismissed with costs, the time given by the Court appealed from to run from the date of the judgment herein.

Appeal dismissed.

Attorneys for Appellant: *Davidson and Cushing.*

Attorney for Respondent: *A. M. Hart.*