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JAMES MORGAN AND OTHERS (PLAINTIFFS) ..... } APPELLANTS; *May 15. *June 14.

AND

THE AVENUE REALTY COMPANY (DEFENDANTS) ..... } RESPONDENTS.

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

Servitude—Obligation of mitoyenneté—Exercise of party-rights—Contribution towards party-wall—Arts. 510 et seq. C.C.

The defendants erected their building against the plaintiffs' wall so that it served them in the way of exterior protection for the side of the new building; they connected the metal roof-flashing with the wall by nails, etc., but constructed the new works in such a manner as to avoid depending upon the plaintiffs' wall for support and without piercing recesses in it to receive joists, etc.

Held, reversing the judgment appealed from (Q.R. 20 K.B. 524), Fitzpatrick C.J. dissenting, that the defendants had exercised party-rights in the plaintiffs' wall and utilized it as an external wall for their building, and that they were, consequently, obliged to treat it as a common wall and to pay half the value of the portion thereof so utilized by them.

APPEAL from the judgment of the Court of King's Bench, appeal side (1), reversing the judgment, at the trial, in the Superior Court, District of Montreal, and dismissing the plaintiffs' action with costs.

The material circumstances are stated in the judgments now reported.

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

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The Chief Justice.

T. P. Butler K.C. and *Lafleur K.C.* for the appellants.

T. Brossedu K.C. for the respondents.

THE CHIEF JUSTICE (dissenting).—I agree entirely with the judgment of the court of appeal.

IDINGTON J.—The question raised here is whether or not the respondents have so used the wall erected by appellants as entitles the latter to call upon them for payment of half the costs of construction.

The line between these adjacent properties has never been finally determined and seems so doubtful that their respective surveyors employed to try and determine it, found the appellants' wall in part might be upon the ground of the respondents and recommended making a party-wall of it.

But the respondents instead of agreeing to that conceived the idea that they might so construct their building as to avoid perceptibly pressing upon or enjoying support from this wall yet enjoy every other benefit that an external or end wall could give it and be free from being called on to contribute to the cost of its erection.

Respondents' architect ingeniously contrived, by means of an iron structure rested on the front and rear walls or foundations and on pillars in the basement at a distance of a few feet from the wall in question, to avoid putting any beams into the wall as in old days was the common method of support to carry the upper part of a building.

The iron beams reached up to the edge of the wall in question and, so as to enable respondents to say it did not touch the wall, a sheet of paper was put between the end of each of these beams and the wall.

It was thought this was not enough, but a pretence of an end wall was made by building one of eight inches consisting of terra-cotta brick which, I suppose, could be a furring to receive the plastering on the inside.

Covered over the roof by usual material the job looked well done and all the protection of any party-wall was got without the expense of paying for half of it.

There were weak spots in the scheme. In the cellar the wall in question was white-washed by respondents, no doubt for purposes of light and cleanliness. The terra-cotta brick only began with the ground floor and was carried on the iron frame structure I have referred to. And when it became necessary to make the roof complete the respondents used metal flashing, which they found necessary to tie to the appellants' wall by nails driven into that. The respondents, therefore, had all the benefits (save the usual extent of support) a party-wall ever gives by sheltering the occupants of its building from the inclemencies of the weather.

The terra-cotta unless covered by metal or cement was worthless as an external wall. This was not so covered.

The question is raised whether or not this use of a party-wall is a usage of it that entitles the appellants to compensation.

It is said that so long as the party-wall is not used for support of the building put up against it the appellants have no right to complain.

It is by no means clear that the respondents' structure does not derive very substantial support from the stone wall in question. If the foundations of respond-

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ents are, as few are, absolutely solid, and can never settle and their structure has been built absolutely plumb, the structure undoubtedly can never rest for support on the party-wall. But if, as shewn, it rests on a blue clay, liable to give way and produce a settlement, then assuredly the party-wall of stone may become not only a great support and stay, but also a perpetual safe-guard that the settlement will, on that side, be kept nearly plumb. I hardly think the sheet of paper, now most likely ground to powder by the pressure, will help much.

It seems asking rather too much, indeed, to require a good deal of assurance, to obtain such an assurance against the possibilities of the consequences of such settling tendencies and yet to say that this party-wall is of no use to respondents and hence that it does not use it.

But there is more than that; they made, as bound by law, an application to the civic authorities for a permit to build and, in that, represented their proposed building to be of four stories in height and the thickness of its external party-wall as follows:—

> Thickness of external walls, 1st, *20*, 2nd, *16*, 4th, *16*, 5th * * 6th * * 7th * * 8th * * 9th * * 10th * *. Thickness of party-walls, 1st, *24*, 2nd *20*, 3rd, *16*, 4th * * 5th * * 6th * * 7th * * 8th * * 9th * * 10th * * . Are the party walls solid or vaulted: *solid*. External walls * * .

Either it was intended to use this wall now in question or it was not.

Certainly if it was intended to use this appellants' wall as a shield against prosecution the respondents ought not to be heard to say they did not use it.

And if it was not intended to use it, but to rely on the terra-cotta structure as an external wall, then that was something like fraud upon the authorities. I

prefer believing respondents' application and intention were honest. Indeed, I hardly think they should be allowed to say otherwise.

The inspector says:—

Q.—In other words, they used Morgan's wall as their outside wall, is that the case ?

A.—Well, I do not know if I can answer that way. But what I know is that there was a wall there, and they came to my office to ask me if I would accept a terra-cotta wall hanging on steel joists and beams, I told them it was unnecessary as there was a strong wall there. They said that they did not want to use this strong wall, but wanted a terra-cotta wall independent of Morgan's wall, I said if Morgan's wall was not there you would have to build according to your application, because it would not answer the purpose of the by-law.

Q.—You could not have a terra-cotta wall without anything outside ?

A.—No, you cannot have an exterior wall built of terra-cotta, only eight inches.

Q.—That would not have been a wall ?

A.—No, not an external party-wall.

Q.—As a matter of fact there was no wall built by them at all that would be allowed as an exterior wall ?

A.—No, there was none.

Even without more than using the wall to nail the roof to and finish the protection against the weather which this wall in question gave respondents, I incline to think they made that use of the wall that requires they should pay for it.

The mere accidental shelter a wall gives, say to a tent, though beneficial as sheltering from the wind, can give no right of compensation. But this design shews a great deal more. It is a use of a wall for all the purposes for which an external or party-wall is needed and the very effort put forth to avoid, by the design adopted, giving compensation, shews a desire to use the wall in the common acceptation of the term.

It is not the mere support involved and usually re-

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ferred to that determines the limit of the law in this regard. The law gives the right to use such a wall and implies the corresponding obligation to pay for it. It saves wasting money, and those thus saved (as the respondents were), must pay for the use they have made of the privileges the law gives.

Modern ingenuity and skill may enable a dispensation of the use of the old devices as to support, but does not avoid the application of the principle the law always carried in it and which, when applied here, seems to me to bind the respondents to pay for the benefits they enjoy thereunder. Without this wall they would have had to build another, such as specified, by itself for external walls.

The appeal should be allowed with costs here and in the court of appeal, and the judgment of the learned trial judge should be restored.

DUFF J.—The evidence is sufficient to establish the conclusion that the appellants' wall serves the purpose of an exterior wall in the protection of the respondents' building. The respondents' architect admits as much: and the municipal inspector makes it clear that it was because of the juxtaposition of the appellants' building that the respondents were allowed to proceed with the erection of their building without constructing an exterior wall on the south side. It is really not disputed that the respondents have intentionally and deliberately availed themselves of the appellants' wall for all the purposes of an exterior wall except support; and there can be little doubt that they constructed the building in the full expectation that, when it had settled into its permanent position, it should receive support also from the appellants'

wall. The respondents have, no doubt, struggled hard to avoid the burden while enjoying the benefit but, I think, they have not succeeded. I agree with reasons given by Mr. Justice Trenholme and by the trial judge.

ANGLIN J.—Although the evidence is probably insufficient to establish that it was the intention of the defendant company that their building should receive lateral support on its southern side from the north wall of the plaintiffs' building, or that it in fact receives such support, the use made by the defendants of the plaintiffs' wall, in my opinion, constituted it a party-wall. By an ingenious method of construction the defendants have, perhaps sufficiently, provided for the support of the eight-inch terra-cotta structure, which they call the south wall of their building, without its receiving actual support from the plaintiffs' north wall. But the latter wall is none the less made use of by the defendants in many respects as an external wall of their building.

But for its contiguity the by-laws of the City of Montreal, if enforced as we must assume they would have been, would have prevented the erection of the defendants' building having for its south wall merely an eight-inch terra-cotta structure. The evidence indicates that the civic authorities permitted the building to be constructed as it was solely because it was represented to them that the plaintiffs' north wall would be used as a party-wall. The defendants have in fact no other south wall of any kind in their basement. They have whitened the face of the plaintiffs' wall which serves as the south side of their cellar rooms. They have actually connected the top of

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their terra-cotta structure with the north wall of the plaintiffs' building by the use of metal flashing. Without the covering afforded by the plaintiffs' wall, the defendants' terra-cotta structure would not at all have answered the purpose of an external wall. It is in fact the plaintiffs' wall which, partially at least, serves that purpose. In these circumstances I am satisfied that the defendants have taken such possession and have made such use of the plaintiffs' wall that they should not be allowed to escape liability to pay one-half the cost of so much of it as they have thus taken advantage of.

In an attempt to evade this liability — noteworthy for its cunning rather than for its honesty — they have, no doubt, not made the full use of the plaintiffs' wall which they might have made of it as a party-wall. But they have made and are making a use of it which they cannot honestly enjoy without assuming the obligations incident to its existence as a party-wall. It is gratifying to me that the law, as I understand it, does not require us to reach a conclusion not consonant with common honesty, which would be the result of upholding the respondents' contention.

For these reasons and those stated in the opinions of the learned trial judge and of Mr. Justice Trenholme, who dissented in the Court of King's Bench, I would respectfully allow this appeal with costs in this court and in the Court of King's Bench and would restore the judgment of the trial judge.

BRODEUR J.—La question est de savoir si l'intimée fait usage du mur érigé par l'appelant dans la ligne de séparation entre leurs propriétés, et si elle est tenue de lui en payer la moitié de la valeur.

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Il est bien évident que, d'après les règlements municipaux, la bâtisse de l'intimée serait illégalement construite si elle n'utilisait pas le mur en question.

Les autorités municipales, quand elles ont accordé le permis de bâtir, ont compris que ce mur serait utilisé et l'intimée s'est exemptée par là même d'en construire un tel que requis par les ordonnances de la Cité de Montréal. Mais quand elle fut mise en demeure par l'appelant de payer la moitié de la valeur de ce mur, elle a répondu qu'elle n'en avait pas besoin.

Les ingénieux procédés auxquels l'intimée a eu recours violent les principes élémentaires de la justice et de l'équité et il ne peut lui être permis de s'enrichir ainsi aux dépens d'autrui.

Elle a mis dans les étages supérieurs de sa bâtisse un mur en brique poreuse (terra-cotta) qui, comme il est en preuve, ne peut servir que dans l'intérieur et ne pourrait jamais être utilisé comme mur extérieur à moins d'être recouvert de métal ou d'une couche de ciment.

Dans le soubassement elle n'a pas jugé à propos de continuer son mur de brique poreuse et le mur du demandeur, appelant, fait la division des deux propriétés.

L'intimée avait laissé entre son mur de terra-cotta et le mur du demandeur un espace à peine suffisant pour y mettre une feuille de papier. Comme le terrain est peu solide à cet endroit il est arrivé ce qui devait inevitablement se produire: les deux bâtisses se sont rejointes et elles se trouvent l'une sur l'autre.

L'intimée, cependant, n'aurait pas pu se contenter d'en rester là car la pluie se serait inévitablement introduite entre les deux murs et aurait desagrégé sa brique poreuse et rendu sa maison inhabitable. Alors

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elle a réuni la partie supérieure de sa brique poreuse au mur du demandeur par une bande de métal qu'elle y a clouée solidement.

Elle a donc fait acte de propriétaire sur ce mur en y introduisant ces clous et cette bande de métal.

La loi déclare que les murs sont présumés mitoyens (art. 510 C.C.).

Il me paraît bien evident que si, plus tard, les tribunaux avaient à se prononcer sur la nature du mur en question qu'ils le considèreraient comme mitoyen. L'usage que l'intimée en fait dans le soubassement, la bande de métal qui y a été introduite et clouée dans le haut feraient considerer le mur érigé par le demandeur comme étant le mur mitoyen servant aux deux maisons, vu que le mur en brique poreuse qui s'y trouverait ne pourrait pas plus être considéré comme le mur extérieur de la maison de l'intimée que les enduits faits par le demandeur-appelant, de son côté.

L'intimée pouvait bien acquérir la mitoyenneté après entente avec l'appelant. C'est une faculté que la loi lui accorde (art. 518 C.C.). Mais si, au lieu de procéder de cette manière, elle s'est servie du mur construit exclusivement par son voisin, il est clair qu'en pareil cas ce dernier pouvait la poursuivre en dommages-intérêts et pouvait demander la destruction même de la besogne mal plantée, pour me servir de l'expression de Fuzier-Hermann, Répertoire, *vo.* "Mitoyenneté," No. 222.

Mais ne pouvait-il pas également, s'il le préférait, considérer l'intimée comme ayant tacitement manifesté la volonté d'acquérir la mitoyenneté et réclamer d'elle le paiement de la moitié de la valeur de son mur? La jurisprudence et la doctrine n'ont pas craint d'aller jusque là. (Fuzier-Herman, *vo.* "Mitoyenneté," No. 223.)

Le propriétaire voisin peut donc devenir acquéreur d'un mur mitoyen soit en donnant formellement son intention, soit en faisant des actes qui constituent de sa part la volonté de se servir du mur.

Les auteurs appellent ce dernier cas "l'usurpation de la mitoyenneté:" et la personne qui y a recours engage aussi bien sa responsabilité que si elle avait formellement réclamé la cession forcée du mur.

La voie de fait est équivalente au contrat même de cession. Dijon, 21 janv., 1880, Recueil, arrêts de Dijon 1880, 151.

Quand y a-t-il usurpation d'un mur ? C'est là une question de fait dont le tribunal de première instance devrait être le juge souverain, surtout si, comme dans le cas actuel, la preuve est quelque peu contradictoire.

Le savant juge qui a entendu la cause en cour supérieure a trouvé que l'intimée se servait du mur du demandeur, appelant. Il n'est pas nécessaire pour qu'un mur soit mitoyen qu'on y introduise des poutres: mais on peut en faire usage et, en consequence, engager sa responsabilité quand, en ayant recours à des moyens plus ingénieux qu'honnêtes, le propriétaire d'un lot voisin d'un mur en retire tous les avantages qu'il peut procurer et qu'il se dispense, à raison de çela, d'en construire un lui-même.

La jurisprudence Canadienne ne nous donne qu'une cause où cette question se soit soulevée: c'est celle de *Boyer* v. *Marson* (1), où il a été décidé que le défendeur qui avait bâti près de la maison de la demanderesse sans faire de mur, mais qui avait rempli de mortier les interstices entre le toit et le mur voisin a été obligé le payer la moitié du mur. Il y avait en plus le fait

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que les locataires du défendeur avaient posé de la tapisserie sur le mur. La situation était passablement identique à cette cause-ci. En effet la partie supérieure avait été remplie de mortier, tandis que dans notre cas une bande de métal a été clouée dans le mur du demandeur.

Le mur avait été tapissé. Dans notre cas, la partie du mur dans le soubassement a été blanchie à la chaux.

L'intimée a cité devant cette cour deux décisions qui ont été rendues devant les tribunaux français et qui sont rapportées dans Dalloz 1859-1-277; Sirey, 1898-1-503.

La première de ces décisions est à l'effet que les constructions n'avaient été élevées qu'à proximité du mur du voisin et qu'elles n'y *pénétraient pas et ne s'y appuyaient pas* et qu'il n'y avait pas lieu de maintenir l'action possessoire qui avait été instituée par ce voisin, vu que les constructions ne constituaient pas un trouble à sa possession.

La deuxième de ces décisions a été rendue sous les dispositions de l'article 656 du Code Napoléon qui diffère sensiblement de notre article correspondant (art. 513 C.C.). Ce jugement porte d'ailleurs non pas sur l'obligation du propriétaire voisin de contribuer au mur dont il s'est servi par usurpation, mais sur le droit que le propriétaire possède de renoncer à la mitoyenneté ou de l'abandonner.

Ce n'est donc pas le cas tel que posé dans la cause actuelle que ces décisions des tribunaux français décident.

D'ailleurs les deux articles, ainsi qu'on le voit, ne sont pas du tout rédigés de la même manière. Voici,

en effet, l'article 656 du Code Napoléon ainsi que l'article 513 de notre code:—

Art. 656 C.N.	Art. 513 C.C.
Cependant tout co-propriétaire d'un mur mitoyen peut se dispenser de contribuer aux réparations et reconstructions en abandonnant le droit de mitoyenneté, *pourvu que le mur mitoyen ne soutienne pas un bâtiment qui lui appartient.*	Cependant tout co-propriétaire d'un mur mitoyen peut se dispenser de contribuer aux réparations et reconstructions en abandonnant le droit de mitoyenneté et *en renonçant à faire usage de ce mur.*

Ces jugements reconnaissent le droit au propriétaire voisin d'abandonner la mitoyenneté lorsque le mur ne *soutient pas sa maison*. Dans notre code, au contraire, il est dit que la faculté d'abandonner ne peut pas s'exercer si le voisin *fait usage* du mur.

On ensigne également en France que le propriétaire voisin engage sa responsibilité *s'il fait usage* du mur, même lorsqu'il le fait pas servir a supporter ses bâtiments. Fournel, "Traité du Voisinage," *vo.* "Mur," vol. 2, page 316, et au mot "Adossement," Demolombe, "Servitude," vol. 1, no. 421; Dalloz, 1870, 2, 217.

J'ai souligné les parties des deux articles qui diffèrent. Je reconnais que la différence n'est pas très considérable: mais elle démontre que notre loi engage plus facilement la responsabilité du co-propriétaire que la loi française. Sous le Code Napoléon le droit d'abandon ne peut s'exercer que dans le cas où le mur ne supporte pas la bâtisse voisine: tandis que sous l'autorité de notre code la simple utilisation du mur empêche l'exercice de cette faculté.

Pour ces raisons j'en suis venu à la conclusion que l'action du demandeur doit être maintenue et que la défenderesse, intimée, doit lui payer la moité du mur en question.

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L'appel doit être maintenu avec dépens tant de cette cour que de la cour d'appel et le jugement de la cour supérieure doit être confirmé.

Appeal allowed with costs.

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

Solicitors for the respondents: *Brosseau, Brosseau, Tansey & Augers.*