1929

*Feb. 22.
*April 30.

JOSEPH CARDINAL (PLAINTIFF).....APPELLANT;

AND

JOSEPH PILON (DEFENDANT).....RESPONDENT.

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—Plea of non-mitoyenneté—Acquisition by way of prescription—Inscription-in-law—Arts. 510, 512, 532 C.C.

In an action by the appellant to have the respondent condemned to reconstruct, at his own expense, a wall alleged to be situated on the boundary line between their respective properties.

*PRESENT:—Duff, Mignault, Newcombe, Rinfret and Smith.

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Held that, upon the evidence, the appellant can only charge the respondent and his predecessors with a neighbourly tolerance of his own very slight acts of trespass; and this, in itself, is not sufficient to entitle the Court to impute to them a recognition of the rights of *mitoyenneté* set up by the appellant.

Morgan v. *Avenue Realty Company* ((1912) 46 Can. S.C.R. 589) distinguished.

APPEAL from the decision of the Court of King's Bench, appeal side, province of Quebec, affirming the judgment of the Superior Court, Weir J. (1), and dismissing the appellant's action.

The appellant sought by his action to have the respondent condemned to reconstruct, at his own expense, a wall situated on the boundary line between their respective properties, alleging that it was a party wall and was leaning towards the respondent's property owing to the fact that the latter's house was not properly underpropped. The respondent, in his plea, besides alleging that the wall was his own wall and not a party wall, denied the allegations of the statement of claim. The appellant, in his answer, alleged that he had been using that wall to support his house for a period extending over thirty years and that he had acquired a party right by way of prescription; and the respondent filed an inscription in law against this last allegation.

The facts, as found by the appellate court, are as follows: the wall is one of the four walls of the respondent's house; this house, built before that of the appellant, is faced with stone and its three other sides are solid brick; the three outside walls of the appellant's house are of lumber covered with brick, while on the side next to respondent's property, the wall is merely a stud-work covered with laths and mortar, the two houses being therefore connected, not by one wall only, but by a wall and a stud-work. If the wall had been straight, the appellant's house would not have been exposed to wind and weather; but, owing to the opening resulting from the leaning of the wall, the appellant's house was damaged by exposure from wind and rain.

The appellate court held that the leaning of the wall was apparently caused, upon the evidence, not by a fault of the respondent, but by the unsettled condition of the soil;

(1) (1927) Q.O.R. 66 S.C. 29.

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that, under these circumstances, the reconstruction of the wall, if necessary and on the assumption that it was a party wall, could be ordered only at the expense of both parties (Art. 512 C.C.); and, without deciding whether the wall was a party wall or not, the appellate court maintained the judgment of the trial judge dismissing the appellant's action, on the ground that it could not order the reconstruction of the wall at the joint expense of both owners as such judgment would be *ultra petita.*

P. St. Germain K.C. and *G. Guérin* for the appellant.

L. Farribault K.C. and *J. A. Robillard K.C.* for the respondent.

THE COURT.—We are all of the opinion that this appeal should be dismissed. It seems plain that but for the decision of this Court in *Morgan* v. *Avenue Realty Co.* (1), we should never have heard of it.

The facts which then confronted the Court differed radically from those before us. There the view of the majority of the Court was that, having regard to the circumstances in which the respondents had taken possession of part of the appellant's wall, and to the manner in which they had used it, they were precluded from denying that they had done so with "*la volonté d'en acquérir la mitoyenneté.*"

The present appellant, upon the evidence, can only charge the respondent and his predecessors with a neighbourly tolerance of his own very slight acts of trespass. This, in itself, is not sufficient to entitle us to impute to them a recognition of the rights of *mitoyenneté* now set up. The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Guérin, Renaud & Cousineau.*

Solicitors for the respondent: *Robillard, Julien, Allard & Julien.*

(1) (1912) 46 Can. S.C.R. 589.