COURT OF QUEEN'S BENCH.

MONTREAL, January 25, 1883.

DORION, C.J., RAMSAY, TESSIER, CROSS & BABY, JJ.

STEPHEN et al. (defts. and incidental plffs. below), Appellants, and WALKER (plff. and incidental deft. below), Respondent.

Mitoyen wall—Recess made therein.

The parties are owners of contiguous properties on the east side of Notre Dame street, occupied as *restaurants*.

RAMSAY, J. This litigation began by a suit on the part of respondent to compel appellants to close a door which had been opened by them into a common passage leading to the back yards of the properties respectively owned by the parties appellant and respondent. This action was met by an incidental demand on the part of appellants, calling on respondent to fill with *verre dormant* a door opened by him into the passage, to pull down a wall built by him, and to restore a *mitoyen* wall in which he had cut a hole in order to extend his window frontage on Notre Dame Street.

The merits of these various pretentions must be judged by two deeds,one passed in 1800 and another passed in 1832. It has been contended that the second of these deeds completely avoided the former, and makes the rule by which we must be guided. I cannot concur in this view. It seems to me that the two deeds must be read together, and that the former one is only affected by the latter, in so far as they are incompatible. I think, then, that the second deed, by which appellants secured the *mitoyenneté* of the western gable of respondent's house, did not give him any greater rights in the passage than he had before, and therefore, that his opening a door into the passage was an infringement of the rights of the respondent. So far, then, the judgment appears to me to be correct.

Then, as to the question of the glass door opened by respondent, the Court below has condemned respondent to put in *verre dormant*, and there is no appeal from this decision, so we have only to discuss this question in so far as regards the right of respondent to open a door there at all. On this point I am with respondent. I don't think the door on the slant is any violation of the *acte* of 1800. There is nothing in the *acte* of 1832 which touches the matter.

Then, as to the building a wall in the place of the gate-way contemplated in the *acte* of 1800, I do not think appellants can complain of this. The right to make gate-ways was a mutual stipulation for the convenience of each of the parties to the deed, and therefore the right may be abandoned by either at his pleasure. It did not require any stipulation to permit either party to build a wall in the line of the slant, for it is a common law right.

Last, we come to the hole made by respondent in the wall. That is clearly illegal. Respondent could not do this without a demand to appellants to allow him to do this work, and, on his refusal, taking the precautions required by the Code(519). We are therefore to reverse so much of the judgment as affects the interference with the *mitoyen* wall, and to condemn respondent to restore the wall to its former condition within six months of the service upon him of the judgment in this case. Respondent must pay the costs of this appeal.

The judgment is as follows:—

"The Court, etc.

"Considering that there is no error in so much of the judgment appealed from, to wit, the judgment rendered by the Superior Court sitting at Montreal, on the 30th day of June, 1881, as condemns the appellants on the principal action, doth confirm the same;

"And considering that as regards the incidental demand, it is established that the respondent has made or caused to be made a recess in the thickness of the *mitoyen* wall between his premises and those of the appellants, and this without the consent of appellants, or, in default thereof, and, on the refusal of the appellants so to consent, without causing to be settled by experts the necessary means to prevent the new works from being injurious to the rights of others;

"And considering, therefore, that there is error in the judgment dismissing so much of the incidental demand as refers to the opening of the said recess by respondent, doth amend the said judgment by setting aside so much of the said judgment on the incidental demand as refers to the said recess only, confirming the said judgment as regards the incidental demand for the rest;