"And proceeding to render the judgment the said Court ought to have rendered regarding the said recess, doth order the said respondent, plaintiff and incidental defendant in the Court below, within six months of the service upon him of this judgment, to restore the said *mitoyen* wall to the same condition in which the said wall was prior to the making of the said recess, with costs of this appeal against the said respondent. (Tessier, J., dissenting.)"

Judgment reformed.

Davidson & Cross, for Appellants.

Judah & Branchaud, for Respondent.

COURT OF QUEEN'S BENCH.

MONTREAL, May 27, 1882.

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

QUINN (deft. below), Appellant, and LEDUC (plff. below), Respondent.

Dividing wall—Alleged encroachment.

The appeal was from a judgment of the Court of Review at Montreal, condemning the appellant to demolish a gable wall which, it was pretended, rested upon the wall of respondent's house, or to pay $55.46, half of the estimated value of the wall.

The parties are owners of adjoining properties on Sydenham street, in St. Mary Ward. The pretension of the respondent was that the appellant's house is constructed so as to rest upon a gable wall of respondent's building, and he asked for the demolition of the wall, unless the appellant paid half the value of the gable. The first court dismissed the action, but this judgment was set aside by the Court of Review, and the appellant was condemned as prayed.

The appellant submitted that the evidence showed that he had made no use of the gable of his neighbor, and that the two walls were quite separate.

RAMSAY, J. This is one of those wire-drawn actions which has no claim to favorable consideration. The plaintiff claims from the defendant a sum of money for no real equivalent, or that he shall be subjected to a very serious inconvenience. Technically, the demand is based on the following allegations: 1. That plaintiff's wall is not *mitoyen*, but that it is built entirely on his own land; 2. That defendant used the wall so built on plaintiff's land, and supported his house upon it.

The defendant met this demand by two pleas. In the first he said, my wall is complete in itself, and I did not use your wall, which is not *mitoyen*, and which is a mere wooden structure with a shell of brick. He pleaded also the general issue.

The evidence discloses that the wall is not *mitoyen*, that though built at the foundation on plaintiff's property it hangs over defendant's property, that defendant's wall is complete in itself—that is, self-supporting, that it exceeds plaintiff's wall where it overhangs defendant's land, and that defendant, in order to cover this inequality, and, I presume, to preserve his rights, pushed his bricks above plaintiff's wall so as to cover his own line. In other words, instead of turning on plaintiff and compelling him to rebuild his wall perpendicularly, he good-naturedly suffered the slight inconvenience, probably considering that the whole matter could be set right when these temporary buildings were replaced by others of more importance. For this good-natured act he has been dragged into a suit which has lasted nearly four years, and probably put him to considerable expense and annoyance. Evidence of a lengthy and very expensive kind has been rendered necessary to establish a simple fact which plaintiff must have known just as well the day he brought his action as he does now, and which he wilfully mis-stated in his declaration in order to give himself a semblance of a right of action.

But the most curious part of the argument is that the defendant's pleas are not sufficient, because he does not specially plead that the wall of plaintiff leaned over his land. It is no matter of exception. He denies specially the alleged fact that he used plaintiff's wall, and he denies generally the necessary allegation of plaintiff that "le dit pignon est exclusivement construit sur le terrain du demandeur," and the fact alleged in such positive terms by plaintiff turns out to be not only inexact, but calculated to deceive. I cannot see why Laurent thought it necessary to make a second report, for there is no essential difference between his report and that of Bulmer and Esther, except that he tells us that defendant's wall is *accolée* to plaintiff's, and because it has no *mur de fondations*. These facts do not alter the question at all, neither does the fact, as explained,