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PARTY WALLS - REPLACEMENT AND REMOVAL

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PARTY WALLS — REPLACEMENT AND REMOVAL — The usual American theory of the rights of adjoining land owners in a party wall is that each owns in severalty that part of the wall on his land and

each has an easement of support in that part on the land of the other.[1] If the structure is erected under an express contract, the rights of the parties are determined by the terms of their contract. And when the easement of support is created by prescription, its scope is measured by the prior user, and no right to remove or replace the wall can exist by virtue of the easement so acquired.[2] Frequently, buildings are erected with a division wall between them and the ownership is later severed without express reference to the character of the division wall. In this situation the theory is that the party wall easement is created by grant or contract implied in law.[3] The courts, under the guise of presumed intention, are making the contract for the parties. This should be noted, not because it is open to criticism, but because in the exercise of this discretion policy considerations are given great weight in defining the scope of the easement.

A recent Utah case[4] squarely presents the many problems that arise when one owner claims the right to remove and replace a party wall. Plaintiff and defendant were adjoining land owners. A single building covering both lots had been erected by a former owner for the use of both owners; but there was a partition wall between the lots located entirely upon the defendant's land. The defendant removed its part of the building and the partition wall, erecting a larger building and wall in the same place. Plaintiff brought an action for damages resulting from the construction. It was held that the defendant had the right to remove and replace the wall with another sufficient to support its new building; that the plaintiff was entitled to support from the new wall equivalent to that provided by the old; that the defendant in removing and replacing the wall had a duty to use the highest possible care to avoid injury to the plaintiff and that that standard must be adopted by the lower court on retrial of the case.

[1] Graves v. Smith, 87 Ala. 450, 6 So. 308 (1889); Fidelity Lodge v. Bond, 147 Ind. 437, 45 N. E. 338, 46 N. E. 825 (1896); Lederer & Strauss v. Colonial Investment Co., 130 Iowa 157, 106 N. W. 357 (1906); Citizens' Fire Ins. Co. v. Lockridge & Ridgeway, 132 Ky. 1, 116 S. W. 303 (1909).

[2] Bright v. Bacon & Sons, 131 Ky. 848 at 860, 116 S. W. 268, 20 L.R.A. (N. S.) 389 (1909), stating: "It is now the continued adverse use that creates the right of easement, not the fictitious lost grant. As it is the use that creates the right, the right must necessarily be measured by the use." Accord: Barry v. Edlavitch, 84 Md. 95, 35 A. 170 (1896).

[3] Bright v. Bacon & Sons, 131 Ky. 848 at 853, 116 S. W. 268 (1909), stating: "It is not to be presumed that men build party walls . . . upon the adjoining lots, the walls designated to be used, and actually used, by each adjoining owner, without some kind of an understanding between them as to their respective rights in the wall." Accord: Whiting v. Gaylor, 66 Conn. 337, 34 A. 85, 50 Am. St. Rep. 87 (1895); Kiefer v. Dickson, 41 Ind. App. 543, 84 N. E. 523 (1907); Brooks v. Curtis, 50 N. Y. 639 (1872).

[4] Mary Jane Stevens Co. v. First Nat. Bldg. Co., (Utah 1936) 57 P. (2d) 1099.

It is relatively clear that neither owner can remove, without replacing, a party wall, for the party wall easement is not terminable at the will of either owner alone.[5] Nor does it appear that either owner can remove and replace the wall as his pleasure may dictate, for such conduct is an interference with the continuing easement of the other.[6] However, courts have held that the scope of the easement includes the right to remove and replace the wall where it would be insufficient support for a new building to be erected.[7] Thus the courts, with favorable regard for a person's right to enjoy and improve his own property, allow a temporary interference with the other owner's party wall rights. The right to replace is predicated upon a balancing of the benefit to the building owner and the public interest in the improvement of structures, against the detriment to the other owner. Moreover, at a later date the non-builder may be glad to avail himself of the new wall. There is little possibility of abuse of the right, as the expense falls upon the builder.[8] The Ohio court has recognized the right of one owner to pull down and rebuild that part of the wall on his land where it will be more suitable for the improvements that he is making.[9] In New York it has been indicated that there is no right of removal and replacement where the wall is an insufficient support for a contemplated new building,[10] and an early decision supports that proposition.[11] Later cases throw some doubt upon the question. In one it was implied that the right to remove and replace the wall, insufficient for a proposed building, was not a closed question.[12] Another,

[5] Cino Theatre Co. v. B/G Sandwich Shops Inc., (C. C. A. 6th, 1928) 24 F. (2d) 31; Carroll Blake Construction Co. v. Boyle, 140 Tenn. 166, 203 S. W. 945 (1918).

[6] See footnotes 5 and 7. See also, Perry v. Reeve, (App. D. C. 1926) 12 F. (2d) 184, where the defendant in excavating on his land found it more practical to remove and replace the wall than to underpin it, and having done so could not be compelled to remove the new wall.

[7] Putzel v. Drovers' & Mechanics' Nat. Bank, 78 Md. 349, 28 A. 276, 44 Am. St. Rep. 298, 22 L. R. A. 632 (1894); Bellenot v. Laube's Exr., 104 Va. 842, 52 S. E. 698 (1906); Commercial Nat. Bank of Ogden v. Eccles, 43 Utah 91, 134 P. 614, 46 L. R. A. (N. S.) 1021 (1913); Lexington Lodge v. Beal, 94 Miss. 521, 49 So. 833 (1909). See Bean v. Dow, 84 N. H. 464, 152 A. 609 (1930), an analogous situation where the wall was entirely upon the land of the defendant subject to the plaintiff's easement of shelter, not of support. Held, that the defendant could remove the wall for the purpose of erecting a superior one. The rights of the parties being implied, their extent was determined by tests of reasonableness.

[8] Evans v. Jayne, 23 Pa. St. 34 (1854); Putzel v. Drovers' & Mechanics' Nat. Bank, 78 Md. 349, 28 A. 276 (1894).

[9] Duhme v. Jones, 8 Ohio Dec. 757, 9 Wkly. L. Bull. 293 (1883).

[10] Sherred v. Cisco, 6 N. Y. Super. Ct. 480 (1851); Eno v. Del Vecchio, 11 N. Y. Super. Ct. 53 (1854).

[11] Potter v. White, 19 N. Y. Super. Ct. 644 (1860).

[12] Schile v. Brokhahus, 80 N. Y. 614 at 618 (1880): "The right of the defendant

cited as authority for the alleged New York view, had certain distinguishing features.[13] But the defendant there tried to justify the attempted removal and replacement on the ground that it would be less expensive than alterations necessary to make the wall sufficient, and the court held that the saving to the defendant did not justify the interference with the plaintiff's easement. Moreover, the replacement would have constituted an essential alteration, as building regulations prohibited construction of a wall of the size and character of the one to be removed.

A wall, though located entirely upon the land of one owner, may nevertheless be a party wall.[14] The owner of the land on which the wall stands, absent any contrary agreement, is the owner of the entire wall subject to the other's easement of support. Thus, as in the principal case, such an owner's right to remove and rebuild a wall insufficient to support a new structure may be even clearer than when the ownership of the wall is divided; for the builder interferes only with the other's easement, not with both his easement and ownership. The converse case has never arisen, but it does not seem that the scope of the easement of the landowner who owns no part of the wall would include the right to remove and replace a wall entirely on his neighbor's land. The foundation of the right of removal and replacement lies in the courts' desire that each man be free to build on and improve his own property. And the landowner who has only an easement of support has his entire property at his disposal unhampered by an encroaching party wall.

The right of either owner to remove and replace a party wall that has become dangerous to life or property has been sustained by some courts.[15] Here, however, the problem may become one of extinguishment of the easement,[16] and once the party wall easement is extinguished there exists no right of replacement.[17] Accordingly,

to replace the old party-wall with another suitable for the new building which he was about to erect seems not to have been considered or determined." The case was tried on the theory that the defendant did not intend to give the plaintiff any support in the new wall. The court held there was some evidence to support the jury's finding to that effect.

[13] Partridge v. Lyon, 67 Hun 29, 21 N. Y. S. 848 (1893).

[14] Commercial Nat. Bank of Ogden v. Eccles, 43 Utah 91, 134 P. 614 (1913); Brown v. Werner, 40 Md. 15 (1873); Molony v. Dixon, 65 Iowa 136, 21 N. W. 488 (1884). See Henry v. Koch, 80 Ky. 391 (1882).

[15] Campbell v. Mesier, 4 Johns. Ch. 334, 8 Am. Dec. 570 (1820); Partridge v. Gilbert, 15 N. Y. 601 (1857); Crawshaw v. Sumner, 56 Mo. 517 (1874).

[16] See Partridge v. Gilbert, 15 N. Y. 601 (1857).

[17] Hearrt v. Kruger, 56 N. Y. Super. Ct. 382, 5 N. Y. S. 192 (1889), here one owner brought a successful action of ejectment to recover that part of his land on which the adjoining owner rebuilt the wall. See Fewell v. Kinsella, (Tex. Civ.

where the wall and buildings become ruinous and the wall is removed for protection, neither can rebuild on the land of the other.

Problems of extinguishment may be closely related to problems of rebuilding in other situations.[18] In a recent New York case it was held that when one owner demolished his building, preparatory to the construction of another which was to have support from the wall, the adjoining owner had an option to terminate the easement by destruction of the wall and his own building.[19] In support of this view it may be argued that public policy favors the freeing of land from servitudes. But clearly its adoption by other state courts may have serious practical effect upon the exercise of the right of removal and replacement. Building operations might be restricted; for one owner, desiring to rebuild and retain the advantage of a party wall, might refrain from action, if, after incurring expense, he could only replace with the consent of the adjoining owner. It is a serious question whether the recognition of such an option is not an excessive extension of the policy of favoring extinguishment of easements.[20]

Where the right to remove and replace is recognized, the right of the non-builder to support in the new wall is upheld.[21] A contrary result would allow one owner to permanently impair the party wall easement of the other. It would appear that the non-builder is entitled to have the removal and replacement accomplished without unnecessary delay.[22] Moreover, the new wall should occupy no more of his land than did the old.[23] The non-builder cannot be subjected to a greater burden or to a wall of a different character.[24] This is by

App. 1912) 144 S. W. 1174, holding that the easement was extinguished on condemnation of the wall.

[18] Hieatt v. Morris, 10 Ohio St. 523 (1860), holding that the easement being extinguished, one owner might remove the part of the wall he owned. See Commercial Nat. Bank of Ogden v. Eccles, 43 Utah 91, 134 P. 614 (1913).

[19] 357 East 76th Street Corporation v. Knickerbocker Ice Co., 263 N. Y. 63, 188 N. E. 158 (1933). The building owner had filed plans with the building department showing its intended use of the party wall for its new building before the other owner exercised his option. See 237 App. Div. 717, 262 N. Y. S. 705 (1933). Under this New York decision it may be difficult to decide at what stage in the rebuilding process the other owner loses his right to exercise the option.

[20] See 11 N. Y. UNIV. L. Q. REV. 483 (1934).

[21] See cases cited supra, note 7.

[22] See cases sited supra, note 7.

[23] Bellenot v. Laube's Exr., 104 Va. 842, 52 S. E. 698 (1906). And see the principal case.

[24] Phillips v. Bordman, 4 Allen (86 Mass.) 147 (1862), which held that the plaintiff was entitled to a solid party wall, and that the defendant in reconstructing had no right to create two separate walls, connected by ties, although the support thus furnished was equivalent to that provided by the old wall. See Springer v. Darlington, 207 Ill. 238, 69 N. E. 946 (1904), where the defendant was compelled to close up

virtue of his general ownership. Where the non-builder has merely an easement of support, it would seem that he is entitled only to receive equivalent support, as was held in the principal case, unless the change in the wall is such as to constitute a nuisance.

There are few decisions and many dicta as to the extent of the liability of the builder for injuries to his neighbor's property ensuing from the removal and reconstruction of the wall. His liability has been declared to be that of an insurer with responsibility for all resulting injuries.[25] Yet in most of these cases no right to remove and replace existed and so his activity constituted a trespass.[26] Other courts have declared that the builder is liable for all damages resulting from the failure to exercise reasonable care to prevent injury to the property of the other owner.[27] Generally, where the duty of reasonable care was imposed, the right of removal and replacement existed. The fact that the builder enjoys the primary advantage may be significant in determining his responsibility for all inevitable injuries.[28] However, in the normal case the fact that the immediate benefit flows to the builder does not, and should not, require that he assume an insurer's liability. To adopt such a view might be a serious restriction on the incentive to build; moreover, the expense of building is his. One court held that the adjoining owner must himself provide the necessary support for his building while the other was demolishing and reconstructing the wall.[29] The exercise of due care should require the builder to provide the temporary support for the other's building. Normally he will prefer to support his neighbor's building rather than have the latter protect himself. For one owner to handle all the work should mean greater efficiency. The court in the principal case intimates that

openings left in the party wall. Also Evans v. Shepard, 81 Ind. App. 147, 142 N. E. 730 (1924), where it was held that the leaving of openings and doors in the new wall and the use of the same constitute a continuing trespass.

[25] Nippert v. Warneke, 128 Cal. 501, 61 P. 96, 270 (1900); Fowler v. Saks, 18 D. C. 570, 7 L. R. A. 649 (1890); Fischer-Leaf Co. v. Caldwell, 15 Ky. L. Rep. 542 (1894); Potter v. White, 19 N. Y. Super. Ct. 644 (1860); Schile v. Brokhahus, 80 N. Y. 614 (1880).

[26] *Contra*: Putzel v. Drovers' & Mechanics' Nat. Bank, 78 Md. 349, 28 A. 276 (1894).

[27] Maypole v. Forsythe, 44 Ill. App. 494 (1892); Lexington Lodge v. Beal, 94 Miss. 521, 49 So. 833 (1909); Crawshaw v. Sumner, 56 Mo. 517 (1874); Partridge v. Gilbert, 15 N. Y. 601 (1857); Commercial Nat. Bank of Ogden v. Eccles, 43 Utah 91, 134 P. 614 (1913).

[28] McGlumphy v. Lentz, 69 Pa. Super. 36 (1918). The defendant on rebuilding changed the line of the wall to the true dividing line. The change was for the advantage of the defendant. The defendant had the right to rebuild, but the change to the true line meant injury to the plaintiff was inevitable. Held, that the defendant must bear the loss.

[29] Maypole v. Forsythe, 44 Ill. App. 494 (1892).

the duty is one of exercising the highest possible care, an intermediate standard between due care and absolute liability. It may be that the Utah court merely had in mind the requirement of due care under the circumstances. Granting the existence of the right to remove and replace, the logical requirement is that of due care; and it necessarily leads to the imposition of high standards where there are possibilities of great potential harm as in these cases.

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