

## Party Walls--Nature--Creation--Termination

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showing, says the court, that this was the intent of Congress when the Act was adopted and that Congress is fully satisfied with the interpretation of the courts of this section with regard to rent claims. One might, with all due respect, ask why the same argument was not applied in the case of *Maynard v. Elliot*<sup>40</sup> in which the Supreme Court decided that contingent claims were provable under the present Act. It is equally applicable. As we have stated before, the first three Bankruptcy Acts adopted by Congress expressly allowed contingent claims. In the first two the contingent claims allowed were listed, while the third allowed contingent claims generally, excepting, by more or less express language, future rent. The fourth and present Act, however, says absolutely nothing about contingent claims. Might it not be said that such action on the part of Congress showed an intent that no contingent claims should be allowed? Statutes of a like nature were so construed in England before our present Act was adopted.<sup>41</sup> And our own courts for many years so interpreted the Act of 1898 without any interference or alteration by Congress,<sup>42</sup> showing, one might readily say, the "construction adopted by the courts has been acceptable to the legislative arm of the government."<sup>43</sup> But in 1931 the Supreme Court decided that contingent claims are provable under the present section.<sup>44</sup> One is forced to conclude that they are irreconcilable decisions.

The Supreme Court does not, however, eternally condemn the landlord to stand in trembling and fear of the ever-threatening bankruptcy of his tenant. They hold out one faint and flickering beacon of salvation to him. Being reluctant to change a rule so long imbedded in our land law, reluctant to place a different interpretation on the Bankruptcy Act than that established so long by the decisions of the lower courts, with the apparent sanction of the legislature, leaving a bad situation where it finds it, the Supreme Court of the United States holds out this parting word of advice:

"If the rule is to be changed Congress should so declare."<sup>45</sup>

HAROLD V. DIXON.

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#### PARTY WALLS—NATURE—CREATION—TERMINATION.

From the layman's point of view, a party wall is a wall erected on a line between adjoining property-owners and used in common.<sup>1</sup>

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<sup>40</sup> *Ibid.*

<sup>41</sup> *Supra* note 22.

<sup>42</sup> *Ibid.*

<sup>43</sup> *Supra* note 34.

<sup>44</sup> *Supra* note 29.

<sup>45</sup> *Ibid.*

<sup>1</sup> FUNK & WAGNALLS, PRACTICAL STANDARD DICTIONARY (1930) 827.

Technically, the term has been used in connection with division walls in four different senses.<sup>2</sup> It may refer to

(1) a wall of which, with the land beneath, the owners of the two adjoining buildings are tenants in common;

(2) a wall divided longitudinally into two strips, one belonging to each of the neighboring owners and each having the right to use his strip only;

(3) a wall located entirely on the land of one and belonging entirely to him, but subject to an easement in the other owner to have it maintained as a division wall between the two properties and to use it for purposes of support;

(4) a wall divided longitudinally into two strips, each of the adjoining owners owning the strip on his side only, but having an easement in the other strip for the purposes of support of his building.

In England and Canada, a division wall is presumed to belong to the first of the above classes.<sup>3</sup> In this country, the great weight of authority is against the recognition of this presumption, although there are some cases to the effect that the adjoining owners of a party wall standing in part on the land of each are tenants in common of the wall.<sup>4</sup> The general rule adopted in this country is that a party wall almost invariably belongs to the fourth class mentioned above,<sup>5</sup> except, of course, in those few cases when, the wall having been built entirely on the property of one landowner, the party wall properly falls within the third class.<sup>6</sup> This undoubtedly is the New York rule too.<sup>7</sup> The logical consequences of such a rule are that each owner owns in severalty so much of the wall as stands on his land, but his estate in the wall is subject to an easement of the other owner of support for his building from the entire wall and of the mainte-

<sup>2</sup> 2 TIFFANY, REAL PROPERTY (4th ed. 1920) 1244; 47 C. J. 1324.

<sup>3</sup> *Cubitt v. Porter*, 8 B. & C. 257 (1826); *Watson v. Grey*, 14 Ch. D. 192 (1827); 47 C. J. 1324, n. 16a (In England and in Canada it has been held that, in the absence of other evidence of the ownership of a party wall, the common use of it by the adjoining proprietors raises the presumption that they own the wall and the land on which it stands in common; such presumption may, however, be rebutted by proof of the actual title).

<sup>4</sup> *Weil v. Baker*, 39 La. Ann. 1102, 3 So. 361 (1887) (in which the court says, "In the absence of evidence to the contrary, the whole wall, as it stands \* \* \* is presumed to be a wall in common. There is no division of ownership of a wall in common. The whole belongs jointly to the neighboring proprietors \* \* \*"); *Scott v. Baird*, 145 Mich. 116, 108 N. W. 737 (1906).

<sup>5</sup> WALSH, REAL PROPERTY (2d ed. 1927) 650; 2 TIFFANY, *op. cit. supra* note 2, at 1245, n. 61; 3 GERARD, N. Y. REAL PROPERTY (6th ed. 1926) 2286; 47 C. J. 1325, n. 22.

<sup>6</sup> 2 TIFFANY, *op. cit. supra* note 2, at 1224, n. 60.

<sup>7</sup> *Partridge v. Gilbert*, 15 N. Y. 601 (1857); *Hendricks v. Stark*, 37 N. Y. 106 (1867); *Brooks v. Curtis*, 50 N. Y. 639 (1873); *Rogers v. Sinsheimer*, 50 N. Y. 646 (1873); *Sherred v. Cisco*, 4 Sandf. 480, 6 N. Y. Super. Ct.

nance of the wall as a party wall.<sup>8</sup> Moreover, although each owner owns in severalty his own soil beneath the wall up to the boundary line between the two properties, the soil of each is burdened with an easement and servitude of support in favor of the other and the title of each owner is qualified by the easement to which the other is entitled.<sup>9</sup>

Notwithstanding a party wall easement is a burden on the soil and qualifies the title of each of the adjoining landowners, it "is not an encumbrance on either of the parcels involved. It exists for the common benefit of both parcels, used or to be used for the advantage of each, and is therefore no objection to a title. Each parcel is benefited, not merely in the saving of half the cost of the wall, but in saving the additional space that an independent wall would require."<sup>10</sup> Since it is a benefit to the land, each owner must be allowed to increase the height of his building, using the party wall for that purpose, to extend the wall to the rear and enlarge it, if necessary.<sup>11</sup> But if the party-wall agreement provides for the rebuilding of the wall of the same height and thickness and of the same material, this is clearly an encumbrance as would constitute a valid objection to title under a contract of sale since it binds both parcels to a perpetuation of the same wall and, in effect, of the same buildings.<sup>12</sup>

Party-wall easements may arise in one of several ways. They may be "created by express grant or covenant, the common form of party-wall agreement being executed prior to the erection of a building on one of the parcels, the owner of the other parcel promising to pay one-half of the cost of the wall (or such other proportion or fixed amount as may be agreed upon), whenever he should build on his lot and make use of the wall."<sup>13</sup> Such an express covenant

<sup>8</sup> *Sherrid v. Cisco*, *supra* note 7.

<sup>9</sup> *Partridge v. Gilbert*, *supra* note 7, at 614. Judge Denio said,

"Each had a title to the soil to the division line, \* \* \* but this title was qualified by the easement which each owner had of supporting his building by means of the common wall."

*Brooks v. Curtis*, *supra* note 7, at 642. The court said,

"Although land covered by a party wall remains the several property of the owner of each half, yet the title of each owner is qualified by the easement to which the other is entitled."

3 GERARD, *loc. cit. supra* note 5.

<sup>10</sup> WALSH, *op. cit. supra* note 5, at 653; *Hendricks v. Stark*, *supra* note 7.

<sup>11</sup> *Brooks v. Curtis*, *supra* note 7 (a party wall is a structure for the benefit and convenience of both the tenants whom it separates and either party may make any use of it which he may require, either by deepening the foundation or increasing the height); *Bull v. Barton*, 227 N. Y. 101, 124 N. E. 111 (1919); *Hermann v. Hartwood Holding Co.*, 193 App. Div. 115, 183 N. Y. Supp. 402 (1st Dept. 1920); 47 C. J. 1344, n. 10.

<sup>12</sup> *O'Neill v. Van Tassel*, 137 N. Y. 297, 33 N. E. 314 (1893).

<sup>13</sup> WALSH, *op. cit. supra* note 5, at 652; 2 TIFFANY, *op. cit. supra* note 2, at 1262; *Cutting v. Stokes*, 148 N. Y. 730, 42 N. E. 722 (1895); *Mott v. Oppenheimer*, 135 N. Y. 312, 31 N. E. 1047 (1892).

or grant may apply to a definite building being built or about to be built or it may take the form of permanent mutual easements in favor of and against each parcel. Destruction of the building, in the first case, would terminate any easement in its favor, while, in the latter case, the easement would survive.<sup>14</sup>

The agreement between the adjoining landowners need not be express, but may also be, and very often is, implied from the acts of the parties. Thus party-wall easements arise when adjoining owners erect buildings with a common wall.<sup>15</sup> They may come into being, too, by estoppel as where one who acquiesces in the use of the dividing wall by the adjoining owner is estopped from denying that the wall is a party wall.<sup>16</sup> And where a wall between adjoining buildings has been used uninterruptedly during the prescriptive period as a party wall, it becomes a party wall within the legal sense of the term,<sup>17</sup> even though the wall stands wholly on the land of one of the owners.<sup>18</sup>

Most frequently, however, party-wall easements arise by implied grant or reservation. When the common owner of adjoining lots erects on them buildings supported by a common wall and conveys each lot to different persons, or conveys one and retains the other, each acquires title to one half the wall and an easement of support in the other half, even though the conveyances say nothing about the rights of parties in the wall.<sup>19</sup> The fact that the wall stands wholly on the ground of one of the grantees does not prevent an easement from arising in favor of the other under the same circumstances.<sup>20</sup>

The writer has gone into a detailed discussion of the nature and theory of party walls and party wall easements and outlined the various methods of their creation because he feels a thorough understanding of the principles underlying the subject is necessary before he can attempt a clear dissertation on the main theme, which is: How and when are party-wall easements terminated? The recent case of

<sup>14</sup> *Mott v. Oppenheimer*, *supra* note 13.

<sup>15</sup> *Rindge v. Baker*, 57 N. Y. 209 (1874); *Sherrerd v. Cisco*, *supra* note 7.

<sup>16</sup> *Brooks v. Curtis*, *supra* note 7; *Cherry v. Brizzolara*, 89 Ark. 309, 116 S. W. 668 (1909); *WALSH*, *op. cit. supra* note 5, at 651.

<sup>17</sup> *Browning v. Goldenberg*, 36 Misc. 438, 72 N. Y. Supp. 759 (1901), *aff'd*, 71 App. Div. 616, 76 N. Y. Supp. 1010 (1st Dept. 1902); *Eno v. Del Vecchio*, 4 Duer 53 (11 N. Y. Super. Ct. 1854).

<sup>18</sup> *Pearsall v. Westcott*, 30 App. Div. 99, 51 N. Y. Supp. 663 (3rd Dept. 1898).

<sup>19</sup> *Heartt v. Kruger*, 121 N. Y. 386, 24 N. E. 841 (1890); *Eno v. Del Vecchio and Snyder*, 6 Duer 17 (13 N. Y. Super. Ct. 1856); *Everett v. Edwards*, 149 Mass. 588, 22 N. E. 52 (1889).

<sup>20</sup> *Rogers v. Sinsheimer*, *supra* note 7 (holding that the grantee of the other lot has also the right to occupy the space of the two inches between the wall and the boundary of his lot); *Schaefer v. Blumenthal*, 169 N. Y. 221, 62 N. E. 175 (1901); Note (1913) 13 Col. L. Rev. 754. But see *Sloat v. McDougal*, 9 N. Y. Supp. 631 (1896).

*357 East Seventy-Sixth Street Corp. v. Knickerbocker Ice Co.*<sup>21</sup> brings us the latest words of the Court of Appeals on this point of law. Plaintiff and defendant were respective owners of adjacent premises, acquiring title through mesne conveyances from a common grantor who erected tenement houses on both lots with a party wall equally upon each. Plaintiff tore down the building on its premises, except the party wall, intending to build a garage, using the party wall for support on that side. Before it could do this, defendant tore down the building on its premises, together with the party wall, with the intention of building an ice-plant. Thereby plaintiff was obliged to build an independent wall on its own premises. In an action to recover for the extra expense of building the independent wall (when the party wall would have been entirely adequate) and for loss of rental space, *held*, by a five-to-two decision, plaintiff's easement in the party wall had its origin by implication when the common ownership in the wall was severed and conveyed to separate owners; that the easement was measured, in its extent and duration, by the existence of the necessity for it; and when plaintiff demolished its building, it put an end to the necessity of support on its side of the wall. To the defendant, then, came the option either to continue the wall for the support of its own existing building or to put a definitive end to the easement.

Plaintiff contended that its rights in and to the wall continued so long as the wall itself remained standing in a fit and suitable state for further use as a party wall, and the demolishing of the wall by the defendant was an unauthorized destruction of the plaintiff's property and property rights.<sup>22</sup> One of the principles discussed above is that each owner owns in severalty as much of the wall as stands on his land.<sup>23</sup> From this it would follow that he has a property right in at least half of it and an unauthorized interference with the property right would give him a right of action for damages for any injuries sustained. This was plaintiff's contention. How did the court get over this seemingly unsurmountable obstacle?

Let us examine the cases on which the court based its decision. Judge Crouch quoted extensively from *Heartt v. Kruger*<sup>24</sup> to the effect that the "easement was measured, in its extent and duration, by the existence of the necessity for it. When the necessity ceased, as it did by the destruction of the buildings and wall, the rights resulting from it ceased also,"<sup>25</sup> and also from *Partridge v. Gilbert*<sup>26</sup> to the same effect. Taken by themselves, these words sustain the court's view. The two buildings and the party wall undoubtedly were destroyed in the instant case. Superficially, then, the law

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<sup>21</sup> 263 N. Y. 63, 188 N. E. 158 (1933).

<sup>22</sup> *Id.* at 64.

<sup>23</sup> *Supra* note 8.

<sup>24</sup> *Supra* note 19.

<sup>25</sup> *Id.* at 392.

<sup>26</sup> *Supra* note 7.

would seem to hold that plaintiff's rights ceased when the buildings were destroyed.

But before the reader reaches any conclusions as to the soundness of the court's ruling, let the writer, too, quote from *Heartt v. Kruger*:

"The implied agreement that the party wall, existing at the time of the conveyances of the two lots by their common owner, should continue in its use and occupancy as such, cannot be extended so as to relate to a changed condition of things, caused by the *casual* destruction of the wall and the buildings."<sup>27</sup> (Italics writer's.)

And on the next page,

"The mutual easements existed by force of the situation at the time of the severance of the ownership of the two lots, and, with the change in that situation produced by the *casual* destruction of the buildings, the reason for their existence ceased."

"Casual" means that which happens accidentally or is brought about by cause unknown.<sup>28</sup> How did the destruction take place in the case of *Heartt v. Kruger*? The buildings and the wall were destroyed simultaneously by fire. This was a casual destruction. In *Connelly v. Fish*,<sup>29</sup> the buildings and party wall were also destroyed by fire. The court said, "It was a party wall, but the easement of joint use therein, to the interest of both parties, did not survive the destruction of the wall so long as that destruction occurred *without fault of either of the owners*. This proposition is settled, I think for the first time, in the Court of Appeals in *Heartt v. Kruger*."<sup>30</sup> (Italics writer's.) This case was not mentioned in the *Knickerbocker Ice Company* case, but it is given a place in this discussion because it is valuable in helping us to see how other courts have construed *Heartt v. Kruger*. Judge Kiley construed "casual" as meaning "without fault."

Into that category very easily falls *Partridge v. Gilbert*. In that case one of the buildings had become so dilapidated as to be unfit and unsafe for use. Defendant, in order to rebuild, took down his building and the party wall, because the party wall also was too weak for use. This destruction of the party wall was in no way the

<sup>27</sup> *Supra* note 19, at 391.

<sup>28</sup> *Lewis v. Lofley*, 92 Ga. 804, 19 S. E. 57 (1894); BLACK, LAW DICTIONARY (3rd ed. 1933) 175; WEBSTER, NEW INTERNATIONAL DICTIONARY (1932) 343 (happening to come or pass without design, and without being foreseen or expected).

<sup>29</sup> 152 N. Y. Supp. 371 (1914).

<sup>30</sup> *Id.* at 375.

fault of the owner. He could properly be called the agent of natural causes, as he merely consummated a condition which, to all intents and purposes, already existed.

As can be readily seen, the two cases on which the Court of Appeals relied in reaching its decision are radically different in their facts from the case before the court. In one, *Heartt v. Kruger*, the destruction of the wall was purely casual; in the other, *Partridge v. Gilbert*, without fault of either party. In both cases the court came to the same conclusion, that under such circumstances the party wall easements, since they arose by implied grant or reservation, ceased when the walls were destroyed unintentionally. Was the court justified in extending that principle to a case of wilful destruction of a party wall so that the innocent party could be deprived of his property and property rights or easements in the wall?

All the adjudicated cases on the destruction and termination of party wall easements are cases where the wall was accidentally destroyed or became unfit for its purposes by accident or age.<sup>31</sup> The writer has been unable to find any case where an intentional destruction of a wall in good condition was held to destroy the easement of the other owner. True, there are no cases giving a right of action for damages to the injured party in such case. Where there is no precedent upon which a court can base its decision, it must be guided by general principles governing the point of law in issue and bolster its decision by analogy to similar cases. On principle, the injured party should have a right of action for damages when the wall in good condition is wilfully destroyed, because certainly he owns half the wall and certainly its wilful destruction by the other owner injures him. Reasoning by analogy, it would seem that the court could not logically rely on *Heartt v. Kruger*, a case of casual destruction, and *Partridge v. Gilbert*, a case of destruction without fault, for any guidance, because their basic facts are not analogous to the facts in the *Knickerbocker Ice Co.* case, where the wall was in good condition and destroyed intentionally.

The only ground on which the court could have rightfully decided as it did is the ground of abandonment. But even here the argument falls through. To be an abandonment it must be shown that the owner destroyed his building with no intention of using again the party wall, which intention would best be shown by his rebuilding with an independent wall.<sup>32</sup> But, in the *Knickerbocker Ice Co.* case, not only did the plaintiff not intend to abandon the wall, but it expressly made known its intention to use the wall. It filed with the building department plans for a garage to be erected on its premises, showing the intended use of the party wall as a supporting and retaining wall. "Thereupon the defendant, with full knowledge of

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<sup>31</sup> 47 C. J. 1333, §22.

<sup>32</sup> *Duncan v. Rodecker*, 90 Wis. 1, 62 N. W. 533 (1895).

the facts and over the objection and protest of the plaintiff, took down its building including the entire party wall." <sup>33</sup> It could not possibly be maintained that plaintiff had abandoned the wall and its rights in it.

Had plaintiff wished to raise the height of its building, extend the wall to the rear or alter the tenement house that originally stood on the premises, it could have used the party wall for that purpose and defendant could not rightfully have interfered. Why, then, should defendant be allowed to interfere when plaintiff wishes to erect a new building, fully satisfied with the condition of the wall as it exists? There is authority holding that one who wishes to rebuild cannot tear down the party wall when it is not dilapidated but must use it, if it affords a sufficient support for his building. <sup>34</sup> Plaintiff was doing no more than complying with the law. Should he be penalized? The writer respectfully submits that on principle and reason the court went astray. The doubts that the court itself evinced by the dissent of two judges, who unfortunately did not hand down opinions, have been, in the writer's estimation, resolved against the decision of the court.

ANTHONY CURRELI.

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#### CHARITABLE TRUSTS—CERTAINTY OF PURPOSE.

A charitable trust is a gift to indefinite or uncertain beneficiaries for the purpose of "either bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government." <sup>1</sup> At the outset it is well to note certain distinctive features of this type of trust.

(1) It is founded upon a humanitarian view looking to the improvement and well being of mankind. <sup>2</sup>

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<sup>33</sup> 357 East Seventy-sixth Street Corp. v. Knickerbocker Ice Co., 237 App. Div. 717, 262 N. Y. Supp. 705 (1st Dept. 1933).

<sup>34</sup> Partridge v. Lyon, 67 Hun 29, 21 N. Y. Supp. 848 (1893).

<sup>1</sup> Union Pac. Ry. Co. v. Artist, 60 Fed. 365, 369 (C. C. A. 8th, 1894); Stuart v. Easton, 74 Fed. 854, 859 (C. C. A. 3rd, 1896), *aff'd*, 170 U. S. 383, 18 Sup. Ct. 650 (1898); People v. Fitch, 154 N. Y. 14, 32, 47 N. E. 983, 988 (1897); Jackson v. Phillips, 96 Mass. 539, 556 (1867).

<sup>2</sup> Ould v. Washington Hospital, 95 U. S. 303, 24 L. ed. 450 (1874); Tilden v. Green, 130 N. Y. 29, 28 N. E. 880 (1892), wherein the phrase "well doing and well being of mankind" was used in denoting the purpose of the charitable trust.