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# Party Walls-What Constitutes a Use-Use By Lessee of Non Builder

PARTY WALLS—WHAT CONSTITUTES A USE—USE BY LESSEE OF NON-BUILDER—Plaintiff and defendant were adjoining landowners, and they entered into an agreement whereby the defendant permitted the plaintiff to "extend" a party wall eight inches in width on the defendant's side of the property line, and whereby the defendant promised to pay the plaintiff one-half of the value of said wall whenever the defendant, his successors or assigns, desired to use the same. The agreement stipulated that the defendant acquired "the right to use said wall—as a party wall." Plaintiff erected the wall, and at the time of erection and continuously thereafter, defendant's adjoining premises were in the possession of a tenant. This tenant built a frame garage about twenty-four feet wide and twenty-four feet long, supported by posts which rested on brick piers built on the ground. The party wall formed one of the walls of the garage, and the paper roofing of the garage was attached to the wall, this being, however, the only point of connection between the garage and the wall. Plaintiff contended that this was such a use as to make the defendant liable to contribute one-half the value of the party wall. Trial was had by the court, without a jury, resulting in a judgment for the defendant. Motion for a new trial was filed and overruled. Plaintiff appealed. Held, that construction of a garage so that a party wall formed one of its walls attached to remainder of garage only by roofing paper is not such a use as to render adjoining landowner liable for contribution under a party wall agreement; and that the tenant's unauthorized use of a party wall could

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[a] Dunn v. State (1903), 162 Ind. 174, 70 N. E. 521; Rock v. State (1915), 185 Ind. 51, 110 N. E. 212; Redman v. State (1820), 1 Blackf. 96; Lovell v. State (1859), 12 Ind. 18; Hahn v. State (1914), 182 Ind. 1, 105 N. E. 385.

[a] Cross v. State (1894), 138 Ind. 254, 37 N. E. 790; Spears v. State (1897), 147 Ind. 51, 46 N. E. 301; Thompson v. State (1919), 189 Ind. 182, 125 N. E. 641; Zimmerman v. State (1920), 190 Ind. 537, 130 N. E. 235.

not impose on the landlord a duty of contributing half of the cost under such an agreement.[1]

There are many courts which have held that under agreements or statutes providing that the adjoining owner shall, on making use of a wall, contribute to the builder toward the cost of its construction, the use contemplated is the use to which a party wall is ordinarily put, namely, its use in the construction and support of an adjoining building, including the resting of timbers of the building on or in the wall; and in the absence of other provisions, until such a use is made, no liability for contribution arises.[2] In some instances, it has been said that a use which is slight or temporary in its character will not make the user liable, that the utilization intended is such as makes the wall a part of some permanent structure; as in Beggs v. Duling,[3] where there was an open shed, ten feet high, with the roof nailed to a two story party wall; and in Fox v. Mission Free School,[4] where a one story open shed was fastened onto a party wall.

There are some authorities, however, that hold as a qualification to the above rules, that though a land owner is not liable to the owner of the party wall for availing himself of such wall as part of an inclosure of his premises,[5] the use of the party wall as one of the inclosing walls of a building erected on the adjoining lot is such a use as renders the adjoining owner liable for contribution,[6] even though the building of which the party wall constitutes one of the inclosures is not actually attached to, or supported by the party wall.[7] In most of the cases, the building of which the party wall was one of the inclosing walls was of a fairly substantial and permanent nature; however, in Moye v. Morrison,[8] the court declared that a use of the party wall as an inclosing wall for a one story shed, open at the front, with one side wall of tin and one brick, supported by posts set in stone and covered by roofing paper was such a use as to render the user liable for contribution. One case also held that erection of a wooden structure which would be unlawful under a city ordinance, except that the party wall formed one side, was such a use or benefit of the wall as rendered the builder liable for his share of the party wall erection costs.[9]

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[1] Jones v. S. S. Fisher Realty Co. (1933), 187 N. E. 753.

[2] McEwen v. Nelson (1891), 40 Ill. App. 272; Berry v. Godfrey (1908), 198 Mass. 228, 84 N. E. 304; Fox v. Mission Free School (1894), 120 Mo. 349, 25 S. W. 172; Hunt v. Ambruster (1865), 115 N. J. Eq. 208; Kingsland v. Tucker (1889), 115 N. Y. 574, 22 N. E. 268; Brown v. McKee (1874), 57 N. Y. 684; Douthitt v. State Nat. Bank (1914), 42 Okla. 676, 142 Pac. 1009; Fidelity Ins. Co. v. Hafner (1897), 6 Pa. Super. 48; McCormick v. Stoneheart (1917), (Tex. Civ. App.), 195 S. W. 883, 885.

[3] (1897), 102 Iowa 13, 70 N. W. 732.

[4] (1894), 120 Mo. 349, 25 S. W. 172.

[5] Young v. Linn Motor Co. (1932), (Tex. Civ. App.) 53 S. W. (2nd) 799.

[6] Harris v. Dozier (1897), 72 Ill. App. 542; Deere v. Weir-Shugart Co. (1894), 91 Iowa 422, 59 N. W. 255; Japeles Confectionery Co. v. Brown (1906), 147 Ala. 593, 41 So. 626; Costa v. Whitehead (1868), 20 La. Ann. 341; Huston v. De Zeng (1898), 78 Mo. App. 522.

[7] Greenwald v. Kappes (1869), 31 Ind. 216; Deere v. Weir-Shugart Co. (1894), 91 Iowa 422, 59 N. W. 255; Canal-Villere Realty Co. v. S. Grumble Realty Co. (1849), 1 La. Ann. 123.

[8] (1923), 81 Pa. Super. 251.

[9] Allen v. Cass-Stauffer Co. (1891), 11 Pa. Co. Ct. 231.

The reason for such line of authority seems to be that while it is true that a most important use of a party wall is to give support to the building to which it is common, as by bearing the weight of floors and roof, it is not the only use and in many cases not the chief one. Walls are not only important to support floors and roofs, but they are necessary to inclose buildings and make them fit for use.[10] In Hilsmeyer v. Berry,[11] the court said, "Use of a party wall does not necessarily mean that it must be used as a means to support the weight of the adjoining structure."

It might be of value to especially notice a recent Louisiana decision[12] which held that a corporation constructing a building without using the party wall for support was not liable under the Civil Code for "use" and did not have to pay half of the value thereof. This case is differentiated by the court from earlier cases[13] holding that use as an inclosure renders user liable, inasmuch as here the corporation went to great extra expense to keep from using the wall for support, while in the other cases the owners used the party wall voluntarily and were benefited thereby.

As a further proposition, there is some authority that under an agreement or statute requiring contribution by the adjoining owner to the builder of a wall on use by the former, the adjoining owner is liable for a share of the cost of the wall where it is used by his lessee, if it appears that he knew of such use at the time it was made,[14] or that he is, under the terms of the lease, entitled to improvements made to the premises by the lessee.[15] In touching upon this point in the principal case, the Indiana Appellate Court relied partially on an Iowa case, Percival v. Colonial Insurance Co.,[16] in which the court held that since the duty to contribute to the cost of a party wall became a personal liability of the first person who uses it, where a lot is held by the lessee who first uses the wall, there is no liability on the part of his lessor, who has made no use of it, either to pay the one who built it or to reimburse the lessee, who alone is liable. The Iowa court, however, explained that this rule is the outgrowth of Iowa's peculiar statute on the subject. This statute gives either of two adjoining landowners the right, without the consent of the other, to rest a party wall on the other's premises, and the court says that the only theory on which this statute can be held constitutional is that such party wall does not constitute an incumbrance on the premises so as to impose a liability to a grantee under the usual covenants of conveyances. Whether such a rule as the Iowa court has formulated as to liability of the lessor for use of a party wall by his lessee would be applicable where a similar statute is not in effect, as in Indiana, is at least open to question.

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[10] Deere v. Weir-Shugart Co. (1894), 91 Iowa 422, 59 N. W. 255.

[11] (1928), 132 Okla. 177, 169 Pac. 1078, 1079.

[12] Grand Lodge, K. P. of Louisiana v. Thomson & Bros. (1930), 12 La. App. 258, 127 So. 32.

[13] Costa v. Whitehead (1868), 20 La. Ann. 341; Canal-Villere Realty Co. (1849), 1 La. Ann. 123.

[14] Pillsbury v. Morris (1893), 54 Minn. 492, 56 N. W. 170.

[15] Auch v. Labouisse (1868), 20 La. Ann. 553.

[16] (1908), 140 Iowa 275, 115 N. W. 941.