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Party Walls

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CASES NOTED

PARTY WALLS

Plaintiff brought an action to enjoin defendant, the owner of adjacent property, from demolishing the wall of a building that had formed a common wall with plaintiff's building since 1920. The common wall was located approximately one inch inside the defendant's property line and plaintiff's building encroached upon defendant's property by one inch. It was not evident that the two buildings were attached until the defendant began to demolish his building. There was no predecessor in title common to both parties. Plaintiff, arguing that there was an easement described as a party wall, sought an injunction to prevent the defendant from destroying the common wall. The trial court found that such an easement did exist. On appeal to the District Court of Appeal of Florida, Third District, *held,* reversed with directions to enter a judgment dismissing plaintiff's complaint: A true party wall exists where there is either an actual agreement to use the wall as a party wall, a common predecessor in title, or a prescriptive use of the wall. *Esquire Estates, Inc. v. Krakow*, 249 So.2d 503 (Fla. 3d Dist. 1971).

The existence of party walls was first enunciated in Florida in *Orman v. Day*.[1] Since *Orman,* there has been a dearth of Florida decisions on this topic. It is necessary, therefore, to look to other sources for a workable definition of a party wall. A party wall has been defined as

> [a] wall located upon or at the division line between adjoining landowners and used or intended to be used by both in the construction or maintenance of improvements on their respective tracts, or, more briefly, as a dividing wall for the common benefit and convenience of the tenements which it separates. The term "wall in common," as sometimes used, has the same meaning as party wall. A distinctive feature of a party wall is that the adjacent buildings are so constructed that each derives its support from the common wall . . . . A party wall is not required to stand upon the properties of both of the adjoining owners, or on the dividing line; it may rest entirely on the land of one owner and still have the legal characteristics of a party wall.[2]

It is generally recognized that even in the absence of a specific statute, party walls may be created by contract, severance, or by prescriptive use.[3]

The creation of a party wall by contract occurs when two adjoining

1. 5 Fla. 385 (1853).
2. 40 AM. JUR. *Party Walls* § 2 (1942).
3. Pickens, *Party Walls*, 41 IOWA L. REV. 613, 617 (1956); 40 AM. JUR. *Party Walls* § 4 (1942).

lot owners agree to erect a common wall for buildings erected or to be erected on each of the lots. This common wall becomes a party wall with such incidents as the parties may stipulate.[4] The contract creating the party wall may be either expressed or implied.[5]

A second method of creating a party wall is by severance.[6] A party wall is created by severance when an owner of buildings, located on adjoining lots and having a common wall, conveys one of the lots to a grantee. In such a case, the law implies the reservation of an easement in the half of the wall granted, and the grant of a corresponding easement in the half retained. The title of each owner, of necessity, becomes subject to the easement of the other, if the support of each building is dependent on the common wall.[7] Thus, when a conveyance operates as a severance of the title to lots where there are buildings supported by a common wall which is located on or near the division line, the wall is considered a party wall.[8]

A third method by which a party wall may be created is by prescription.[9] When a common wall is built, either partly on the land of both adjoining owners or wholly upon the land of one owner, if it has been used and enjoyed in common by the owners of both buildings for the prescriptive period, it becomes a party wall.[10] In order to establish an easement by prescription in Florida,

> [a] claimant must prove actual, continuous, uninterrupted use for a period of twenty years. In acquisition of such an easement the use must be adverse under claim of right and *must either be with the knowledge of the owner or by a use so open, notorious, visible, and uninterrupted that knowledge of the use by an adverse claimant is imputed to the owner.* Moreover, the use must be inconsistent with the owner's use and enjoyment of his lands and also must not be a permissive use; for the use is required to be such that the owner has a right to a legal remedy to stop it.[11]

Further, the distinction between the acquisition of title by adverse possession and the acquisition of a prescriptive right must be noted. In the former the possession must be exclusive, while a prescriptive right may be acquired through a use in common with the owner.[12]

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4. *See, e.g.*, Nabers v. Wise, 241 Ala. 612, 4 So.2d 149 (1941).

5. Louis Pizitz Dry Goods Co. v. Penney, 241 Ala. 602, 4 So.2d 167 (1941); Liberty Nat'l Bank & Trust Co. v. Merchant's & Mfr's Paint Co., 307 Ky. 184, 209 S.W.2d 828 (Ct. App. 1948).

6. Fleming v. Cohen, 186 Mass. 323, 71 N.E. 563 (1904).

7. *Id.*

8. Weadock v. Champe, 193 Mich. 553, 160 N.W. 564 (1916).

9. Carley v. Lawrence, 170 F.2d 381 (7th Cir. 1948); Waterman S. S. Corp. v. McGill Institute, 274 Ala. 481, 149 So.2d 773 (1961).

10. Sorensen v. J.H. Lawrence Co., 197 Md. 331, 79 A.2d 382 (1951).

11. Hunt Land Holding Co. v. Schramm, 121 So.2d 697, 700 (Fla. 2d Dist. 1960) (emphasis added).

12. Downing v. Bird, 100 So.2d 57 (Fla. 1958).

The law used in reaching the decision in *Esquire Estates, Inc. v. Krakow*[13] is not as unusual as the application of the law to the particular facts of this case. The Florida court merely adopted the general rule, previously accepted in other jurisdictions, that a party wall can be created where there is either an actual agreement to use the wall as a party wall, a common predecessor in title, or a prescriptive use of the wall.[14]

The court, analyzing the three methods in which a party wall could have been created, summarily rejected the contention that a party wall had been created by agreement by holding that the record was devoid of any evidence upon which an agreement could be presumed. In a similar manner, the court dismissed the possibility of the creation of a party wall by severance by stating that there was no predecessor in title who was common to both parties. Therefore, no easement in the common use of the wall could be implied.

In analyzing the possibility of a creation by prescription, the court held that no prescriptive right to the use of the wall could exist because there was no proof that the use was "open and obvious during any twenty year period."[15] The court based this holding on the fact that none of the witnesses presented at trial knew of the use until shortly before the beginning of the litigation. In addition, the method by which the buildings were attached was not observable until demolition of one building had begun.

The court's decision that there was no prescriptive easement is perhaps open to some criticism in that it did not expressly deal with all theories of recovery. For example, in an Alabama case,[16] the argument was advanced that the structural work in the building concealed the fact that the wall was a common wall of both buildings. In response to this argument, the court stated:

> The easement was possessory, an actual use of the wall in question. The structural work is not supposed to expose the connection of the building to the wall. By measurements complainants could have readily discovered the wall was wholly on their lot, and of necessity was a supporting wall for respondents' building. *They were charged with notice of the easement.*[17]

One might speculate that the Alabama Supreme Court would have held that knowledge of use by the adverse claimant should be imputed to the owner under the facts of the instant case. Had this finding been made, a party wall easement would have been created by prescription.

Even though the court in *Krakow* concluded that knowledge of the use by the adverse claimant should not have been imputed to the owner,

13. 249 So.2d 503 (Fla. 3d Dist. 1971).
14. *See* note 3 *supra*.
15. Esquire Estates, Inc. v. Krakow, 249 So.2d 503, 505 (Fla. 3d Dist. 1971).
16. Nabers v. Wise, 241 Ala. 612, 4 So.2d 149 (1941).
17. *Id.* at 617, 4 So.2d at 152 (emphasis added).

one further question remains. Certainly, both parties' predecessors in title had knowledge of the situation at the time the common wall was created. The question then becomes whether the knowledge of the original predecessors in title has any effect on the present parties to the litigation, who had no knowledge of the existence of the common wall. This question was not explored by the court in its opinion.

To resolve this question, *Harrison v. Union National Bank*[18] might be considered. In *Harrison,* on the basis of facts strikingly similar to those in the noted case, the court held that when a person builds a wall wholly upon his own land and permits the adjoining owner to support his floor beams in the wall, if the successors in title of the owner of the land upon which the wall stood have no notice or knowledge of the support given, the adjoining owner cannot acquire an easement for such support by any lapse of time. Thus, it appears that even if the original predecessors in title to the common wall had knowledge of the situation, the decision in *Esquire Estates, Inc. v. Krakow*[19] that there was no prescriptive easement is sound.

In the opinion of this writer, the court had a unique opportunity to delineate the law of party walls in Florida. The court utilized this occasion to establish a general rule of law, which has been previously accepted in most other jurisdictions. In addition, the court properly applied this rule of law to the facts of this case. Although a different result could have been reached by imputing knowledge of the existence of the party wall to the defendant in the instant case, it is submitted that the result reached by the court is a more rational solution to the problem than a solution based on imputed knowledge.

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PROTECTING THE LIVES AND LIMBS OF PUBLIC INVITEES—NEW LIABILITY FOR FLORIDA LAND OWNERS?

Defendant, an honorary member of the Garden Club of Palm Beach, gratuitously allowed her estate to be included in a club money-raising tour of show place homes. Plaintiff, who had paid a five dollar tour fee to the Garden Club, tripped on a piece of vinyl material protecting the Defendant's rugs and fractured her hip while on the tour. The jury, having been instructed that the plaintiff was a licensee, returned a verdict upon which judgment was entered for the defendant. On appeal to the District Court of Appeal, Fourth District, *held,* reversed and remanded: The "mutual economic benefit" test adopted by the Florida Supreme Court

18. 22 Pa. County Ct. 562 (1899), *aff'd,* 13 Pa. Super. 274 (1900).
19. 249 So.2d 503 (Fla. 3d Dist. 1971).