

Louisiana Law Review

Volume 17 | Number 3

Golden Anniversary Celebration of the Law School

April 1957

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Repository Citation

Burrell J. Carter, *The Party Wall Servitude in Louisiana*, 17 La. L. Rev. (1957)

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time it should be obeyed. If this be correct, there is no logical, moral, or legal reason why members of the legislature should, any more than any other official or citizen of a state be allowed to usurp from the people the rights of control which they have seen fit to reserve to themselves in their constitution.¹⁰⁷ It may well be that it is desirable to protect the representation of certain districts by providing for minimum representation in the constitution of a state. This has been done.¹⁰⁸ Such is the right of a state to decree its policy. But at the same time, that right is one belonging to the people as a sovereign and not to a minority of representatives espousing the cause of self or group interest.

George W. Hardy III

The Party Wall Servitude in Louisiana

In urban areas, the owners of adjoining properties often contract to build one wall on the line between their properties to support the buildings of both. This is done primarily to conserve land area, construction materials, and labor. In France, not only may a party wall be created conventionally, but an owner of property which adjoins a wall has a right, a legal servitude, to purchase an interest in the wall and make it one in common.¹ This right is granted by Louisiana law also; but, additionally, Louisiana law permits the person who first builds to rest one-half his wall on the land of his neighbor.² This Comment will be

107. See *Dyer v. Kazuhisa Abe*, 138 F. Supp. 220, 236 (D. Hawaii 1956); *Radford v. Gary*, 145 F. Supp. 541 (W.D. Okla. 1956) (dissenting opinion).

108. For example, see Miss. CONST. art. 13, § 256.

1. FRENCH CIVIL CODE art. 661: "Every owner adjoining a wall has also the right to make it a party wall, wholly or in part, by reimbursing to the owner of the wall half its value or half the value of the part over which he wishes to have a joint right and half the value of the land on which the wall is built." Compare with LA. CIVIL CODE art. 684 (1870): "Every proprietor adjoining a wall has, in like manner, the right of making it a wall in common, in whole or in part, by reimbursing to the owner of the wall one-half of its value, or the half of the part which he wishes to hold in common, and one-half of the value of the soil upon which the wall is built, if the person who has built the wall has laid the foundation entirely upon his own estate."

2. LA. CIVIL CODE art. 675 (1870): "He who first builds in the cities and towns, or their suburbs, of this State, in a place which is not surrounded by walls, may rest one-half of his wall on the land of his neighbor, provided he builds with stones or bricks at least as high as the first story, and not in frame or otherwise; and provided the whole thickness of this wall do not exceed eighteen inches, not including the plastering, which must not be more than three inches.

"But he can not compel his neighbor to contribute to the raising of this wall." Cf. *Zellar v. LaNasa Bakery*, 172 So. 33 (La. App. 1937) (zoning ordinances).

concerned with the party wall servitudes established by the Louisiana Civil Code.

Situations from Which Party Walls May Arise

The Code specifically provides rules for two situations in which party walls may come into existence as a result of a legal servitude. Article 675 contemplates a situation in which there is no existing wall on or near the dividing line, and states that the person who first builds may rest half his wall on the land of his neighbor, provided that he builds with stone or brick as high as the first story and the entire thickness of the wall does not exceed eighteen inches. It is important to notice that the wall thus erected is only "potentially" a party wall. It becomes a party wall only when and if the neighbor pays one-half the cost of the wall. Article 684 provides that when a pre-existing wall is on or at the dividing line, the owner of property which adjoins the wall may make it one in common by paying for one-half the value of the wall and one-half the value of the property upon which it is located.

A third possible situation, for which the Code makes no specific provision, is one in which a pre-existing wall is located within a few inches of the dividing line. The issues involved are as follows: Is the wall susceptible of being made a party wall under Article 684 even though the wall is only near, rather than at or on, the line? If the wall cannot be made a party wall under Article 684, does the adjoining proprietor then have a servitude whereby he might place one-half his wall on the land of his neighbor under the provisions of Article 675?

If Articles 675 and 684 are construed literally, the party wall servitude will be limited to the two situations specifically provided for, i.e., where there is no existing wall, or where the wall is on or at the line.³ The practical result would be that the existence of a wall near, but not contiguous to, the line would prevent the creation of a party wall or a "potential" party wall.

To accomplish fully the purposes underlying the establishment of party walls, that is, the conservation of space, land, and construction materials, and the promotion of harmony between

3. See *Jamison v. Duncan*, 12 La. Ann. 785 (1857). It should be noticed that the court has limited the servitude to side walls. In reference to this the court has said that the right is in derogation of property and should be strictly construed.

neighbors, it would appear that the articles should not be so strictly construed.⁴ Rather, Article 684 should be construed to permit a proprietor, whose lot adjoins property upon which a wall has been built only a negligible distance from the property line, to acquire an interest in the wall and make it one in common. If, however, the wall is located more than a negligible distance from the line, it would appear that Article 675 would be applicable, that is, though the pre-existing wall would not be susceptible of being made a party wall, its existence would not prevent the adjoining proprietor from erecting a potential party wall across the line. In building this "second" wall, the builder would be in fact the "first builder" under Article 675 because a party who erects a wall a substantial distance from the dividing line cannot be considered the first to build within the contemplation of this article.⁵

Article 675 provides that a person may rest one-half of his wall on his neighbor's property provided the wall does not exceed eighteen inches in thickness. From this it can be concluded that a person can use a maximum of nine inches of his neighbor's property. There is no indication that the nine-inch implication of Article 675 should be considered a prerequisite to the exercise of the servitude; rather, it appears to be no more than a limitation on the use of the neighbor's property. Therefore, the fact that a wall exists within nine inches of the line should not prevent the exercise to a lesser extent of the right given by Article 675.

The French authorities are not entirely in point, for there is no article of the French Civil Code comparable to Article 675 of the Louisiana Civil Code. But in applying the article⁶ of the French Code similar to Article 684 of the Louisiana Civil Code, two French courts have held that, though a person builds a wall away from the property line, the adjoining proprietor may acquire an interest in it if the distance from the line is

4. See *Heine v. Merrick*, 41 La. Ann. 194, 5 So. 760 (1889), where after stating that these provisions established rights in derogation of property and must be strictly construed, the court went on to say: "[B]ut such strictness cannot be carried to the point of attaching an impossible meaning to the law or rendering it practically nugatory." The court held that the foundation of a building would necessarily have to extend beyond the nine inches specified in Article 675 and that the right to build a wall partly upon the land of the adjoining proprietor includes the right to enter upon the neighbor's property to the extent necessary to exercise that right.

5. *Carrigan v. DeNeutbourg*, 3 La. Ann. 440 (1848); *Crocker v. Blanc*, 2 La. 531 (1831); *Larche v. Jackson*, 9 Mart. (O.S.) 724 (La. App. 1831).

6. FRENCH CIVIL CODE art. 661.

negligible.⁷ Two other French courts have reached opposite results.⁸

No Louisiana cases expressing an opinion upon these problems have been found. But the practical effect of several decisions of the Louisiana Supreme Court seems to evince a tendency to affirm the application of either Article 675 or Article 684 to the situation in which a pre-existing wall is located near but not at the line. In the case of *Lavergne v. Lacoste*,⁹ the Supreme Court allowed an adjoining proprietor to make his neighbor's wall a party wall under Article 684 although a part of the wall did not extend to the division line. In applying Article 675, the Supreme Court has held that a pre-existing wall which leaves a space between the wall and the edge of the property would not prevent the neighboring proprietor from exercising the servitude under that article.¹⁰ It was held, in the case of *Crocker v. Blanc*,¹¹ that such a wall could not be considered a division wall. The court went on to say that division walls were the only structures which authorized a proprietor to prohibit the erection of a wall partially upon the property of each. However, in the *Lavergne* case, the court allowed a "division wall," or wall on or near the dividing line, to be made a party wall under the provisions of Article 684. In the final analysis, it appears that the existence of a wall, whether it be on, at, near, or far from the line, would determine only the issue of whether the right afforded by Article 675 or that afforded by Article 684 is appropriate, but would in no way prevent the creation of a party wall.

What Constitutes a Party Wall

Article 675 provides that the party who first builds must construct with brick or stone if he is to exercise the right of placing one-half his wall on the land of his neighbor. Although Article 684 does not require that a wall upon which the right provided for by that article is to be exercised must be made

7. Bourges, 9 Dec. 1837, J. G. Servit 460; Caen, 27 Janv. 1860, D.P. 60.2.204, both cited in 1 DALLOZ, CODE CIVIL ANNOTES art. 661, n. 67 (1900).

8. Douai, 7 Aout 1845, D.P. 47.4.446; Civ. C., 26 Mars. 1862, D.P. 62.1.175; Bourdeaux, 3 Janv. 1888, D.P. 88.2.320, cited in 1 DALLOZ, CODE CIVIL ANNOTES art. 661, nn. 69, 70, 71 (1900).

9. 26 La. Ann. 507 (1874).

10. Cf. Carrigan v. DeNeutbourg, 3 La. Ann. 440 (1848); Crocker v. Blanc, 2 La. 531 (1831); Larche v. Jackson, 9 Mart.(O.S.) 724 (La. App. 1831).

11. 2 La. 531 (1831).

of brick or stone, the Supreme Court, in *Bryant v. Sholars*,¹² limited the application of the article to such walls. In that case a proprietor whose property adjoined a wooden wall was refused the right to acquire an interest in it. The court stated, "[t]he side of a wooden house is not a party wall held in common. It is not a wall at all." The court explained its conclusion by saying that "the Articles of the Code on the subject of party walls were enacted from public policy, in aid of the general interest for the solidity and safety of brick or stone building." The French courts and text writers similarly interpret Article 661 of the Code Civil, which corresponds to Article 684 of the Louisiana Code, as not extending to wooden walls.¹³

Since a wooden wall cannot be made a party wall under Article 684, can such a wall erected on or near the property line

12. 104 La. 786, 29 So. 350 (1901).

13. 7 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS § 508 (2d ed. 1876): "*La cour de cassation a jugé, avec raison, que la loi s'applique à toute espèce de clôture. Dans l'espèce, il y avait une clôture en planches, connue au Havre sous le nom de pal. Le tribunal avait admis le voisin à en acquérir la mitoyenneté. O'était étendre la disposition de l'article 661 à un cas que le texte ne prévoit pas; or, la disposition est une dérogation au principe d'après lequel nul ne peut être contraint de céder en tout ou en partie sa propriété; elle est donc essentiellement exceptionnelle, et partant de stricte interprétation. La cour ajoute que les motifs qui ont fait admettre la cession forcée de la mitoyenneté des murs n'existent pas pour les clôtures en planches.*"

"The Court of Cassation has decided, and reasonably so, that the law applies to all kinds of enclosures. In the case in question, there was a wooden wall, known in Havre by the name of *pal*. The lower court had permitted the neighbor to acquire part ownership of it. It was decided that Article 661 had been extended to a case which the text did not provide for because the disposition is in derogation of a principle according to which no one can be forced to give up his property, in whole or in part; it is, then, essentially exceptional, and is to be strictly interpreted. The court adds that the motives which caused the forced cession of part ownership do not exist for plank walls.

4 HUC, COMMENTAIRE DU CODE CIVIL § 335 (1893): "*Que l'expression mur doit être considérée comme employée dans un sens limitatif et non démonstratif; elle ne devrait donc pas s'appliquer aux clôtures composées de pieux, lisses, planches, etc.*"

("That the word 'wall' must be considered as employed in a limiting sense and not a demonstrative sense; it should not, then, be applied to walls composed of stakes, rails, planks, etc.")

2. AUBRY ET RAU, COURS DE DROIT CIVIL FRANÇAIS 611 (5th ed. 1897): "*D'un autre côté, elle ne s'applique pas simples clôtures en planches.*" (On the other hand it does not apply to simple wooden walls.") (Stated in reference to Article 661.)

4 BEUDANT, COURS DE DROIT CIVIL FRANÇAIS § 365 (2d ed. 1938): "*Le critérium du mur a été dégagé, en ces termes, par la Cour de Rouen: 'On doit entendre par mur, ainsi que le disent les experts, tout ouvrage en maçonnerie, d'épaisseur variable, formé de matériaux superposés et liés avec du mortier de chaux, de plâtre ou de ciment.' Rennes 29 Février 1904, précité. D'où il suit qu'une clôture en planches, quelle qu'en soit la solidité, n'est pas un mur; elle n'est pas un ouvrage de maçonnerie.*" ("The criterion of a wall has been defined in the following terms by the Court of Rouen: 'We must understand by "wall," as experts say, every work in masonry, of variable thickness, formed of materials superimposed and bound together with lime, plaster, cement, or mortar.' . . . Therefore, a wooden wall is not a wall, whatever may be its solidity; it is not work of masonry.")

prevent the exercise of the legal servitude provided by Article 675, as would a stone wall? If the wooden wall is a mere board or plank fence, it would seem that it would not be the type of existing structure that would preclude the applicability of Article 675. If, however, the wooden wall is used to support a building the problem becomes more difficult. The case of *Gettwerth v. Hedden*,¹⁴ concerning a similar issue, may be helpful on this problem. There, the court allowed the defendant to tear down his neighbor's wall and erect a brick wall strong enough to support both structures. The court did not indicate the nature of the materials used in the original wall. If the case implies a rule applicable to existing wooden structures, then it would appear that a person may not acquire an interest in a wooden wall, and the existence of the wall would not prevent the erection of a brick or stone party wall by the adjoining proprietor under the provisions of Article 675.

Reimbursement To Effect a Party Wall

A person who uses the wall of his neighbor to support a building is required to acquire an interest in the wall and reimburse the owner.¹⁵ There are two general provisions in the Code as to the proper reimbursement to effect a party wall. The first paragraph of Article 676 provides that, when a wall has been constructed partly upon the land of the adjoining proprietor, "if the neighbor be willing to contribute for his half to the building of the wall thus raised, then this wall is a wall in common between the proprietors." The second paragraph of this article provides that even though the neighbor refuses to contribute to the raising of the wall, he may later make it a party wall by paying "one half of the cost of construction." Article 684 provides that when a person has constructed a wall entirely upon his own estate his neighbor may make it a party

14. 30 La. Ann. 30 (1878).

15. *Graihle v. Hown*, 1 La. Ann. 140 (1846). In this case it was held that the use of a wall to support the roof, floors, and walls renders the user liable for half of what, by such use, was made common.

See also *Canal Villere Realty Co. v. Gumble Realities and Securities Co.*, 1 La. App. 123 (1924), where the roof of a building "flashed" into the neighbor's wall was held a sufficient use of the wall to render the adjoining proprietor liable to the owner of the wall.

But see *Grand Lodge v. Thompson and Bros. Ltd.*, 13 La. App. 258 (1930), where the use of a wall to enclose one side of the building of the neighbor, but without connecting with the wall was held insufficient to render the proprietor adjoining the wall liable to the owner.

wall by paying for one half its value and one half the value of the property upon which it is located.¹⁶

From the application of these provisions by the courts, a body of well established principles has emerged. If a party has placed one half of his wall on the property of his neighbor, and has asked for a contribution from the latter, who refused, the party so refusing may later make the wall one in common by paying one half of the *cost of construction*.¹⁷ If the adjoining proprietor was not requested to contribute to the raising of the wall, he may make it a common one by paying for one half the *value* of the wall.¹⁸ In the cases of *Florance v. Maillot*¹⁹ and *Fitzgerald v. Katzenstein & Wiener*,²⁰ it was held that where a replacement of the wall would cost more than the original cost of construction, the party who made the wall a party wall, and who had not refused to contribute when the wall was constructed, had to pay only one half the original cost of construction.²¹ In *Olsen v. Tung*²² it was held that the same rules applied when a party exercised his right to make a wall, resting entirely upon the property of his neighbor, one in common. However, if a party chooses to pay one half the cost of construction, he has the burden of proving this cost.²³ A failure to discharge this burden will result in the person being liable for the present value of the wall.²⁴

Presumption and Transfer of Ownership

Article 677 of the Code states that every wall which is a separation between buildings is presumed to be a party wall if there is no title, mark, or proof to the contrary.²⁵ The court, how-

16. See *Oldstein v. Firemen's Ass'n*, 44 La. Ann. 492, 10 So. 938 (1892), where it was held that the building of a wall by one of two adjacent proprietors, and placing the same in equal proportions on each lot, did not make it a party wall; *Jeanin v. DeBlanc*, 11 La. Ann. 465 (1856), where it was held that the wall belongs entirely to the person who erected it until the neighbor contributes to the cost of the wall.

17. *Board of Administrators of Tulane Educational Fund v. Israel*, 132 La. 676, 61 So. 734 (1913); *Graihle v. Hown*, 1 La. Ann. 140 (1846) (dictum).

18. *Augustine v. Farnsworth*, 155 La. 1053, 99 So. 868 (1924); *Davis v. Graihle*, 14 La. Ann. 338 (1859); *Graihle v. Hown*, 1 La. Ann. 140 (1846). *But cf.* *Marion v. Johnson*, 23 La. Ann. 597 (1871).

19. 22 La. Ann. 114 (1870).

20. 5 La. App. 28 (1926).

21. The Supreme Court, on the ground that the judgments were correct, denied writs of review.

22. 179 La. 760, 155 So. 16 (1934).

23. *Ibid.*

24. *Ibid.*

25. See Dubuisson, *Errors of Translation in the Codes*, 5 LOYOLA L. REV. 163, 172 (1949).

ever, has qualified this statement by holding that the presumption applies only when the wall rests partially on the land of each proprietor.²⁶ The article further provides that every wall which is a separation between yards and gardens, in the cities, and even "enclosures in the fields," is presumed to be in common. However, in *Cordill v. Israel*,²⁷ it was held that the presumption did not apply to a division wall between a building and a vacant lot.

If the owner of property has not acquired an interest in a wall subject to being made a party wall, his vendee does not acquire an interest in the wall. He acquires only his vendor's right to make the wall one in common by making the appropriate contribution.²⁸ Even though the owner may permit the adjacent proprietors to use the wall, neither the owner nor his vendees acquire an interest in the wall. Should the owner of the wall require it, they must make the contribution appropriate under the circumstances to be entitled to the continued use of the wall.²⁹ If the owner of property adjacent to a wall, not held in common, permits his tenant to build against the wall, the owner of the wall may require the proper reimbursement from the owner of the property.³⁰ To the contrary, if one purchases property after his neighbor has repaired or reconstructed a party wall which neither the vendee nor his vendor is shown to have used, and the vendor has not personally undertaken to pay one-half the cost, the vendee may be relieved of the obligation to pay by giving up his interest in the wall.³¹

Repairs, Demolition, and Reconstruction

The Code provides that the repair and reconstruction of walls held in common are to be made at the expense of all who have a right to the wall, and in proportion to their interest therein.³² However, a co-proprietor who has no building supported by the

26. *Olsen v. Tung*, 179 La. 760, 155 So. 16 (1934).

27. 130 La. 138, 157 So. 778 (1912).

28. *Cordill v. Israel*, 130 La. 138, 57 So. 778 (1912); *Chism v. Lefebvre*, 27 La. Ann. 199 (1875). See *Heiderich v. Heiderich*, 3 Orl. App. 485 (La. App. 1906), where it was held that, although one of the co-owners of lot A was also the owner of lot B, and the wall on lot B encroached upon lot A, a sale of lot A to effect a partition by licitation does not convey to the purchaser any greater right to the wall than the co-owners of lot A had, which was nothing more than the right to make the wall one in common.

29. *Winter v. Reynolds*, 24 La. Ann. 113 (1872).

30. *Faison v. Lovie*, 1 McGloin 113 (La. App. 1881).

31. *Davis v. Marshall*, 9 La. Ann. 480 (1854).

32. LA. CIVIL CODE art. 678 (1870).

party wall may be exonerated from the expense of repair and rebuilding by giving up his right to the wall.³³

A party who has an interest in a wall has an absolute right to demolish it and erect one that is stronger and higher, but only at his own expense.³⁴ The Supreme Court has held that the right of demolition must be exercised with great care, the party who demolishes the wall being liable in damages for any neglect or want of skill in the demolition and reconstruction.³⁵ If the new wall must be of greater thickness to support the additional weight and height, the additional property must be taken from the land of the party who reconstructs.³⁶ However, the neighbor is bound to bear, without indemnity, the inconvenience and injury consequent to the demolition and reconstruction so far as they are inseparable from the exercise of the right.³⁷

Even though the neighbor refuses to pay for a reconstruction, the creation of the new wall does not take from it its character as a party wall. The theory is that the additional height and thickness is for the benefit of the person who undertook the additional raising. If the person who did not contribute to the reconstruction desires to take advantage of the additional height he may do so upon reimbursing the builder for one-half the cost of reconstructing the wall, and if any additional land is employed, for one-half its value.³⁸

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33. *Bank of West Carroll v. Brower*, 5 La. App. 469 (1927). See *Doll v. Cacioppo*, 90 So.2d 688 (La. 1956), where the plaintiff, a co-owner of a party wall, was required to contribute one-half to the cost of reconstructing the wall, although he used only twelve feet of the wall, which was fifty feet in height. The City of New Orleans had ordered the party wall repaired or demolished as being unsafe. Concerning reconstructing the wall, plaintiff stated that he had no intention of relinquishing any part of his complete one-half interest in the wall. The court stated: "Having refused to surrender his interest in the wall, we think that he [plaintiff] was the common owner of the entire wall."

34. LA. CIVIL CODE arts. 681, 682 (1870); *Levy v. Fenner*, 48 La. Ann. 1389, 20 So. 895 (1896); *Heine v. Merrick*, 41 La. Ann. 194, 5 So. 760 (1889); *Gernon v. Soule*, 1 Orl. App. 185 (La. App. 1904).

35. *Pierce v. Musson*, 17 La. 389 (1841); *Loney v. High*, 13 La. 271 (1839).

36. LA. CIVIL CODE art. 682 (1870). It is not clear from this article whether a co-owner, having destroyed a party wall that did not occupy nine inches of his neighbor's property, can erect a new wall using the full nine inches. It was argued in *Porkorny v. Pratt*, 110 La. 603, 34 So. 703 (1903), that the co-owner must take the property for the additional thickness from his own land regardless of the original thickness of the wall. The case was decided on other grounds, but the court said that there was "great force" in this argument.

37. *Heine v. Merrick*, 41 La. Ann. 194, 5 So. 760 (1889).

38. LA. CIVIL CODE art. 683 (1870)