ORIGINAL CIVIL.

Before Mr. Justice West.

1882
August 8.

COOVERJI LUDHA, PLAINTIFF, *v.* BHIMJI GIRDHAR, DEFENDANT.*

Party wall, liability for cost of—Building-leases—Agreement to refer disputes to a third person—Effect of such agreement on the right to sue—Award of such third person essential to right of action—Surveyor's certificate—Limitation—Covenant—Right to sue—Stranger to consideration—Landlord and tenant.

The plaintiff sued to recover from the defendant half the cost of a party wall.

The plaintiff and defendants were lessees of adjoining pieces of land under agreements made between them respectively and the Secretary of State for India in Council as lessor. The terms and conditions of the two agreements were the same. By these agreements the plaintiff and defendant respectively agreed to build houses upon the said pieces of land in the manner therein specified, and the agreements contained the two following clauses:—(1) "The buildings to be continuous with party walls common to both adjoining houses." (7) "All disputes regarding the cost and maintenance of party walls to be decided by the Government surveyor, whose decision shall be binding on both parties." In pursuance of the said agreements the plaintiff and defendants respectively erected buildings on the said pieces of land. The plaintiff caused the northern wall of his building to be built as a party wall, and it was used by the defendants as the southern wall of the building erected by them. The defendants paid the builder who was employed by the plaintiff a sum of Rs. 700 on account of the cost of erecting the party wall, but the rest of the cost was defrayed by the plaintiff. The party wall was completed in November 1871; but, in consequence of disputes which arose between the plaintiff and the building contractor, the sum payable to the latter was not ascertained for some years. In March, 1879, the plaintiff caused the party wall to be measured by a surveyor, and on the 7th June, 1879, demanded from the defendants payment of half the cost. The defendants, however, failing to pay the sum demanded, the plaintiff, after notice to the defendants, caused the cost of the said party wall to be ascertained by the Government surveyor, who by a certificate dated the 25th February, 1882, certified that the share of the cost to be borne by the defendants for the said party wall was Rs. 3,226. The plaintiff in this action sought to recover this sum from the defendants *minus* the Rs. 700 which, as above stated, the defendants had already paid, and for which the plaintiff gave them credit.

The defendants in their written statement alleged that the party wall had been partly built with materials supplied by them, and that in the year 1870 they had adjusted accounts with the plaintiff in respect of the said materials and the said party wall, and it was then agreed that the sum of Rs. 700 paid by the defendants should be treated as a final settlement. They also alleged that the plaintiff had settled disputes with the building contractors, and had only paid them three annas in the rupee on the amount of their claim in full satisfaction; the defendants pleaded that they ought not to be charged with more than their due proportion of such reduced amount. It was further contended for the defendants that their obligation to pay half the cost of the party wall existed independently

* Suit No. 99 of 1882.

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of the arrangement between them and the plaintiff to refer the matter to the Government surveyor; that this latter covenant was only collateral, and did not interfere with the plaintiff's right to sue the defendants for their half share of the cost; that the plaintiff's cause of action in this respect arose on the 15th October, 1878, when the contractor's claim was finally settled, and that this suit not having been brought for more than three years after that date it was barred by limitation.

Held that the suit was not barred. There was no right of action independently of the valuation and award of the Government surveyor. There was no separate covenant to pay compensation to which the covenant for reference to the Government surveyor could be collateral. The rights of the parties were defined by the contracts, and, under these, each lessee might have the benefit of a party wall on such terms, and no others, as he on his part submitted to. Payment of a share of the cost was not one of those terms, except in so far as each lessee, if a dispute arose, was bound by the decision of a Government surveyor. That decision was not ancillary, serving to give greater explicitness to a right already fully subsisting. It was essential to the right itself, and until it was made, no cause of action for the moiety of the cost arose.

Where, in leases granted by one lessor to several lessees taking sites for buildings intended to be contiguous and to form one block or group in mutual relation, there is a common covenant which is an inducement to the lessee to take the lease, and which he must know is equally an inducement to his neighbour to take his lease, neither can be called a stranger to the consideration. Each may be regarded as an equitable assignee of the covenants which the lessor made for his benefit as lessee. Each, consequently, has an equitable right to enforce against the other the obligation stipulated for in his interest, and serving as a part of his inducement (as the other knew) to the contract.

SUIT to recover Rs. 2,526, alleged to be the share of the cost of erecting a party wall, payable by the defendant.

The plaint stated that under certain agreements made between plaintiff and the Secretary of State for India in Council the plaintiff became lessee for the term of nine hundred and ninety-nine years from the 26th August, 1877, of a certain piece of land in Bombay, called lot No. 5, upon the tenure and conditions specified in the said agreements. The defendants became lessees of adjoining land, called lot No. 4, under similar agreements made by them with the Secretary of State for India in Council which contained terms and conditions similar to those contained in the agreements entered into by the plaintiffs.

By the terms of the said agreements the plaintiff and defendants respectively agreed to erect upon the said pieces of land buildings in the manner and within the times therein specified, and it was also provided that the buildings to be erected upon the said

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two pieces of land should be continuous with party walls common to both of them. It was further provided that all disputes regarding the cost and maintenance of the said party walls should be decided by the Government surveyor, whose decision should be binding on both parties.

In pursuance of the said agreements the plaintiff and defendants respectively erected buildings on the said pieces of land. The paintiff caused the northern wall of his building to be built as a party wall, and it was used by the defendant as the southern wall of the building erected by him. The defendants paid the builder, who was employed by the plaintiff, a sum of Rs. 700 on account of the cost of erecting the party wall, but the rest of the cost was defrayed by the plaintiff. The party wall was completed in November, 1871.

After the erection of the plaintiff's buildings and of the party wall had been completed, disputes arose between the plaintiff and the contractor who had been employed by him, in consequence of which the sum payable to the contractor was not ascertained for some years.

7. "In the month of March, 1879, the plaintiff caused the work of the said party wall to be measured by a surveyor, and the amount so found to be due by the defendants to the plaintiff for their half share in the cost of the said wall was Rs. 3,648-13-0. The plaintiff by his solicitors' letter, bearing date the 27th day of June, 1879, demanded payment of the said sum.

8. "The defendants having failed to admit the accuracy of the said report, or to pay the said sum of Rs. 3,648-13-0, the plaintiff, in pursuance of the said seventh clause of the said specification, and after due notice to the first defendant, caused the cost of the said party wall to be ascertained by the Government surveyor. By a certificate, bearing date the 25th day of February, 1882, the said Government surveyor certified that the share of cost to be borne by the defendants for the said party wall was Rs. 3,226.

9. "After crediting the defendants with the said sum of seven hundred paid by them as aforesaid, there remains due to the plaintiff by the defendants the sum of Rs. 2,526 for their share

of the cost of the said party wall. The plaintiff has demanded from the defendants payment of the said sum, but the defendants have failed to pay the same or any part thereof."

The plaintiff claimed to recover from the defendants the sum of Rs. 2,526, with interest at the rate of 9 per cent. per annum from the 17th November, 1871.

The following paragraphs from their written statement set forth the defendant's defence:—

4. "The defendants say that the plaintiff in building his house, in the said paragraph mentioned, used a considerable quantity of building materials belonging to the defendants, and that a portion of the plaintiff's party wall in the said paragraph mentioned was built by the defendants at their own expense. After the completion of the houses of the plaintiff and the defendants in the year 1870 they adjusted their mutual accounts in respect of the said materials and the said party wall, and it was then agreed by and between the plaintiff and defendants that the sum of Rs. 700 paid by the defendants, as in the said fifth paragraph mentioned, should be treated as a final settlement of all accounts whatever between them in respect of the said buildings.

5. "The defendants believe that disputes did arise between the plaintiff and his contractors, as in the sixth paragraph of the plaint stated, but such disputes were settled in or about the year 1876 by the said contractors accepting payments at the rate of three annas in the rupee or thereabouts on the amount of their claim against the plaintiff in full satisfaction thereof. The defendants submit that in any case they ought not to be charged more than their due proportion of the reduced amount so paid by the plaintiff to the said contractors.

6. "The defendants say that they had no notice of the plaintiff's intention to make the measurement in the seventh paragraph of the plaint referred to. The defendants do not admit that they or any of them received the letter of the 27th day of June, 1879, in the said paragraph mentioned."

The defendants also pleaded that the suit was barred by limitation.

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The following issues were raised by the defendants:—

(1). Whether the claim was barred by limitation?

(2). Whether the plaintiff was entitled to be recouped by defendants any and what part of the sum expended by him on the construction of the party wall in question?

(3). Whether there was a final settlement between the parties as alleged in paragraph 4 of written statement?

(4). Whether the defendants were entitled as against plaintiff to credit for building materials or otherwise by way of set off against the whole or any portion of the plaintiff's claim.

The defendants began:—

Telang (with *B. Tyabji*, for the defendant).—The cause of action arose when the contractor was paid, which was in December, 1877, and October, 1878. The plaintiff was not at liberty to sleep on his right: *Dawson* v. *Fitzgerald* (1). In the leases there is no covenant not to sue until the surveyor settles the cost. Here there is no dispute as to the cost of the wall. The defendants allege that part of the materials were supplied by them. The clause requiring disputes to be settled by the Government surveyor did not prevent the plaintiff suing: *Goldstone* v. *Osborn* (2). Again, the decision of the Government surveyor cannot do more than settle the actual cost. The amount to be contributed by the defendant is not settled. The defendant can only be required to pay his proportion of what the plaintiff has actually paid, which, we say, was much less than contractor's charge. He has only paid part in satisfaction of the whole. Defendant may claim the benefit of the reduction: Leake on Contracts, ch. i, sec. 2; *Maxwell* v. *Jameson* (3).

Farran (with the Hon. *B. Lang*, Acting Advocate General) for plaintiffs.—The case of *Maxwell* v. *Jameson* does not apply. In that case there was a joint obligation. The defendants contend they are entitled to a reduction. Suppose we had paid at a double rate, could we claim at that rate from them? The "cost" means the cost at a reasonable rate determined by the Government surveyor.

(1) L. R. 9. Ex. 7, *per* Bramwell, L. J., at p. 11, whose view was approved by the Court of Appeal, 1 Ex. D., 257.

(2) 2 C. & P. 550.

(3) 2 B. & Ald. 51, *per* Bayley, J.

No cause of action arose until the certificate of the Government surveyor was given.

It is contended that the obligation to pay for the party wall arises by implication of law, but it really arises from the agreement, and can be made complete only in the way contemplated by the agreement.

WEST, J.—The plaintiff and the defendant hold adjacent plots of building land, numbered 5 and 4, under agreements for a lease from the Secretary of State for India. These are expressed in identical terms, save as to the definition of the areas, and it has been admitted by the defendant's counsel that as to terms inserted for the common benefit of a group of lessees taking sites for buildings intended to be contiguous and to form one block or group in mutual relation, the defendant having a knowledge of the circumstances, is bound by his covenant not only towards the Secretary of State the lessor, but also towards the lessees of the neighbouring plots for whose benefit the terms were introduced, and on whom, reciprocally, he, on his part, has a claim for the fulfilment of the like terms by them for his benefit as lessee: see *Western* v. *Macdermott* (1); *German* v. *Chapman* (2). A covenant in favour of a lessor does not indeed, necessarily, avail for a tenant injured by some act of another tenant, but where there is a common covenant, such as in the present case, which is an inducement to the lessee to take the lease, and which he must know is equally an inducement to his neighbour to take his lease, neither can be called a stranger to the consideration. Each may be regarded as an equitable assignee of the covenants which the lessor made for his benefit as lessee: see *Master* v. *Hansard* (3). Each, consequently, has an equitable right to enforce against the other the obligation stipulated for in his interest and serving as a part of his inducement (as the other knew) to the contract.

Among the terms is an engagement that the intended lessee shall, within two years, erect a building of one of several kinds speci-

(1) L. R. 1 Eq. 499: S. C. on App. L. R. 2 Ch. Ap. 72. (2) 7 Ch. D. 271.

(3) L. R. 4 Ch. D. at pp. 723, 724, *per* Bramwell, L. J.; and see *Lloyds* v. *Harper*, 16 Ch. D. 290 *per* Fry, J.: "Where a contract is made for the benefit and on behalf of a third person, there is an equity in that third person to sue on the contract, and the person who has entered into the contract may be treated as a trustee for the person for whose benefit it has been entered into."

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fied "of such description and in such positions and according to the specification hereunto annexed." The specification so annexed applies in its terms to the whole group of intended buildings. It says: "(1) The buildings to be continuous, with party walls common to both adjoining houses," and (7) "All disputes regarding the cost and maintenance of party walls to be decided by the Government surveyor—whose decision shall be binding on both parties." There is here no stipulation that either of the lessees of contiguous sites shall build the party wall, but it is obvious that whichever tenant should build first must, of necessity, build a wall serving as a party wall to his own house and his neighbours. The term "party wall" has different meanings under different circumstances: *Watson* v. *Gray* (1); but the most usual of these implies a tenancy in common held by the holders of the adjacent properties, and the expression "common to both adjoining houses" seems to favour that sense in the present case. As the neighbouring lessees were thus to be tenants in common of what in the ordinary course would be built by one of them or of what would at any rate seldom be built in exactly equal proportions by each, it would be reasonable that the cost should be fairly distributed between them. Disputes might probably arise, and hence the utility, if not necessity, of the 7th article of the specification making the Government surveyor final adjudicator in all such dispntes. The plaintiff built the party wall in question and paid the contractors with a comparatively small exception. He sought payment from the defendant of one-half of the cost as valued by an architect, and when this demand failed, he applied to the Government surveyor, who eventually valued the party wall, and after making allowance for certain materials supplied by the defendant, pronounced him liable to pay to the plaintiff Rs. 3,226 as his share of the cost. Defendant had paid Rs. 700 to the contractors, and, deducting this, plaintiff now claims Rs. 2,526.

The defendant pleads limitation. It appears that the plaintiff being in difficulties, a friend of his, in 1877 and in October, 1878, bought the shares of the remaining claims against the plaintiff from the two partners of the firm of contractors who had built

(1) L. R. 14 Ch. D. 192.

for him the houses on plots No. 2 and No. 5. The sum claimed being Rs. 20,559, the plaintiff's friend bought it up for Rs. 5,150, and, on the 5th November, 1879, he transferred it or released it to the plaintiff for the same sum. It is admitted that the plaintiff's friend, Liladhar, was, in fact, acting for the plaintiff. As the contractor's claim was finally settled by him on the 15th October, 1878, while the present suit was not brought until 1882, the claim, it is contended, is barred by the lapse of three years since the cause of action arose.

In support of this contention Mr. Telang has relied on several cases, of which the one most in point is that of *Dawson* v. *Fitzgerald* (1). In that case there were covenants by a tenant to keep down hares and rabbits within uninjurious limits and to pay reasonable compensation for injury caused by an excessive number, "the amount of such compensation, in case of difference, to be referred to the arbitration of two arbitrators, the arbitrators ...to...nominate an umpire, and the decision of such arbitrators or umpire to be binding and conclusive on the lessors and the lessee", and the Court of Appeal reversing the decision of the Court of Exchequer, held that the agreement to refer to arbitrators being collateral to the one to pay compensation, the latter might be sued on without a reference. The distinction taken by the Court was between a covenant to pay a sum to be ascertained by some third person or persons and one creating liability accompanied by another for referring the matter giving rise to such liability to arbitration. In the latter case it was ruled the right of action on the one covenant was not taken away by the second covenant, whatever effect the latter might have in giving the defendant a cause of action against the plaintiff for not referring to arbitration or in enabling him to call for a reference by the Court under the Common Law Procedure Act. So, in the present case, Mr. Telang contends that the right of action, if it exists at all, arose, at latest, when the contractors were paid, that the covenant to abide by the decision of the Government surveyor is collateral, and as the plaintiff could have sued in 1878, he is barred by limitation in 1882.

The question is, whether there was any right of action in-

(1) L. R. 1 Ex. D. 257.

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dependently of the valuation and award of the Government surveyor? I cannot find that there was. Each lessee who builds, is bound to allow the wall between his house and the next "to be a party wall common to both houses". This is a term of his holding which he covenants to fulfil. There is no provision for compensation at all, except what is involved in article 7 of the specification. The language used is not, "I covenant to pay my share of the cost of party walls, such share to be ascertained in case of dispute by reference to the Government surveyor", there is no separate covenant at all to which that for the reference can be collateral. The case, therefore, differs wholly from the one relied on, and resembles those in which "no cause of action arises until the third person assesses the sum." The law, it was argued, would compel the defendant to pay his share, but the parties did not leave their rights to be settled by the law; they defined them, as they might do, by their contracts. Under these each lessee might have the benefit of a party wall on such terms and no others as he on his part submitted to. Payment of a share of the cost was not one of these terms except in so far as each lessee, if a dispute arose, was bound by the decision of the Government surveyor. Thus his assessment was not only ancillary, like reference to a builder's price book, serving to give greater explicitness to a right already fully subsisting. It was essential to the right itself. Until it was made, no cause of action for the moiety of the cost arose, and as the assessment was, in fact, made within the present year, the suit is not barred by limitation.

The same stipulation which makes the surveyor's valuation essential to the right and obligation between the parties makes it conclusive as to the amount that may be claimed. It would only be in case of fraud or misconduct, or of circumstances that must produce an unfair bias of his judgment, that the Court could deprive the Government surveyor of the functions assigned to him by the contracting parties. I find, therefore, on the several issues for the plaintiff, awarding him under the fourth issue the amount claimed by him with costs. Interest to be allowed on Rs. 2,526 at 9 per cent. from 25th February, 1882, till judgment,

and interest on the aggregate amount decreed until statisfaction.

There was, however, it is said, no dispute as to the cost of the party wall: the dispute was as to the deduction to be made from the defendant's share of the cost, and it is stipulated only that the Government sur veyor's decision shall settle the mere cost, not that it shall give any right to one lessee as against another, as such right may be subject to unlimited modifications by other circumstances. To this the answer is that, by silently rejecting the claim of the plaintiff, the defendant most practically refused to recognize it. A demand which he did not submit to, he disputed; and though the clause of the specification giving authority to the Government surveyor is very defectively expressed, the sense is clear, that when a setttlement is not arrived at by private agreement, the surveyor is to be called in and his decision accepted as final. The surveyor's decision, however, being final and the tenants being entitled as admitted *inter se* to take advantage of the covenants for their common benefit, it cannot be doubted that the right to the moiety of the cost of the party wall arose in this case immediately on the award of the Government surveyor being given. It might be qualified by other rights and obligations arising from other transactions, but could not in itself be questioned. An agreement, though clumsily expressed, must be given effect to where the intention is clear and where the party seeking to enforce it has expended money in reliance on it; and the only sense I can attach to the stipulation in this case is that what the surveyor settled the party liable should pay, subject, as in other cases, to any lawful deduction or set off or accord and satisfaction.

Decree for plaintiffs.

Attorneys for the plaintiff.—Messrs. *Hore, Conroy, and Brown.*

Attorneys for the defendants—.Messrs. *Shapurji and Thakurdas.*