[HALLINAN, C.J., AND GRIFFITH WILLIAMS, J.]

(April 15, 1953)

COSTAS XENOPHONTOS OF NICOSIA,

Appellant,

v.

HAGOP KAZANDJIAN OF NICOSIA,

Respondent.

(*Civil Appeal No.* 3953.)

Party-Wall—Prima facie evidence as to remedies of one co-owner against the other—When damages given instead of injunction.

X sued K for damage and trespass to a wall. K had opened a window in the wall and inserted beams thereon. Each party alleged that he was the owner of the wall. The trial Court found that the wall was a party-wall, that there had been no ouster of X's joint possession of the wall but that the weight of the beams had caused "partial destructive damage" assessed at £12, and K was ordered to pay £6 damages. X appealed.

Held: (1) The wall was a party-wall. Common user by adjoining owners of a party-wall separating their properties is *prima facie* evidence that the wall and the land beneath belongs to them both equally as tenants in common (3 Halsbury, 2nd Edition 158; *Cubitt* v. *Porter* (1828) 2 B. & C. 257). No sufficient evidence had been adduced by the appellant to rebut that presumption.

(2) Opening a window on the wall was not ouster or destruction. The remedy for partial ouster or partial injury is for the aggrieved party himself to restore the status quo (*Watson* v. *Gray* 14 Chan. Div. 192.)

(3) Each co-owner before he builds on the party-wall must see to it that the new building will not endanger the wall; if the wall is endangered then he and he alone must bear the consequences.

(4) The only legal remedies open to one co-owner of a party-wall against another are: damages for destruction (which amounts to ouster); injunction to prevent ouster or destruction; or damages in lieu of injunction which are only given in the circumstances laid down in *Shelfer* v. *City of London Electric Lighting Co.* (1895) 1 Ch. 310 at 322, 323.

(5) X had not proved acts which might cause destruction or ouster; he had therefore no cause of action. Since K had made no cross-appeal the judgment for £6 damages must stand.

Appeal dismissed.

Appeal by plaintiff from the judgment of the District Court of Nicosia (Action No. 114/50).

N. G. Chryssafinis, *A. Emilianides* and *G. Constantinides* for the appellant.

M. Fuad Bey for the respondent.

The judgment of the Court was delivered by:

HALLINAN, C.J.: The parties are owners of adjoining premises at Ouzounian Street in the Ayios Andreas Quarter of Nicosia. The respondent-defendant has caused some damage to a wall used by both parties for the support of buildings on their land, by inserting in 1950 two corbels on which beams were placed to support a kitchen on the first floor. The respondent has also opened a window in this wall. The appellant claimed a mandatory injunction presumably to remove the supports and close up the window, and damages presumably for the injury and trespass to the wall. The appellant alleges that the wall, the subject matter of the action, belongs to him. The respondent denies this and alleges that the wall was his and denies liability.

The trial Court found that the parties were co-owners of the wall in dispute. We may say at once that despite the detailed consideration of the evidence by appellant's counsel, we consider that no sufficient evidence has been shown why this finding should be upset. Common user by adjoining owners of a party-wall separating their properties is *prima facie* evidence that the wall and the land beneath belongs to them both equally as tenants in common (3 Halsbury, 2nd Edition 158; *Cubitt* v. *Porter* (1828) 2 B. & C. 257). No sufficient evidence has been adduced by the appellant to rebut that presumption.

Now since the parties are co-owners of the wall, both parties are entitled to use the wall provided that such user does not oust the possession of the other party nor destroy or threaten to destroy the walls. The window which the respondent put in the wall and of which the appellant complains does not amount to either ouster or destruction. The trial Court was therefore right in holding that the window does not give the appellant a cause of action. If the appellant wishes to use that part of the wall and the respondent has not acquired a right to the window's light by agreement or by prescription, the appellant may build up the wall where the window has been made. The remedy for partial ouster or partial injury is for the aggrieved party himself to restore the status quo (*Watson* v. *Gray* 14 Ch. Div. 192).

The only part of the judgment of the trial Court which is open to criticism concerns the findings as to damage. Part of the common wall supports the room of the appellant (" R " on the Plan Exhibit 1) and at the other side the corbels inserted by the respondent which support his kitchen. The evidence of what damage the corbels with their beams caused is meagre. The appellant's architect said " the damage caused from B to C amounts to £15. I saw some cracks there ". The appellant stated baldly " damage caused to my wall is £50 ". The P.W.D. engineer called by the respondent stated that the damage to the wall was £12, but he was uncertain whether the cracks in the wall

were due to the additional weight of the new kitchen or to weak foundations. The appellant's architect did not examine the foundations at all. The trial Court on the evidence found that " there is partial destructive damage to the wall amounting in my opinion to £12 to both owners, *i.e.* £6 to each of the two litigants ". The Court apparently considered that the evidence of damage to the foundations was too vague to assess and that, as to any future damage which the weight of the respondent's kitchen might cause to the party wall, the appellant might look to section 5 (4) of the Immovable Property Law (Cap. 231) for his remedy. On these findings the appellant was awarded £6 damages.

We may say at once that section 5 of Cap. 231 refers to a building of more than one storey ; it does not concern adjoining buildings such as are the subject matter of this case. For this reason the provisions of section 5 cannot be applied to the facts now before us. The rights and liabilities of the parties in the present case are to be determined by the common law and equity.

It is not easy to understand the cause of action upon which the trial Court awarded damages to the appellant or why, even if there was a cause of action, the respondent should only pay for half the damage which he had caused. We do not know the grounds on which the trial Court only awarded the appellant half the damage caused by the respondent's act. Perhaps the Court considered the case fell within section 5 (4) of the Immovable Property Law and that it was dealing not with a case of tort where the loss or damage must be made good by the wrongdoer, but with a case of joint liability to maintain or repair under section 5 of Cap. 231. However, as has been said, section 5 does not apply to the case of adjoining premises. It was suggested by respondent's counsel that where a party-wall of adjoining premises becomes unsafe through the weight put on it by both co-owners, they should share the cost of making it safe. This is not the law. Each co-owner before he builds on the party-wall must see to it that the new building will not endanger the wall ; if the wall is endangered then he and he alone must bear the consequences.

If we were satisfied that the respondent, by adding the weight of the kitchen to the party-wall had endangered the whole structure, then the appellant would be entitled to an injunction or to damages in lieu thereof. The measure of damages might then be the estimated cost of making the wall strong enough to bear the additional weight ; the whole of that cost, not half, would be borne by the respondent, and the amount would, no doubt, be more than £12.

But before the Court could hold that the appellant was entitled not to £6 but to £12 or more, it must be satisfied that the appellant has established a cause of action. The

trial Court found there had been no ouster of the appellant's possession, and for the small amount at which the damage to the wall was assessed (£12) it is apparent that the Court was not considering damages in lieu of injunction for the threatened destruction of the wall. We are unable to find any authority at common law or equity for awarding damages for injuries to a party-wall unless the wall was destroyed (which amounts to ouster) or unless the damages were given in lieu of an injunction to restrain a defendant from doing or continuing to do something which would endanger the whole structure.

In a recent decision of this Court (Civil Appeal No. 3925) delivered on 16th November, 1952, authority was cited for the proposition that a tenant-in-common can be restrained by injunction from an act of destructive waste. On a further examination of the authorities we do not consider that the right of action for injury to a party-wall by a co-owner can be extended beyond the limits of the common law, namely a right to damages for such injury as destroys the wall; the Courts have frequently granted an injunction to prevent a wrong and will therefore grant an injunction to prevent the co-owner of a party-wall from doing such acts as may destroy the wall, and in certain circumstances damages should be given in lieu of an injunction. These circumstances were enumerated by A. L. Smith, L.J., in *Shelfer* v. *City of London Electric Lighting Co.* (1895) 1 Ch. 310 at 322, 323 as follows :—

> " In my opinion it may be stated as a good working rule that—
>
> (1) If the injury to the plaintiff's legal rights is small ;
>
> (2) And is one which is capable of being estimated in money ;
>
> (3) And is one which can be adequately compensated by a small money payment ;
>
> (4) And the case is one in which it would be oppressive to the defendant to grant an injunction :
>
> then damages in substitution for an injunction may be given."

On the findings of the trial Court it is very doubtful whether the appellant had established any such cause of action, *and we are therefore unable to give him any damages in excess of what the trial Court awarded.*

On the other hand, there has been no cross-appeal and the judgment against the respondent for £6 must stand.

No order as to costs.