BOYD, C. JUNE 29TH, 1910.

BRENNAN v. ROSS.

Party Wall — Contract—Construction—Breach—Addition to Wall —Openings or Windows.

Action for damages for trespass and for a mandatory injunction to compel the defendants to remove a wall.

J. F. Orde, K.C., for the plaintiff.

J. I. McCraken, for the defendants.

BOYD, C.:—I think the proposition of law applicable to this case may be succinctly stated thus; if the wall which has been added to or built upon the original party wall can be called an external wall, then there is the right to put windows in it; if the extension or addition has the character of a party wall and is to be so designated, then the windows are a derogation from that method of construction. Now the character of this raised wall has been settled by the parties in the agreement. The original wall was built by the Blythes on the dividing line between their own land and the land sold by the plaintiff in such wise that it should be of brick or stone 16 inches thick—8 inches being on each side of the centre line of the lots—to such height as the Blythes might require, and when erected "the said wall shall be a party wall." That was the original wall, upon which, by further provision, should either party desire to build higher, that might be done, the party so desirous to build at his own cost, and the other party to be at liberty to use without compensation "any additions to said wall when constructed as a party wall." That is to say, the said original wall, when it has been built and completed as a party wall, and being a party wall, may be afterwards built upon and added to by a further party wall, which may be used by the party who does not build it as a party wall. But, whether he elects to use it or not, the addition to the party wall is in the contemplation of the parties to retain its character of a party wall, and to attach any other character to it by constructing it with openings or windows is in violation of the meaning of the contract as I read it.

I follow what was decided by myself in Sproule v. Stratford, 1 O. R. 339; see also Day v. Avery, [1896] 2 Q. B. 271; and Knight v. Russell, 11 Ch. D. p. 415.

The plaintiff should have judgment with costs.