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NOTES AND COMMENTS

Adjoining Landowners—Lateral Support—Duty of Excavator.

Plaintiff and defendant were adjoining landowners in the city of Greensboro, North Carolina. In laying a foundation for his building defendant excavated below the foundation of plaintiff's building. Soft soil, first discovered at a depth of twelve feet, began to run out from plaintiff's land. Plaintiff's building settled and damages resulted. It was held that defendant's failure to make a soil test in order to ascertain the effect of the proposed excavation upon plaintiff's property as well as the failure to give plaintiff proper notice amounted to negligence for which defendant was liable.¹

By the common law the owner of land in its natural state has an absolute right to have his soil remain in its natural position.² This right, however, does not include that of having the contiguous land remain in its natural state, but only the right to have the benefit of support. Consequently, the authorities recognize that the neighboring landowner can make excavations if artificial support is substituted to prevent the falling away of the adjoining land.³ If the excavating owner violates this absolute right of lateral support he must respond in damages,⁴ irrespective of negligence or want of skill,⁵ or the distance of the excavation from the adjoining land.⁶

The natural right of lateral support does not, however, give to a landowner the right to place on his land additional weight, such as buildings and other superstructures, and then claim additional lateral support for the buildings beyond the support given his land in its natural condition, since this would deprive the adjoining owner of the

¹ *S. H. Kress and Co. v. Reaves*, 85 F. (2d) 915 (C. C. A. 4th, 1936), *Cert. denied*, 57 Sup. Ct. 322, 81 L. ed. No. 8 (Cum. Tab.). No statute was involved.

² I REEVES, *REAL PROPERTY* (1909) §206; I TIFFANY, *REAL PROPERTY* (2d ed. 1920) §345; *Trowbridge v. True*, 52 Conn. 190 (1884); *Shultz v. Bower*, 57 Minn. 493, 59 N. W. 631 (1894); *Walker v. Strosnider*, 67 W. Va. 39, 67 S. E. 1087 (1910). However, it appears that courts have generally held that a landowner has no right of lateral support as against a municipal corporation's right to dictate the level of streets and can acquire none through the lapse of time. DILLON, *MUNICIPAL CORPORATIONS* (1911) §1679. See also *Radcliff's Ex'rs v. Mayor of Brooklyn*, 4 N. Y. 195, 203 (1850); *Village of Haverstraw v. Eckerson*, 192 N. Y. 54, 84 N. E. 578 (1908); *N. Y. Steam Co. v. Foundation Co.*, 195 N. Y. 43, 87 N. E. 765 (1909).

³ I TIFFANY, *REAL PROPERTY* (2d ed. 1920) §345; *Rector, etc., v. Paterson Extension Ry.*, 66 N. J. L. 218, 49 Atl. 1030 (1901); see also *Stimmel v. Brown*, 7 Hbust. 219, 30 Atl. 996 (Del. 1885).

⁴ *Gray v. Tobin*, 259 Mass. 113, 156 N. E. 30 (1927); *Neyman v. Pincus*, 82 Mont. 467, 267 Pac. 805 (1928); *Prete v. Cray*, 49 R. I. 209, 141 Atl. 609 (1928).

⁵ *Chesapeake and O. Ry. v. May*, 157 Ky. 708, 163 S. W. 1112 (1914); *Cooper v. Altoona Concrete Construction and Supply Co.*, 53 Pa. Super. 141 (1913).

⁶ *Louisville and N. R. R. v. Colombo*, 240 Ky. 102, 41 S. W. (2d) 672 (1931).

proper and natural use of his land.⁷ In England and in many American jurisdictions the owner may recover for the damage done to his buildings as well as to the land if the land without the added weight would have fallen away as a result of the excavation on the contiguous soil.⁸ A few courts, however, tend to support the view that there can be no recovery for damages to the buildings in the absence of negligence even though the land would have fallen without the additional weight.⁹ Whether or not the land without the buildings would have fallen, the modern view seems to be that the owner who excavates his land must use ordinary care to protect buildings on the adjoining land and that he is liable for damages if he is negligent.¹⁰ The excavating owner, however, is not a guarantor of the safety of the adjoining buildings and he is not bound to exercise extraordinary care;¹¹ but a trespasser digging on the supporting land is held to a higher standard of care than the owner.¹² Failure to give timely and sufficient notice of a proposed excavation;¹³ failure to excavate friable soil otherwise than in sections;¹⁴ failure to ascertain in advance whether the proposed excavation is likely to expose neighboring land with artificial additions to unreasonable risk;¹⁵ use of inadequate instrumentalities;¹⁶ changing the method

⁷ Northern Transportation Co. v. Chicago, 99 U. S. 635, 25 L. ed. 336 (1878); Moody v. McClelland, 39 Ala. 45 (1863); Ceffarelli v. Landino, 82 Conn. 126, 72 Atl. 564 (1909); Thurston v. Hancock, 12 Mass. 220 (1815); Gilmore v. Driscoll, 122 Mass. 199 (1877); Gildersleeve v. Hammond, 109 Mich. 431, 67 N. W. 519 (1896); Walker v. Strosnider, 67 W. Va. 39, 67 S. E. 1087 (1910).

⁸ Brown v. Robins, 4 H. & N. 186 (Ex. 1859); Atty Gen. v. Conduit Colliery Co., 1 Q. B. 301 (1894); Langhorne v. Thurman, 141 Ky. 809, 133 S. W. 1008 (1911); Farnandis v. Great Northern R. R., 41 Wash. 486, 84 Pac. 18 (1906).

⁹ Moellering v. Evans, 121 Ind. 195, 22 N. E. 989 (1889); Vandegrift v. Boward, 129 Md. 140, 98 Atl. 528 (1916); Weiss v. Kohlhausen, 58 Ore. 144, 113 Pac. 46 (1911); Ulrick v. Dakota Loan and Trust Co., 2 S. D. 285, 49 N. W. 1054 (1891).

¹⁰ Moore v. Anderson, 5 Boyce 477, 94 Atl. 771 (Del. 1915); Wigglesworth v. Brodsky, 7 Boyce 586, 110 Atl. 46 (Del. 1920); Horowitz v. Blay, 193 Mich. 493, 160 N. W. 438 (1916); Diksajtsz v. Brosz, 104 Pa. Super. 246, 158 Atl. 620 (1932); Christensen v. Mann, 187 Wis. 567, 204 N. W. 499 (1925); RESTATEMENT OF TORTS (Tent. Draft No. 14, 1937) §1303.

¹¹ Canfield Rubber Co. v. Leary and Co., 99 Conn. 40, 121 Atl. 283 (1923); Walker v. Strosnider, 67 W. Va. 39, 67 S. E. 1087 (1910).

¹² Jeffries v. Williams, 5 Ex. 792 (1850); Bibby v. Carter, 4 H. & N. 153 (Ex. 1859); see also Finegan v. Eckerson, 26 Misc. Rep. 574, 57 N. Y. Supp. 605 (1899).

¹³ Canfield Rubber Co. v. Leary and Co., 99 Conn. 40, 121 Atl. 283 (1923); Bonaparte v. Wiseman, 89 Md. 12, 42 Atl. 918 (1899); Gerst v. City of St. Louis, 185 Mo. 191, 84 S. W. 34 (1904); Schultz v. Byers, 53 N. J. L. 442, 22 Atl. 514 (1891); Walker v. Strosnider, 67 W. Va. 39, 67 S. E. 1087 (1910).

¹⁴ Gildersleeve v. Hammond, 109 Mich. 431, 67 N. W. 519 (1891); Davis v. Summerfield, 131 N. C. 352, 42 S. E. 818 (1902), *rehearing denied*, 133 N. C. 325, 45 S. E. 645 (1903); see also Hammond v. Schiff, 100 N. C. 161, 6 S. E. 753 (1888).

¹⁵ Bissel v. Ford, 176 Mich. 64, 141 N. W. 860 (1913); Canfield Rubber Co. v. Leary and Co., 99 Conn. 40, 121 Atl. 283 (1923).

¹⁶ Canfield Rubber Co. v. Leary and Co., 99 Conn. 40, 121 Atl. 283 (1923) (insufficient sheet piling).

of excavating after notifying the adjoining owner that a certain method was to be followed;¹⁷ employment of incompetent workmen;¹⁸ and maintaining an excavation under such conditions or for such a length of time as to expose adjoining land with buildings thereon to unreasonable risk of harm,¹⁹ have been held to constitute negligence. When the excavator has given due notice and has otherwise exercised due care, the duty to take necessary precautions to provide proper support is generally placed on the owner of the buildings himself.²⁰

Legislation has been enacted in many states in order to secure better protection to the public and to define more specifically the relative rights and duties of coterminous landowners. Statutes in a few states merely require the excavator to give notice and to take reasonable precaution to sustain the neighboring land, but the statutes say nothing about supporting buildings.²¹ Others create new duties and require the excavator to provide temporary support for adjoining buildings where the excavation is to be made below a certain depth.²²

The court in the principal case holds that "due care" includes the duty to make a preliminary soil test, and that the failure to exercise this duty amounts to negligence. The only other case which the writer has been able to find that imposed upon the excavator the duty of making a soil test involved an excavation over a hundred feet in depth.²³ In the principal case the defendant intended to dig only twenty feet deep. The requirement of making soil tests whether the proposed excavation be shallow or deep seems justifiable, particularly when applied in urban centers where nearly all available space is used for building purposes.

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¹⁷ *Cooper v. Altoona Concrete Construction and Supply Co.*, 231 Pa. 557, 80 Atl. 1047 (1911); *Collias v. Detroit and Northern Michigan Bldg. and Loan Ass'n.*, 220 Mich. 207, 189 N. W. 866 (1922).

¹⁸ *Stockgrowers' Bank v. Gray*, 24 Wyo. 18, 154 Pac. 593 (1916).

¹⁹ *Garvy v. Coughlan*, 92 Ill. App. 582 (1901) (exposure to rain, snow and freezing for three years); *Bohrer v. Dienhart Harness Co.*, 19 Ind. App. 489, 49 N. E. 296 (1898) (blocking gutter so as to bring surface water into the excavation); *Hannicker v. Lepper*, 20 S. D. 371, 107 N. W. 202 (1906) (exposure to weathering); *Lochore v. City of Seattle*, 98 Wash. 265, 167 Pac. 918 (1917) (weathering).

²⁰ *Vandergrift v. Boward*, 129 Md. 140, 98 Atl. 528 (1916); *Obert v. Dunn*, 140 Mo. 476, 41 S. W. 901 (1897); *Eggert v. Kullman*, 204 Wis. 60, 234 N. W. 349 (1931).

²¹ GA. CODE (1933) §§5-1203; IDAHO CODE ANN. (1932) §54-310; S. D. COMP. LAWS (1929) §361.

²² CAL. CIVIL CODE (Deering, 1931) §832 (12 feet); MICH. COMP. LAWS (1929) §§13500-13503 (12 feet); N. J. COMP. STAT. (1910) §3926 (8 feet); OHIO CODE ANN. (Throckmorton's, 1929) §§3782, 3783 (9 feet); PA. STAT. (Purdon, 1936) §53-5648 (to a depth below the bottom of existing wall).

²³ *Bissel v. Ford*, 176 Mich. 64, 141 N. W. 860 (1913); see also *Canfield Rubber Co. v. Leary and Co.*, 99 Conn. 40, 121 Atl. 283 (1923).