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EASEMENT OF LATERAL SUPPORT OF LAND.

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for the Degree of LL. B.

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EASEMENT OF LATERAL SUPPORT OF LAND.

The right of lateral and subjacent support is that right which the owner of land has to have his land supported by the adjoining land or the soil beneath. Farrand v. Marshall, (19 Barb. 380). And adjacent proprietors may have the right to enjoy the benefit of having one parcel laterally supported by the other.

This does not seem to be an absolute right of support, but rather that every land owner has a right to have his land preserved intact and that an adjoining owner must not excavate upon his own land so near the land of his neighbor as to cause the soil to crumble under its own weight and fall upon his land. And every man has a right to have his soil left intact. But if the land is such that it will stand intact of its own coherence, and the adjoining owner can dig up to the line without injury to the land, he has a right to do so.

But this absolute right to lateral support does not extend to buildings or other additional weights imposed upon the lands, unless they have gained an easement of support from the adjacent land, and it is in regard to this additional weight upon the land that many interesting questions and cases have arisen, and the difference of opinion of the courts in modern cases has arisen where the land in its natural state has been burdened with houses.
And there is a distinction between soil falling into an excavation of its own inherent weight, and that which was pressed in by the building.

Thus in Brand v. Murphy, (37 Vt. 99), it was said that every land owner is entitled to have his land preserved intact, but if it appear that the falling was the result of weighty erections upon the adjoining land, the defendant's liability is removed.

This statement is modified in Wood on Nuisance, (2d Ed. Sec. 178), where it is said that it is incumbent on the defendant to make out his defense by clearly establishing the fact that the injury would not have resulted except for the erections; that is, that the pressure of the building was the principal cause of injury to the soil.

And although one may dig in his own land for all lawful purposes, (Panton v. Holland, 17 Johns. 92), yet he has no right to do this carelessly, nor with intent to injure the adjoining property, and although a person on building a house adjoining the house of another may lawfully sink his foundation below the foundation of his neighbor, he is not liable for any consequential damages, provided he has used due care and diligence to prevent any injury to the house of the other.

By the law of Solon, if any one should build a wall he should leave a space of a foot between it and his neighbor's land; if a house, two feet; if he should dig a sepulchre or a ditch, he should leave a space equal to its
depth; if a well, the distance of a pace. But this space re-
quired by the laws of Greece and Rome is said to have been part of the family religion and had nothing to do with later-
al support. And it is obvious that this law, while just in its time, would hardly do in these changed times, especially in our large cities, where every available inch of space is used.

And the general rule as to the right of lateral support is, that where the rights of the parties relate to the soil in its natural state, neither shall excavate his own soil so as to cause that of his neighbor to be loosened and fall into such excavation. (2 Rolle, Ab. Trespass, 1 Pl. 1.) This dicta of Rolle's was based on the decision of the case of Wilde v. Minsterley, (15 Can., 1 B. R. Pasch 384), and Lord Campbell in Wyatt v. Harrison, (3 Barn. & Ad. 871), in referring to this dicta treated it as an authority for the doctrine of support, and it has ever since been referred to as sustaining that doctrine. And what the doctrine really asserts is, not that A may not dig in his own land up to the line of his neighbor's land, if he can do so without letting down his neighbor's land, but he cannot do so, so as to let it down, leaving the fair inference to be drawn that he may dig with impunity when the nature of the soil is such that it will stand intact by the force of its own cohesion. (Wood on Nuisances, 2 Ed. Sec. 172).

To digress from the subject for a moment,—an inter-
teresting question arose in The Mayor of Birmingham v. Allen,
(37 L. T. Rep. N. S. 207), as to what was meant by the term, "neighboring land", when used in regard to lateral support. The suit was for an injunction to restrain defendant from working his mines, which lay near plaintiff's lands, in such a manner as to cause the wasting away of plaintiff's land and injury to his buildings. There was an intervening strip of land between the property of this plaintiff and defendant which had been mined with the knowledge and consent of the plaintiff and evidence tended to show that if this land had not been mined the defendant might have worked his land up to his boundary without any injury to plaintiff and he would have a right to do so. The question was, whether the intermediate excavation by a third party could have the effect of lessening that right.

It is clear that if defendant was to be considered plaintiff's "neighbor" and his land "neighboring" or "adjacent" to the plaintiff's land, as these terms are understood, he could be restrained.

The argument was advanced that all land owners must be considered a man's neighbors whose operations in any remote degree injure his land. But the court was of the opinion that the term could not have so wide a meaning and said, that the "neighboring owner" must be the owner of that portion of land, the existence of which in its natural state is necessary for the support of the land. And this seems to be the correct solution, for otherwise a man might be made liable for the acts of another over which he had no control.
The question of negligence does not come in when the question is in regard to the damage done to the soil in its natural state. For if the adjoining owner takes away the natural support of the land and the land is injured, we have seen he is liable, although he used diligence in the matter and was not negligent.

It is possible, however, that certain cases may arise where an adjacent owner is not liable for the injury to the unencumbered soil. Thus it was held in Hendricks v. Mining Co., (58 Cal. 190), that where plaintiff and defendant were adjacent land owners and both engaged in mining on their lands, the defendant was not liable for the falling away of plaintiff's lands caused by these mining operations where the work was not carelessly or improperly done.

The case of Thurston v. Hancock, (12 Mass. 220), decided in 1815 is generally referred to as a leading one in this country. The facts were as follows: The plaintiff in 1802 built a house on his own land within two feet of his own boundary. Ten years after this the defendant, having purchased the adjoining land, began grading and digging away the same, but kept within five or six feet of the plaintiff's land; notwithstanding this, the soil of the plaintiff was undermined and he was obliged to take his house down, as it was unsafe to live in, and he sues for damages to the house and premises. But the court held he was without remedy for the injury to his house, as there was no negligence or malice, and the plaintiff was in fault for he built too near defend-
ant's line and by so building he cannot deprive the defendant of the use of his land. But the court went on and said that the defendant should have anticipated the consequences of digging so near the line, and that the defendant was liable for the damage arising from the falling of the natural soil into the pit so dug, but not for the damages done to the house, for when an excavation is made, even with the exercise of the highest care and skill possible, for injury to the soil which is not burdened with buildings, the adjoining owner is liable and excavates at his peril, as it is an interference with a natural right and liability attaches whether the digging was accompanied with negligence or not.

And this statement of the liability of an adjacent owner for injuries to unencumbered land is the law at the present time, the difficulty in many of the subsequent cases arising where the land has been encumbered with erections.

This case was followed in 1861 in the case of Foley v. Wythe, (2 Allen 131). The facts herein were similar to those in Thurston v. Hancock, supra; the defendant by carrying away large quantities of clay and earth caused the plaintiff's house to settle and crack, thereby lessening its value. The court said that few principles of the law can be traced to an earlier or more constant recognition than the one stated by Rolle. And the conclusion at which they arrive is, that in the absence of any proof of carelessness, negligence or unskilfulness in the execution of the work, so far as the house was concerned, a jury had no right to regard, as an
element of damage, the fact that such digging caused the foundation of the plaintiff's house to crack and settle, although he was entitled to recover for causing the natural soil of the plaintiff to fall into the excavation made by the defendant. And in this they coincide with the rule which was practically applied in Thurston v. Hancock, supra. And it was further said that an adjacent owner in order to make a justifiable use of his own land must have a proper respect to the appropriation which has already been made by the owners of the surrounding territory and therefore when one makes an excavation on his own land he must consider how it will be likely, in view of the existing and actual occupation of others, to affect the soil of his neighbor. But it is not necessary that one subject himself to extraordinary expense in guarding against such injury. Thus if there was no house on the land he might excavate for a considerable distance without substituting any safeguard, as a wall; whereas, if there was a house on the land he might expose but small portions of the soil at a time. But, as said before, he would only have to use reasonable care and diligence, and he would not have to prop up his neighbor's house, if the owner was cognizant of the excavation being made, in order to prevent its falling. (Peyton v. Mayor, 9 Barn. & C. 725; Charless v. Rankin, 22 Mo. 566).

In this case of Foley v. Wythe, supra, the plaintiff wished the court to decide the question as to whether buildings which do not sensibly increase the pressure upon
the land deprive a party from an action for interference with the natural right of lateral support, and if defendant sought to escape liability on the plea that there are erections on plaintiff's land, he must make out his defense by showing that the injury would not have resulted except for the erections; that is, that the presence of the buildings was the principal cause of injury to the soil. But the court said it was not necessary to decide this point in order to decide the case.

In O'Neil v. Hawkins, (4 Bush. 653), the court noticed the distinction in regard to structures which do not contribute to the injury and held that a division fence should not be regarded as such an increased burden upon the soil as to prevent the recovery of damages for the lateral support to land. And this on the ground, that such a fence was a necessary incident to the enjoyment of such a lot and it could not be regarded as a sensible increase of burden on the land.

But this decision may be doubted if its reasoning is carried out to its logical conclusion, for it can be readily seen that even a fence, if made of stone or other weighty material, might become quite a burden upon the land.

And it was held in Gilmore v. Driscoll, (122 Mass. 201), that the plaintiff could recover for the unencumbered land which fell on account of defendant's digging, but no recovery could be had for the injury to the fences and shrubbery, because the natural right of support extends to the
land itself and does not include buildings and other improvements thereon.

And this case (decided in 1877) follows Thurston v. Hancock, supra, and discusses the American and English cases generally upon the subject of lateral support.

In Brown v. Robbins, (4 H. & N. Exch. 186), the question was left to the jury "whether the land fell from the superincumbent weight of the house, or whether it would have fallen in the same manner whether there had been a house upon it or not", and in this particular case the jury found that the weight of the house did not contribute to the injury.

And the court said that the moment the jury found that the subsidence was not caused by the weight of the buildings, the existence of the house became unimportant in considering the question of defendant's liability, and it is the same as if a mere model of a house stood there which bore so small a proportion to that of the soil as to practically add nothing to it. And this case is said to establish fully, that the mere pressure upon land of a superincumbent weight, as buildings, or anything else, does not prevent a recovery for the interference with the right of support, where the superincumbent weight does not contribute to the injury, and that in such a case, recovery may be had not only for the soil, but for all buildings standing upon it, if they were not the cause of the injury itself. And the court may have been influenced in its decision by the pertinent question of counsel: "Has a person a right to dig so near the land of his neighbor as to disturb
his soil whether there is a house there or not?" This case is approved in Richards v. Jenkins, (18 L. T. E. S. 445).

But it may be questioned whether this decision was entirely correct, for it is obvious that every pound of additional weight imposed upon the surface increases the vertical and lateral pressure, and that the weight of several thousand pounds, such as would likely be imposed by the most ordinary buildings, would in a measure contribute to the subsidence of the soil beneath them. This case of Brown v. Robins, supra, is directly opposed to Thurston v. Hancock, supra, and the other American cases. (Wood on Nuisances, 2d Ed. Sec. 178)

One of the earliest cases in New York upon our subject is that of Panton v. Holland, (17 Johns. 92). The plaintiff was the owner of a house and lot in New York City, and the defendant in erecting a house on the lot adjoining the plaintiff dug some distance below plaintiff's foundation by reason of which the walls of plaintiff's house were cracked and the house damaged, for which plaintiff seeks to recover damages. The court held that the defendant was not liable for any consequential damage provided he had used due care and diligence to prevent any injury to the house of the other, and said that no man should be held liable in damages for the reasonable exercise of a right when it is accompanied by a cautious regard for the rights of others, where there is no just ground for the charge of negligence and unskilfulness, and when the act done is not done maliciously. And it was also said that the degree of care of a person excavating can-
not be defined but must necessarily depend upon the circumstances of each case. Thus the character of the soil, the condition of the wall under building, the depth of the excavation, and all those conditions that a man of ordinary prudence would observe.

But even a better rule than this was laid down in Thurston v. Hancock, supra, where it was said "that if the mere exercise of a lawful right to remove the soil upon his own premises occasioned the fall of the structure, no liability exists, but if the fall is occasioned by the manner in which it is removed, the liability attaches for all the consequences of the act." And it is said that no more than ordinary care is required, although there must be an absence of negligence or of unskilfulness and of improper motive. (McGuire v. Grant, 25 N. J. L. 361; R. R. Co. v. Reaney, 42 Md. 117)

The next important New York case in which this question arose was Lasala v. Holbrook, (4 Paige 169). The case arose upon an application to dissolve an injunction by which the defendant had been restrained from digging in his land so near the plaintiff's church (which had been erected more than thirty-eight years before, and stood six feet from the line between the parties) as to injure the walls of the church. The injunction was dissolved and the court said that the defendant had a right to dig a pit upon his own land if necessary to its convenient and beneficial use, when it can be done without injury to the adjacent land in its natural
state, and that a person cannot be deprived of the use of his own land by erecting a building on the adjoining lot, the weight of which will cause my land to fall into the pit which he may dig, in the proper and legitimate exercise of his previous right to improve his own lot.

But it was conceded that this case would have been differently decided had an easement of support of the house been gained by grant from the owner of the adjacent lot. (Cox v. Matthews, 1 Vent. 237; Story v. Oden, 12 Mass. 157)

And in this connection the case of Bononi v. Back-house, (27 L. J. Q. B. 388), is a leading English case in regard to the right of support of buildings. The facts were, that A was the owner of certain houses standing on land which was surrounded by lands of B, C and D. E was the owner of mines running underneath the lands of all these persons. He worked his mines in such a manner without actual negligence, that the lands of B, C and D sank in; and after an interval of six years, their sinking occasioned injury to the houses of A, and A brought an action to recover damages for the injury, and it was held that he was entitled to recover. The court said that the right to support of land and the right to support of buildings stand upon different footings as to the mode of acquiring them; the former being prima facie a right of property analagous to the flow of a natural river or of air; while the latter must be founded upon prescription on grant, express or implied, but the character of the rights, when acquired, are the same.
In Radcliff v. The Mayor of Brooklyn, (4 Coms. 195), there is a dictum which disapproves Lasala v. Holbrook, supra. This was an action to recover damages for an injury to plaintiff's property by the precipitation of his soil into a street which the defendant had graded by authority of the legislature. There was no superincumbent weight upon the soil, and there was no charge that the defendants acted maliciously or with want to skill or care. The court said, that the defendants are a public corporation, and the act in question was done for the benefit of the public and by authority of the legislature, and the Chief Justice said, that a man may do many things under a lawful authority, or in his own land, which may result in injury to the property of another, without being answerable for the consequences, and, indeed, an act under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow; and the court criticized the dictum of Rolle, and observed that if that doctrine was carried out to its legitimate consequences, it would often deprive men of the whole beneficial use of their property, and an unimproved lot in a city would be worth little or nothing to the owner unless he was allowed to dig in it for the purpose of building, and the Chief Justice thought that the law had superseded the necessity of negotiating with one's neighbor for such purposes, and that it gave every man such a title to his own land that he might use it for all the purposes to which such lands are usually applied, provided he exercised proper
care and skill to prevent any unnecessary injury to the ad-
joining land owner. And although this case, (Radcliff v.
Mayor, supra), has been cited in many cases, as an authority,
it has always been limited to acts done for the public bene-
fit. (Tinsman v. R. P., 2 Dutch. 148)

But the dictum above referred to was denied in
Farrand v. Marshall, (21 Barb. 409), decided in 1855, where
it was said that the only point decided in Radcliff v. The
Mayor, supra, was, that a municipal corporation acting under
an authority conferred by the legislature, to grade, level
and improve streets and highways, if they exercise proper
care and skill, are not responsible for the consequential
damages which may be sustained by those who own lands bounded
by the street or highway.

And this case of Farrand v. Marshall, supra, is the
leading one on this subject in New York, and one to which re-
ference is always made. The facts were as follows: The
plaintiff and defendant were adjoining land owners in the
City of Hudson. The land of the plaintiff, at its extremity,
is in its natural state and supported by the lands of the de-
fendant, and it has always been thus laterally supported. It
is the right of the plaintiff that he may enjoy his land in
the condition in which it was placed by nature, and no one
should be permitted to render his enjoyment insecure or des-
stroy it altogether by removing its natural support. The de-
fendant had been, and was, engaged in excavating the soil on
his own land, which supports the plaintiff's close, and had
given notice to the plaintiff that he intended to pursue his excavations up to the line, and to an indefinite depth. The plaintiff's land had begun to subside and he claimed that if the excavations continued, it would fall over into the pit upon the defendant's land. The defendant's excavations were not made with the view of improving the land or enjoying it in the manner that land is usually enjoyed, but he was engaged in converting the earth thus removed into brick, and he is allowed to do this, provided he does not interfere with the paramount right of others to the possession and enjoyment of their property, or the natural right which they possess to have their land surrounded and protected by the adjacent soil.

And, to digress for a moment, the reasons advanced by the court in this case as to the dictum in Radcliff v. The Mayor, supra, were,—that it was unnecessary, in order to decide the case, to mention the doctrine in Rolle at all, but that it had become the custom at the bar to give a wide range of discussion and accordingly the dictum in Rolle was attacked, with an expression of opinion as to its unsoundness, and we cannot regard the case as authority binding us to say that a man may destroy his neighbor's land by depriving it of its natural support, when such land is in the natural state, and that it is damnum absque injuria.

But to return to the subject. The court discusses the subject why a man cannot recover for a house built on the extremity of his own land but may when there is no house there, when the circumstances are the same. And they say, as
an original question they would certainly doubt the correctness of the position, that though a man may have recently erected a house on the confines of his land, his adjoining neighbor may, without being answerable for the consequences should the house fall into the pit, excavate his land to an extraordinary and unreasonable depth, not for the purpose of improving and enjoying it as land is usually enjoyed, but to abstract the soil itself and to convert it into brick. It is said that it is the fault of the one building the house, as he could not by his act hinder his neighbor from making the most profitable use of his land, but it is difficult to perceive how it is his fault, in a legal sense, when lawfully using his land; as it was quite as lawful for him to build there as for his neighbor to dig down. Neither could lawfully prevent the other from a reasonable use of his own to the injury of his neighbor. And in the case cited by Rolle, and others holding that a man who builds his house upon the margin of land cannot recover, were thought to fall within the qualification of the maxim, "that he who complains of the use that another makes of his own property, must himself be free from fault." And the court said, that it may be that this principle was erroneously applied, but if it were at all important here, it is perhaps too late for us to question the soundness of the application to either of the latter cases, as in this case the subject of buildings does not come in. And it is obvious that if the defendant continues to make the excavation the plaintiff's land will subside and fall into
the pit made by the excavations, and this must not be permit-
ted and the defendant is restrained from excavating or remov-
ing any soil adjoining the plaintiff's premises, which shall
cause the plaintiff's land, by reason of the withdrawal of
the lateral support to fall away and subside.

And as to the argument in Radcliff v. The Mayor, supra, based on the inconvenience of applying the principle
discussed to proprietors of city lots, the court said, that
although this doctrine was put forth under the sanction of a
distinguished name, it is unsatisfactory to overthrow rights
"standing on natural justice and essential to the protection
and enjoyment of property in the soil."

In McGuire v. Grant, (I Dutch. 356), it is said that
the distinction that a man may recover for an injury done to
his land when he could not, under the same circumstances
recover for the injuries to his buildings, at first view
seems paradoxical. But it appears upon reason and principle
that this distinction is founded in reason and sound princi-
ple. Thus if every proprietor of land was at liberty to dig
and mine at pleasure upon his own soil, without considering
what effect this would have upon the lands of his neighbors,
it is obvious that such excavating would in many cases cause
the falling of the land adjoining, and as far as the mere
support of the soil is concerned, such support must have been
afforded as long as the land was in existence, and this seems
to be a right of property and naturally attached to the soil.
But where anything has been done to increase the pressure,
the right to support is not a property right but rather in
the nature of an easement, and no man has a right to such in-
creased support unless the building is of ancient erection or
gets its right of lateral support from grant.

In Richardson v. R. R., (25 Vt. 465), the court
adopted the distinction of Rolle made between encumbered and
unencumbered land, and held, that where the defendant has
made an excavation so near to the line of the plaintiff's
land that a part of the soil had fallen away, the injury is
such as to deprive the owner of a portion of his soil, to
which his right is absolute and a recovery can be had.

As an illustration of the kind of cases that follow
Radcliff v. The Mayor, supra, I will call attention to the
case of the City of Quincy v. Jones, (76 Ill. 231), where it
was said that the case of Farrand v. Marshall, supra, simply
decided, that a man may dig on his own land, but not so near
that of his neighbor as to cause the land of the latter to
fall into a pit and that it is not in conflict with the rule
that the owner of a building, in the absence of a grant or
prescriptive right, is not entitled to have it sustained by
the lateral support of his neighbor's soil. This was an ac-
tion for damages for injury to plaintiff's house by reason of
the defendant, a municipal corporation, changing the level of
the street. The court held there could be no recovery and
said, that if injury is sustained to a building in conse-
quence of the withdrawal of the lateral support of the neigh-
boring soil, when it has been withdrawn with reasonable skill
and care to avoid unnecessary injury, there can be no recovery; but if injury is done the building by the careless and negligent manner in which the soil is withdrawn, the owner is entitled to recover to the extent of the injury thus occasioned. But this applies only to cases where the owner of the soil has no other right to the lateral support of the adjacent soil than results from the naked ownership of the soil, and does not apply where there is a valid right to burden the adjacent soil with the claim of lateral support resulting from contract or prescription. An illustration of this latter right would be where a common owner of the soil originally held both parcels,—that on which plaintiff's house was built, and that on which the defendant subsequently excavated,—and it was held that the plaintiff was charged with the duty of supporting not merely the soil, but the house of plaintiff's parcel. (Humphries v. Broyden, 12 Q. B. 743)

But it can be readily seen that this case of Quincy v. Jones can be distinguished from Farrand v. Marshall, in that it applies to acts done for the public benefit.

In Transportation Co. v. Chicago, (99 U. S. 635), the court said, that it may be admitted that the general rule is, that every land owner has a right to have his land preserved unbroken, and that an adjoining owner excavating on his own land is subject to this restriction, that he must not remove the earth so near the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his land.
But this right of support extends to land only in its natural condition. It does not protect whatever is placed upon the soil increasing the downward and lateral pressure. If it did it would be in the power of a lot owner, by erecting heavy buildings on his lot, to greatly abridge the right of his neighbor to use his lot. It would make the rights of the prior occupant greatly superior to those of the latter.

In Charles v. Rankin, (22 Mo. 566), the action was brought to recover damages for injuries to plaintiff's buildings by reason of the improper excavations upon the lot of the defendant, an adjacent proprietor. The court discusses the question of lateral support from the earliest times and refers especially to Thurston v. Hancock, supra, and said, that although every proprietor of land has a right to the support of the soil of an adjacent lot, as a natural servitude or easement, yet this servitude does not impose upon the adjoining proprietor the obligation of furnishing increased support where the lateral pressure is increased by the erection of buildings, unless such a right of servitude has been conferred by grant on the lapse of time. And the decisive question in fixing the liability of the defendant is, was there negligence in view of the circumstances of the case?

The test of liability in Rockwood v. Wilson, (II Cushing 221) was: Was the work managed and executed with such care and caution as men of common prudence usually exercise in the management of their own business?

And a similar test was laid down in Smith v. Hand-
esty, (31 Miss. 411), thus: Was the work managed and executed with such care as a man of ordinary prudence usually exercises in the management of his business?

In conclusion it may be said that the right of one land owner to excavate to the extent of ten feet, without affording any protection to his neighbor, is the rule of the common law, (Panton v. Holland, supra), and has been left unchanged by statute. But if the land owner excavates below ten feet, the statute applies, (in New York County see Laws 1882, Ch. 410, Sec. 474), and the excavating owner must protect his neighbor's wall, upon being afforded by the owner of the adjoining land the necessary license to enter for the purpose; and it is the duty of the excavating owner to request such permission, and if he does not, he is liable for all damages suffered in consequence. (Dority v. Rapp, 72 N. Y. 307)

But it is equally clear that if the adjoining owner does not intend to go below the statutory limit of ten feet, he is under no obligation, aside from notice, to protect him, as he must in such a case, according to the rules of the common law, protect himself.