South Carolina Law Review

Volume 2 | Issue 2 Article 6

Winter 12-1-1949

The Law of Lateral Support

Roy V. Lind

in the case of *Carroll v. Beard-Laney, Inc.*, the court sustained the findings of fact of the jury.

On the other hand, in the case of *Falconer v. Beard-Laney, Inc.*, the court reversed the findings of fact of the Industrial Commission, a body comparable to the jury, as to findings of fact. Admittedly, the master will not be liable for the injury to the servant, if the servant acts outside the scope of his employment. The court did not in the *Falconer* case discuss the fact that the Industrial Commission's findings if supported by any evidence would be final, or the competency of evidence presented, but paid lip service to the doctrine of burden of proof. The court did not in the latter case overrule the previous case either. The court had before it evidence that Falconer was taking a route 55 miles in distance when the normal route was 28 miles and the route he took was southwest when he should have been returning northerly. Also in evidence was the fact that the deceased driver stated his intention of filling a date in York. It would seem that in either case the employee had so departed from the scope of his employment, that the master should not be liable.

It is submitted that if the court deemed it unconscionable that a servant could be acting in the scope of employment under facts such as these, the proper result would have been an overruling of the *Carroll* case and a statement that these acts were so grossly out of line with the duties conferred on Falconer as to render him outside the scope of his employment for all purposes.

LEON S. GOODALL

THE LAW OF LATERAL SUPPORT

The general law of lateral support is well settled in the United States. The owner of land is entitled to have it supported in its natural condition by land of the adjoining proprietor, and if such adjoining proprietor removes this support whereby the soil of the former is disturbed or falls, he is liable for all damages so occasioned, regardless of whether he was negligent in making the excavation.[1] The nature of

1. Walker v. Strosnider, 67 W. Va. 39, 67 S. E. 1087 (1910), probably the leading case in the U. S.; Gildersleeve v. Hammond, 109 Mich. 431, 67 N. W. 519 (1896); Prete v. Cray, 49 R. I. 209, 141 Atl. 609 (1928); 59 A. L. R. 1241; 2 C. J. S., Adjoining Landowners; RESTATEMENT, TORTS, §817 (1939).

this right is not defined strictly as an easement, but as an incident to the land, a right of property necessarily and naturally attached to and passing with the soil. It is a servitude rather than a common law easement, and is an absolute right in property.[2]

Where structures have been erected on the land, however, the rule governing lateral support is not the same, as the absolute right to lateral support applies only to lands in their natural condition, and does not extend to situations where buildings or artificial structures are erected on the land.[3]

The rule has been stated thus: "Unless conferred by statute or acquired by grant, the right to lateral support of land in its natural condition does not extend to land encumbered by buildings or other structures *which increase the lateral pressure.*"[4] We have no such statute in South Carolina as referred to in the rule. Our Supreme Court has briefly discussed the point in only two cases.[5] In the *Bailey* case it was sought to enjoin the adjoining landowner from excavating up to the property line in the middle of an alley-way which ran along the line separating the two plots of land. *No excavation had actually taken place.* The main points of the case dealt with easements of land and of light and air. But the Court cited a New England case,[6] and by way of a dictum stated, "It is there shown to be the settled rule in this country that while the soil, in its natural condition, cannot be lawfully injured by excavation made by an adjoining proprietor on his own land, yet for injuries done to buildings or other improvements no right of action can be maintained without allegations of negligence."

In the *Contos* case the lessees of a building sought damages against contractors excavating on the adjoining land, alleging that the damages resulted from the grossly negligent and reckless manner in which the excavation was done. The answer of the contractors set up notice and contributory negligence in the owner-lessor. The main point of the case was whether the contributory negligence of the lessor could be imputed to the lessees. The Court held that it could not, and in an aside

2. 2 THOMPSON, REAL PROPERTY, 602 (Perm. Ed. 1940).
3. 1 Am. Jur., Adjoining Landowners, §22.
4. 2 C. J. S., Adjoining Landowners, §6; 50 A. L. R. 487.
5. Bailey & Son v. Gray, 53 S. C. 503, 31 S. E. 354 (1898); Contos & Metracas v. Jamison & Morris, 81 S. C. 488, 62 S. E. 867 (1908).
6. Gilmore v. Driscoll, 122 Mass. 199 (1877).

cited the *Bailey* case and said, "It * * * is well settled that a proprietor excavating on his own premises is liable for damages done to the adjacent owner's soil if in its natural condition, whether damages result from negligence or not, but when buildings are erected upon the soil, and its natural condition thus altered, *no action* lies against such excavator except upon allegation and proof of negligence." But the plaintiff-lessees had alleged and proved negligence, and that point was not in issue.

Note that the language in the *Bailey* case says, " * * * *for injuries to buildings* * * * no right of action can be maintained without allegations of negligence," while that of the *Contos* case reads, "* * * when buildings are erected upon the soil, * * * *no* action lies * * * except upon allegation and proof of negligence."

Thus it would appear that the South Carolina law of lateral support as to property upon which buildings have been erected has been established by dicta, and an examination of the exact language of the courts in the *Bailey* and *Contos* cases shows the South Carolina declaration of the law on this point to be as strict a rule as can be found anywhere in the United States. Interpreted, it can only mean that even though the showing be made that the building in no way contributed to the weight of the soil, damages cannot even be collected for the destruction of the soil, not to mention the building, in the absence of allegation and proof of negligence. South Carolina is not alone in this declaration of the rule.[7]

It appears that more just and equitable results are obtainable in other jurisdictions which have qualified or modified this strict rule. Virginia, for example, says that damage done to the buildings may be considered in estimating total damages in cases where the land, upon which there are buildings, slides or subsides by reason of excavation upon the adjoining land and the buildings in consequence are damaged, provided that their weight in no way contributed to the subsidence of the soil.[8] Since this reasoning is based on the natural property right of the adjoining owner to lateral support, it results in a split of authority as to whether recovery may be had under such circumstances for both land and buildings,

7. Gilmore v. Driscoll, *supra*, in which the weight of the buildings in no way contributed to the injury.

8. Stearns' Ex'r v. City of Richmond, 88 Va. 992, 14 S. E. 847 (1892).

especially since under the general rule recovery for damages to buildings is based on negligent excavation.

Another example is the Michigan rule stated as follows: "(1) While a landowner has the undoubted right to excavate close to the boundary line, he must take reasonable precautions to prevent his neighbor's soil from falling. (2) If he has taken such reasonable precautions, and yet the soil falls from its own pressure, he is still liable for injury to the land, but not for any injury to the superstructures. (3) If the pressure of the superstructure causes the land to fall, he is not liable either for injury to the land or superstructure. (4) If he fails to take such reasonable precautions to protect his neighbor's soil, and to preserve it in its natural state, he is liable for the injury to both the land and the superstructure, if the pressure of the superstructure did not cause the land to fall, and it fell in consequence of the failure to take such reasonable precautions."[9]

The liberal viewpoint is expressed in a Rhode Island case.[10] The rule there set out repeats the general principle that the right of lateral support does not include the right to have the weight of a building placed upon the land also supported, and that *if the pressure and weight of the building cause the land to subside* the excavator is not liable for injury to the building in the absence of a showing of negligent excavation. But the case goes on to say that a landowner by building upon his land has not thereby lost his right to have his soil supported, and, when that right is invaded by his neighbor, and his land sinks, he is entitled to compensation for the direct results of such breach of duty, including any injury to buildings upon his land, when such injury is due to an interference with the lateral support of the soil, and cannot be ascribed to the weight and pressure of the building upon the land.

The American Law Institute favors the Rhode Island view, and expressed it as follows: "A and B are severally in possession of lands. There is a heavy building on A's land. B makes an excavation in his land for the purpose of building a house thereon. A's land falls into this excavation. If A's land would not have fallen if there had been no building on it, B is not liable on the principle of duty to give lateral support to the land of A. If A's land would have fallen if there had been no

9. Gildersleeve v. Hammond, *supra.*
10. Prete v. Cray, *supra.*

building on it, B is liable "* * * for the consequential damage to the buildings on the basis of removal of natural support —not negligence."[11]

The rule as expressed in the Rhode Island case and by the American Law Institute certainly is calculated to and would result in the fairest settlement of this type of dispute. As in other cases the testimony of experts could be utilized in determining whether or not the weight of the buildings contributed to the subsidence, and the final question would be left, as it should be, to the jury.

Where there is definite negligence on the part of the excavator, the rule is clear. Even though the excavator is not bound to furnish lateral support sufficient to sustain his neighbor's land where the pressure has been increased by buildings, he must use due care in making an excavation even in such case, and he is liable in damages if the injury to his neighbor was caused by the negligent and unskillful manner in which the excavation was made or maintained.[12] This rule is based on the idea that one must use his own property in such a way as not to injure his neighbor, and must execute work thereon, as far as is reasonably practicable, with a view to the safety of the buildings on the adjoining property.[13] All the authorities agree on this. The "due care", as it is expressed, is simply the duty to proceed in an ordinarily skillful and careful manner, exercising only reasonable and ordinary care to prevent damage. Ordinary care and skill in excavation and maintaining an excavation depend on the circumstances of each particular case.

The American Law Institute says, "The elements necessary to render the actor liable are: (1) The withdrawal of the lateral support; (2) the negligent character of the withdrawal; (3) harm to land or to artificial additions thereon which is the legal consequence of the negligent withdrawal; (4) absence of conduct on the part of the person suffering the harm which disables him from maintaining an action therefor." [14]

The same work sets out specific acts of negligence as follows: "Under particular circumstances and conditions, it may

11. RESTATEMENT, TORTS, §817 (2) (1939).
12. 1 Am. Jur., Adjoining Landowners, §26.
13. Walker v. Strosnider, *supra.*
14. RESTATEMENT, TORTS, §819 (c) (1939).

be negligence: (1) To excavate sand, gravel, loam, or other friable soil otherwise than in sections; (2) not to furnish temporary support by shoring; (3) to fail to give timely and sufficient notice of the proposed excavation; (4) to maintain an excavation under such conditions or for such a length of time as to expose the adjoining lands with artificial additions to unreasonable risk of harm as by exposure to rain, frost or weathering; (5) to make use of improper instrumentalities or improper use of proper instrumentalities; (6) to employ incompetent workmen; (7) to neglect to ascertain in advance whether the excavation as planned is likely to expose adjoining land with artificial additions to unreasonable risk of harm; (8) to represent to the adjoining landowner that a certain method will be followed or that certain precautions will be taken, and thereafter without adequate notice change the method or omit the precautions."[15]

As to contributory negligence, the general trend indicates that it will excuse the negligent excavator from liability.[16] The only South Carolina case mentioning the point is *Contos & Metracas v. Jamison & Morris*,[17] and that case does not actually say that contributory negligence will prevent recovery. It merely indicates that such a decision would result if contributory negligence were in issue and proved. The presence or absence of contributory negligence, like that of negligence, would depend on all the facts and circumstances of each particular case, and would be for the jury to decide.

In the final analysis, the South Carolina law of lateral support is very limited. Only two expressions of it have come from our Supreme Court. In the case of *Bailey & Son v. Gray*,[18] there was no need to discuss it since the facts show that there was no excavation. This expression, then, was a pure dictum. In *Contos & Metracas v. Jamison & Morris*,[19] negligence was alleged and proved, but whether or not this was necessary to collect for damage to the artificial addition was not in issue in the case. Again the Court declared the law on the point, citing the *Bailey* case. If these expressions are considered the settled case law of this state, we are adherents to the strict

15. RESTATEMENT, TORTS, §819 (f) (1939).

16. Huber v. H. R. Douglass, Inc., 94 Conn. 167, 108 Atl. 727 (1919); Smith v. Hardesty, 31 Mo. 411 (1861).

17. See note 5, *supra*.

18. See note 1, *supra*.

19. See note 1, *supra*.

rule, discussed above. The effect of the *Contos* case, with a strict interpretation of the language, is to declare as a matter of law that any artificial structure placed upon land will increase the lateral pressure to a distance sufficient to place the area of increased pressure beyond the boundary of the adjoining landowner. Should this not be a question of fact for the jury to decide? It is difficult to believe, after a thorough study of the two South Carolina cases, that our Supreme Court would feel itself bound to follow them. Rather, it is to be thought, it would feel constrained, upon presentation of a proper case, to make a full declaration of the law as to lateral support in South Carolina, with a tendency to support the more liberal views expressed in the American Law Institute's RESTATEMENT, TORTS.

ROY V. LIND