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SUPPORT—LATERAL AND SUBJACENT.

THE maxim *cujus est solum ejus est usque ad cœlum, et ad inferos* expresses the interest which a fee-simple owner has in land. He owns everything contained between lines drawn from the centre of the earth through the boundaries of his surface property, and produced to infinity. Theoretically, he has a right in the one direction, to erect a structure reaching the heavens; or, in the other, to excavate to the lowest depths.

In order, however, to the proper enjoyment of these rights, it is necessary that there be a mutual yielding of interest; the theoretical must be modified by the practical. This common consent is embodied in the familiar maxim *sic utere tuo, ut alienum non lædas.* The meaning of this would seem to be that the *absolute* ownership of property is *qualified* in its use.

A consideration of the subject of SUPPORT, *Lateral* and *Subjacent*, will furnish an illustration of the conflict between the two common-law maxims.

I. LATERAL SUPPORT.—The obvious distinction between the soil in its natural state and the soil whose weight is increased by artificial means, suggests the most appropriate division of the subject.

(*a*) *The Natural Soil.*—It is a well settled principle of law, that the owner of land in its natural state, has a right to have it supported by his neighbor's soil.

The Code of Solon recognised this principle, as may be seen from the quotation, "If a man dig a sepulchre, or a ditch, he shall

leave (between it and his neighbor's land), a space equal to its depth; if he dig a well, he shall leave the space of a fathom."

This enactment was, in substance embodied into the Roman Law of the Twelve Tables, and thence transferred to the Pandects of Justinian: Digest X., b. 10, tit. I., § 13.

The doctrine has prevailed from the earliest times, in the English law. It is well formulated by Rolle, in the case of *Wilde* v. *Minsterley*, Rolle Abr. "*Trespass*," I., pl. 1. "It seems that a man who has land closely adjoining my land, cannot dig his land so near mine, that mine would fall into his pit, and an action brought for such an act would lie." The later English decisions uniformly recognise the law as laid down by Rolle, and the consideration of a very few cases, will show how closely the American law has followed the English.

A very important case, and one always cited when the subject is discussed, is that of *Thurston* v. *Hancock*, 12 Mass. 220. PARKER, C. J., in the course of his opinion, remarks: "A man, in digging upon his own land, is to have regard to the position of his neighbor's land, and the probable consequences to his neighbor, if he digs too near his line; and if he disturbs the natural state of the soil, he shall answer in damages."

The case of *Farrand* v. *Marshall*, 18 Barb. 380, sustains the law as stated in the above case, that the right to natural support is incident to property.

Chancellor WALWORTH, in delivering the opinion in *Lasala* v. *Holbrook*, 4 Paige 169, says, "I have a natural right to the use of my land, in the situation in which it was placed by nature, surrounded and protected by the soil of the adjacent lots. And the owners of those lots will not be permitted to destroy my land, by removing this natural support, or barrier."

The Pennsylvania case bearing most directly on the subject, is that of *Altvater* v. *Woods*, 1 W. N. C. 23 (Pa.). Altvater, the defendant below, undertook to reduce his lot to the grade of the street, in the city of Allegheny, and as a consequence, the soil of the plaintiff's lot fell into the excavation. The court, in charging the jury, allowed the defendant the right to excavate his own ground; but held that if he could not excavate without injury to his neighbor's natural soil, he was to be entirely deprived of his right.

The doctrine was also applied in *Bell et al.* v. *Reed*, 31 Leg. Int. 389 (Pa.), where the complainant brought a bill in equity to restrain

the respondents from excavating so near complainant's land as to deprive it of its natural support. The court, in accordance with the Master's report, awarded a perpetual injunction, restraining the respondents from excavating within forty feet of complainant's land. On appeal the injunction was so modified as to allow the appellants to strip their land up to the appellee's line, "provided they furnish a sufficient artificial support for appellee's land."

This modification calls attention to another very important principle, and one which is recognised in other than Pennsylvania cases: *Thurston* v. *Hancock*, *Lasala* v. *Holbrook*, *supra*; *Radcliff* v. *Mayor*, *&c.*, 4 Comst. 195.

In our zeal for establishing and protecting the right of lateral support, which a man has in his neighbor's soil, there is danger of our overlooking the fact that the neighbor also has rights which are to be respected. His land may be of such a quality as to be useful or valuable only by being excavated and disposed of; as in the very common cases of sand-pits and stone quarries. Yet, if the principle under consideration is applied in its full force, he will be prevented from gaining as much profit from his land as he should gain. Hence, the wisdom of the rule or permission in *Bell* v. *Reed*, allowing the appellants to support their neighbor's soil artificially, and thus to receive the full benefit of their own soil. But it would seem that, notwithstanding any care or skill on the part of the defendant, still, if the plaintiff's soil falls in as a consequence of the excavation, the defendant is liable for all damages: *Hayes* v. *Cohoes Co.*, 2 Comst. 162.

The majority of the cases considered arose with reference to land burdened with buildings. But in them all the doctrine of lateral support to the natural soil is impliedly admitted, if not expressly stated to be the law. The principle, originating in an antiquity, preserved in the civil and the common-law system, is well recognised in the law of to-day.

(*b*) *The Soil Burdened.*—As to the right of support which adjoining landowners have to each other's soil, there is a manifest distinction to be drawn between lands as left by nature and land whose weight is increased by artificial means. While it is plainly in accordance with law and justice that I should have undisturbed enjoyment of my *land*, it is not so clearly lawful or just that I should increase the weight of my land, and call upon my neighbor not to disturb my newly-acquired right, if a right it be. As we

have before seen, the neighbor has as much right to his soil as I have to mine; and consequently he may dig it up and carry it away, provided he does not injure my natural soil in so doing. In preventing him from excavating, lest he undermine my building, I would be committing a positive wrong, that is, would be depriving him of a natural right.

Lord TENTERDEN, in delivering the opinion of the court in *Wyatt* v. *Harrison*, 3 B. & Ad. 871, after referring to the right of action for damages occasioned to the natural soil by excavation, remarks: "But if I have laid an additional weight upon my land, it does not follow that he (my neighbor) is to be deprived of the right of digging his own ground because mine will then become incapable of supporting the artificial weight which I have laid upon it." The same view is held in *Thurston* v. *Hancock*, 12 Mass. 220, and in *Lasala* v. *Holbrook*, 4 Paige 169, in which latter case the chancellor, after speaking of the neighbor's right to dig upon his own land, says: "I cannot, therefore, deprive him of this right by erecting a building on my 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." The foregoing authorities are sufficient to establish the general rule, that a landowner has no natural right to increase the lateral pressure of his soil, or to add to his neighbor's obligation of natural support. But as buildings of some kind are necessary to the comfort and convenience of landowners, and since they have no natural right to the support of the adjacent soil, it is obvious that there must be some artificial right established either by usage or law.

Easements are acquired by grant, express or implied, or by prescription presuming a grant. A grant of an easement may be implied from certain peculiar circumstances attending the transfer of land. It has been held in several cases, for instance, that where the owner of two lots of ground conveys one of them upon which a house is standing, he cannot excavate so as to affect the house because an implied right of support has passed with it: *McGuire* v. *Grant*, 1 Dutcher 356; *United States* v. *Appleton*, 1 Sumn. 492. Another case extends the owner's disability to his assigns: *Lasala* v. *Holbrook*, 4 Paige 169. It has been held that where an owner divides his estate by the alienation of a part, the alienee becomes entitled to all the continuous and apparent easements: *Keiffer* v. *Imhoff*, 2 Casey 438 (Pa.). But while the easement of

support to buildings may be continuous, it is not apparent. Hence, in accordance with the maxim *expressio unius exclusio alterius est*, it follows that, under the last case, such an easement does *not* pass by an implied grant on the division of an estate.

Easements may also be acquired by prescription presuming a grant. The common lawyers, from the earliest times, manifested a certain reverence for whatever was *ancient*. Back to a time whereof the memory of man runneth not to the contrary, was, with them, a favorite expression. It was owing to this tendency that houses, ancient or upon ancient foundations, obtained an advantage over those newly erected. Ancient buildings were such as had, by lapse of time, gained a right to support by prescription; this right being more properly an *easement*, while the right to lateral support of land by land, is rather an incident of property than an easement: *Humphries* v. *Brogden*, 12 Q. B. 739.

The reasoning was similar to that regarding the acquirement of land, under the Statutes of Limitations: that as the mere possession of land ripens, by lapse of time, into an indefeasible title; so, the right of support to buildings, originally no right at all, becomes one by the length of time during which it has remained undisturbed. The doctrine of the common law is, in short, that the easement of support to artificially weighted land, may be acquired by prescription presuming a grant, as well as by a grant itself. The principle is well illustrated by Lord ELLENBOROUGH in *Stansell* v. *Jollard*, 1 Selw. N. P. 444. His language is: "Where a man has built to the extremity of his soil, and has enjoyed his building above twenty years, upon analogy to the rule as to lights, he has acquired a right to a support, or, as it were, of leaning to his neighbor's soil, so that his neighbor cannot dig so near as to remove the support; but it is otherwise of a house newly built."

The common-law doctrine as to prescriptive support is followed in a number of American cases: *Thurston* v. *Hancock*, 12 Mass. 220; *Lasala* v. *Holbrook*, 4 Paige 169. But see *Gilmore* v. *Driscoll*, 122 Mass. 207.

In Pennsylvania, however, we find a different rule prevailing. We will adopt the analogy suggested above by Lord ELLENBOROUGH, and consider first, the Pennsylvania law as to "Ancient Lights," and from that may be inferred the law as to the easement of support by prescription.

In *Haverstick* v. *Sipe*, 9 Casey 371 (Pa.), LOWRIE, C. J.,

remarks. "It has never been considered in this state that a contract for the privilege of light and air over another man's ground could be implied from the fact that such a privilege has been long enjoyed," and the reason he gives for this is, that "the advantage which one man derives by obtaining light and air over the ground of another is no *adverse* privilege." In *Richart* v. *Scott*, 7 Watts 460 (Pa.), remarking on the claim of the plaintiff to an implied consent to the support of buildings, and admitting that an easement may be acquired by adverse enjoyment and acquiescence for twenty-one years, KENNEDY, J., says: "But it is difficult, if not impossible to conceive, how an implication or presumption of such license or grant can be made, where there is no *adverse user*, encroachment upon or possession had or taken of any right or thing belonging to another, and nothing done to which any other can make even the slightest color of objection."

Thus it may be seen that one of the essentials to an easement by prescription is an *adverse user* during a certain period. Hence, it being shown that neither the *user* of light over, nor of support to buildings from another's ground, can be called *adverse*, or under a claim of right, it follows that neither right can be established or maintained in Pennsylvania. So far as the law of Pennsylvania is concerned, I am inclined to regard the privilege of support as belonging to that class of easements which are created by express grant only.

Of the two doctrines considered, that of the Pennsylvania courts is clearly the more logical and philosophical. Yet what was long assured as the common-law doctrine as to prescriptive support, has, as we have seen, obtained in England and a number of the United States. We may understand the law of *Stansell* v. *Jollard* to have remained in full force in the English courts up to December 11th 1877, when it was entirely overruled and swept out of existence by a majority judgment of the Queen's Bench, delivered on that date.

The case of *Angus* v. *Dalton*, Law Rep. 3 Q. B. Div. 85; 17 Am. Law Reg. N. S. 645; is one of importance, as its manifest tendency is entirely to change the current of the English decisions on the subject of prescriptive support. It was an action brought against defendants for so excavating, as not to leave sufficient lateral support for plaintiff's factory. Plaintiffs had enjoyed the support of the neighboring house and soil for twenty-seven

years. The majority opinion of the court was delivered by COCKBURN, C. J. (MELLOR, J., assenting, LUSH, J., dissenting). His argument is, I think, contained in substance, in the following comprehensive sentence: "To say that by reason of an adjoining house being built on the extremity of the owner's soil, a right of support is to be acquired in the absence of any grant or assent, express or implied, against the adjacent owner, who may be altogether ignorant whether the house or other building is supported by his soil or not, and who, whether he knows it or not, has no means of resisting the acquisition of an easement against himself, either by dissent or resistance of any kind, appears to me to be repugnant to reason and common sense, as well as to the first principles of justice and right." It is not difficult to perceive the similarity between the above reasoning and that of KENNEDY, J., forty years earlier, in *Richart* v. *Scott*, before cited. Adverse user and acquiescence are correlated, and the two together are essential to the establishment of an easement by prescription. Uninterrupted user amounts to acquiescence. But where nothing is done to which objection can be made, there can be no adverse, no interrupted user, and consequently no acquiescence. It is not a little remarkable that after the lapse of so long a time the doctrine early established in Pennsylvania, and looked upon as a peculiarity of the law of that state, should be adopted by the Court of Queen's Bench as the correct exposition of the common law.

Now, while I may not have the right by merely increasing the weight of my property to prevent my neighbor from using his in a reasonable way, still it is manifest that I have a right to protection from the consequences of his careless or malicious acts. In other words, a man must do neither intentional injury, nor what, through negligence, may amount to injury to his neighbor.

This principle is clearly laid down in the books. In *Dodd* v. *Holme*, 1 A. & E. 493, Lord DENMAN, C. J., says, *inter alia*, "A man has no right to accelerate the fall of his neighbor's house." The opinions of TAUNTON and WILLIAMS, JJ., are to the effect that defendants should not have been negligent so as to have injured a house, which from its own weakness would have soon fallen down. The principle is here very strictly applied, but it is admitted in the *syllabus*, that the jury, on the question of negligence, may consider the state of the plaintiff's house.

WOODWORTH, J., in *Panton* v. *Holland*, 17 Johns. 92, remarks:

"On reviewing the cases, I am of opinion that no man is answerable in damages for the reasonable exercise of a right, when it is accompanied by a cautious regard for the rights of others; when there is no just ground for the charge of negligence or unskilfulness, and when the act is not done maliciously;" and he quotes Baron COMYNS to the same effect.

In *Bentz* v. *Armstrong*, 8 W. & S. 40 (Pa.), KENNEDY, J., after speaking of the necessary improvements to be made on town or city lots, and the consequent change in the soil, enjoins upon the purchaser, while using his lot for the purpose for which it was bought, "not to produce any detriment or injury to his neighbor in the occupation or enjoyment of his adjoining lot."

It must be remembered, however, that while the neighbor is to use due care and diligence, his liability exists, or does not exist, according to the proper or improper construction of the neighboring house. This is clearly the law as laid down in *Richart* v. *Scott*, 7 Watts 460 (Pa.). KENNEDY, J., says, in that case, "Every builder ought, in putting up his house, to do it in such a manner as to impose no unnecessary expense or burthen thereafter upon the owner of the adjacent lot, when he shall come to build upon it, or to alter and remodel that which he may have put on it previously."

II. SUBJACENT SUPPORT.—Land may be divided horizontally as well as perpendicularly. The surface of the earth is cut up into sections of square feet, square acres, and square miles. So may its mass be divided into an infinite number of strata. Each stratum may, equally with each acre, have a fee-simple owner. Just as a surface-owner may demand support from an *ad*jacent neighbor, so may he, or any upper owner, demand support from a *sub*jacent neighbor. Both rights result from the contiguity of two freeholds. There is the same distinction between the natural and the burdened soil. As to the rights of support to the *natural soil*, Lord CAMPBELL, C. J., (*Humphries* v. *Brogden*, 12 Q. B. 739), shows a perfect similarity. After speaking of the right to lateral support as a "right of property passing with the soil," and hence, requiring no grant, he continues: "*Pari ratione* where there are separate freeholds from the surface of the land and the minerals belonging to different owners, we are of opinion that the owner of the surface, while in its natural state, is entitled to have it supported by the subjacent mineral strata."

The case of *Humphries* v. *Brogden*, *supra*, in which the above

opinion was delivered, was decided in 1850. There are several other cases (*Harris* v. *Ryding*, 5 M. & W. 60; *Rowbotham* v. *Wilson*, 8 H. L. 348; *Backhouse* v. *Bonomi*, 9 Id. 511,) on the subject, both prior and subsequent to that date, in which a similar view to that of the Chief Justice is held, and it is law in Pennsylvania: *Jones* v. *Wagner*, 16 P. F. Smith 434.

We are not to infer, however, from the language of Lord CAMPBELL, that the subjacent owner is to be entirely deprived of his right to mine. To prevent any such conclusion, he himself remarks further on in his opinion: "Those strata may, of course, be removed by the owner of them, so that a sufficient support for the surface is left."

This is nothing more than a principle of common sense and justice. A man of the least mental capacity would hesitate in buying a mine were he aware that he would not be allowed to excavate it. He may undoubtedly put the mine to the use for which it was bought; but he must understand this use to be reasonable. It is his duty to furnish a reasonable support to the surface (*Harris* v. *Ryding*, 5 M. & W. 60,), which is "a support that will protect the surface from subsidence, and keep it securely at its ancient and natural level:" *Humphries* v. *Brogden*, 12 Q. B. 739. Anything short of this, even in the absence of negligence, will render the lower owner liable for all damages.

This is the normal relation existing between the upper and lower owners of land. But this, of course, may vary according to circumstances; as where the surface-owner, originally holding all the land, has conveyed an estate in the minerals, and by the deed of conveyance the usual mining rights are enlarged. It was held, for instance, in *Rowbotham* v. *Wilson*, 8 H. L. 348, that the rights of the grantee of minerals depend on the terms of the deed by which they are conveyed. A much stronger case on this point is *Smart* v. *Morton*, 5 E. & B. 30, the language of which is: "Upon the severance of the surface and the minerals, a deed might be framed empowering the owner of the minerals to remove the whole of them without leaving a support for the surface: compensation being made to the owner of the surface for the damage thereby occasioned to his tenement."

Strong as this is, in favor of the grantee, I do not suppose that in case of gross negligence, he would be free from liability.

As to the *soil burdened*, there is no more natural right to sub-

jacent than to lateral support. The right may be acquired at common law, by grant or prescription. The right by prescription is recognised in *Partridge* v. *Scott*, 3 M. & W. 220, and Lord CAMPBELL, (*Humphries* v. *Brogden*, *supra*), though admitting the difficulty of finding whence the grant of such an easement can be presumed, yet, illogical as it may seem, holds that a right to lateral support may be acquired in this manner (referring to the language of Lord ELLENBOROUGH in *Stansell* v. *Jollard*, 1 Selw. N. P. 444, as an authority for his position), and extends the application of the principle, by analogy, to subjacent support. The principle is adhered to in *Rogers* v. *Taylor*, 2 Hurlst. & N. 828, with the *query* in addition—whether independently of prescription, the owner of the surface has not a right to the vertical support of the subjacent strata, for the surface and for all reasonable buildings put upon it.

The whole duty of the subjacent owners may be summed up in the one expression "*reasonable use*;" which means that he must work his mines in a manner not materially to injure the surface. When such injury does occur, there is a presumption of negligence on the part of the subjacent owner. If negligence be shown, it matters not whether a house be ancient or modern, the one committing the wrong will be liable. Where a lower owner is working his mine so carelessly that if he continues, injury to the surface will ensue, he may, on complaint, be restrained by a court of equity:" *Lawrence, Merkle & Co.'s Appeal*, 2 W. N. C. 4 (Pa.). As to the question of negligence there are correlative rights and duties. *Caldwell* v. *Fulton*, 7 Casey 481, and *Jones* v. *Wagner*, 16 P. F. Smith 434, substantiate this statement. They are to the effect that the upper and under ground estates are governed as other estates, by the maxim *sic utere tuo, ut alienum non lædas*. The upper freeholder is entitled to reasonable support from the lower, while the lower is, in turn, not to be unreasonably deprived of his accustomed rights.

To sum up the entire subject of support, lateral and subjacent, it may be said, that the right to natural support is universally held as law; that the right of support to burdened soil is not a right naturally, but one to be acquired at common law by grant, express or implied, or (as formerly with reference to lateral support and still with reference to subjacent support) by prescription; by the Pennsylvania law, to be acquired, if at all, by express grant only.