

1929

Lateral Support: Rights and duties of, to Adjoining Landowners

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Repository Citation

John J. McRae, *Lateral Support: Rights and duties of, to Adjoining Landowners*, 13 Marq. L. Rev. 249 (1929).

Available at: <https://scholarship.law.marquette.edu/mulr/vol13/iss4/12>

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In *Land, Log, and Lumber Co. vs. McIntyre*, 100 Wis. 245; 75 N.W. 964, 69 *Am. St. Rep.* 915, this above distinction is brought out. There, a member of the county board received money from the county on such an illegal contract and the county not being in *pari delicto* was allowed to recover the money so paid in a taxpayer's action. In *Lauro vs. Pacific Mutual Life Insurance Company* 131 Wis. 555; 111 N.W. 660, Justice Timlin presents many cases illustrating the general principle applicable in such cases. He there quotes with approval from *Harris vs. Runnels*, 12 How. 72, "It must be obvious from such diversities of legislation, that Statutes forbidding or enjoining things to be done, with penalties accordingly, should always be fully examined before courts should refuse to give aid to enforce contracts which are said to be in contravention of them."

The late Chief Justice Vinje said that the principle running through the cases is this: "Not all contracts forbidden by statute are void." The entire subject is admirably discussed, and numerous cases cited which are to the point in a note at Page 618, 12 L.R.A. (NS). The principle to be applied, which would give relief to the blameless party, and the innocent victim, seems to be: Where the contract is not expressly prohibited by statute, where the contract is not *Malum per se*, or where the parties are not in *pari delicto*, courts will look to the purpose and intent of the statute and give it effect accordingly.

STANLEY D. CELICHOWSKI

Lateral Support; Rights and Duties of, to Adjoining Landowners

The subject of lateral support touching on the rights and duties of property owners to the same is of utmost importance to the practicing lawyer of today. We are living in an age of concentration of forces which has resulted in the upbuilding of large cities. The growth of cities has greatly increased the value of property in certain districts. Likewise the growth of cities has made for the concentration of forces in particular districts for commercial purposes. The increase in value together with the desirability of concentration has led to the utilization of every foot of land by property owners. The above two forces have likewise resulted in the placing of greater burdens on the land through the building of higher buildings. Years ago when a man built on his property he erected his building within his lot so that the support from his own land was enough to protect his structure in case his neighbor wished to excavate and build on his land. The immense structures which are built today, usually extend to the edge of the lot line. When the adjoining owner wishes to construct a building on his lot, there is danger of the first building being damaged if some means of support is not given during the time the excavation is being

made when the natural support which the adjoining lot gives is taken away. For the above reasons, the question of the rights and duties of adjoining landowners with regard to lateral support has become an important phase in the law of real property. Due to its growing importance, a brief review of the law on the subject is here given so that the reader may have a basis of research should he wish to delve deeper into the subject.

The underlying principle governing the rights and the duties of adjoining property owners to lateral support is of itself simple. Granting his land is in its natural condition (no added burden thereon), a property owner has the absolute right to the lateral support of his neighbor's soil. Conversely, a property owner has the duty of furnishing the lateral support which his land gives when left in its natural condition. Eschweiler, J. in *Hickman v. Wallauer*,¹ ably states the law in these words: "As incident to the plaintiff's ownership of his lot, he had the absolute right, so far as the land was in its natural condition, to lateral support from the defendant's lot." As an illustration of this basic principle let us suppose two adjoining lot owners, A. and B. A. has a right to excavate on his lot to any depth providing he furnishes B. with the same lateral support which his land furnished before he started his improvements. For this duty which A., the party changing the nature of his land, owes to B., the adjoining property owner, there is of course the corresponding right of B. to have the lateral support which A.'s land gave when in its natural condition. Added authority for this basic principle may be found in *Christensen v. Mann*,² *Wahl v. Kelley*,³ *Schaefer v. Hoffman*.⁴ See also *Cooley on Torts*, 1236 to 1238.

Most of the litigation on this subject, however, rises where the land has been improved by the construction of buildings and those buildings are injured as a result of the loss of lateral support when the adjoining landowner excavates on his property preparatory to construction thereon. We have advanced the principle in the beginning of this article that the property owner has the right to the lateral support of his neighbor's land, which right is limited to the support necessary to the land in its natural condition. Where a person adds weight to the soil by the creation of a building, the person thus creating the burden has the duty of providing support for the same. "The principle established by the authorities is, that one landowner cannot, by altering the natural condition of his land, deprive the adjoining proprietor of the privilege

¹ 169 Wis. 23.

² 187 Wis. 567.

³ 194 Wis. 564.

⁴ 223 N.W. 847.

of using his own land as he might have done before; and consequently, that he cannot, by building a house near the margin of his land, prevent his neighbor from excavating his own soil, although it may endanger the house."⁵ Thus if A. erects a building on his lot and B. an adjoining property owner wishes to build on his lot, A. has the duty of protecting the building which he has erected. Of course B. must use ordinary care in his work of excavation. Likewise B. must give A. notice of his intention to excavate on his land, so that A. may protect his building. The law is that if B. fails to give A. due notice of his intention to excavate, it becomes B.'s duty to protect the building on A.'s lot.

There are a few recent Wisconsin cases which treat the subject of lateral support at quite a length and which are illustrative of the circumstances which gave rise to litigation on this subject. *Hickman v. Wellauer*,⁶ is one of the leading cases on the subject. In this case, the defendant through a misunderstanding of a city ordinance, thought that he was bound to support the building which was on the plaintiff's land. The plaintiff was not notified of the defendant's intention to build. The means of support adopted by the defendant proved inadequate and as a result the plaintiff's building was damaged. The court held that the plaintiff was not obliged to support his building unless the defendant give him timely notice of his intention to excavate. No notice having been given, the duty of supporting the plaintiff's building shifted from the plaintiff to the defendant so that the defendant is liable for the damage done to the plaintiff's building.

Another leading case on the subject is *Christensen v. Mann*.⁷ This case concerned the construction of the Arcade building in Racine. Because of the peculiar circumstances of the case, the owner of the building did not have the duty of supporting the wall of his building. Here both owners claimed title to their land through a common grantor. The wall in question had been used as a party wall but the party constructing the Arcade elected to abandon the party wall which was entirely on the property of the other owner. But the deed from the original grantor provided that the party wall should be abandoned only by the consent of all the parties thereto. Consent to the abandonment not having been obtained from the owner of the building, the court held that the party wall had not been abandoned. While the party wall still existed, the owner of the building had the right of the lateral support which his neighbors' land gave to it. Right to lateral support of the land with a house on it is vested where the owner

⁵ 1 R.C.L., 381.

⁶ 169 Wis. 18.

⁷ 187 Wis. 567.

sells the house to one party and the land contiguous to the house to another party. *Durante v. Alba*.⁸ The Alba case is cited with approval in the Mann case, wherein it is pointed out that this right to lateral support of the land and house would run with the land only so long as the original house stood there.

In *Wahl v. Kelley*,⁹ the plaintiff contended that as a result of the defendant excavating on his property, large fissures had developed on the plaintiff's property. As a result of this, the plaintiff's cellar had been damaged by water seeping through. The court held that the plaintiff's complaint stated facts sufficient to constitute a cause of action. The most recent adjudication of the Wisconsin Court on this subject is *Schaefer v. Hoffman*.¹⁰ In this last case, the adjoining landowner gave the owner of the building notice of his intention to excavate. The owner of the building had hired a contractor to brace up his garage by artificial support during the time of the excavation. The contractor was out on a fishing party at the time when his services were needed and as a result the garage settled and was damaged. The court held that the owner of the lot on which the excavation was made could not be held liable for the damage done.

It is interesting to note here some of the circumstances out of which an adjoining property owner is bound to support the improved land of another. The Mann case and the Alba case cited above are good illustrations of the duty of lateral support resulting from a covenant that runs with the land. Somewhat similar is the case of *Freeholders of Hudson v. Woodcliff Land Co.*,¹¹ wherein land was granted for the express purpose of building a road thereon. The court held that the adjoining owner owed the duty of lateral support to a road built in accordance with the terms of the deed. *Manning v. New Jersey Short Line R. Co.*,¹² is authority for the theory that where a railroad takes land, the adjoining property owners had the duty to support the built up right of way. It is doubtful whether the courts would follow the Manning case in the present day because there has been a decided change in public opinion with regard to the favoritism which was once shown to railroads.

In the Mann case, Doerfler, J. observes: "The law as laid down in the Wellauer Case and in other Wisconsin cases is so firmly established in the jurisprudence of this state that it must be deemed a rule of property, and if any relief or change is sought it must be obtained

⁸ 266 Pa. St. 444.

⁹ 194 Wis. 559.

¹⁰ 223 N.W. 847.

¹¹ 65 Atl. 844.

¹² 78 Atl. 200.

from the legislature. This leads one to speculate on the possibilities of there being a change in the law of lateral support through legislation. In the Wellauer case, the plaintiff based the defendant's liability on a city ordinance which provided: "Any person, firm, or corporation making excavations or causing the same to be made, shall properly guard them and shall protect them that the adjoining soil shall not cave in, and no one shall excavate so as to injure any adjoining ground or building."¹³ The court held that this ordinance could not be interpreted as placing the duty of supporting the building on the party doing the work. On page 24 Eschweiler, J. points out that "such well established property rights as are here involved cannot be taken away or substantially changed except by express declaration of the legislature, either by statute or by expressly delegating such power to the common council. Neither of such is found in this case." The ordinance has apparently never been changed. Since this decision was handed down the Home Rule Amendment was added to our constitution. We wonder what would be the effect of a charter ordinance similar to the ordinance quoted above, bearing in mind the fact that the law on lateral support as it exists in Wisconsin today is entirely bench made law.

JOHN J. McRAE

Pleading; Demurrer for Nonjoinable Causes of Action Intermingled in One Count

Ernst vs. Schmidt 223 N.W. 559 (Wis.)

Plaintiff loaned money to the Elmwood Co., a corporation engaged in the development of Texas oil lands. The defendants, stockholders in said corporation, agreed in writing that in the event that the plaintiff was compelled to foreclose on the corporate property to secure the loan, they would pay their pro rata share of the loan and take their pro rata share of the fee. The debt was not paid, plaintiff foreclosed on said property, and now sues the stockholders to obtain the amount of the loan according to the agreement.

The plaintiff joined the defendants in one action failing to separately state and number the separate causes of action. The defendants demurred separately on the ground that several causes of action had been improperly united. The lower court overruled this demurrer. On appeal it was held that such demurrer should have been sustained. The court said that where the causes of action are joined in one complaint, and instead of being individually stated in separate counts they are joined in one count, the defective pleading is properly reached under

¹³ Milwaukee Code of 1914, IV, 43.