



1950

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Recommended Citation

Edmonds, Hollis E. (1950) "Some Aspects of Lateral Support in Kentucky," *Kentucky Law Journal*: Vol. 39 : Iss. 1 , Article 11.
Available at: <https://uknowledge.uky.edu/klj/vol39/iss1/11>

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NOTES AND COMMENTS

SOME ASPECTS OF LATERAL SUPPORT IN KENTUCKY

The conflicting rights of adjoining property owners are reconciled normally on the basis that one is entitled to use his land according to his own taste so long as he does not invade or interfere with the rights of his neighbor,¹ and in its broadest sense this fundamental idea includes the corollary notion that one is entitled to have his land remain in its natural state, which may require lateral support from the adjoining land or an artificial support substituted by the adjoining owner.² There is substantial disagreement, however, as to whether this well established right to lateral support is in the nature of an easement³ or simply a right incident to the ownership of land. Also, there is a lack of uniformity as to the extent of the right with respect to the amount of damages recoverable where the land and buildings thereon are damaged by a subsidence resulting from the weight of the land itself.⁴ It is the purpose of this note to examine briefly the Kentucky cases on these two questions with reference to cases from other jurisdictions where necessary for comparison.

With regard to the nature of the right, the Kentucky Court in *Louisville & Nashville R. Co. v. Bonhayo*, clearly took the position that the right is incident to the ownership of land, by saying:

"The right of lateral support is an *incident* to the land, and one adjoining or near to has no right to so excavate and dig the soil as to deprive the land of his neighbor of this support."⁵ (Italics writer's)

An examination of later cases fails to reveal any further discussion on this point, so it is probably safe to conclude that the Kentucky Court accepts the right as one incident to the land and not in the nature of an easement. It is submitted that this position is sound because a right to lateral support is unlike an easement in several important particulars.

¹ *Stimmel v. Brown*, 7 *Houst. (Del.)* 219, 30 *Atl.* 996 (1885); *Moellering v. Evans*, 121 *Ind.* 195, 22 *N. E.* 989 (1889); *Spoo v. Garvin*, 236 *Ky.* 113, 32 *S. W.* 2d 715 (1930).

Moody v. McClelland, 39 *Ala.* 45 (1863); *Omel v. Harkins*, 8 *Bush (Ky.)* 650 (1872).

² See Note, 68 *L.R.A.* 692 (1904).

³ *Green v. Berge*, 105 *Cal.* 52, 38 *Pac.* 539 (1894); *Gilmore v. Driscoll*, 122 *Mass.* 199 (1877); 1 *AM. JUR.*, *Adjoining Landowners*, sec. 21.

⁴ *Moody v. McClelland*, 39 *Ala.* 45 (1863); *Stimmel v. Brown*, 7 *Houst. (Del.)* 219, 30 *Atl.* 996 (1885).

⁵ On most of the other aspects of the problem there is substantial agreement, e.g., (1) it is generally held that the right to have land supported in its natural state does not extend to buildings placed thereon. *Prete v. Cray*, 49 *R. I.* 209, 141 *Atl.* 609, (1928); See Note, 50 *A.L.R.* 486, (1927) 1 *AM. JUR.*, *Adjoining Landowners*, sec. 22. (2) By the weight of authority in this country the right to have weight of the building supported cannot be acquired by prescription, *TIFFANY, REAL PROPERTY*, secs. 753, 1194, (3rd. ed. 1939). (3) The cause of the action accrues at the time of the subsidence, (See, 1 *AM. JUR.*, *Adjoining Landowners*, secs. 34, 36). (4) Some states have attempted to regulate various aspects of the problem by statutes. *Ky. R. S.* 381.440.

⁷ 94 *Ky.* 67, 21 *S. W.* 526 (1893).

⁸ *Id.* at 68, 21 *S. W.* at 527.

An easement is normally created by a grant, express or implied,⁹ whereas the right to lateral support is conceded by all authorities to be a natural right,¹⁰ which attaches by mere ownership of the land. Further, the right cannot be acquired by prescription because there is no need to so acquire it if the land remains in its natural state. Mere ownership of the land is sufficient. It should be pointed out that there is no discussion in the cases regarding a right by prescription to have the land supported in its natural state, but according to the English view the right to have the *weight of a building* supported by the adjoining land can be acquired by prescription.¹¹ A few American cases seem to follow this doctrine,¹² but it is doubtful whether these courts would actually subscribe to it if the question were squarely before them. By the great weight of authority this view has been expressly rejected¹³ on the ground that the owner of the building claiming the prescriptive right has done nothing upon the adjoining land to which the adjoining owner could object; therefore there is nothing on which to presume that he has assented to its adverse use for the required statutory period. The position of the Kentucky Court on this point indirectly confirms its view as to the nature of the right. In the early case of *Clemens v. Speed*,¹⁴ the plaintiff and defendant were owners of adjacent houses supported by a common or party-wall. Defendant after due notice to plaintiff removed her house from the wall in a careful manner and as a result the support of the plaintiff's house was removed causing it to fall and sustain damage. In seeking to recover damages the plaintiff claimed a prescriptive right to have his building supported. The court, in holding for the defendant, rejected the plaintiff's contention because it was contrary to the whole concept of prescription, which rests upon the principle of acquiescence to the adverse acts of another. It was pointed out that the defendant's consent could not be presumed merely because she had no remedy to prevent the plaintiff from building his house and having it supported by her land for a number of years.

Finally, an easement is an interest in the land of another,¹⁵ while the right to lateral support as an incidence to the ownership vests no interest in the adjoining land. In a sense there is an element of interest in the right but only to the extent that it affords a personal action for damages against the adjoining owner, or the person who caused the subsidence. Thus, it is readily seen that such an interest in no way resembles an easement, which is an interest in the land and necessarily of higher dignity.

It may be argued that the label placed on the nature of the right is relatively unimportant, since in either case the right will be protected. While it is true that in most instances the substantive rights of the parties will not be affected by

⁹ *Jacksonville Public Service Corp. v. Calhoun Water Co., et al.*, 219 Ala. 616, 123 So. 79 (1929); *TIFFANY, REAL PROPERTY*, secs. 776, 779 (3rd. ed. 1939).

¹⁰ *Gilmore v. Driscoll*, 122 Mass. 199 (1877).

¹¹ *TIFFANY, REAL PROPERTY*, sec. 1194 (3rd. ed. 1939).

¹² *Stimmel v. Brown*, 7 *Houst. (Del.)* 219, 30 *Atl.* 996, 997 (1885); and in *Mamer v. Lussem*, 65 *Ill.* 484, 491 (1872) where the court said: "There is no question of prescriptive right. Plaintiff's building was of recent erection." In neither case was the question of prescriptive right before the court, but it was merely indicated that the right might be recognized.

¹³ *Sullivan v. Zener*, 98 *Cal.* 346, 33 *Pac.* 209 (1893); *Gilmore v. Driscoll*, 122 *Mass.* 199 (1877); *TIFFANY, REAL PROPERTY*, sec. 753 (3rd ed. 1939).

¹⁴ 93 *Ky.* 284 (1892).

¹⁵ *Wingard v. Copeland*, 64 *Wash.* 214, 116 *Pac.* 670 (1911).

describing the right as an easement in the adjoining land or a right incident to the ownership of the land, there are situations where the distinction would be important. For example, A excavates on his land and then conveys it to B, after which C's adjoining land subsides because of the excavation and a cause of action arises. To whom must C look for his damages? Admittedly, under the easement theory he could very well hold B, who is innocent of any wrong, liable; whereas under the other theory, A would be liable. Since A was actual wrongdoer this would seem to be the more equitable result.¹⁶ Should A allow D a third party to excavate on his land, A's liability would be determined on the basis of agency or negligence.

From the practicable viewpoint, the amount of damages recoverable for the damage caused by the subsidence of the land is more important than the nature of the right. Where the land falls of its own weight the courts find no difficulty in allowing recovery for damage to the land itself. However, a major difficulty arises when a building on the land is also damaged by reason of the subsidence. Actually, most courts have denied recovery for damage to the building irrespective of whether it increased the lateral pressure.¹⁷ There are a few cases cited as authority for this position which apparently recognize the possibility of recovery for damage to the building, but assume that the lateral pressure is increased by reason of the building. In one of these, the leading case of *Moellerng v. Evans*,¹⁸ the court seemed to adhere to the view that if the excavation was performed in a careful manner, and the house falls because of the additional weight, there could be no recovery. The case was remanded for a new trial due to error in instructions regarding negligence, and the court did not decide the question of the building increasing the lateral pressure. Another case to the same effect is *Moody v. McClelland*,¹⁹ where the court restricted the right to land in its natural state and not to buildings which have increased the lateral pressure. Since the case was actually decided on the basis of negligence, the court did not squarely face the question of increased pressure.

It is submitted, that in a few cases the old common law principle which limited the support to the land in its natural state, has been retained. Under such view there is no liability for the damage to the building in the absence of negligence, even though it did not increase the lateral pressure. There are also other cases which reach the same result by finding as a matter of law that the building increased the lateral pressure. At an early date, the Kentucky Court recognized the right of recovery for damage to both land and building, where the subsidence was not caused by the weight of the building. Thus in *Oneil v. Harkins*,²⁰ it was implied that the court would hold as a matter of law that an ordinary fence did not increase the lateral pressure; and it was for the jury to determine whether an outside privy would increase it. In reference to the fence the court said that its

¹⁶ See Note, 14 TEMPLE L. Q. 243 (1940).

¹⁷ *Scranton Coal Co. v. Graff Furnace Co.*, 289 Fed. 305 (CCA 3rd 1923); *Thurston v. Hancock*, 12 Mass. 220 (1815). The rule is still followed in Mass. as evidenced by the case of *Corcoran v. S. S. Kresage Co.*, 313 Mass. 299, 47 N. E. 2d 257 (1943), where the court in interpreting a city ordinance providing that the excavator take proper steps to support the adjoining "earth," held that it meant the earth in its natural state and thus did not change the common law rule of non-liability for damage to buildings on the land.

¹⁸ See 121 Ind. 195, 22 N. E. 989 (1889).

¹⁹ 39 Ala. 45 (1863).

²⁰ See, 8 Bush (Ky.) 650, 653 (Ky. 1872).

pressure did not deprive the owner of the right to recover for damages to his *realty*. In using the term *realty* it is apparent that the court intended to allow recovery for damage to permanent buildings or any other property on the land falling within the definition of the term. The rule was succinctly stated in *Langhorne v. Turman*,²¹ as follows:

“The rule in this State is that, where a landowner, by digging on his own land, has deprived the land of his neighbor of its natural support, he is, whether negligent or not, liable in damages to his neighbor, not only for the actual injury to the soil, but for injuries to buildings.”²²

This rule was quoted with approval in *Smith v. Howard*,²³ where the court in remanding for a new trial recommended an instruction to the effect that there could be a recovery for damage to personal property in the buildings as well as the loss of rents and profits. Such an instruction would seem to incorporate the substance of the well known Tort rule that a plaintiff may recover for all the direct consequences of the defendant's tortious acts.²⁴

While, as pointed out above, substantial justice will be achieved whether the right is labeled an easement or a right incident to the ownership of the land, such is not the case in regard to the conflict as to the extent of recovery where the land subsides of its own weight and damages a building thereon. If recovery is allowed for damage to the land and building, the owner is made whole again, since he is placed in the same position as he was prior to the invasion of his right. On the other hand, if the extent of liability is limited to damages for the land only, it is apparent that the injured party has not been made whole. When the common law rule of denying support to the building was adopted, there was ample building space, so that it was not necessary to build in such proximity to the adjoining land as to require lateral support of the building from it. However, this situation does not exist today, especially in the cities. It would seem therefore, that the rule should at least be relaxed so as to also allow recovery for the building when its weight did not contribute to the subsidence, and perhaps it should be abandoned completely in favor of comprehensive statutory regulations.

Only one aspect of the concept of recovery for damages caused by the subsidence has been discussed; but it will suffice to say that where the excavator is negligent, recovery is based upon the flow of direct natural consequences from the negligent act. All courts allow recovery on this basis but there are some variations as to what constitutes negligence. It is interesting to note that the full implication of this conclusion is that the right to lateral support, a property interest, is measured as to its extent in terms of negligence on the part of the owner of the adjoining land.

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²¹ 141 Ky. 809, 133 S. W. 1008 (1911).

²² *Id.* at 815, 133 S. W. at 1011.

²³ 201 Ky. 249, 256 S. W. 402 (1923).

²⁴ PROSSER, TORTS 340 (1941).