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RIGHT OF LATERAL SUPPORT OF LAND IN TEXAS

REMOVE one side of an arch and the other side will fall. Open a side-wall door near the bottom of a full grain bin and the grain will flow out through the opening, allowing the surface of the grain to subside. In ways suggested by either or both of these examples the land of each owner supports the adjoining land and is itself supported by such adjoining land. What right has each owner to have this support of his land continued? What duty has he to maintain the support which his land gives to the adjoining land?

This comment will be limited to an analysis of the right of *lateral* support as distinguished from the right of subjacent support,¹ and will not include a consideration of the withdrawal of subterranean water or other fluids of which the constituents are preponderantly water.² In *Comanche Duke Oil Co. v. Texas Pacific Coal & Oil Co.* the Texas Commission of Appeals defined the nature and extent of the right as follows:

Ex vi necessitate, there is an area of a sort of common ownership near the boundary and from surface to center of the earth; that ownership being known as the right to "lateral support." . . . Physical invasion of that area, with resultant damage directly attributable to injury to property in or on the adjoining tract, being accompanied by liability absolute or contingent upon lack of due prudence accordingly as the injury may be to the adjoining tract in its natural state or to improvements. . . .³

With the analogies of the arch and grain bin in mind, it will be the writer's purpose here to relate them to land and to explore

¹ "Support is lateral when the supported and supporting lands are divided by a vertical plane. Support is subjacent when the supported land is above and the supporting land is beneath it." 4 RESTATEMENT, TORTS (1939) 184.

² "To the extent that a person is not liable for withdrawing subterranean waters from the land of another, he is not liable for a subsidence of the other's land which is caused by the withdrawal." 4 RESTATEMENT, TORTS (1939) § 188.

³ 298 S. W. 554, 559 (1927). *Comanche Duke* was an oil-field case, ultimately decided on the basis of negligent blasting. The court's mention of the right of lateral support, although by way of dictum, illustrates the elusive nature of the concept.

the practical problems which are met in applying the rules of lateral support law. Texas cases on the subject will be discussed after the prevailing views in other jurisdictions have been briefly summarized. In conclusion certain judicial and legislative steps which appear desirable will be suggested.

THE PROBLEM OF LATERAL SUPPORT IN TEXAS

In a state largely devoted to agrarian purposes few questions of lateral support will arise. A farmer or rancher will ordinarily build valuable improvements far away from a boundary line, with the usual exception being his fence. This at once creates two probabilities — (1) that no disturbance of the natural earth close to the boundary line will be necessary, and (2) that no valuable improvement will be found on the other side of such boundary line in the event that a disturbance is necessary. In a state such as Texas, which has long prided itself on the amount of "elbow-room" available, it is natural that there should be fewer instances of conflicting interests at property lines than in some of the more crowded states.

As large areas of an agrarian state become urbanized, the situation there changes into one which is the opposite of that in the rural areas. Instead of shying away from the boundary lines toward the center of a large tract, the city builder is forced to exploit every square foot of a small and expensive lot. The larger the city and the greater the property valuation, the more necessary this total utilization becomes. In this latter situation there develop intense conflicts of interest regarding the rights of lateral support.

Texas is undergoing a metamorphosis. Certainly there is nothing unique in the change — the northeastern portion of the United States having experienced a similar one during most of the last century — but consider how it has affected the average Texan during the past half-century. In 1900 only ten per cent of all Texans

lived in cities of 10,000 population or greater, whereas today over half of them do. In 1900 Texas had no city exceeding 100,000 population while today one out of every four of us lives in such a city.⁴ Many of the problems which this trend portends are obvious. Some are not so obvious, and it is submitted that the law of lateral support of land is one of the latter — one which will get in the future more attention than it has received in the past.

Texas is entering a critical period of growth and development when the possibility of economic waste seems to indicate that the public interest would be better served by a set of affirmative rules designed to prevent damage from occurring than would a set of negative rules fixing liability after it has occurred.⁵

For the practical importance of lateral support problems to any owner of property, one must look at the questions which the lawyer must answer for the architect and engineer. Each owner is a dominant owner to the extent that he is entitled to support from his neighbors. His own estate is servient to similar rights of his neighbors. The determination of these rights and duties must be made as to each neighbor and may vary slightly in each instance. The lawyer representing a client who is first to build in a particular area must determine what steps must be taken to protect the structure against later lawful development by the adjoining owners. The greater the freedom allowed the later builder, the greater must be the extent of precaution by the earlier one. The lawyer representing the later builder will be interested in the duties owed by his client to the owners of buildings already in place. If the property lies between developed and undeveloped tracts, all of the above problems will arise in connection with one excavation.

⁴ TEXAS ALMANAC, 1954-1955, p. 91.

⁵ See Note, *Lateral Support for Existing Buildings During New Construction*, 50 Yale L. J. 1125 (1941).

THE LAW OF LATERAL SUPPORT OUTSIDE OF TEXAS

Answers to the above questions have been difficult to anticipate because they have evolved from a conflict between two public policies. One protects the first-comer whose valuable investment made in good faith has contributed to the growth and prosperity of the community. Where lateral support is concerned, however, the first-comer's rights are rendered precarious by an equally powerful policy in favor of encouraging further development.⁶ This latter policy is served by removing from the path of the later developer as many as possible of the rights or limitations which may hamper or make more burdensome the later development. The law of lateral support centers upon the constant balancing of equities between the early-comer and the late one, and the attempts of the courts not to lean unreasonably in the direction of either. The same struggle is evident in the cases of water rights, oil and gas extraction rights, easements, and adverse possession generally. With the exception of those states admitting some portions of the appropriation doctrine, American jurisdictions lean heavily in favor of any late-comer if his purpose is a socially beneficial one. This preference is also found in the law of lateral support.

Under the general rule, the liability of the owner of the servient estate will depend upon which of three conditions is found to have existed in the land of the dominant owner at the time the subsidence and consequent damage occurred. The three conditions are as follows:

Condition 1. The soil in its natural condition.

Condition 2. Structure on the soil, but soil would have fallen in even without the structure.

⁶ See opinion expressed in Recent Cases, 7 Minn. L. Rev (1922), concerning *Knapp v. Siegley*, 120 Wash. 478, 208 Pac. 13 (1922), where the court allowed plaintiff to recover for damage to house and trees as well as to the soil. The writer criticizes this "enlargement" under Washington's constitution of the plaintiff early-comer's rights and feels that it destroyed legal rights of the later-comer.

Condition 3. Structure on the soil, but soil would not have fallen in but for the structure.

As to the first condition the courts are almost unanimous in their assertion that the owner of the servient estate is under an absolute duty to maintain lateral support for the soil of the dominant estate in its natural condition.⁷

Where the second condition is found, there is a division of authority. Many American jurisdictions follow the so-called English rule and hold the owner of the servient estate absolutely liable for all of the damages, both to the soil and to the structure.⁸ Other jurisdictions hold that the owner of the servient estate is absolutely liable only for the damages to the soil and is not liable for the damage to the structure unless he has been negligent.⁹

Where the third condition exists the courts are unanimous in holding under the common law rule that the owner of the servient estate has no absolute duty to support the structure on the dominant estate, and is liable only in the event that the structure is damaged through his negligence.¹⁰ At this point statutes have intervened in many states to set the standard of care in determining negligence or, in some instances, to create an absolute liability.¹¹

⁷ 1 AM. JUR., *Adjoining Landowners*, § 21; 4 RESTATEMENT, TORTS (1939) § 817(1), Comment b.

⁸ 4 RESTATEMENT, TORTS (1939) § 817(2), Comment m; Recent Cases, 77 U. Pa. L. Rev. 405 (1929); *Prete v. Cray*, City Treasurer, 49 R. I. 209, 141 Atl. 609 (1928), 59 A. L. R. 1241 (1929). The *Cray* case involved the tapping of a stratum of quicksand by the city's excavation for a sewer, the quicksand running out from under the plaintiff's land and causing it to subside, injuring the plaintiff's building. Holmes and two other justices had dissented in a similar case reaching a similar result, *Cabot v. Kingman*, 166 Mass. 403, 44 N. E. 344, 345 (1896), on the ground that the distinction should have been between the support of liquids and the support of solids, with quicksand being considered as a liquid. The cases have not followed Holmes' distinction, however, See 4 RESTATEMENT, TORTS (1939) § 818, Comment b; Recent Cases, 19 Minn. L. Rev. 587, 588, argues that *Prete v. Cray* represents the majority American view.

⁹ 1 AM. JUR., *Adjoining Landowners*, § 43; see Note, 33 Am. St. Rep. 445, 475 (1893); Recent Cases, 77 U. Pa. L. Rev. 405 (1929).

¹⁰ 1 AM. JUR., *Adjoining Landowners*, §§ 26-28; Note, 33 Am. St. Rep. 445, 472 (1893).

¹¹ 1 AM. JUR., *Adjoining Landowners*, § 29, p. 524; Recent Cases, 33 Mich. L. Rev. 812 (1935), noting *Tillson v. Consumers Power Co.*, 269 Mich. 53, 256 N. W. 801 (1934).

The common law of lateral support is a combination of real property and tort law.¹² Where the first condition exists, the right is a pure real property right — one that inheres in the land itself and creates a servitude upon the land adjoining. The right to recover under the third condition is one that finds its origin in case and is purely a right in tort. This right in tort does not inhere in the land, and the resultant liability is not limited to the owner of the servient estate, but is equally available against all the world. The second condition involves, under the English rule, an extension by a rule of damages of the real property rule applicable to the first condition, while in the jurisdictions which do not follow the English rule the cause of action is split — the real property rule of absolute liability being applied to the damage to the soil and the tort rule of negligence being applied to the damaged structure.

The practical effect of these rules is to leave any case of substantial damage in the field of tort law, since it is for damage to costly structures that recovery will usually be sought. The real property doctrine, applied where the soil is in its natural condition, settles upon the owner of the servient estate an absolute duty to provide support, but only that naturally necessary to support the land. Since the disturbance of a natural earth bank is relatively easy to repair, the failure to provide support for it will seldom result in anything more than the recovery of nominal damages for the invasion of a legal right. When the second condition is found to have existed, the owner of the dominant estate has some slight hope to recover for building damage in jurisdictions following the English rule but only if he succeeds in proving that the land would have subsided even without the building — practically an impossibility except in the quicksand cases. A valuable structure is the primary thing that the owner of any dominant estate is interested in protecting, but he is left under the common law

¹² See Leesman, *Significance of the Doctrine of Lateral Support as a Real Property Right*, 16 Ill. L. Rev. 108 (1922).

rule to the dubious remedy of proving negligence if his structure is damaged.

Negligence in any of its applications is confounding — in lateral support cases it is especially so. For the purpose of this discussion it will be assumed that it was reasonably necessary for the owner of the servient estate to have made an excavation, and attention will be given to the duty he owed the dominant estate in making it. Ordinarily the foreseeability test is applied in determining both negligence and proximate cause. In determining negligence it is applied to determine whether the defendant should have foreseen that a certain act or omission would cause injury to the plaintiff, thereby creating a duty to avoid such act or omission. In the determination of the other essential element — proximate cause — the foreseeability test is again applied to ascertain whether the damages actually suffered were foreseeable or whether the possibility of such damage was too remote. In cases involving the negligent removal of lateral support, great caution must be exercised in applying the foreseeability test. Foreseeability receives a standard application in testing proximate cause, but before that point is reached the main problem arises of determining whether the defendant has been negligent — it is at this point that one must be wary. The test is not whether the defendant owner of the servient estate could have foreseen that damage would result to a structure on the dominant estate from the removal of lateral support, since this is not enough to create a duty to maintain such support. The courts have reasoned that to accept such a premise would be tantamount to their creating an absolute duty in tort that the servient owner provide lateral support for the structure when the common law had refused to recognize it as a real property right. The finding that the defendant servient owner should have foreseen the damage to the building is not enough

to create any duty except to see that the *means* employed to remove the support do not unreasonably increase the risk.¹³ It appears that if the owner of the servient estate is removing the support to serve a reasonable social and economic purpose, and if he removes such support carefully, he will not be liable even though he anticipated the building's collapse after the support was removed.¹⁴

Where recovery is sought for negligent damage to structures, the shifting tide of battle between the conflicting policies referred to earlier makes the result in a particular case almost impossible to anticipate. Whether the first-comer or the come-lately will prevail, depends in any closely balanced case in large measure upon which of the policies the presiding judge feels to be the sounder. The undependable protection afforded a dominant owner by this branch of the law has been obvious and has impelled many legislatures to fix rights and duties by statute.¹⁵ In a few states this has been done by fixing the standard of care to be applied in determining negligence, while in others the statutes have imposed an absolute liability and the negligence issue has been removed.¹⁶ In practically all cases where the constitutionality of the statutes has been in issue they have been sustained,¹⁷ and in most cases the constitutionality is assumed.¹⁸

The pendulum seems never to stop at dead center. Just as the statutes and ordinances have been enacted to avoid the harsh and uncertain results of the common law rules, so the courts have now

¹³ The courts have involved themselves in some difficulty at this point by reasoning that if the servient estate owner's act of removing the lateral support is for some unreasonable purpose, the removal is then negligent. It seems the better view to hold the servient owner liable for unreasonable conduct of any sort, which would include the careful making of an unnecessary excavation as well as the careless making of a necessary one. This Comment is limited to the problems growing out of the latter. 4 RESTATEMENT, TORTS (1939), § 819, Comment e.

¹⁴ 1 AM. JUR., *Adjoining Landowners*, § 26.

¹⁵ See note 11 *supra*.

¹⁶ 4 RESTATEMENT, TORTS (1939) § 819, Comment h.

¹⁷ *Tillson v. Consumers Power Co.*, 269 Mich. 53, 256 N. W. 801 (1934).

¹⁸ "... These statutes are usually enforced without discussion of their constitutionality." See *Recent Cases*, 33 Mich. L. Rev. 812, 814 n. 8 (1935).

begun inventing elaborate rationalizations in order to avoid the sometimes equally harsh results of applying the statutes literally. Examples can be found in the constructions of such terms as "adjoining landowners"¹⁹ where it is sought to determine whether a defendant is within or without the operation of a particular rule, and in the peregrinations of a court which is trying to decide whether a certain thing which has been built is a "structure" so as to bring it within the protection of a building ordinance.²⁰

In summary, the common law of lateral support outside of Texas gives to the dominant owner an absolute right which is practically useless — the right to the support of his soil in its natural condition. It has provided no protection for structures unless negligence can be proved. To avoid these results statutes have been enacted either (1) to fix the standard of care for proving negligence, or (2) to impose an absolute duty upon the excavator to support buildings already in place.

TEXAS CASES ON LATERAL SUPPORT

There have been six Texas lawsuits in which the appellate opinions contain some discussion of the law of lateral support. Chronologically listed, they are:

Rowland v. Murphey, Texas Supreme Court, 1886,²¹ involved Condition No. 3, and recovery was sought for negligent injury to a house. There was no new twist in the case, the court seeming to follow the general rule, although the judgment for plaintiff was reversed and remanded on other grounds.

Simon v. Nance, Court of Civil Appeals of Texas, 1907²²

¹⁹ *Williams v. Thompson*,Tex....., 256 S. W. 2d 399, 403 (1953); *McDaniel v. Wilson*, 45 S. W. 2d 293, 297 (Tex. Civ. App. 1931); *Chesapeake & O. Ry. v. May*, 157, Ky. 708, 163 S. W. 1112 (1914); to distinguish "adjoining" from "abutting" see 1 AM. JUR., *Adjoining Landowners*, § 2.

²⁰ *El Paso Electric Co. v. Safeway*, 257 S. W. 2d 502, 505 (Tex. Civ. App. 1953) *er. ref. n.r.e.*

²¹ 66 Tex. 534, 1 S. W. 658.

²² 45 Tex. Civ. App. 480, 100 S. W. 1038.

and 1911,²³ involved Condition No. 1 along a fence line between two farms. The defendant's ditch was dug near the property line and caused the plaintiff's land to erode into it. The plaintiff had the consolation of getting a strongly worded opinion upholding his rights on the first appeal, but after a reversal and remand he was denied recovery on other grounds on the second appeal.

Comanche Duke Oil Co. v. Texas Pacific Coal & Oil Co., Texas Commission of Appeals, 1927,²⁴ added only a very general dictum to the literature on the subject,²⁵ the case being decided on the point of negligent blasting.

McDaniel Bros. v. Wilson, Court of Civil Appeals of Texas, 1931²⁶ and 1934,²⁷ involved Condition No. 3, with the problem being to determine the effect of a City of Beaumont building code provision after the jury had found that there was no common law negligence. Here, as in the *Simon v. Nance* case, the plaintiff succeeded in obtaining a favorable and strongly worded opinion on the first appeal, setting forth the servient owner's absolute duty under the ordinance to support the plaintiff's building. The lateral support points were, however, expressly brushed aside on the second appeal. The plaintiff was able to recover but only upon a rather devious theory of trespass.²⁸

Williams v. Thompson, Texas Supreme Court, 1953,²⁹ would

²³ 142 S. W. 661.

²⁴ 298 S. W. 554.

²⁵ See quotation at note 3 *supra*.

²⁶ 45 S. W. 2d 293.

²⁷ 70 S. W. 2d 618, *er. ref.*

²⁸ The plaintiff and defendant were cotenants in a private alleyway lying between their properties. The defendant's removal (in connection with an excavation) of the concrete with which the alley was paved was held to have been an "ouster" of his cotenant and thus a trespass, which trespass allowed rain water to soak into the soil of the alley, softening it and ultimately causing the damage to the plaintiff's building. This theory added nothing to the law of lateral support and would be as applicable to a third party, even a trespasser, as to an adjoining owner. 70 S. W. 2d at 624.

²⁹Tex....., 256 S. W. 2d 399.

have involved the first condition had lateral support rules been applied. The court stated that lateral support rules applied only between adjoining landowners and that the rightful user of a private easement was not such an "adjoining owner".

El Paso Electric Co. v. Safeway Stores, Court of Civil Appeals of Texas, 1953,³⁰ was a case wherein the court attempted to decide whether an underground electrical conduit was a "structure" within the protection of the City of El Paso's building code. The effect of the court's strong support of the ordinance has been weakened by the supreme court's refusal of a writ of error with the notation, "no reversible error".

Several of the above cases are filled with language which indicates that the Texas courts follow the general rules of other jurisdictions. It appears significant that the three cases which have elicited the most discussion of lateral support have been decided in such a way that any stare decisis effect has been practically eliminated. The first opinion in *Simon v. Nance*³¹ contained the strong and oft-cited³² language of Key, J., regarding the absolute right of the owner of the dominant estate to have his land supported in its natural state by the owner of the servient estate. On the subsequent appeal³³ of the case to the same court, Rice, J., asserted the proposition that if the cost to the owner of the dominant estate to support his own land was slight compared to that which would be occasioned to the owner of the servient estate to support it, then the owner of the dominant estate should

³⁰ 257 S. W. 2d 502, *er. ref. n.r.e*

³¹ Cited *supra* note 22.

³² *Williams v. Thompson*,Tex....., 256 S. W. 2d 399, 403 (1953), the court pointing out that the right was described as "absolute"; *Comanche Duke Oil Co. v. Texas Pacific Coal Co.*, 298 S. W. 554, 559 (Tex. Comm. App. 1927); *McDaniel v. Wilson*, 45 S. W. 2d 293, 295 (Tex. Civ. App. 1931); *Brightwell v. Int. Great Northern R. Co.*, 41 S. W. 2d 319, 322 (Tex. Civ. App. 1931). None of these cases refers to the later opinion in the same cause, 142 S. W. 661 (Tex. Civ. App. 1911).

³³ See note 23 *supra*.

support his own land at his own expense.³⁴ The first opinion in *McDaniel Bros. v. Wilson*³⁵ likewise contains much strong and persuasive language with regard to the liability imposed upon an excavator by a building ordinance, but the subsequent determination of the case on its second appeal³⁶ ignored lateral support and relied on trespass. In the *El Paso Electric Co.* case,³⁷ another wherein the effect of a building ordinance was brought into question, the court of civil appeals broadly supported the ordinance and held that an underground electrical conduit was a "structure" within the protection afforded by the ordinance, but even this effect was weakened by the supreme court's notation, "no reversible error".

In addition to the five doubtful opinions above mentioned, the three remaining cases — two decided by the supreme court and one by the commission of appeals — add little of practical value to the right of lateral support. The *Rowland* case,³⁸ decided by the supreme court, seemed only to follow the general rule that when the third condition exists, the excavating owner of the servient estate is not liable unless he was negligent. The *Comanche Duke* case,³⁹ decided by the commission of appeals, added nothing except the dictum aforementioned. The 1953 decision of the supreme court in the *Williams* case⁴⁰ served only to narrow any right of lateral support which may have existed previously. The court avoided a consideration of the law of lateral support in the

³⁴ The court quoted 22 Cyc., *Injunctions*, pp. 782, 783, "... [W]hen the complainant can at comparatively slight cost protect himself, he is not entitled to equitable relief." 142 S. W. at 664. The court in its summary referred to the "great injury" which would result to the defendant and the "slight benefit" which would result to plaintiff before it affirmed the trial court's action in refusing the plaintiff the injunctive relief which he had sought. Although the court had mentioned earlier in the opinion that the plaintiff's petition had been in the alternative for damages should injunctive relief be denied, the court took no occasion to mention this further or to rationalize the trial court's action in refusing such prayer for damages.

³⁵ Cited *supra* note 26.

³⁶ Cited *supra* note 27.

³⁷ Cited *supra* note 30.

³⁸ Cited *supra* note 21.

³⁹ Cited *supra* note 24.

⁴⁰ Cited *supra* note 29.

Williams case by holding that the one entitled to use an easement and the owner of the abutting fee were not "adjoining land-owners" so as to entitle the owner of the abutting fee to the right of lateral support. The *Williams* case is significant mainly to point up the rather anomalous results which can be reached by our lateral support law in its present embryonic and confused state.⁴¹

In Texas the tug-of-war between policies — one favoring the rights of the first comer and the other freeing the later developer of unnecessary restriction — has resulted in a situation where the later comer has every advantage. It is true that no case can be found stating such a "rule", but among the Texas cases no one can be found where the right of the dominant owner to support has been unequivocally enforced. Texas' position can be seen when results under each of the three conditions are compared with those reached under the general rule elsewhere:

Condition 1. In the *Simon*⁴² and *Williams*⁴³ cases the plaintiffs sought protection against damage to land in its natural state, but in neither of these was the plaintiff able to recover.

Condition 2. Although we have no Texas case squarely under the second condition — where the land would have fallen even without the presence of the structure — this question seems largely academic in view of the results reached in the *Simon* and *Williams* cases. Doubt is possible under the second condition only after the court has imposed an absolute liability under the first. Accepting liability under the first condition, there only remains the question of whether the damages to the building

⁴¹ This unsatisfactory situation was pointed out in the dissent of Wilson, J., 256 S. W. 2d at 405. The dissent pointed out that, under the reasoning of the majority, had the defendant had the fee to the roadway, he would have been bound to provide support for the plaintiff's land, but since he was only one of many entitled to use a private easement of passage, he had no duty at all to support the plaintiff's land but could use the full width of the roadway without liability for removal of the support of plaintiff's land.

⁴² Cited *supra* notes 22 and 23.

⁴³ Cited *supra* note 29.

were incidental to the damages to the land. Where it is held that they were incidental, the defendant is held liable for the entire damages. Since Texas courts have not been able to find the owner of a servient estate liable even for the damages to the land, it would seem that they may never get to the question of whether damage to the structure was incidental. It is interesting to note that the *El Paso* case could have been argued on some such theory if counsel had felt that such a theory would have been accepted. It would seem that if there had been an absolute duty on the part of Safeway and its contractor to support the soil in the alley, it would have been an easy step to find that the damage to the underground conduit was incidental to the damage to the soil.

Condition 3. Where the land would not have fallen but for the weight of the structure, we have seen that Texas follows the general common law rule of negligence.⁴⁴ The dominant owner has little of practical value upon which to depend unless statutes or building ordinances have imposed upon the excavator either a statutory standard of care or an absolute liability. The Texas courts have failed to affirm for owners of structures the full protection which was intended by the municipal ordinances in both the *McDaniel*⁴⁵ and *El Paso*⁴⁶ cases. In neither of these cases was the question of constitutionality discussed, and this question poses a further disadvantage to the owner of the dominant estate. If he should find himself protected by the letter of an ordinance, it might still be open to the constitutional objection. In view of the wide acceptance of such statutes elsewhere, it appears that the danger of constitutional objection is slight and could be overcome by properly framed ordinances and statutes.

In summary, the first-comer in Texas has practically nothing to depend upon later. His position as a so-called dominant owner

⁴⁴ *Rowland v. Murphey*, cited *supra* note 21.

⁴⁵ Cited *supra* notes 26 and 27.

⁴⁶ Cited *supra* note 30.

is precarious when a later servient owner begins an excavation. There is, however, little repugnance between this result and that reached by the application of other Texas common law rules of real property. If the owner of a mineral estate finds that the oil and gas underneath his land are being extracted by the greater productive capacity of his neighbor, he is told that he can protect himself by digging more wells, not by imposing some hindrance upon his neighbor. In Texas' law of adverse possession the courts strain mightily to extinguish a bare legal right in favor of a later developer of the land who may be nothing but a trespasser. Where all the land along a stream is owned by private persons, Texas has refused to recognize any vested rights such as those which would be created under the "natural flow" theory, but rather has looked to the "reasonable use" doctrine whereby a later upstream user can, if he is making a reasonable riparian use of the water, entirely deprive the lower owner of the water without regard to the damages occasioned.

An important difference between our present law of lateral support and the other doctrines mentioned above is that in each of the three areas compared — the oil and gas rule of capture, the law of adverse possession, and the law of riparian rights to water in streams — there is *some* protection afforded the first-comer. In the field of oil and gas the protection has been afforded by the Railroad Commission's spacing and proration limitations which apply to the first-comer and the late-comer alike. In the field of adverse possession the first-comer, the claimant of the bare legal title, certainly has the right to assert himself within some length of time. In the field of riparian rights there is the exception that certain appropriative rights may have been acquired by the first-comer before the land along the stream was all privately owned.

CONCLUSION

Our economy has a great stake in construction now in place, that which is being undertaken, and that which must be undertaken in the future. Interest should be shown in all phases of this problem and not limited to one single phase. The multi-million dollar structures which are now being erected as a commonplace deserve as substantial a sub-structure of law as of concrete and steel if they are to survive undamaged through their useful life.

In many other jurisdictions it has been recognized that the common law negligence rule will not afford necessary protection to the owner of a building. These other jurisdictions have turned to statutes and building ordinances to create affirmative duties before damage is done.⁴⁷ We have such ordinances which have been enacted by Texas cities, an example being the following from the *City of Dallas Building Code, 1951*:

Section 2801. *Excavations.*

All excavations for buildings and excavations accessory thereto shall be protected and guarded against danger to life and property. All permanent excavations shall have retaining walls of masonry or reinforced concrete of sufficient strength to retain the embankment together with any surcharged loads. No excavation for any purpose shall extend within one (1) foot of the angle of repose or natural slope of the soil under any footing or foundation, unless such footing or foundation is first properly underpinned or protected against settlement.

Any person causing an excavation to be made on his own property, to a depth of ten (10) feet, or less, below the grade, shall protect the excavation so that the soil of adjoining property will not cave in or settle, but shall not be liable for the expense of underpinning or extending the foundation of buildings on adjoining properties where his excavation is not in excess of ten (10) feet in depth. Before commencing the excavation the owner shall notify in writing the owners of adjoining buildings not less than (10) days before such excavation

⁴⁷ See Note, *Lateral Support for Existing Buildings During New Construction*, 50 Yale L. J. 1125 (1941).

is to be made that the excavation is to be made and that the adjoining buildings should be protected. The owners of the adjoining properties shall be given access to the excavation for the purpose of protecting such adjoining buildings. The person making or causing an excavation to be made shall have the right of access to adjoining buildings but if this right of access is denied, then the owners of the adjoining buildings will be held responsible for underpinning their walls.

Any person causing an excavation to be made exceeding ten (10) feet in depth below the grade shall protect the excavation so that the adjoining soil will not cave in or settle, and shall extend the foundation of any adjoining buildings below the depth of ten (10) feet below grade at his own expense. The owner of the adjoining buildings shall extend the foundations of his buildings to a depth of ten (10) feet below grade at his own expense as provided in the preceding paragraph.⁴⁸

To fix rights and duties Texas must either (1) obtain judicial interpretation and endorsement of existing ordinances, or (2) enact statutes which will meet the tests of constitutionality and which will, incidentally, effect some degree of uniformity throughout the state. The advantages of the latter in avoiding the infinite variations of the municipal building codes and in giving some protection to structures outside any city limits would make it the more desirable if the premise is accepted that one of the purposes of the

⁴⁸ Note that the ordinance shifts the liability from the owner of the building to the excavator at a depth of ten feet. For a very detailed analysis of the problems posed by such ordinances see the article referred to in note 47 *supra*. It will be noted that the ordinance has the effect of forcing the one building after the date of the ordinance to construct a reasonably good foundation (one at least ten feet deep) lest he be later liable for carrying his foundation to a ten-foot depth if an excavation is begun next door. The fear that the first building would be inferior and that it would thereby place an unreasonable burden on later construction was one of the great concerns of the common law judges, and one which forced them ever away from placing an absolute duty upon the excavator to support existing structures. The SOUTHERN STANDARD BUILDING CODE (2d ed. 1945, rev. 1948), published by the Southern Building Code Congress, contains a provision similar to that in the Dallas Code at p. 165. The BASIC BUILDING CODE (1950), published by the Building Officials Conference of America, Inc. (of which Dallas is a member), contains provisions similar to those in the Dallas Code, p. 286 *et. seq.* A note states: "... The depth of excavation at which the excavator's responsibility should start is a matter of local policy and rule and varies in different jurisdictions. The municipality should specify the limiting depth at which responsibility changes. In Niagara Falls, New York, it is fixed at three (3) feet, the assumed frost line, which is the minimum required legal depth for all foundations in that municipality. In New York City, the statutory depth is ten (10) feet..."

law is to enable citizens to proceed with some reasonable assurance of their rights, duties, and liabilities.

Until one of the above is accomplished, the only safe advice to the owner of any dominant estate is that he support his own land and structures if he wants to be sure that they will not be damaged by subsidence. The right of the dominant owner to insist that his neighbor not remove the other side of the "arch" or open the door near the bottom of the "grain bin" has not been established by the Texas courts at this date.

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