New Jersey Court of Errors and Appeals.

HELENA SCHULTZ AND VALENTINE SCHULTZ, *Plaintiffs in Error.* *vs.* JOHN S. BYERS, *Defendant in Error.*	*In Error* *to* *Hudson Circuit* *Court* *on Exceptions.*

BRIEF FOR DEFENDANT IN ERROR.

I.

A man has a right to excavate his own land so long as he does no injury to the soil of his neighbor's land in its natural state, and the Court will not afford relief for damages by reason of such excavation to any artificial structure on his neighbor's lands. Foley vs. Wyeth, 2 Allen, 131; Charless vs. Rankin, 22 Mo., 571; Wilde vs. Ministerly, 2 Rolle, Abr. 1 pl. 1; Beard vs. Murphy, 37 Verm. 101.

See Washburn's Easements and Servitudes, p. 544.

McGuire Vs. Grant 1 Dutch & cases cited

II.

The common law required no notice of excavation and none is required to be given by statute.

DEWITT VAN BUSKIRK,

of Counsel for Defendant in Error.

New Jersey Court of Errors and Appeals.

HELENA SCHULTZ
AND
VALENTINE SCHULTZ,
Plaintiffs in Error.
vs.
JOHN S. BYERS,
Defendant in Error.

IN ERROR

BRIEF

POINTS.

This was an action brought by the plaintiffs against their adjoining owner to recover damages for injury done to their property by excavations made by him.

The first point to be determined is whether an owner centemplating improvements on a lot adjacent to one which is already built upon is liable to his adjacent proprietor for damages caused by said improvements by reason of his failure to give him notice thereof.

The Plaintiffs offered to prove that their building was built on piers, that Defendant excavated to the depth of seven feet, and to within three or four inches of their building. That the excavations caused them great damage and that they had no notice whatever of Defendant's contemplated improvements.

The Court erred in holding that the offer was insufficient upon which to base a recovery.

First. Because it is the duty of one comtemplating improvements to notify his adjoining owner of his intention. A denial of the proposition is a declaration of hostility, to justice, to reason, nay, to humanity itself.

If the adjoining land be built upon . . . the owner or his builder will be in duty bound to notify the adjoining neighbor before proceeding and then use due care in executing the work, but the owner will not be responsible if he takes these precautions unless the right to lateral support is acquired by right or prescription.

Lloyd on Law of Building and Buildings, P. 119 and 120.

In *Shafer vs. Wilson*, 44 Md., the Court says:

The second prayer of the Pliantiff claims that it was the duty of the Defendant to have given him *notice* of his intention to make the comtemplated improvements.

Such notice would seem to be a reasonable precaution in a populous city where buildings are necessarily required to be contiguous to each other and improvements made by one proprietor *however skillfully* conducted may be attended with accidental and disastrous results to his neighbors who ought to have the opportunity to take the steps necessary to protect themselves and property.

This was recognized as a sound principle in the case of *Lasala vs. Holbrook*, referring to English cases deciding that the party who is about to endanger the buildings of his neighbor by a reasonable improvement on his land is bound to give the owner of the adjacent lot *proper notice* thereof and to use ordinary *skill* in conducting the same and that it is the duty of the latter to shore or prop up his own building so as to render it secure in the meantime. (4 Paiges' C. R. 169).

The cases which have come under my observation and which possibly will be cited in support of a contrary position are cases in which the question of notice is not raised or determined, nor are they in con-

flict with the principles here contended for. They substantially hold that with proper precautions one can make all reasonable improvements on his lands without becoming liable to his neighbor for any damages that might ensue. With such a doctrine there can be no conflict. Let us observe what a contrary doctrine leads to.

An assumption that one making excavations is liable for an inconsiderable amount of dead soil of which he robs his neighbor, but not (simply using skill in excavating) liable when the same excavations robs him of his buildings and perhaps him or others of life, is as false as it is dastardly.

A man stands on his own lot and says: I am going to improve it. It is true that however carefully and skilfully I may excavate I know that injury to my neighbor's property will be the inevitable result and perhaps loss of life may follow. Yet why should I be concerned about my neighbor. Why should I apprise him of his danger? The law says that I am absolute monarch further than I can see upward and dig downward. Therefore can I not do as I please with mine own? Does not reason turn with abhorrence upon such a law? Does not justice declare such a man better suited for the halter, than for private ownership of property.

In Foley vs. Weyth, 2 Allen, Mass., the Court says: His right of dominion over his own land is not without some limitations. To make a justifiable use of his own property he must have a *proper respect* to the appropriation which has already been made by other owners of surrounding territory. And, therefore, when one undertakes to make an excavation on his land he must consider how it will be likely, in view of the *existing and actual* occupation of others to *affect* the soil of his neighbor.

What are reasonable precautions? To notify one's

neighbor of contemplated improvements and then to use care and skill in making excavations; what more easy, just and reasonable precaution than the former?

Second. In the present case the situation and construction of Plaintiff's building was such as to give the Defendant certain warning of the result that followed. Had the Plaintiff had notice of Defendant's intention the injury might have been provided against with little difficulty and trifling cost. Whereas the construction and proximity of the buildings now renders the work of reparation difficult and expensive. It is fair, therefore, to charge improper motive as well as neglect of duty on the part of Defendant.

Commercial necessity as well as personal security demands that the precautions enumerated should be required, otherwise the ownership of improved, adjacent to unimproved property is attended with risks that might well cause a prudent man to pause long and consider well before concluding to hold that which he has and to buy that which he has not.

It cannot be that the law declares care in excavating to be an impregnable shield and protection for the malice, pique and caprice of any one who may purchase unimproved land adjoining my house. If the law should acknowledge that she had an interest in such a copartnership the sooner that individual ownership of property is abolished the better.

The principle here contended for works injustice and hardship to no one. On the contrary, it conduces to the highest good to the greatest number of citizens of the commonwealth.

In conclusion I cite Lasala vs. Holbrook, 4 page, R. 169; Kent, 3d vol., page 437, &c., 13th Ed.; Schafer vs. Wilson, 44 Md., page 268; Schiever vs. Stokes, 8 B. Mon., 453; Sutton vs. Clark, 6 Taunt. 29-44; Dodd vs. Holme, 1 Adol. & Ellis, 493; Massy vs. Goyder, 4 Carr & P., 161; Walters vs. Pfeil, 1

Moody & Malk, 362 ; Peyton vs. Mayor of London, 9 Barn. & Cress., 725 ; McGuire vs. Grant, 1 Dutch., 356. 4; Man & Ry., 625 S. C.

Respectfully submitted,

W. W. ANDERSON,

Counsel of Plaintiffs in Error.

New Jersey Court of Errors and Appeals.

HELENA SCHULTZ AND VALENTINE SCHULTZ, *Plaintiffs in Error.* *vs.* JOHN S. BYERS, *Defendant in Error.*	*In Error* *to* *Hudson Circuit* *on* *Exceptions.*

W. W. ANDERSON,

Attorney Plaintiff in Error.

DEWITT VAN BUSKIRK,

Attorney Defendant in Error.

HUDSON COUNTY CIRCUIT COURT of the twenty-second day of December in the year of our Lord one thousand eight hundred and eighty-eight.

John S. Byers, the Defendant in this suit, was summoned to answer unto Helena Schultz and Valentine Schultz of a plea of Tort and thereupon the Plaintiffs by W. W. Anderson, their Attorney, complains. For that whereas, heretofore to wit on the twenty-third day of April, in the year of our Lord one thousand eight hundred and eighty-eight at Bayonne City, said County, certain land to wit: All that certain lot, plot, or parcel of land and premises hereinafter particular-

ly described, situate, lying and being in the city of Bayonne, in the County of Hudson and State of New Jersey. Beginning at a point in the Southerly side of Twenty-fifth street, as said street is laid on a map of the City of Bayonne made by the "Map and Grade Commissioners" and filed in the Clerk's Office of the County of Hudson, aforesaid, two hundred feet (200) easterly from the intersection of the easterly side of Avenue D (as laid in said map) with the southerly side of said Twenty-fifth street; thence southerly along the said land of John S. Byers, one hundred feet (100); thence (2d) parallel with said Twenty-fifth street, westerly twenty-five feet; thence (3d) northerly parallel with the first mentioned avenue, one hundred (100) feet to the southerly side of said Twenty-fifth street; thence (4th) easterly along said Twenty-fifth street, twenty-five (25) feet to the point or place of beginning, together with the right, title and interest of the first part to the land in front of the premises hereinbefore described and conveyed to the centre of said Twenty-fifth street, with dwelling house and other buildings erected thereon were in the premises of Lepold Bohn and ——— Cosnor as tenants thereof to the Plaintiffs and the Plaintiffs as reversioners were entitled to have the said lands, dwelling house and other buildings supported by the lands adjacent thereto and by the soil under the said land, dwelling house and other buildings, and the said Defendant injured said reversion by wrongfully digging away and removing the said land, dwelling house and other buildings and the soil under the same without leaving proper and sufficient support for the said land, dwelling and other buildings, whereby the same sank and gave away, and the said dwelling house and other buildings were weakened, crashed and injured to the damage of said Plaintiffs, five hundred dollars, and therefore the said Helena Schultz and Valentine Schultz bring their suit, etc.

And the said defendant by De Witt VanBuskirk, his Attorney, comes and defends his wrong and injury

where, etc., and says that the said declaration and the matters therein contained in manner and form as the same are above stated and set forth are not sufficient in law for the said plaintiff to lease and maintain their aforesaid action thereof against him, the said defendant, and that he, the said defendant, is not bound to answer the same and this the said defendant is ready to verify, therefore this defendant prays judgment and that said plaintiffs may be barred from having or maintaining their aforesaid action against him; and the said Helena Schulz and Valentine Schulz say that this said declaration and the matters therein contained in manner and form as the same are above stated and set forth are sufficient in law for them, the said plaintiffs, to have and maintain the aforesaid action thereof against him the said John S. Byers and the said plaintiffs are ready to prove and verify the same as the Court here shall direct and award.

Wherefore inasmuch as said John S. Byers hath not answered the said declaration nor hitherto in any manner denied the same, the said plaintiffs pray judgment and his damages by reasons of his not performing the said several premises and undertakings in the said declaration mentioned to be adjudged to them, etc.

And the said defendant by De Witt Van Buskirk, his Attorney, comes and defends the wrong and injury when, etc., and says that he is not guilty of the trespass above laid to his charge in manner and form as the said plaintiff hath above thereof complained against him and of this he puts himself upon the country.

Therefore to try the issue above joined let a jury come before the said Circuit Court, at Jersey City, aforesaid in the ninth day of April in the year of our Lord, one thousand eight hundred and ninety, as yet of the term of April in said year, who neither, etc., by whom, etc., to is given to the parties aforesaid, at which day before the

Circuit Court and the said parties by their Attorney aforesaid, and the jury above mentioned, also come, who, to speak the truth of the matter aforesaid being chosen and sworn upon their oath say that the said Defendants are not guilty of the trespass laid to their charge, as the Plaintiff hath above thereof complained against them and they assess the acts of the Defendant by reason of the premises, to

Wherefore it is considered that the said Defendants do recover against the said Plaintiff, their costs aforesaid, by the jury aforesaid, in form aforesaid, assessed and with their assent by the said Court now here adjudged to the Defendants.

And the said Plaintiffs in mercy, etc.

Judgment signed.

New Jersey *vs.* The State of New Jersey to Manning M. Knapp, Esquire, Judge of our Circut Court at Jersey City, in and for the County of Hudson, as such Justice of the Supreme Court of the State of New Jersey, as shall hold such Circuit Court, Greeting: *

SEAL

Because in the record and proceedings and also in the giving of judgment in a plaint which was in our Circuit Court holder at Jersey City in and for the said County of Hudson, between Helena Schultz and Valentine Schultz, Plaintiffs, and John Byer, Defendant, of a plea of tort manifest error hath intervened to the great damage of Helena Schultz and Valentine Schultz as by their complaint we are informed, as being willing that speedy justice should be done to the parties aforesaid in this behalf, do command her distinctly and openly to send under your hand and seal the record and proceedings aforesaid, with all things touching and concerning the same to our Judges of our Court of Errors and Appeals, in the last resort in all causes at Trenton, on the Twenty-ninth day of September, instant together with this writ that the record and proceedings, being inspected as may cause to be further done thereupon for correcting that error, what of right and according to law and custom of the State of New Jersey, ought to be done.

Witness our Chancellor and president Judge of our said Court of Errors and Appeals, at Trenton, aforesaid the nineteenth day of September, in the year of our Lord, one thousand eight hundred and seventy.

HENRY C. KELSEY,
Clerk.

W. W. ANDERSON,
Attorney.

The answer of Manning M. Knapp, Esquire, the Judge of our Circuit Court at Jersey City, in and for the County of Hudson.

The record and proceedings of the plea whereof mention is within named with all things touching and concerning the same to the Judges of our Court of Errors and Appeals, in the last resort in all cases at Trenton, within specified at the day and place within contained I certify in a certain schedule to this writ annexed, as I am commanded.

M. M. KNAPP,
Judge.

Hudson County Circuit Court.

HELENA SCHULTZ
AND
VALENTINE SCHULTZ.
vs.
JOHN S. BYERS.

In Tort.

Exceptions.

Be it remembered that on the ninth day of April, in the year of our Lord, one thousand eight hundred and ninety, at a Circuit Court, holden in Jersey City, in and for said County of Hudson by his Honor Jonathan Dixon, Esquire, one of the Justices of the Supreme Court of Judicature of the State of New Jersey, said Justice being the Judge who held said Court the issue joined in the above stated cause, between the said parties, (pro at the pleadings) came on to be tried by a jury for that purpose, duly impannelled and thereupon the Attorney for the said Plaintiffs, in order to maintain the said issue on their part offered to prove.

That said Plaintiffs and Defendant, were residents of the City of Bayonne, New Jersey. That said Plaintiffs and Defendant, owned adjacent lots in said city, that there was a building on the lot of Plaintiffs, erected on brick piers set from three feet to three feet and a half in the ground, when Defendant began to excavate and did excavate for a foundation on his lot to the depth of seven feet. That Defendant erected a building on said foundation, within three or four inches of Plaintiffs' building. That said excavations of said Defendant caused the building of said Plaintiffs to sink, whereby it was greatly damaged.

That said Plaintiffs had no notice whatever of said contemplated improvements.

Whereupon the said Judge of said Court, did then and there declare and deliver his opinion that the said offer was insufficient to warrant a recovery against said Defendant, in that no neligence in the execution of the work was shown, and did thereupon order and direct that the said Plaintiffs be non-suited and they were non-suited accordingly.

To which opinion of the said Judge, the said Plaintiffs did then and there except, insisting that the Defendants' failure to give the Plaintiff notice was sufficient to warrant a recovery, and tendered their bill of exceptions, and prayed that the same might be sealed according to the Statuted in such case made and provided and it is sealed accordingly.

Done in open Court this Thirty-first day of May, eighteen hundred and ninety.

JONATHAN DIXON,

Judge.

New Jersey Court of Errors and Appeals.

HELENA SCHULTZ
AND
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Assignment of Error.

Afterwards, that is to say on the third Tuesday of November in the year of our Lord one thousand eight hundred and ninety, in the Court of Errors and Appeals, in the last resort in all cases of the State of New Jersey, the said Helena Schultz and Valentine Schultz by W. W. Anderson, their attorney, and say that in the record and proceedings aforesaid and also in the matters recited and contained in the said bill of exceptions and also in giving the judgment aforesaid there is manifest error in this, to wit:

That the said Justice before whom, etc., at and upon the aforesaid trial of the said issue so joined between the parties aforesaid, directed that said Plaintiffs be non suited for the reason that the failure of said Defendant to give notice to said Plaintiff of his contemplated improvements, was not sufficient grounds upon which to base a recovery in said cause.

Therefore the said Helena Schultz and Valentine Schultz pray that the judgment aforesaid by reason of the aforesaid errors appearing in the records and proceedings aforesaid, be reversed, annulled and held

for nothing, and that the said Helena Schultz and Valentine Schultz may be restored to all things they have lost on occasion of the said judgment and that the prosecutor of said plea in the name of John S. Byers may rejoin to the said errors, etc.

W. W. ANDERSON,
Attorney for and Counsel with Plaintiff in Error.

Joinder in Error.