INDEX.

Notice of Appeal.

Filed.

New Jersey Supreme Court.

November Term, 1917.

JOSEPH HIRSCHBERG, *Plaintiff,* vs. BENJAMIN FLUSSER, *Defendant.*	*Action at Law.* *Notice of Appeal.*

To PHILIP J. SCHOTLAND, Esq., attorney of plaintiff-respondent.

TAKE NOTICE that the defendant appeals to the New Jersey Court of Errors and Appeals from the judgment of the Supreme Court, reversing the judgment of the Essex County Circuit Court, in the above entitled cause.

SAMUEL ROESSLER,
Attorney of Defendant-Appellant.

Grounds of Appeal.

Filed.

New Jersey Court of Errors and Appeals

JOSEPH HIRSCHBERG, *Plaintiff-Respondent,* *vs.* BENJAMIN FLUSSER, *Defendant-Appellant.*	*Grounds of Appeal.*

The appellant states the following grounds of appeal:

First. The Court below misconstrued the provisions of the Act of 1871 (Compiled Statutes 3926), in that it imposes upon the appellant an absolute duty to protect his neighbor's wall, whereas under the provisions of said statute, the defendant-appellant was merely required to exercise a high degree of care.

Second. The Trial Court correctly construed the provisions of the statute in question, and properly charged the jury that if the defendant did what the law required him to do to protect the adjoining wall, even though the building settled, the verdict must be in favor of the defendant; wherefore the judgment of the Essex County Circuit Court should have been affirmed.

SAMUEL ROESSLER,
Attorney of DefendantAppellant.

Notice of Appeal.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH HIRSCHBERG, *Plaintiff,* *vs.* BENJAMIN FLUSSER, *Defendant.*	Action at Law.

To Samuel H. Roessler, Attorney for Defendant:

TAKE NOTICE, that the Plaintiff appeals to the New Jersey Supreme Court from the whole of the Judgment entered in this cause.

PHILIP J. SCHOTLAND,
Attorney for Plaintiff.

Dated, Jan. 5, 1917.

Summons.

THE STATE OF NEW JERSEY TO BENJAMIN FLUSSER:

(Seal.)

You are summoned to answer the annexed complaint of Joseph Hirschberg in an action at law in the Essex County Circuit Court.

And take notice that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court, at Newark, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, FREDERIC ADAMS, Judge of the Essex County Circuit Court, at Newark, this Twenty-second day of June, Nineteen hundred and fifteen.

JOSEPH MCDONOUGH,
Clerk.

PHILIP J. SCHOTLAND,
Attorney.

Amended Complaint.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH HIRSCHBERG,
Plaintiff,
vs.
BENJAMIN FLUSSER,
Defendant.

Action at Law.

Plaintiff, residing at 54 Beacon Street, Newark, New Jersey, says that:

1. On May third, Nineteen hundred and eleven, plaintiff was the owner of a certain building and the land whereon it stood, together with the curtilage known as 54 Beacon Street, in the City of Newark, County of Essex and State of New Jersey.

2. That the plaintiff caused to be erected on said lands, a tenement house and barn, both of which buildings have stood on said land continually, openly and notoriously for more than twenty years last past, in the same condition in which they now are, and near the Southerly boundary of said land.

3. Defendant was the owner of land adjoining the lands and premises of the plaintiff on the South, for at least the entire South side of the plaintiff's land.

4. Defendant, on or about the day above mentioned, caused an excavation to be made on and along the boundary line between his, the defendant's said lands, and the plaintiff's lands and premises, to a depth greater than eight feet, namely, to a depth in excess of twenty-four feet, for the purpose of erecting a building in addition to the building that then stood on the said defendant's land; that defendant gave no notice to plaintiff as to the depth of the excavation he intended to cause to be made, and although awarded the license to enter on the plaintinff's land to preserve the plaintiff's property and land from injury which would result from said excavation, did not, as in duty bound to do, at his own expense, to do, at his expense, preserve said property and land from injury, and support the same by a proper foundation, so that it should remain as stable as before such excavation were commenced, but wholly failed and neglected so to do, thereby causing the lands of the plaintiff near said boundary line, and which supported the foundation walls of plaintiff's said building, to crumble and thereby causing said foundation of plaintiff's building to crumble and thereby causing the plaintiff's building to become out of plumb, and damaging the same, so that it required repairs to be made to the foundation, the building to be jacked up, the chimney to be repaired, plaster work throughout the building to be repaired, the rear porch to be repaired, floor beams to be reset and repaired, the roof to be fixed and general plumbing and carpenter work to be repaired, to the damage of the plaintiff, Seven hundred and fifty dollars.

5. Plaintiff demands damages in the sum of Seven hundred and fifty dollars, and the costs of this suit.

PHILIP J. SCHOTLAND,
Attorney for Plaintiff.

Answer.

ESSEX COUNTY CIRCUIT COURT.

JOSEPH HIRSCHBERG, *Plaintiff,* *vs.* BENJAMIN FLUSSER, *Defendant.*	Action at Law.

The defendant, Benjamin Flusser, residing at No. 122 Newton Street, in the City of Newark, Essex County, New Jersey, answering says:

FIRST DEFENSE:

1. Defendant will object that the complaint discloses no cause of action. It fails to show that the excavation complained of by the plaintiff was intended to be carried to a depth of more than eight feet below the curb or grade of the street.

2. The complaint fails to show that there was, at the time of said alleged excavation, a party or other wall wholly or partly on the adjoining land, and standing upon or near the boundary lines of the adjoining land.

3. The damages complained of in said complaint are not chargeable to the defendant.

SECOND DEFENSE:

1. He denies the truth of the matters contained in the complaint.

SAMUEL ROESSLER,
Attorney for Defendant.

Judgment.

ESSEX COUNTY CIRCUIT COURT.

26466

JOSEPH HIRSCHBERG, *Plaintiff,* *vs.* BENJAMIN FLUSSER, *Defendant.*	Action at Law. Verdict by a Jury. Judgment for Defendant Costs $67.52.

Samuel Roessler, Atty. of Defendant.

This action was tried before Judge Nelson Y. Dungan with a jury at the Essex County Circuit Court November 27th, 1916. The cause having been heard and submitted to the jury they return the verdict as follows:

They find in favor of the defendant, Benjamin Flusser and against the plaintiff, Joseph Hirschberg.

Whereupon it is adjudged that the complaint of the plaintiff be dismissed and the defendant recover of the plaintiff costs which are taxed at sixty-seven dollars and fifty-two cents.

Judgment entered and signed November 27th, 1916.

WM. S. GUMMERE,
Judge.

Book 94, page 24.

Clerk's Certificate.

ESSEX COUNTY CLERK'S OFFICE.

STATE OF NEW JERSEY, County of Essex. } SS.:

I, JOSEPH MCDONOUGH, Clerk of the Circuit Court, in and for the County of Essex in the State of New Jersey.

DO HEREBY CERTIFY that the foregoing is a true and correct copy of the Notice of Appeal and entire transcript of all the Pleadings and Proceedings and the Judgment record in the case of *Joseph Hirschberg vs. Benjamin Flusser,* and the same is taken from and compared with original records and papers on file in my office and as the same now remains on the files of said office.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said Court and County at Newark, N. J., this 15th day of January, A. D. 1917.

(Seal)

JOSEPH MCDONOUGH,
Clerk.

Charge.

The Court charged the jury as follows:

DUNGAN, J.

Gentlemen: The plaintiff in this case seeks to recover for damages to his building, situated on Beacon street in this city, which he claims were caused by reason of an excavation on the defendant's adjoining property, and through the failure of the defendant to properly protect the plaintiff's property.

Three questions arise in the course of your consideration and determination of this case. First, did the building settle by reason of this excava-

tion? If it did not, that ends the consideration of this case, and the verdict must be for the defendant. If it did, then the second question for you to consider and determine is whether or not the defendant, Mr. Flusser, did what the law requires him to do to protect Mr. Hirschberg's property. If he did, even though you should find that the building settled, your verdict must be in favor of the defendant. But if he did not, then the third question for you to consider and determine is what damage has been suffered by Mr. Hirschberg. First, did the building settle? It appears that Mr. Hirschberg's house covers the entire front of his lot on the easterly side of Beacon street, and along the south side of his lot he has constructed a driveway, 7 or 8 feet in width, under the second, third and fourth stories, and, to protect the east, or southerly, wall of the second, third and fourth stories, he has placed a foundation which most of the witnesses fix as about 3 feet in depth, that is, from the top of the wall to the bottom of the wall, upon which are placed piers, or posts, supporting this southerly wall. At the southeast corner is a chimney. The defendant owns property on the south, one of his properties being on the east side of Beacon street and facing west, and the other property being on the northerly side of Springfield Avenue. Admittedly the defendant excavated in the rear of these two properties, they coming together at the rear, excavated up to the rear of the building on Beacon Street, and up to the rear of the building on Springfield Avenue.

The plaintiff and his son, corroborated in part by other witnesses, whose testimony I shall not particularly mention, but which you should remember and consider in connection with other testimony, where it corroborates the testimony—or, you can consider it even if it does not corroborate the testimony—the plaintiff and his son

both testify that after this excavation had been going on for six or seven weeks, and when it had gone to the depth of about 15 feet opposite the plaintiff's property, they noticed a settlement of that portion of the building, or, they noticed, from the effects within the building, that the building had settled. And they tell you how they knew that it had settled; the crack in the walls, the sinking of the floors, and the overflow of water on the roof, and by the breaking away of certain walls. The defendant's property facing on Beacon Street extends back to within about 15 feet of the rear of the plaintiff's property along this southerly side, and then the porch is beyond that, a 7 foot porch; so that from the easterly end of Mr. Flusser's Beacon Street property Mr. Hirschberg's building, with the porch, extends 22 feet beyond that, approximately; and it is this portion of the property, that is, the southeast corner, which the plaintiff claims was damaged by this excavation.

The elder Mr. Hirschberg says this building settled four or five inches; the son says that it was an inch, or an inch and a half that it settled; and Mr. Feinsod fixes it at an inch and a half or two inches. Mr. Petz, who was called in to examine this property in June of the present year, says that he found the kitchen and the bathroom, which it appears are on that corner, the kitchen being in the main building, and the bathroom out on the porch, built upon what was formerly the porch, found those floors leaning toward that corner, that is, towards this southeast corner; and that the wall in the driveway, which holds up this east wall of the building, looked as if it had been tipped over, and that this sag was too much in one spot to indicate any general condition of decline. He said that he found the enclosure, the

clapboards, sagging down, with the joints open; and he says that if this building had been standing for twenty-two years—seventeen years at that time, being five years since this occurred—his opinion is that there was a pretty good bottom for that east wall, which it appears was only 18 inches to 3 feet in the ground; some witnesses saying 18 inches, and others 3 feet.

On behalf of the defendant, Mr. McCullough, who at that time was just commencing his labors with the building department of this city, says that he was sent up there to examine this building. His testimony I shall call to your attention more in detail upon the next point. He says that in his opinion the southerly wall of the plaintiff's building had not settled, and that his building had not sagged.

Mr. Frank Grad, who was the defendant's architect upon this building, says that when this foundation was constructed, it was constructed by a slant at the top, beginning at nothing at the top, and was dug down to about 7 feet in depth on a slant; that is, on batters, as it has been called here; that the bottoms of these batters were about 3 feet out at a depth of 7 feet. While Mr. Grad expresses his opinion, in each instance—except when he says that there is no lean to the southerly wall—he qualifies this, and gives it as his opinion that there is no damage done to the Hirschberg foundation. But he qualifies it by these words, "not to my knowledge," the building did not sag, adding "so far as I know." He again says "as far as I could see with my naked eye the southeast corner is on a level with the rest of the building." If his knowledge is based upon proper observation and measurement, then these qualifications, perhaps, would not amount to anything. But without having done that—and it does not appear that he did put a level, or a plumb, on this

building—it is for you to say what weight you are willing to accord to his testimony, qualified as it is in this case upon that point.

Mr. Kemper says that he saw that this south wall was in good condition; and he said that he used a level upon the wall. But it does not appear that he went to the inside of the building, in fact, he says he did not go to the inside of the building.

Mr. Flusser himself says that when this wall was constructed, when the excavation was made, it was dug in a slanting way, as indicated by Mr. Grad, the architect, and that there was no evidence outside of any crack.

Mr. Blanchard, a builder of many years' experience, in fact, an experience almost as long as that of Mr. Petz, who says that he was in business twenty-eight to thirty years—Mr. Blanchard says he has been building twenty-eight years, and that he examined the property yesterday and today; and he says that while he did find these rooms out of level, that he found the bathroom on the second floor inclined two inches toward the Flusser property; that on the third floor inclined a half inch the other way, away from the Flusser property; and that on the fourth floor had inclined an inch toward the Flusser property again. He says that the entire house leans, at the northeast corner of the porch, three inches to the north, and the main building an inch and a half toward the north. He says that he found no split at the nail holes, which he says would have shown where there was a settlement; that it would tend to show that the southerly wall has not sagged; that this southerly wall is a trifle higher than the front. And he says that if you jack up the southeasterly corner

you could make the second and fourth floors bathroom level, but you could not do that on the third floor. And he says that in his judgment the house was built that way.

Mr. DeVita, who dug this foundation, tells how the foundation was dug, and how it was buttressed, to which I will call your attention presently.

The testimony on the part of the plaintiff is that the building is in substantially the condition it was after the damage had been done, except for certain repairs, which the son testifies to, and which is the evidence that makes proper the estimates of these witnesses who did not make their examinations until recently, one on the part of the plaintiff, and the other on the part of the defendant. And it also makes important your own examination of this property. Of course, in taking your observations, you have a right to consider the length of time that has elapsed since the injury complained of was done, five years ago, and the present time, also taking into consideration in connection with that the testimony of the unchanged condition of that building, and, from all of the evidence in the case, assisted by your own observation, it is for you to say whether or not this building did settle, bearing in mind that the burden of proof is upon the plaintiff to establish, by the greater weight of the evidence, the fact that the building did settle.

As I have suggested, even though you find the building settled, if the defendant did what the law requires him to do, he is not liable.

We come, then, naturally, to the next question, and that is whether or not the defendant did what the law requires of him to protect the property.

Charge.

Land, in its natural condition, without any building upon it, is entitled to lateral support. That is, no one can take away the land immediately adjoining that of another in its natural state, without being required to answer for the damage which results therefrom. But, independently of the statute, which I shall presently read, when a structure is placed on land, thus increasing the weight upon it, that land is not entitled to lateral support. Here comes in the statute, which is practically an affirmation of that last rule which I have mentioned, provided the excavation does not exceed 8 feet. This statute is that "Whenever excavations hereafter commenced for building, or other purposes, on any lot or piece of land, shall be intended to be carried to the depth of more than 8 feet below the curb or grade of the street, and there shall be any party or other wall, wholly or partly on adjoining land, and standing upon or near the boundary line of such lot, the person causing such excavation to be made, if afforded the necessary license to enter upon the adjoining land, and not otherwise, shall at all times from the commencement until the completion of such excavation, at his own expense, preserve such wall from injury, and shall support the same by a proper foundation, that it shall remain as stable as before such excavation were commenced." That is the law applicable to this case. You will observe that this statute does not say that if it is intended that the excavation is to go to a great depth, that the party making the excavation may wait until his excavation is to the depth of 8 feet before doing anything, but it says that if he intends to excavate below 8 feet, then, from the commencement until the completion of the excavation, he shall

properly protect the adjoining building. In this case admittedly the defendant went below the depth of 8 feet. The admitted depth of this excavation is 24 feet. And you may assume, since there is no testimony of any change of plans after the construction was commenced, that it was intended to go to the depth of 24 feet when the excavation was started. Therefore, under this statute, it was the duty of the defendant to protect the plaintiff's east wall, not after a depth of 8 feet had been reached, but as soon after the excavation was commenced as was reasonably necessary to preserve the plaintiff's wall from injury. If this building sagged as the result of this excavation, it is then for you to determine whether or not this was done; that is, whether this wall was protected as soon as was reasonably necessary to preserve it from injury.

As I have already stated to you, the plaintiff and his son both testified that this excavation was to a depth of about 15 feet, a vertical excavation, within an inch and a half of the plaintiff's line, before any shoring whatever was done.

Mr. Grad, on behalf of the defendant, says that this digging was done, as I have already indicated to you, by starting at nothing at the top, and digging down until at 7 feet there was a buttress there 3 feet wide at the bottom, going to nothing at the top; and that when this excavation was down 7 feet there was a shore put under this chimney at the southeast corner; and then when the excavation had gone down to 24 feet, the entire depth, another shore was put in there.

Mr. Tarkosky, who was the mason working on that work, says that when Zuzi came there—Zuzi is the man who put up this shore—that when

Zuzi came there it was dug out to the depth of 7, 8 or 9 feet deep. Mr. Zuzi says that along the Hirschberg property it was dug out to 7 feet deep when he did his shoring.

Mr. Flusser says that this digging was done in a slanting way. And Mr. DeVita, who is the contractor who dug out the dirt, tells in great detail how this excavation was done. He says that they started to work a little before Christmas, and that it took about six weeks of actual work to excavate there, but they were working unil March, when he cleaned up there. He says that they started back, that is, at the easterly end of the lot, and went toward Beacon street; they shoveled it out in steps, he says, about every 6 feet, going to the entire depth on the extreme easterly end, and then throwing it out, and taking it away. He says from the Hirschberg property he dug it out on a slope to 6 or 7 feet depth, and then went out 2 feet, and went down again to 19 or 20 feet, and that also was built in steps; that when they got to the bottom Mr. Flusser got his masons, and they dug out 3 feet of this buttress, filled in the wall on those 3 feet, and then they dug out in other places, until the wall was entirely completed.

Mr. McCullough, however, who is one of the defendant's own witnesses, to whose testimony I have already called your attention on another point, does not say that this excavation along this east wall was dug down in this way; because you will recall that he said that the foundation along the Hirschberg property, during the excavation, was entirely exposed. If it was entirely exposed at the time Mr. McCullough was there, then, of course, at that time, there was not this buttress along the property.

Charge.

There seems to be no question in this case on behalf of either party but that the necessary license called for was given for the defendant to enter upon the plaintiff's property. It is true the defendant says that when he first asked Mr. Hirschberg for permission to go upon the property, that Mr. Hirschberg hesitated, and declined to permit him to go on, but it does not appear but that the consent, which he admits was given, was granted almost immediately. Of course, on the part of the plaintiff, you will remember that Dr. Hirschberg testifies that it was not the defendant who came to him at all, but that it was he who went to the defendant and warned him of the possible consequences of that excavation, and that then the defendant said to him that he knew what he was doing, and that he would take care of any damage there.

As I have already indicated, before you can find a verdict for the plaintiff you must find, first, that the building sagged as the result of this excavation. You must also find that the defendant did not, as required by this statute which I have read, from the commencement until the completion of the work, preserve the plaintiff's wall from injury, "support the same by a proper foundation that it should remain as stable as before such excavations were commenced." If you find that he did not do that, and that there was a sag to this building caused by this excavation, then the plaintiff is entitled to be compensated for whatever his building is damaged.

Both sides in this case seem to have assumed that the rule of damage is what it would cost to restore that building, therefore, for the purposes of this case, that seeming to be the theory of both the prosecution and the defense, I shall adopt that as the rule of damage in this case. So that, if

the plaintiff is entitled to recover, he is entitled to recover what it has already cost, and what it will cost, to restore that building to its normal condition five years ago. You see the plaintiff cannot fail to restore his building at the time, and then, when prices have advanced, as all these contractors on both sides admit the cost of building has advanced, require the payment of the added cost. He cannot do that. The cost of the restoration must be the cost as of the time when the damage was done, or as soon as it could reasonably be done thereafter.

Dr. Hirschberg testifies that almost immediately after this work was done, certain repairs which were rendered necessary by the sagging of the building were made. That is, he says, and so does his father, and those who testified upon that point, Mr. Feinsod being one of them, that before this excavation was made these floors were level, and the building in good condition; and that immediately after this excavation was made these conditions were found of which they complain. He says the work which was then done was that there was a leak over the roof, that the water leaked over to the south side, toward the Flusser property, and that they had that repaired by putting a 2 by 4 up on the edge, and putting tin over that, and that that remedied the difficulty, and that the cost of that was $35. However, Mr. Blanchard said he did not find the 2 by 4 in that place at all; that it was not on that south side of the building, but was on the east side, not on the south side of the building where Dr. Hirschberg said it was placed; and, of course, if it was not so placed to remedy a difficulty which was occasioned by the sagging of his building, that is not an item which you can include.

Then he said there were three toilets and baths

reset, which were level before the excavation, and had to be straightened out and set over. That was plumber's work, which he said cost $50.

Ceiling boards in the bathroom on the first and second floor, third not yet done; that one of them came down, and the other was done later.

Chimney fixed from foundation to roof and that that cost $90 to $95, including the painting and plastering; and that underneath the piaza the boards bulged out, and there were put on others to keep them up straight, and that that cost $15.

These items all together amount to $190, which Dr. Hirschberg says has already been expended.

The next question is what would it have cost in 1911 to have put this building back in the condition in which it was before the excavation was made, if you find the defendant to be responsible for the sagging of the building?

Mr. Petz, who, as I have already called to your attention, says he has been in the contracting business about thirty years, gives it as his opinion that it will now cost $960 to jack this building up, and level it, and repair what would be damaged by the jacking up of the building. He says that that is thirty per cent. higher than it would have been in 1911, and that in his opinion the cost at that time would have been $750. But Mr. Petz, you will remember, upon cross examination admitted that that was a rough guess. Those are his own words. And that he did not know how much it would cost, or how much he had allowed in that figure for labor, for shoring, for plumbing, or for anything else; that that figure was intended to cover all possible contingencies, some of which might never happen.

Mr. Feinsod, who was working there at the time, and who examined this property at the time this damage was alleged to have been done, says

that in his opinion the reasonable charge to jack up and fix the building would be between $800 and $900; and he does give it in some detail, $150 for the plumbing, plaster, $150, shoring, $200, carpenter work, $100, and painting $150, making $750. But Mr. Feinsod admitted upon cross examination that "You have got to guess." Of course you cannot found your verdict upon a mere guess; it has to be founded upon reasonable probabilities. As one of our justices of the Supreme Court now deceased was fond of saying "You cannot guess money out of one man's pocket into another man's pocket." Your verdict must be founded upon reasonable probability.

Mr. Blanchard, while giving it as his opinion that there has been no settlement of this building, says that if he were called upon to raise that side of the building, that it could be done for $100, and to protect against breakage, $125. But in that he admitted that he did not include this second floor bathroom, which he says slopes to the north. He said that to put that bathroom in shape, in his opinion, would cost from $150 to $175, and that he would be willing to take the contract to do that at that price.

These figures are wide apart, and in determining who is right about it, if you get that far in the case, you have a right to take into consideration the experience of these men, the value which you are willing to attach to their judgment and opinions, and then, having determined that, bearing in mind that the burden is upon the plaintiff to establish his damage by the greater weight of the evidence, it will be for you to say, if you determine that the plaintiff is entitled to recover in this case, what will make him whole for the repairs which he has already made as the result of this careless excavation, if you find it to have

been careless, and for the reasonable cost of putting the building back into the condition in which it was before the excavation was made in 1911.

MR. SCHOTLAND: There has been a mis-statement by the Court in regard to the southerly wall.

THE COURT: You saw that southerly wall, and if I have misunderstood the testimony of course you will disregard what I said on that. You know the conditions there better than the Court, and if they have been misdescribed in any way by the Court, you will realize that it is because the Court has not seen it; you have.

(The jury withdrew.)

MR. SCHOTLAND: If your Honor please, I desire to except to the second proposition charged by your Honor, the way in which it was stated at first, without any qualification, and to the manner in which it was charged in the body of the charge. You seem to have assumed that if the defendant took steps to protect that wall in time, then the plaintiff cannot recover, leaving out the qualification unless what was done was so improperly done as to cause damages anyhow.

THE COURT: The exception will be noted.

The exception is noted by the plaintiff as ground of appeal.

MR. SCHOTLAND: You also in charging charged the jury that if the defendant took steps to protect, and did protect the building, as soon as was reasonably necessary. The statute requires him to do it from the commencement, and not to take a chance on his judgment as to when it was reasonably necessary.

THE COURT: The exception will be allowed.

The exception is noted by the plaintiff as ground of appeal.

Reasons.

NEW JERSEY SUPREME COURT.

JOSEPH HIRSCHBERG, *Plaintiff-Appellant,* *vs.* BENJAMIN FLUSSER, *Defendant-Appellee.*	Action at law. On Appeal.

To Samuel Roessler, Attorney of Defendant-Appellee:

PLEASE TAKE NOTICE, that the Appellant hereby specifies the following error committed by the Judge of the Essex County Circuit Court as his ground of appeal in the above entitled cause:

Because the Court erred in his charge to the Jury in the following particulars:

> "If it did (that is, if the building settled by reason of the excavation) then the second question for you to consider and determine is, whether or not the defendant, Mr. Flusser, did what the Law requires him to do, to protect Mr. Hirschberg's property. If he did, even though you should find that the building settled, your verdict must be in favor of the defendant."

Also in charging the following language:

> "As I have suggested, even though you find the building settled, if the defendant did what the Law requires him to do, he is not liable".

Also:

> "if this building sagged as the result of this excavation, it is then for you to determine whether or not this was done; that is, whether this wall was protected as soon as was reasonably necessary to preserve it from injury."

Dated, April 2, 1917.

Respectfully yours,

PHILIP J. SCHOTLAND,

Attorney for Plaintiff-Appellant.

Opinion.

Filed November 7, 1917.

NEW JERSEY SUPREME COURT.

June Term, 1917.

JOSEPH HIRSCHBERG,
Appellant,

vs.

BENJAMIN FLUSSER,
Appellee.

Submitted July 5, 1917. Decided November —, 1917.

The requirement of the Act of 1871 (C. S. 3926) that one excavating more than 8 feet deep on his own land shall support his neighbor's wall on adjoining land if licensed to enter on that neighbor's land for such purpose, is an absolute one. Reasonable care alone is not sufficient.

Appeal from Essex Circuit Court.

Before Gummere, Chief Justice, and Justices Parker and Kalisch.

For the appellant, Philip J. Schotland.

For the respondent, Samuel Roessler.

The opinion of the Court was delivered by PARKER, *J.*:

This appeal turns upon the meaning and effect of the statute entitled "An act relating to party walls and other walls standing upon or near boundary lines of adjoining lands," first

enacted in 1871. (P. L., p. 20; Rev. 1877, p. 809.) The title was amended in 1909. (P. L., p. 200; C. S. 3926.) The act provides "That whenever any excavations hereafter commenced, for building or other purposes, on any lot or piece of land, shall be intended to be carried to the depth of more than eight feet below the curb or grade of the street, and there shall be any party or other wall, wholly or partly on adjoining land, and standing upon or near the boundary lines of such lot, the person causing such excavations to be made, if afforded the necessary license to enter on the adjoining land, and not otherwise, shall at all times, from the commencement until the completion of such excavations, at his own expense, preserve such wall from injury, and so support the same by a proper foundation that it shall remain as stable as before such excavations were commenced." The pertinent facts are that plaintiff and defendant were adjoining owners; that defendant proposed to build on his own land and to excavate for that purpose more than eight feet in depth, and obtained a license to enter on the plaintiff's land for the purpose of providing proper support to a wall of plaintiff's building. The situation was therefore concededly within the statute. The case further shows that during the excavation, plaintiff's wall cracked and sagged, and plaintiff sued for the damages caused thereby. At the trial the jury were told to ascertain whether the wall was injured as a result of defendant's excavations, and if so, then to ascertain further whether defendant had done what the law required him to do to preserve plaintiff's property, and the jury were instructed that if he had so done, plaintiff could not recover. The jury

returned a verdict for defendant, and plaintiff on this appeal claims that the Trial Court failed to give full effect to the statute. The plaintiff's position is that by the act, one excavating over eight feet on his own land must at his peril protect the wall of his neighbor from injury by reason of such excavation; the defendant's, that the excavator must use all reasonable care so to protect the wall on the adjoining premises, but cannot be held to more than that.

Plainly, the statute is a radical departure from the common law, which contented itself with requiring support of the adjoining land alone, and left its owner to care for his own building, after reasonable notice of the intended excavation. *Schultz* v. *Byers,* 53 N. J. L. 442. The language of the Act of 1871, is so strong and so plain as to leave little, if any, room for doubt. In a case within its purview it requires the person causing the excavation to be made, when licensed to enter on the other's land for that purpose, at all times from commencement to completion, at his own expense, to preserve said wall from injury, and so support the same by a proper foundation that it shall remain as stable as before such excavations were commenced. There is nothing in this about due care, or reasonable care; the duty is an absolute one, to support the wall and keep it as stable as before the excavation was begun. We have difficulty in imagining language that could be stronger or more explicit.

Viewed in this light, there was error in the judge's instructions to the jury. At one place he quoted the statute and correctly charged that if the defendant failed to support the wall and it sagged as a result of that failure, defendant was

liable; but the effect of this was destroyed by instructions elsewhere in the charge, in which he left it to the jury to say whether the wall was protected as soon as was reasonably necessary to preserve it from injury. The two questions put to the jury were, first, did the building settle because of the excavation; and secondly, if so, did the defendant do what the law requires him to do to protect plaintiff's property; if he did, then even if the building settled (because of the excavation) the defendant would not be liable.

As we read the statute, an affirmative answer to the first question necessarily requires a negative answer to the second; for the law required defendant to prevent any settlement as a result of his excavation. The underlying idea of the charge seems to have been that if defendant did all that he reasonably could do, he should not be held, even though he failed to prevent injury. This, we think, is not the law. And the fact that the law was properly laid down at one place in the charge will not cure the error in the other part. *State* v. *Tapack,* 78 N. J. L. 208. Nor can we assume that the jury found the building did not settle because of the excavation, for they were not called on to answer that question separately.

The judgment will be reversed to the end that a *venire de novo* issue.

Order Reversing Judgment.

Entered November 9, 1917.

NEW JERSEY SUPREME COURT.

June Term, 1917.

JOSEPH HIRSCHBERG, *Appellant,* vs. BENJAMIN FLUSSER, *Appellee.*	*Action at Law.* *On Appeal.* *Order.*

This cause having been duly submitted on Briefs at the June Term, 1917, of this Court, by Philip J. Schotland, attorney for the appellant, and Samuel Roessler, attorney for the appellee, and the Court having inspected the record and judgment below, and considered the causes assigned for error and the Grounds of Appeal therein:

It is, thereupon, on this ninth day of November, 1917, ORDERED that the Judgment of said Essex County Circuit Court be in all things reversed, set aside and for nothing holden, to the end that a *venire de novo* issue, and that the record and proceedings be remitted to the said Essex County Circuit Court to be proceeded with in accordance with this Judgment and the practice of said Court.

Entered November 9, 1917.

On motion of

PHILIP J. SCHOTLAND,

Attorney of Appellant.

A true copy,

WM. C. GEBHARDT, *Clerk.*

New Jersey Court of Errors and Appeals.

JOSEPH HIRSCHBERG, *Plaintiff-Respondent,* *vs.* BENJAMIN FLUSSER, *Defendant-Appellant.*	On Appeal.

PLAINTIFF-RESPONDENT'S BRIEF.

Facts.

This is an action brought by the plaintiff-respondent who owns certain premises situate on Beacon Street, in the City of Newark, to recover for damages to his building which he claims sagged and was put out of plumb by an excavation made by the defendant-appellant on the lot adjoining, for a building which defendant-appellant was erecting, which excavation was made to a depth of twenty-four feet. The defense interposed was twofold:

1st. That the building did not sag and was not injured by the excavation; and

2nd. That the defendant-appellant applied for and procured license to protect plaintiff-respondent's building and did protect by shoring until his walls were up to support the ground.

The evidence as recited in the charge of the Court on page 13 of the State of the Case shows that the defendant-appellant admitted that he in-

tended to make the excavation to a depth of twenty-four feet and that the plaintiff-respondent, and his son, both testified that the excavation was carried to a depth of fifteen feet before any shoring was done, and defendant-appellant's witness, Mr. Cullough, also testified, as appears on page 14, lines 30 to bottom of page of State of the Case, that the excavation was carried to a considerable depth, so that the entire foundation of the plaintiff-respondent's property was exposed by the excavation before any shoring was done.

An appeal was taken from the Circuit Court of Essex County, to the Supreme Court, on the ground that the trial judge erred in his charge to the jury, and as the charge completely quotes the evidence necessary to a proper understanding of the case for the purpose of the appeal then taken, the State of the Case did not contain the evidence and upon motion before the trial Court to determine the propriety of the form of the State of the Case, the trial Court held that the State of the Case as prepared was sufficiently complete for the purpose of the points raised on appeal, and, therefore, the State of the Case before the Supreme Court contained only the pleadings, charge, the judgment, and the reasons for appeal, and for the same reason, the defendant, who has now become the appellant, has presented a similar State of the Case to which plaintiff-respondent does not object.

The only ground of appeal presented by defendant-appellant is that the Court below misconstrued the provisions of the Act of 1871 (Compiled Statutes, Sec. 3926), and that the Circuit Court correctly construed the provisions of the Statute. Plaintiff-respondent contends that the construction of the Statute by the Supreme Court is correct and that therefore the judgment of the Supreme Court should be sustained.

Argument.

This case is controlled by Section 1, of "An Act relating to party walls and other walls standing upon or near boundary lines of adjoining lands."

3 Comp. Statutes of New Jersey, page 3926.

"That whenever excavations hereafter commenced for building or other purposes, on any lot or piece of land, shall be intended to be carried to the depth of more than eight feet below the curb or grade of the street, and there shall be any party or other wall, wholly or partly on adjoining land, and standing upon or near the boundary lines of such lot, the person causing such excavations to be made, if afforded the necessary license to enter on the adjoining land, and not otherwise, **shall** *at all times, from the commencement until the completion of such excavations, at his own expense,* **preserve such wall from injury** *and so support the same by a* **proper foundation that it shall remain as stable as before such excavations were commenced.**"

Plaintiff-respondent contends that a proper construction of the provisions of the above statute is that, when one intends an excavation to be carried to a depth of more than eight feet below the curb or grade of the street, he must, as the Statute says, preserve the wall standing upon or near the boundary line of his lot from injury at all times from the commencement until the completion of his excavation, and must so support it that it should remain as stable as before his excavation was commenced.

The Court in his charge to the jury (beginning at bottom of page 6 and going on on page 7), says:

"Three questions arise in the course of your consideration and determination of this case.

> First, did the building settle by reason of this excavation? If it did not, that ends the consideration of this case, and the verdict must be for the defendant. If it did, then the second question for you to consider and determine is whether or not the defendant, Mr. Flusser, did what the law requires him to do to protect Mr. Hirschberg's property. If he did, even *though you should find that the building settled,* your verdict must be in favor of the defendant."

The second proposition as charged appears on its face somewhat inconsistent because the Court says that if the defendant-appellant did what the law requires him to do, and the building, nevertheless, settled, the verdict should be for the defendant-appellant. As plaintiff-respondent reads the law, the building could not have settled if the defendant-appellant had complied with the law, because he must prevent a settlement. As the charge develops, however, we get a clearer understanding of what the Court impressed on the minds of the jurors, and what the Court had in mind as to the law of this case. On page 13 of the State of the Case, lines 10 to 20, the Court charged the jury as follows:

> "Therefore, under this statute, it was the duty of the defendant to protect the plaintiff's east wall, not after a depth of 8 feet had been reached, but as soon after the excavation was commenced as *was reasonably necessary to preserve the plaintiff's wall from injury.* If this building sagged as the result of this excavation, it is then for you to determine whether or not this was done; that is, whether this wall was protected as soon as was *reasonably necessary to preserve it from injury.*"

What the Court, therefore, charged the jury was, that if the defendant-appellant protected the wall as long as was reasonably necessary, then even though the building settled as a result of the excavation, the defendant-appellant is not lia-

ble and the jury by their verdict so found. Plaintiff-respondent contends that the statute does not permit the defendant-appellant to use his judgment as to when it is reasonably necessary to protect the wall of the adjoining building, nor does it leave it to the jury to determine whether the exercise of the defendant-appellant's judgment was reasonable, but distinctly says that he is required to protect the wall *at all times.*

Furthermore, plaintiff-repsondent contends that if the defendant-appellant did endeavor to protect the wall and nevertheless it settled, he is responsible and not as the Court charged, because there is no testimony in this case that it was a physical impossibility to protect the wall of the plaintiff-respondent's building and in the absence of such testimony the defendant-appellant is required to so support the same by a proper foundation that it shall remain as stable as before such excavation was commenced. If defendant-appellant did support the wall but did not so support it as to prevent it from sagging or settling, then plaintiff-respondent contends defendant-appellant is liable and not as the Court charged the jury, that under such circumstances their verdict should be for the defendant-appellant.

On the ground therefore that the case was submitted to the jury on an erroneous theory as to the defendant-appellant's liability and the jury by their verdict evidently adopted that theory to the harm of the plaintiff-respondent, plaintiff-respondent respectfully submits that the judgment of the Supreme Court reversing the Circuit Court and directing a new trial, should be affirmed.

Respectfully submitted,

PHILIP J. SCHOTLAND,

Attorney and Counsel for Plaintiff-Respondent.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

New Jersey Court of Errors and Appeals

JOSEPH HIRSCHBERG, *Plaintiff-Respondent,* *vs.* BENJAMIN FLUSSER, *Defendant-Appellant.*	*Action at Law.* *Appeal from Supreme Court.*

Brief on Behalf of Defendant-Appellant.

The facts briefly stated are:

The plaintiff was the owner of premises in the City of Newark and in May, 1911, the defendant commenced to excavate on his property which adjoined the premises of the plaintiff. The defendant was awarded a license to enter upon the plaintiff's premises to protect the plaintiff's property and land and did proceed to shore up the plaintiff's building.

In June, 1915, the plaintiff commenced an action against this defendant, alleging that though he had a license to enter on plaintiff's land to preserve and protect the same, but that he "wholly failed and neglected to do so, thereby causing the lands of said plaintiff near said boundary line, and which supported the foundation walls of plaintiff's said building, to crumble and thereby causing the plaintiff's building to become out of plumb and damaging the same, causing him to expend the sum of $750" (p. 3, ll. 22-28, State of the Case).

The defendant denied that the injuries complained of were chargeable to him and after trial the jury brought in a verdict in favor of the defendant.

The case now comes up on exceptions to portions of the judge's charge to the jury in the court below and it is respectfully submitted on behalf of the defendant-appellant that there was no error in the charge of the learned judge below, and that, therefore, the verdict of the jury should not be disturbed.

The Situation at Common Law.

What duty would this defendant owe to the plaintiff under these circumstances at common law? The law is clearly established that at common law this defendant-appellant owed no duty to afford support for the ground with the superimposed burden of the building, and the natural right of support as between the owners of contiguous lands, existed in respect of lands only and not in respect of buildings and erections thereon.

Panton v. *Holland,* 17 Johns 92.
Thurston v. *Hancock,* 12 Mass. 221.
Humphrey v. *Boyden,* 12 Q. B. D. 139.

At common law also, the owner of land in making excavations on his own premises which might endanger a building on his neighbor's land was bound to use reasonable care in the prosecution of his work and was liable for injuries to his neighbor's property, resulting from negligence. But he was under no obligation to shore up his neighbor's house.

Maguire v. *Grant,* 25 N. J. L. 356.
Schultz v. *Byers,* 53 N. J. L. 442.
White v. *Nassau Trust Co.,* 168 N. Y. 149.
Dorrity v. *Rapp,* 72 N. Y. 307, 310.

The Statutory Change in New Jersey.

To remedy this situation at the common law, which imposed no burden on an adjoining landowner desiring to excavate on his own premises to shore up his neighbor's house, the Legislature of the State of New Jersey passed the following act:

> "That whenever any excavations hereafter commenced, for building or other purposes, on any lot or piece of land, shall be intended to be carried to the depth of more than eight feet below the curb or grade of the street, and there shall be any party or other wall, wholly or partly on adjoining land, and standing upon or near the boundary lines of such lot, the person causing such excavations to be made, if afforded the necessary license to enter on the adjoining land, and not otherwise, shall at all times, from the commencement until the completion of such excavations, at his own expense, preserve such wall from injury, and so support the same by a proper foundation that it shall remain as stable as before such excavations were commenced." *3 Compiled Statutes,* p. 3926.

The defendant-appellant conceded that he received a license to enter upon plaintiff's land, but insists that he complied with the full spirit of the statute and that from the commencement until the completion of his excavation, at his own expense did everything that modern science and skill could do to preserve the adjoining wall from injury.

Point I.

The jury were warranted from the facts in finding that the plaintiff had not made out his case.

Though the entire record is not before this Honorable Court, yet enough facts appear in the charge of the court below to show that the defendant did comply with the statute.

> "Mr. DeVita, who dug this foundation, tells how the foundation was dug, and how it was buttressed" (p. 11, ll. 8-10, State of the Case).

Mr. Grad, on behalf of the defendant, says:

> "That this digging was done, as I have already indicated to you, by starting at nothing on the top, and digging down until at seven feet there was a buttress there three feet wide at the bottom, going to nothing at the top; and that when this excavation was down seven feet there was a *shore* put under this chimney at the southeast corner; and that when the excavation had gone to twenty-four feet, the entire depth, another *shore* was put in there" (p. 13, ll. 27-37, State of the Case).
>
> "And Mr. DeVita, who is the contractor who dug out the dirt, tells in great detail, how this excavation was done. He says that they started to work a little before Christmas and that it took about six weeks of actual work to excavate there, but they were working until March, when he cleaned up there. He says that they started back, that is, at the easterly end of the lot, and went toward Beacon street; *they shovelled it out in steps,* he says, about every six feet, going to the entire depth on the extreme

> easterly end, and then throwing it out, and taking it away. He says from the Hirschberg property he dug it out on a slope to six or seven feet depth, and then went out two feet, and went down again to nineteen or twenty feet, and that also was built in steps; and that when they got to the bottom, Mr. Flusser got his masons, and they dug out three feet of this buttress, filled in the wall on those three feet, and then they dug out in other places until the wall was entirely completed'' (p. 14, ll. 8-30, State of the Case).

This testimony, showing the care the defendant exercised, the precautions he took, the skill with which the work was done, was not contradicted by any witness on behalf of the plaintiff and means that the defendant in making his excavations had complied with the spirit and the letter of the law.

In this connection the amended complaint of the plaintiff must not be lost sight of by the court. The plaintiff proceeded on the theory that the defendant had ''wholly failed and neglected so to do''—namely ''support the same by a proper foundation'' (p. 3, ll. 18-22, State of the Case).

In view of the uncontradicted testimony as set forth above, the jury were warranted in finding that the defendant not only had not neglected to preserve the premises of the plaintiff, but on the contrary that he exercised the greatest caution and care and that he did perform all acts necessary to preserve said premises. Apart from the judge's charge, in view of the theory of the plaintiff's case that he had ''wholly neglected and failed to perform''

his statutory duty, the jury, in the face of the uncontradicted testimony, were warranted in finding that the plaintiff, therefore, had not made out his case.

We have, therefore, shown that the defendant-appellant had complied with the statute set forth above and had done all that modern science and ingenuity could do to preserve the plaintiff's premises.

Point II.

The jury were warranted in finding that the excavation by the defendant-appellant was not the proximate cause of the settling of plaintiff's building.

The court below in its charge to the jury said that "three questions arise in the course of your consideration and determination of the case. First, did the building settle by reason of this excavation? If it did not that ends the consideration of this case and the verdict must be for the defendant" (p. 6, ll. 38-40; p. 7, ll. 1-3, State of the Case).

This question submitted to the jury by the court presented the doctrine of proximate cause. A man is liable for his torts if the injury complained of is a natural and proximate result of the party's act; or, if the act of the party was the natural and proximate cause of the injury.

The statement of this rule is simple; the application thereof, most difficult. There is no phase of the entire field of the Law of Torts that is more complicated than the doctrine of proximate cause. Although the general rule is, undoubtedly that a wrongdoer must answer for the damages caused by his misconduct, our law

strives to apply this rule in a practical and reasonable manner. As said by Lord Bacon, "it were infinite for the law to judge the cause of causes, and their impulsion one of another; therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree."

Burdick on Torts, p. 106, sec. 101, Third Edition.

It was, therefore, proper to submit to the jury the question whether the excavation by the defendant-appellant was the proximate cause of the sagging of plaintiff's building.

The jury having found for the defendant they may have decided, apart from the balance of the charge, that the building did not settle by reason of this excavation, and that the excavation was not the proximate cause of the settling of the building. This question having been presented to the jury, this court, on appeal cannot now say, the jury did not so find, and they did not pass on this question, for, the decision being present all facts must be concluded most favorably on behalf of the defendant-appellant.

And there were facts from which the jury could logically infer that the excavation by the defendant was not the proximate cause of the settling of plaintiff's building.

> "Mr. Blanchard, a builder of many years' experience, in fact, an experience almost as long as that of Mr. Petz, who says that he was in business 28 to 30 years. Mr. Blanchard says he has been building 28 years, and that he examined the property yesterday and today; and he says that while he did find these rooms out of level, that he found the bathroom on the second floor inclined

2 inches toward the Flusser property; that on the third floor inclined a half inch the other way, away from the Flusser property; that on the fourth floor had inclined an inch toward the Flusser property again. He says that the entire house leans, at the northeast corner of the porch, 3 inches to the north, and the main building an inch and a half toward the north. He says that he found no split at the nail holes, which he says would have shown where there was a settlement; that it would tend to show that the southerly wall had not sagged; that this southerly wall is a trifle higher than the front. And he says that if you jack up the southeasterly corner you would make the second and fourth floors bathroom level, but you could not do that on the third floor. And he says that in his judgment the house was built that way'' (p. 10, ll. 17-40; p. 11, ll. 1-4, State of the Case).

''It appears that Mr. Hirschberg's house covers the entire front of his lot on the easterly side of Beacon street, and along the south side of his lot he has constructed a driveway, 7 or 8 feet in width under the second, third and fourth stories, and, to protect the east, or southerly, wall of the second, third and fourth stories, he has placed a foundation which most of the witnesses fixed as about 3 feet in depth, that is, from the top of the wall to the bottom of the wall, upon which are placed piers, or posts, supporting this southerly wall'' (p. 7, ll. 14-25, State of the Case).

Taking this latter testimony and that of Mr. Blanchard, an expert builder, the jury were in a position to infer that the Hirschberg property

was built peculiarly for it sagged in two directions. The jury were in a position to infer that the settling of the property, of which Hirschberg complained, was due to an inherent defect in the structure itself. Furthermore they were in a position to infer that the sagging was due to the faulty erection of the piers which were built to protect this very wall from sagging because of the construction of the driveway by Hirschberg. When Hirschberg built this driveway he erected the piers to protect this very wall. It must also be remembered that the jury visited the premises (p. 19, l. 9; p. 11, ll. 20-21, State of the Case). They saw the Hirschberg and the Flusser property and were in a position to judge whether the excavation had caused this sagging.

It is not the duty of the defendant-appellant to prove that his excavation was not the proximate cause of the sagging of the plaintiff's building. The burden of proof was upon the plaintiff to show that the excavation was the proximate cause of the sagging of his building. He proves a sagging; he shows the excavation; but beyond that he goes no further and the State of the Case shows nothing further. It is respectfully submitted that the mere statement of these two events is not such an interconnection to show that the excavation was the proximate cause of the injury.

Of course the testimony of Mr. Petz for the plaintiff conflicts with that of Mr. Blanchard for the defendant. But where the testimony is conflicting it is the duty of the jury to reconcile it if they can; but if they cannot do this, they should accept as true that part of it which they think most worthy of belief and reject that part of it which they think less worthy of credit

having due regard to the opportunity and capacity of the witnesses to know of that which they speak, and their apparent fairness or bias. They are the sole judges of the credibility of the witnesses and the value of their evidence. The jury decided in favor of the defendant and having visited the premises were in a position to decide as to the credibility of Mr. Petz and Mr. Blanchard. Having found for the defendant it is fair for us to assume that they placed credence in Mr. Blanchard's testimony.

We have thus shown that from the testimony of the witnesses and from their actual viewing of the premises, the jury, not being shown anything to the contrary by the plaintiff, were in a position to decide that the excavation by Mr. Flusser was not the probable cause of the injury suffered by the plaintiff. It is true that this Honorable Court cannot exactly say they did so decide, but the jury having found for the defendant, this court cannot say they did not so decide.

Point III.

The Court's charge:

"If it did (that is, if the building settled by reason of the excavation), then the second question for you to consider and determine is whether or not the defendant, Mr. Flusser, did what the law required him to do to protect Mr. Hirschberg's property. If he did, even though you should find that the building settled, your verdict must be in favor of the defendant," was a correct charge.

The plaintiff-respondent has excepted to this portion of the charge as it was stated at first and as it was re-stated in the body of the charge. This exception denotes the point of

view which the plaintiff has assumed, that the statute has created a new liability for all those who excavate to a depth beyond eight feet—namely the liability of a complete insurer.

It is respectfully submitted on behalf of the defendant-appellant that to hold the defendant liable as a complete insurer apart from any negligence on his part, is something that our statute does not contemplate. Nor, it is also submitted, will a careful reading of the statute set forth above, reveal any such intention on the part of our legislators.

At the outset of the brief on behalf of the defendant-appellant the rights of the parties at common law were set forth. It was shown that the defendant owed no duty to the plaintiff to afford him any support for his land with a building superimposed thereon and there was no duty on his part to shore up his building.

The statute, however, has modified the common law to this extent that where the party intends to excavate more than eight feet, and he is afforded the necessary license to enter upon the adjoining land, at his own expense, must preserve the wall from injury, and so support the same by a proper foundation that it shall remain as stable as before such excavations were commenced.

It is respectfully submitted that this statute does not abrogate the common law, but merely modifies it and prescribes a course of procedure whenever an excavation is of more than eight feet in depth. Whenever an excavation is to be of seven and three-quarter feet or less the old rules of the common law still apply and the sole duty of the defendant was to use reasonable care based on the theory of *"Sic utere tuo ut alienum non laedas."*

Now then, this defendant proceeded to excavate to a depth of more than eight feet, and, it is submitted that the duty this defendant owed to the plaintiff is measured by the statute; the statute is his chart and guide. What test will the court apply in determining whether the defendant-appellant has fully performed his duty to his adjoining landowner? First, did he do those things as contemplated by the statute? Second, how did he do these things?

The evidence is clear that the defendant shored up the plaintiff's walls and that he buttressed them. The evidence is also clear that great care was taken in excavating and removing the dirt and that the work was done by competent artisans. The court cannot consider here whether the defendant was guilty of any negligence because the stated case does not find that he was negligent nor does it set out any fact from which actual negligence can be inferred. On the contrary, as the case now stands, it is fixed that the defendant did everything that a prudent man could do under those circumstances.

If, then, the plaintiff's wall settles should the defendant who, himself, is not negligent, respond in damages? The answer seems clearly to be in the negative. A landowner is entitled to use his land—to develop it according to his necessities. He owns it clear to the sky and at common law could dig down to any depth, provided he used reasonable care. Under our statute, if he digs more than eight feet, under certain circumstances, he must do more. But if he does those things in a legal manner, then his responsibility, just as at common law, ends, and if thereafter the plaintiff suffers injury, it is *damnum absque injuria.*

> "No cause of action arises from the doing of a lawful act or the exercise of a legal

> right if done or exercised in a lawful and proper manner, the resulting damage, if any, being *damnum absque injuria.*''
>
> *Maguire* v. *Grant,* 25 N. J. L. 356.

The defendant in excavating on his premises was doing a lawful act and was exercising a legal right. The testimony showed that he was doing it in a lawful and proper manner. Applying the formula of *Maguire* v. *Grant,* the resulting damage, if any, is *damnum absque injuria.*

And it is submitted this formula is logical and correct. Why should this defendant be punished merely because he is the owner of land and has excavated to a depth more than eight feet in a lawful and proper manner? If this is to be the rule it will mean that all landowners who desire to excavate more than eight feet do so at their peril even if they do everything possible to protect the adjoining landowner. Mere ownership plus a desire to excavate does not make a landowner a *tort-feasor.*

Such a rule would mean that no landowner will dare to excavate more than eight feet if he has an adjoining landowner, and to that extent such a ruling would be a deprivation of property.

Is it possible that the Legislature intended such a ruling? If so, they could have easily embodied it in the act. Its absence therefrom is persuasive that such was not their intention. As was intimated above, this statute merely supplements the common law. Paraphrased, it means this, when a party excavates to a depth beyond eight feet, under certain circumstances, he must use more than reasonable care; he must do something positive; he must support

the adjoining premises; *but* he must support them with a certain degree of care. The jury found that the defendant did preserve the foundation and as the court charged, "he did do what the law required him to do to protect Mr. Hirschberg's property." Having done that, his liability to the plaintiff under the common law plus the statute was at an end.

The doctrine of a party being a complete insurer has found its way into our law. That is the law in regards to common carriers, an institution peculiar in itself. But it is respectfully submitted that, by the widest stretch of the imagination it cannot be conceived that the Legislature, in passing this act, intended to put adjoining landowners in the class of common carriers.

We have diligently searched the decisions of our State but have found no utterance by our courts construing the duty of an excavator under this statute.

But we have found a decision in the State of New York construing a statute almost identical with that of New Jersey, and although the decision cannot be binding on this court, yet it may be persuasive.

Blanchard v. *Savarese,* 89 N. Y. Supp. 664.

The statute which was under discussion in this case read as follows:

> "Whenever an excavation shall be intended to be carried or shall be carried to a depth of more than ten feet below the curb, and there shall be any party or other wall wholly or partly on adjoining land, the person or persons causing such excavation to be made are required at all times from the commencement until the completion thereof,

> if afforded the necessary license to enter upon the adjoining land and not otherwise, at his or her own expense, to preserve an adjoining or contiguous wall or walls, structure or structures, from injury, and to support the same by proper foundations, so that they shall remain practically as safe as before the excavation was commenced."

The facts of the case were as follows: Plaintiff was the tenant of a factory building under a lease. The defendants were the owners of an adjacent lot, on which they proposed to excavate which, according to the application, was to have been only five feet below the curb. The defendants commenced building and then applied for permission to enter upon plaintiff's land to support the wall of the factory occupied by the plaintiff. The day after the defendant received permission to enter on the land, the plaintiff's wall collapsed. The plaintiff brought suit and recovered the damages to his goods and loss of profits occasioned by the negligence of the defendant in failing properly to sustain the factory wall.

The court found that the defendants, at the outset, meant to excavate only five feet, yet their action showed an intention to dig down to a depth greater than ten feet.

The Court held:

> "Having obtained access thereto (to plaintiff's premises) by reason of their implied avowal to that effect (to dig more than ten feet) and having NEGLIGENTLY injured him by failing PROPERLY TO DO THE WORK which they undertook to do, they should not be permitted to escape liability for their NEGLIGENCE by now saying that

they never intended to dig more than five feet below the curb."

This case was affirmed by the Court of Errors in 184 N. Y. 537.

A reading of the New York act shows that it is almost an exact copy of the New Jersey statute. The decision shows the point of view of the New York court when they attached liability to the excavator when he did the work negligently—and when they found he failed properly to do the work. Though a judgment was rendered for the plaintiff in the New York case, it is valuable in giving us the perspective of the court.

The facts in our case show that the work by the defendant was done carefully and in the most scientific manner. To hold him liable under such a state of facts would be to penalize him for owning land; endeavoring to make use of it and complying with the law.

It is, therefore, submitted that the exception of the plaintiff to the judge's charge was not well taken and the judgment of the lower court should not therefore be disturbed.

Point IV.

The judge's charge that if this building sagged as the result of this excavation, it is then for you to determine whether or not this was done; that is, whether this wall was protected as soon as was reasonably necessary to preserve it from injury, was correct.

The defendant-appellant wishes to state that this is but an excerpt from the charge and is found on page 13, lines 16-20.

It is respectfully submitted that one cannot take from a charge to the jury four lines and

say those four lines are an incorrect statement of the law. The four lines must be taken in connection with the preceding statement of the court of which these four lines are but a part. That portion of the charge from which these four lines are taken is found on p. 12, ll. 1-40; p. 13, ll. 1-20, State of the Case. A reading of that charge shows that the court quoted the statute to the jury and then he explained it to them:

> "You will observe that this statute does not say that if it is intended that the excavation is to go to a great depth, that the party making the excavation may wait until his excavation is to the depth of eight feet before doing anything, but it says that if he intends to excavate below eight feet, then, from the commencement until the completion of the excavation, he shall properly protect the adjoining building. In this case admittedly the defendant went below the depth of eight feet. The admitted depth of this excavation is twenty-four feet. And you may assume, since there is no testimony of any change of plans after the construction was commenced, that it was intended to go to the depth of twenty-four feet when the excavation was started. Therefore, under this statute, it was the duty of the defendant to protect the plaintiff's east wall, not after a depth of eight feet had been reached, but as soon after the excavation was commenced as was reasonably necessary to preserve the plaintiff's wall from injury. If this building sagged as the result of this excavation, it is then for you to determine whether or not this was done; that is, whether this wall was protected as soon as was reasonably necessary to preserve it

from injury'' (p. 12, l. 33; p. 13, l. 20, State of the Case).

It can thus be seen that the court did properly explain the statute to the jury.

The exception taken by the plaintiff would seem to indicate that the statute meant a literal compliance in accordance with the meaning of the word commencement. Taking this view of the statute it would mean that when the defendant made his first stroke with the pick axe he had to take steps to protect the plaintiff's wall regardless whether the wall needed protection or not. Such an analysis would render the statute absurd.

Does the plaintiff mean to contend that if his own wall is so strong and so well built yet if the defendant intends to dig down more than eight feet he must at the commencement take steps to protect the wall, even if the wall does not need such protection? And suppose the wall never needs protection, must the defendant go to useless expense in protecting that which needs no protection?

It seems reasonable then to venture the opinion that our Legislature never meant to burden a landowner with a useless expenditure of money under circumstances where a wall needed no protection. Statutes must be interpreted reasonably and it seems reasonable to interpret this statute in this fashion: If at the commencement of your operations, the wall needs protection then at the very commencement you must protect it. If at a depth of two feet it needs protection, then at two feet you must protect it, etc. If at the conclusion of your operations it needs protection, then you must protect it at the conclusion. If at the commencement and at the conclusion it needs

protection, then at the commencement and the conclusion you must protect it.

The contention of the plaintiff would seem to demand a literal compliance even though no protection was necessary. Such an interpretation seems to strain the statute to the breaking point. The jury having found for the defendant, found that he protected the wall at the proper time in a proper manner.

It is, therefore, submitted that the court's charge in its entirety expressed the law clearly to the jury and that the judge's charge was not erroneous and the finding of the lower court should not be disturbed.

Point V.

There was no error in the judge's charge and the verdict should not be disturbed.

A reading of the charge will show the utter fairness of it and there being no prejudicial error the verdict of the lower court should be affirmed.

Respectfully submitted,

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