*1923
May 1, 2.
June 15.

J. G. REID, H. H. FISHER AND A. B. CAMPBELL (DEFENDANTS) ..... } APPELLANTS;

AND

GEORGE LINNELL (PLAINTIFF) .....RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Negligence—Excavation in adjoining land up to border line—Person falling into from his own land—Absence of warning or protection—Liability.

The appellant Reid, intending to build upon his lot no. 17, let a contract to the appellant Campbell who in turn let the work of excavation to the appellant Fisher. The respondent was a sub-lessee of certain premises situate on the adjoining lot no. 18. The excavation was made at the back of buildings already existing, up to the lane and extended to the border line of the two lots; but it was not shored up and was left without fence, or railing, or warning lights. The respondent, while passing at night through the yard back of his house, fell into the excavation, of which he was not aware, was injured and sued the appellants for damages. The action was tried as one of negligence and was submitted as such to the jury who brought in a general verdict for the respondent.

Held, Davies C.J. dissenting, that the appellants were liable.

Per Duff J.—Having regard to the course of the trial, it is not open to the appellants now to ask for a new trial, and they could only succeed in the appeal by shewing that the evidence adduced is sufficiently complete and conclusive as to negative the appellant's liability. The fact that the fence on the dividing line between the two properties was removed is in itself a complete answer to the appellant's contention that what was done by them was done solely in the ordinary exercise of the proprietor's rights in respect of his own land.

Per Anglin and Mignault JJ.—Although there was no absolute duty to guard independent of negligence, the exercise by the appellants of their rights to excavate entailed an obligation to do for the protection of those who they knew might be expected to make use of the adjoining yard what a prudent and reasonable man would regard as requisite, or usually sufficient, to prevent a person using ordinary care from falling into the excavation while moving about the yard as was customary; and the verdict of the jury implies both the existence of this duty and the omission to discharge it, constituting actionable negligence.

Per Brodeur and Mignault JJ.—The contract between the appellant Reid and his contractors provided specifically for lights and railings in order to avoid accidents, thus showing that this was a reasonable precaution that should have been taken, and their failure to provide same renders them liable.

PRESENT:—Sir Louis Davies C.J. and Idington, Duff, Anglin, Brodeur and Mignault JJ.

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Per Davies C.J. (dissenting).—The excavation was made by the appellant Reid, or with his authority, on his own land, in the exercise of his rights to the ordinary enjoyment of his land; and there was no evidence of negligence which could justify the verdict of the jury.

Judgment of the Court of Appeal ([1923] 1 W.W.R. 900) affirmed, Davies C.J. dissenting.

APPEAL from the judgment of the Court of Appeal for British Columbia (1), affirming the judgment of Morrison J, with a jury and maintaining the respondent's action.

The material facts of the case are stated in the above head-note and in the judgments now reported. As already said, the case was tried as an action brought upon a charge of negligence and was submitted to the jury as such by the trial judge, both in his charge and in the specific questions framed by him, with the expressed approval of the counsel. The jury, ignoring the above specific questions, brought in a general verdict for the respondent, awarding him $5,000. Upon appeal to the Court of Appeal and to this court, the appellants raised a contention not urged at the trial, that the respondent must fail because the acts complained of were acts done without negligence by the appellant Reid or by his authority on his own land in exercise of his rights as proprietor and in the ordinary enjoyment of his property. The respondent's reply was first, that the making of the excavation had the effect of depriving the adjoining land of its natural support, and no other support having been substituted, the excavation itself was a contravention of that adjoining proprietor's right to lateral support for his land, and second, that the excavation, although done on appellant Reid's own land, constituted a danger in the absence of a protection or warning to persons who might, without knowledge of its existence, be in the vicinity after dark, and that these circumstances imposed upon the appellants a duty to provide such protection or warning. The court expressed no opinion on the first ground raised by the respondent.

L. G. McPhillips K.C. for the appellants.

H. R. Bray for the respondent.

THE CHIEF JUSTICE (dissenting).—This is an appeal by the defendants from the judgment of the Court of Appeal

(1) [1923] 1 W.W.R. 900.

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of British Columbia dismissing by an equal division of the court an appeal by the defendants from the judgment of Mr. Justice Morrison in the Supreme Court of British Columbia, whereby the learned trial judge (after the jury had brought in a general verdict for the plaintiff respondent for $5,000, but did not answer the special questions the learned judge had put to them, as was their right under the law of British Columbia), pronounced judgment for that amount with costs.

The action was brought to recover damages for injuries which the respondent alleged he suffered by falling into a pit or excavation in the lot immediately adjoining the lot of which he was a part sub-lessee by reason of the excavation not having been shored up and being left without fence or railing or warning lights.

I have carefully read and considered the evidence and judgments and have reached the conclusion that the appeal should be allowed.

I am so fully satisfied with the reasons for their judgment of Martin and McPhillips JJ. in the Court of Appeal, that I have really nothing useful to add to them.

The quotations made by them from the decisions of the learned judges who determined, in the English courts, the many cases cited, and especially the decision of the House of Lords in *Dalton* v. *Angus* (1) clearly established to my mind the right of the defendants to excavate up to the limits of the boundary line (provided such excavation was done without negligence) the cellar into which the plaintiff fell and negative the obligations which the plaintiff claimed were attached to that right of either shoring up the adjoining land or of fencing off the same or of keeping the same lighted during the hours of darkness.

I am quite unable to find any evidence of negligence on the part of the defendants in carrying out their legal right to make the excavation they did which could justify the verdict of the jury.

The attempt to apply the law which governs relating to excavations alongside a public road or private way for the protection of those using those roads or ways should not prevail, in this case, where there was no such road or way but a simple boundary line between two lots.

(1) [1881] 6 App. Cas. 740.

IDINGTON J.—The appellant Reid was the owner of a lot numbered 17, lying alongside of another lot, numbered 18, and, intending to build upon his said lot 17, let a contract therefor to his co-appellant, Campbell, who in turn let the work of excavation to the other co-appellant Fisher.

The said lot 18 had erected upon it a large building when one Mrs. Roberts, three years previous to the incidents in question herein, had become the tenant of said lot 18 and the erections thereon and so continued at the time of the occurrences in question herein.

She lived therein and had sub-let different parts of said building respectively to a number of different tenants, of whom respondent was one, and a social club was another, besides others.

The said building fronted on a leading street and in its rear there was, between it and a lane running past the rear end of both lots, a vacant space of about twenty-five feet wide by twenty-eight feet in length, which was used by tradesmen and others serving those in the building and also by the tenants and numerous members of said club, as occasion might require either for ingress or egress or to serve their purpose in any way such as might happen to be respectively needed by them or their guests or visitors.

One use therefor was found by respondent in depositing his garbage in a tin can placed in that vacant space close to the lane but even by cars which served the business of those those like him in occupation of the said building had similar tin cans to receive their respective accumulations of garbage.

In short the said vacant rear space was used not only as a pathway in from the lane and out from the building to the lane and even by cars which served the business of those having dealings with any one in said building.

The appellants' work of excavation on lot 18 was begun on the 7th February, 1922, and by the night of the 10th of said month had reached at the line between said lots at the rear part thereof, a depth of five or six feet.

That night was dark and stormy, when respondent went out shortly after six, when he had got done with his day's work carrying his refuse to deposit it in his garbage can, whilst on his way to the lane in rear. to avail himself of an

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offer made by a friend to carry him home in his (the friend's) car.

From his room in the building he had no chance of seeing what was going on in the way of the excavation in question and was absolutely ignorant of what had been done in regard thereto.

To proceed from his room on said errand it was necessary to descend a stairway. When he reached the foot of the stairs he of necessity had to turn a step or two to his can, which took him close to said excavation. The next turn was to the left and thence to the lane. He had not gone another step, he thinks, until the earth at the edge of the excavation gave way and he fell down into same and broke his leg and suffered other grievous injuries.

This action was brought to recover damages suffered as result of said fall.

There is no pretence that any notice was given by the way of lights or otherwise or any protection by railing, or in any way.

There had been a fence there according to the evidence of Mrs. Roberts and that, she says, was removed by those engaged in the work of excavation.

This is denied in such a peculiar way that I would not be surprised to learn that the jury accepted Mrs. Robert's version as they had a perfect right to do.

A perusal of the entire evidence, I think, leaves that course clearly open to them and leaves a very decided impression on my mind that there was something there or thereabouts to keep strangers coming from lot 17 off the rear end of lot 18.

The whole question of fact was left to the jury by the learned trial judge in a fair charge of which no complaint was made at the time of the trial, and which ended by submitting to them for their answers the following questions:

1. Did the defendants do anything which persons of ordinary care and skill would not have done under the circumstances?

2. Have they omitted to do anything which persons of ordinary care and skill under the circumstances would have done?

3. Did the plaintiff do anything which a person of ordinary care would not have done under the circumstances?

4. Did he omit to do anything which a person of ordinary care would have done under the circumstances and thereby contribute to the accident?

The jury did not answer these questions.

In British Columbia they are not bound to, and are so told by the learned trial judges.

Nevertheless the consideration of such questions helps I think, so long as not confusing by number or frame thereof, to keep the minds of jurors concentrated on the proper issues.

The counsel for appellants at the trial expressly declared himself as well satisfied with the questions.

The jury found a verdict for plaintiffs (now respondents) and assessed the damages at $5,000, for which the learned judge entered judgment.

The Court of Appeal was equally divided.

This appeal raises the question whether or not appellants in excavating up to the line of the division between lots 17 and 18, or either of them, owed, under such circumstances as in question herein, any duty to others entitled to walk on the rear part of said lot 18.

It has been argued on their behalf herein that no duty exists under such circumstances to any one save those using a public highway.

That seems to me rather a startling proposition. Nor do I find it maintained by the cases cited in support of it.

The fundamental principle upon which the cases holding that those passing along a highway are entitled to recover by reason of the owner of adjacent land having, either by excavation or by structural erection on his land, created a source of danger to such persons as used the highway, is that they having an absolute right to be where they are, the land owner must not, in the use of his land, disregard their right to pass in safety.

It does not follow, that the principle upon which those cases so rest is exclusively confined to highways. It is no doubt most frequently resorted to in cases of injury arising out of the use of a highway. And it has been extended by statutes in England relative thereto and they are substituted as the basis of most actions there. And penalties in most of said statutes are imposed for the purpose of deterring such plain and unjustifiable use of one's land. But in no case has the legislation obliterated the original common law principle.

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I need not elaborate the development of the law, or set forth each case more or less applicable. The facts in this case as above set forth entitled the respondent to use as a means of exit from his place of business the rear part of the lot 18, and to assume that it was in the same safe condition as it had been for years before the appellants swept away the railing or guard Mrs. Roberts testified to as existent, and made the excavation thereby a double source of danger.

In the case of *Clayards* v. *Dethick and Davis* (1), the defendants in constructing a trench across the private entrance of plaintiff to his stable, had as absolute a right to excavate as appellants had herein but, by reason of neglecting to take due care of the plaintiff's rights in the premises, were held liable to damages arising therefrom.

In the case of *Bower* v. *Peate* (2), Chief Justice Cockburn sets forth the principle which must govern the acts of adjoining proprietors as follows:—

> The answer to the defendant's contention may, however, as it appears to us, be placed on a broader ground, namely, that a man who orders a work to be executed, from which, in the natural course of things, injurious consequences to his neighbour must be expected to arise, unless means are adopted by which such consequences may be prevented, is bound to see to the doing of that which is necessary to prevent the mischief, and cannot relieve himself of his responsibility by employing some one else—whether it be the contractor employed to do the work from which the danger arises or some independent person—to do what is necessary to prevent the act he had ordered to be done from becoming wrongful. There is an obvious difference between committing work to a contractor to be executed from which, if properly done, no injurious consequences can arise, and handing over to him work to be done from which mischievous consequences will arise unless preventive measures are adopted. While it may be just to hold the party authorizing the work in the former case exempt from liability for injury, resulting from negligence which he had no reason to anticipate, there is, on the other hand, good ground for holding him liable for injury caused by an act certain to be attended with injurious consequences if such consequences are not in fact prevented, no matter through whose default the omission to take the necessary measures for such prevention may arise.

This exposition on the following pages demonstrates what is correct law to apply.

In the case of *Hughes* v. *Percival* (3), Lord Blackburn suggests how and in what respect that expression of the principle might in some cases, but not affecting what we have to deal with herein, be too broad.

(1) [1848] 12 Q.B. 439. (2) [1876] 1 Q.B. 321, at p. 326.
(3) [1883] 8 App. Cas. 443.

That case and the cases of *Pickard* v. *Smith* (1); *Corby* v. *Hill* (2); *Lynch* v. *Nurdin* (3); and *Kimber* v. *Gas, Light and Coke Company* (4), and authorities cited in each, all illustrate the law applicable herein in its different aspects, and some of them show how the owner is deprived herein of the claim he makes to be distinguished from his co-appellants herein.

It may be noted here that when letting his contract to Campbell he had a different conception of the law from what his counsel sets up herein for that contract expressly provided for guards and lights to prevent just such accidents as in question herein, yet never were provided and I infer he must have known so.

The appellants' counsel's complaint of the changing the basis of action from nuisance to negligence as if important, tempts me to quote from Stroude's Judicial Dictionary the following early definition of "nuisance":—

> "Nusauns" is where any man levieth any wall, or stoppeth any water, or doth any thing upon his owne ground, to the unlawful hurt or annoyance of his neighbour (Terms de la Ley: *Vf*, Cowel: Jacob).

What follows may be usefully studied by any one feeling he has a similar ground of complaint as made herein.

I think this appeal should be dismised with costs throughout.

DUFF J.—This appeal presents some curious features. The grounds upon which the appeal is based are grounds which were not even suggested at the trial, although in the main I think, open on the pleadings. They were raised in Court of Appeal, and upon them the judges of that court were equally divided.

The action was tried as an action brought upon a charge of negligence, was treated by all parties at the trial as such, was submitted to the jury as such by the learned trial judge, both in his charge and in the specific questions framed by him; and the course of the trial judge in the submission of the case to the jury was not only not objected to, but was expressly approved by counsel, counsel for Reid, speaking in presence of all counsel engaged, saying to the judge,

(1) [1861] 10 C.B. (N.S.) 470; 142 Eng. Rep. 535.
(2) [1858] 4 C.B. (N.S.) 556; 140 Eng. Rep. 1209.
(3) [1841] 1 Q.B. 29, at p. 37; 113 Eng. Rep. 1041.
(4) [1918] 1 K.B. 439.

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we are really satisfied with the questions you have put.

In these circumstances the appellants are, I think, clearly disqualified from asking for a new trial. It is a sound rule and a necessary rule that if a party at the trial deliberately elects to fight his case upon a given issue on which he is beaten, he cannot afterwards claim a new trial on the ground that the case really turned upon another issue.

This is not a case to which the enactment of s. 55 of the Supreme Court Act would apply, that a party's right to have the issues of fact submitted to the jury is a right which may be "enforced by appeal" notwithstanding any failure to take exception at the trial. In *Scott* v. *The Fernie Lumber Co.* (1), a decision pronounced in 1904, it was held by the full court that this enactment, which was then s. 66 of the Supreme Court Act, of 1904, had not wholly repealed the rule that a litigant is bound by the way in which he conducts his case at the trial, and that nothing in the section should be taken to give a right to a new trial in cases where counsel have expressly agreed upon the issues to be submitted to the jury or where the issues as submitted, have been accepted by all parties, as the only issues upon which the jury is to pass. Since that decision, s. 66 has been re-enacted at least once without alteration, and as far as I am aware the principle laid down in *Scott* v. *The Fernie Lumber Co.* (1) has been acted upon by the British Columbia courts down to the present time. (See the judgment of McDonald C.J., in *National Pole Co.* v. *Thurlow Logging Co.*

This, however, by no means concludes the matter. Though a new trial should not be accorded the appellants for the purpose of raising issues which they elected not to raise before the jury, it would, I think, be going too far if the facts in evidence entitled the defendants to have the action dismissed on the ground that there is no right in law upon the facts admitted or found by the jury or incontestably established, (and by that I mean established by evidence of so complete and conclusive a character as would have justified a judgment for the defendants in face of a finding against the defendants by the jury) to deny them, notwithstanding what occurred at the trial, on appeal the right to have the action dismissed.

(1) [1904] 11 B.C.R. 91.

Accordingly I think the principal contention of the appellants' counsel was open to him upon appeal in British Columbia and is open here, that contention being that the plaintiff must fail because the acts complained of are conclusively shewn to have been acts done by the defendant Reid or by the authority of the defendant Reid on his own land in exercise of his rights as proprietor and in the ordinary enjoyment of his property, and that contention I proceed to examine.

I premise that in my opinion it is not open to serious dispute that there was evidence from which a jury might properly find that, in the absence of a light or some other means of warning or a protecting barrier, the excavation constituted a danger exposing the owner of the adjoining property and persons using the adjoining property as the owner's tenants and licencees, without negligence, to the risk of serious injury, and in effect the jury has found that; and that there was evidence from which a jury might find that persons who, like the plaintiff, were entitled to use the adjoining property as tenants or licencees of the owner, were likely in the ordinary course to be sufficiently near the excavation to make that excavation, in the absence of any warning or protection, a real danger to them while in the exercise of their rights.

Is it an answer to the *prima facie* case thus established that the excavation was made by Reid or with his authority on his own land and in the exercise of his right to the ordinary enjoyment of that land?

The respondent's reply first, that the making of the excavation had the effect of depriving the adjoining land of its natural support, and no other support having been substituted, the excavation itself was a contravention of the adjoining proprietor's right to lateral support for his land; and secondly, that the acts of Reid and his contractor and workmen were not acts done in the ordinary enjoyment of Reid's rights as proprietor, but that in the special circumstances of the case the excavation, although done on Reid's own land, obviously constituted a danger in the absence of a protection or warning to persons who might, without knowledge of its existence, be in the vicinity of it after dark, and that these circumstances imposed upon those

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who were responsible for the excavation a duty to provide such protection or such warning.

Upon the first point I do not think it is necessary to pass. I cannot refrain from observing, however, that in the extreme form in which the point was presented by counsel for the appellants I can find very little in any of the authorities cited to give countenance to it. Counsel contended that the presence of the owner in person would amount to the imposition of an " artificial " weight upon the land in respect of which his right to lateral support from his neighbour's land would cease to be operative.

Consider the case of the surface owner and subjacent proprietor where the right of support is of the same character. The surface owner is entitled to the support of the surface in its natural state, on the ground, as Lord Campbell said in *Humphries* v. *Brogden* (1), that otherwise the surface property could not be " securely enjoyed as property "; a reason which would seem to be broad enough at least to extend to the case in which the owner is in person upon the land doing some necessary act for the assertion or protection of his rights. I can at all events entertain little doubt that Lord Selborne, in *Dalton* v. *Angus* (2), in speaking of " that which is artificially imposed upon the land ", which " does not itself.. .. ..exist " *ex jure naturae,* was not thinking of the person of the owner. I think it is unnecessary, however, to pass upon this point; and I shall assume that the plaintiff was not entitled to recover on the ground that the acts of the defendants did constitute a violation of the adjoining proprietor's right of lateral support.

The ground on which I think the appeal should be dismissed is this: A jury under a proper direction might have found that the situation, created by the excavation in the place in which it was, constituted, for the reasons above mentioned, in the absence of protection or warning, a danger to persons who might be present in the vicinity of it in the ordinary enjoyment without negligence of their right to be there under the authority of the owner of the adjoining property, and the circumstances under which the situation was created as disclosed by the evidence gave rise to

(1) [1850] 12 Q.B. 739, at pp. 744-5. (2) 6 App. Cas. 740, at p. 792.

a duty on the part of those concerned to provide such protection or warning.

A fact of cardinal importance was deposed to by Mrs. Roberts, the plaintiff's landlady, namely, that there was a fence between her property and Reid's, and that this fence was taken down in course of the execution of the work complained of without her permission, with a promise to replace it that was never carried out. This evidence of Mrs. Roberts was not contradicted, and there was no cross-examination upon it. It was argued by Mr. McPhillips that it must be left out of consideration. But it is impossible to ignore it for the simple reason that, as I have mentioned already, the defendants are only (if at all) entitled to have the action dismissed upon the ground that from the evidence as it stands the only proper conclusion is that the plaintiff has no cause of action.

It is a reasonable assumption that the fence was where it ought to have been, namely, on the line between the two properties, and that fact is fatal to the contention that the appellants in creating the situation out of which the action arose were strictly limiting themselves to acts done in the ordinary enjoyment of Reid's proprietary rights.

There is indeed much force in the argument advanced on behalf of the respondents that even in the absence of the fence the law would have imposed upon the defendants the duty of taking proper measures to protect Mrs. Roberts and her tenants and licensees from the danger created by the existence of the excavation on the principle that there is a duty to give warning of dangers one creates which are not discernible by reasonable care by people whom one knows, or with reasonable care ought to know, may lawfully be in the vicinity of the danger so created.

I respectfully concur in the opinion expressed by Scrutton, L.J. in *Kimber's Case* (1). I think there is much to be said for the view that the principle of the highway cases *(Hadley* v. *Taylor* (2),for example) is properly applicable. A hole placed near the highway, if so near to the highway that a person lawfully using the highway and using it with ordinary caution, accidentally slipping, might fall into it, constitutes a nuisance to the highway and an

(1) [1918] 1 K.B. 439, at pp. 446-7. (2) [1865] L.R. 1 C.P. 53.

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actionable nuisance at the suit of a person injured by reason of its existence there. That is to say, the rights of the owner of land adjoining a highway are qualified by this, that he must not in the ordinary use of his land create a danger of such a character, and it is one of those cases to which Lord Campbell referred in *Humphries* v. *Brogden* in these words:

> The books of reports abound with decisions restraining a man's acts upon and with his own property where the necessary or probable consequence of such acts is to do damage to others.

Why is the principle not applicable to qualify in like manner the rights of a proprietor of land whose property adjoins a private way? The decision in *Corby* v. *Hill* (1), (and particularly the judgment of Mr. Justice Willes), suggests that as regards the duty of persons engaged in a lawful work upon a way who creates a situation which in the absence of warning or protection is dangerous to persons using the way in a reasonable manner, there is no distinction between a public way and a private way; in both cases there is the duty to provide protection and warning imposed upon the person who creates the danger. Why should any distinction exist between a public way and a private way in respect of a danger created upon adjoining property? And if the duty arise in such circumstances is it not a duty resting upon principle, and is the principle not equally applicable where the dangerous condition of affairs arises from acts which are done by a proprietor upon his own land but immediately adjoining a place on his neighbour's property that is in common use and which may expose to risk of injury persons using it without negligence and without warning?

I put the example on the argument of a foot path between the gate and the door of the owner of one of two adjoining houses and an excavation created without warning in midwinter immediately adjoining the footway by his neighbour. Can there be any distinction in principle between the case of the messenger boy who, after dark, slips and falls into the excavation, and the wayfarer who in like circumstances suffers a like mishap in passing along the public road? I can perceive no sound distinction between the two cases. I do not overlook the passage from the judgment of Lord

(1) 4 C.B. N.S. 556, at p. 567.

Penzance in the case of *Dalton* v. *Angus* (1) cited by Mr. Justice Galliher, in which Lord Penzance says that if not bound by authority, he would have considered it no unreasonable application of principle to hold that an owner of land, if he desires to excavate it and does so in a quarter adjoining his neighbour's property, should be obliged to take measures to prevent the excavation resulting disastrously to his neighbour. The proposition suggested thus broadly cannot, of course, now be maintained consistently with the settled doctrines of the English law, but I think there is much to be said for the view that it would be no unreasonable application of the principle of *Hadley* v. *Taylor* (2) and like cases to hold that the appellants were under an obligation to Mrs. Roberts and her tenants and licensees to give warning of the excavation made on their own property. However that may be, it is, as I think, beyond dispute that the act of the defendants in removing the fence imposed upon them an obligation to provide something which would be an effective substitute.

I think the appeal should be dismissed.

ANGLIN J.—The plaintiff was tenant of part of a messuage on lot 18 and enjoyed, in common with other occupants of that lot, rights of user of a yard on the rear part of the lot, which abutted on a lane. The defendant, Reid, owned the adjoining lot, 17; his co-defendants were a contractor and sub-contractor, the latter of whom made an excavation for a building to be erected by the former for Reid on the rear of his lot. This excavation extended to the boundary between lots 17 and 18 and along the yard on lot 18.

On a dark night in February, the plaintiff, while lawfully passing through the yard, to reach his automobile, in which he intended to leave the premises *via* the lane, fell into the excavation on lot 17 and was seriously injured. A jury awarded him $5,000 damages and the judgment entered on that verdict against the three defendants was sustained as the result of an equal division in the Court of Appeal. The dissenting judges, Martin and McPhillips JJ. A. dealt with the case as one depending entirely on an alleged breach by

(1) 6 App. Cas. 740. (2) L.R. 1 C.P. 53.

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the defendants of their duty to the owner and occupants of lot 18 not to deprive that lot of such lateral support as was necessary to sustain it in its natural state, which in their opinion meant without the addition of any superincumbent weight—even that of a person lawfully walking upon it. They were of the opinion that since breach of the duty so defined had not been shown and the defendants owed no other duty to the plaintiff he could not recover.

Galliher J. was of the opinion that, assuming that the earth near the edge of lot 18 had slipped under the plaintiff's weight as he deposed and as the jury was entitled to find it did, there had been such an interference with lateral support as would entail liability. Eberts J. concurred in dismissing the appeal.

Although otherwise presented in the pleadings, the case was submitted to the jury solely as one of negligence. As they were entitled to do under the law of British Columbia, they brought in a general verdict, ignoring certain specific questions put to them by the learned trial judge. While the verdict imports such findings as are necessary to support a judgment based on negligence, it leaves us in the highly unsatisfactory position of not knowing what views the jury took on several questions of fact which were distinctly in issue. For instance, whether the plaintiff's fall was due to the earth on lot 18 near the edge of the excavation giving way under his weight or to his inadvertently, but not negligently, stepping over the boundary and into the hole, as the evidence that the bank or side of the excavation was found intact on the following morning suggests; and whether the defendants had removed a fence between the two properties, are matters of importance. But, inasmuch as the verdict may have been based on the view that the defendants owed to the plaintiff a duty either to warn him of the existence of the excavation or to guard him as one of the lawful users of lot 18 against the danger of falling into it by erecting barriers or placing warning lights, we would not, I think, be justified in assuming either that the plaintiff's fall was in fact attributable to a withdrawal of whatever lateral support the defendants were legally bound to leave, or that a trap had been created by the removal of a fence

on the presence of which, as marking the boundary of lot 18, the plaintiff had been wont and was entitled to rely.

We must, however, assume that the jury found some breach of duty amounting to actionable negligence on the part of the defendants and that they negatived contributory negligence on the part of the plaintiff, probably accepting his story that he was wholly ignorant of the existence of the excavation.

Counsel for the defendants frankly conceded the hopelessness of attempting to re-open the issue of contributory negligence, but he insisted that there was no evidence on which the jury could properly have found negligence on the part of the defendants, maintaining that their only duty was not to take away such lateral support as the law required them to leave for lot 18; that that would not include support for the land plus the weight of a person walking upon it; and that in any event, there was no finding that subsidence of the earth on lot 18 was the cause of the plaintiff's fall. With the contention last stated I am disposed to agree and consequently am not prepared to uphold the judgment in so far as it rests on deprivation of lateral support.

Having regard to the evidence of the known user of the yard by the occupants of lot 18 and by persons having business with them, and especially to the fact that the defendant Reid deposed that it was used as a back entrance to the buildings on lot 18—a trades entrance—the jury, in my opinion, was entitled to find that it was incumbent on the defendants in the exercise of ordinary prudence to make reasonable provision for safeguarding a person lawfully using the yard on lot 18, as the plaintiff did, against the obvious danger of falling into the excavation which they had made immediately adjoining it by taking some means for that purpose such as the erection of a barrier or the placing of danger lights or other reasonably efficient means of protection or warning. In this view it is immaterial whether the plaintiff's fall was due to the earth along the edge giving way under his weight or to his having accidently over-stepped the boundary line.

There was in this case no absolute duty to guard independently of negligence, such as exists where an excavation

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is adjacent to a highway and the maintenance of it unprotected is unlawful, a nuisance and indictable. *Hardcastle* v. *South Yorkshire Railway Co.* (1); Beven on Negligence, p. 360. But the right of the defendants to excavate as they did, like other rights of using property, was subject to the qualification implied in the maxim *sic utere tuo ut alienum non laedas*. Their right to excavate as they did is unquestioned; but the exercise of that right entailed an obligation to do for the protection of those who they knew might be expected to make use of the adjoining yard what a prudent and reasonable man would regard as requisite, or usually sufficient, to prevent a person using ordinary care from falling into the excavation while moving about the yard as was customary.

Although neither of them is upon its facts at all directly in point, in two cases I find expressions of judicial opinion which indicate this duty. In re *Williams* v. *Groucott* (2), Blackburn J. said:

> Looking at the general rule of law that a man is bound to use his property so as not to injure his neighbour, it seems to me that when a party alters things from their normal condition so as to render them dangerous to already acquired rights, the law casts on him the obligation of fencing the danger, in order that it shall not be injurious to those rights.

In *Hawken* v. *Shearer* (3), Mathew J. said:

> It appears to me that the true principle has been well laid down in Groucott v. Williams, which is this, that where an alteration has been made in the normal state of things, calculated to cause injury to a neighbour, an obligation is cast upon the person who makes such an alteration to protect his neighbour from injury.

And Cave J. said:

> A man may dig a pit in the middle of his own field, and leave it unfenced, but if he does so at the side of the road he must fence it and if he alters an existing state of things whereby he makes a highway dangerous, he is liable for any accident occasioned by such alteration. No doubt there are certain limitations to this general principle * * * But it equally applies to the case of an adjoining owner.

The same principle underlies statements of the Lords Justices in the recent case of *Kimber* v. *Gas, Light and Coke Co.* (4). Bankes L.J. said (page 445),

> If a person creates a dangerous condition of things (something in the nature of a concealed trap), whether in a public highway, or on his

(1) [1859] 4 H. & N. 67, at p. 74.
(2) [1863] 4 B. & S. 149, at p. 157.
(3) [1887] 56 L.J. Q.B. 284, at p. 286.
(4) [1918] 1 K.B. 439.

own premises, or on those of another, and he sees some other person who to his knowledge is unaware of the existence of the danger lawfully exposing himself or about to expose himself to the danger which he has created, he is under a duty to give such person a warning. There may be cases in which the duty exists though actual knowledge of the danger may not be brought home to the person charged with negligence * * * The duty arises quite independently of the occupation of the premises. It does not arise out of any invitation or licence. It is not a case of mere omission. The duty arises out of the combination of all the circumstances.

Scrutton L.J. said (p. 446),

It is clear that persons lawfully doing work which interferes with a public right, as contractors opening the highway, must use reasonable care not to injure persons lawfully using the highway, which would include taking reasonable precautions to warn such persons of dangers created by the contractor which the passer-by could not with reasonable care discover. But it is said the case is different when the work is done on private premises in which the contractor has no proprietary or possessory interest and on which he is only a licensee of the owner. The contractor's duty it was said was only, not actively and negligently to injure other persons on the premises, as by carelessly dropping hammers on their heads, and included no duty to warn them of dangers, even hidden ones, which the contractor's work had created * * * There are of course cases where there is moral culpability, but no legal liability. A sees B, a blind man, walking along a highway straight into a pond and gives him no warning, A is not legally liable for he is under no legal duty to B. But if A has himself made the hole in the highway, he is under legal liability at once: *Penny* v. *Wimbledon Urban Council* (1). I cannot see that it makes any difference that B is a person lawfully on private premises where A has made the hole or that A is under a duty as to his acts towards B such as not to hit him with his tools, different from his duty to warn B of dangers A has created which are not discernable by reasonable care on the part of B. It is A's duty to carry on his work with due precautions for the safety of those whom he knows, or ought reasonably to know, may be lawfully in the vicinity of his work; and the most obvious precaution would be to warn B, who is going towards the hidden danger A has created.

See also 21 Hals. L. of E. pars. 888 and 896.

There was in my opinion evidence on which it was competent for the jury to find that the defendants owed to the plaintiff the duty of safeguarding him against, or at least of taking reasonable means to warn him of the existence of, the danger they had created. Failure to discharge that duty, if it existed, is not questioned. The verdict of the jury implies both the existence of the duty and the omission to discharge it, constituting actionable negligence.

The case is not one of so-called casual or collateral negli-

(1) [1899] 2 Q.B. 72.

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gence on the part of the sub-contractor. The making of the excavation as contracted for up to the boundary line necessarily involved creating the hazardous situation. The owner and his contractor were bound to see that reasonable protection was provided. They did not avoid responsibility by entrusting the work to a sub-contractor, however reputable, even though they expressly stipulated for effectual precautions being taken by him.

If the fall of the plaintiff into the excavation was due to the negligence of the defendants, the fact that in so falling he became an involuntary trespasser cannot avail them as an answer to his claim.

I am for these reasons of the opinion that the judgment appealed from should be sustained.

BRODEUR J.—This action was brought by Linnell to recover damages which he suffered by falling into an excavation in the lot immediately adjoining the lot on which he was a part sub-lessee. He claims the excavation should have been shored up and should not have been left without fence, railing or warning lights.

The lot on which the excavation was made is called lot 17, and the adjoining lot on which Linnell resided is called lot 18. Lot 17 belonged to the defendant Reid, and the other defendants, Fisher and Campbell, were respectively contractors and sub-contractors for this excavation.

The plaintiff Linnell had the right to be at the place where the accident happened. He was going through the yard of his residence, in a dark night, to deposit some garbage in cans lying in the yard; and, when he was near the excavation, the ground being likely loosened by frost, gave way under the weight of the plaintiff. A question of contributory negligence was raised against Linnell; but the jury, by returning a general verdict, has evidently discarded the contention of contributory negligence.

The defendants contend that there was no duty imposed by law upon them to guard the excavation against persons lawfully using lot 18.

It is settled beyond question that an owner is entitled to have his soil supported in its "natural state" and as an incident to the land itself. *Dalton* v. *Angus* (1).

(1) 6 App. Cas. 740.

It does not mean however that this right to lateral support should be considered as a right to have the adjoining soil remain in its natural state, but a right, as said by Lord Blackburn in the case of *Dalton* v. *Angus* (1),

to have the benefit of support, which is infringed as soon as and not until damage is sustained in consequence of the withdrawal of that support.

Lord Penzance, in the same case, said that

it would be, I think, no unreasonable application of the principle *sic utere tuo ut alienum non laedas* to hold that the owner of the adjacent soil should take reasonable precautions by way of shoring or otherwise to prevent the excavation from disastrously affecting his neighbour.

In the present case, the contract of Mr. Reid, the owner of the property, with his contractors, provided specifically for lights and railings being provided in order to avoid any accident. Nothing of the kind was done. This provision of the contract shows conclusively that precautions of that kind were needed and that their omission was not a prudent act. None of these precautions were taken. The contract was in that respect violated.

Every man may use his own land for all lawful purpose without being answerable for the consequences, provided he exercises ordinary care and skill to prevent any unnecessary injury to the adjacent land owner.

If in this case the defendants had taken the precaution of doing what their contract provided for, the accident of which the plaintiff was the victim would have been avoided.

It has been contended in that respect by the defendant Reid, the owner, that he is not liable for the injuries received by the plaintiff as a result of negligent acts of the other defendants who were independent contractors, and he was not liable for the collateral or casual negligence of an independent contractor.

This point has been fully considered in the case of *Dalton* v. *Angus* (1), and I may then in that respect quote the following passage from the opinion of Lord Blackburn which shows conclusively that the defendant Reid's contention is not well founded:

Ever since *Quarman* v. *Burnett* (2), it has been considered settled law that one employing another is not liable for his collateral negligence unless the relation of master and servant existed between them, so that a person employing a contractor to do work is not liable for the negligence of that contractor or his servants. On the other hand, a person causing something to be done, the doing of which casts on him a duty, cannot escape

(1) 6 App. Cas. 740, at p. 808. (2) [1840] 6 M. & W. 499.

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from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor.

Lord Buckley, in *Robinson* v. *Beaconsfield Rural District Council* (1), expressed the same view in the following terms:

> Even if the council had contracted for the discharge of this duty, they would have remained liable to the plaintiffs for the contractors' failure to perform the duty.

For these reasons, the appeal should be dismissed with costs.

MIGNAULT J.—This case has been somewhat confused by the appellants treating it as if it involved a question of support of land, and by the respondent applying to it the rules governing the liability for allowing an obstruction or an excavation to be on a highway or in close proximity thereto.

The real question is whether an owner who makes an excavation on his own property extending to the boundary line of the neighbouring property, there being no fence between the two properties, is under any duty to persons whom he knows are likely to pass to and fro on the adjoining property to protect the excavation by railings or barriers or to place a light over it at night in order to prevent accidents.

The appellant Reid was the owner of a lot of land known as no. 17, with a building fronting on Granville Street, Vancouver. The neighbouring property, no. 18, with a building also fronting on Granville Street, was occupied by several tenants or sub-tenants, the respondent being one of the latter. In the rear of both buildings was a vacant piece of land, there being apparently no fence between the two properties, and behind the vacant land was a public lane. In the rear of the building on the neighbouring property was a stairway leading to the second story and this stairway, as well as the vacant land, to the knowledge of Reid, was used as a means of egress and ingress by the tenants of the neighbouring property and by persons whose business brought them there. Reid decided to build on the rear of his property, and gave a contract for the building to the appellant Fisher. For that purpose it was

(1) [1911] 2 Ch. 188.

necessary to excavate a trench up to the line between the two properties and the work of digging this trench was undertaken by the appellant Campbell. It was a condition of the specifications accompanying Reid's contract that the contractor would at all times maintain the necessary guards around the excavations and other places requiring them and all night lights, etc., so as to prevent accidents.

On the evening of the 10th of February, 1922, there being no railing on the side of the trench towards the property occupied by the respondent, nor a light over it, the respondent, when leaving the neighbouring building by the stairway and crossing the vacant space in the rear in order to reach a motor car waiting for him, fell into the trench and was badly injured. The night was dark and stormy and the respondent did not know, he says, that an excavation had been made on Reid's property, and, in fact, the digging had been commenced only two or three days before. The jury evidently believed the respondent's testimony, and having returned a general verdict for the respondent, instead of answering the questions submitted to them, (a most inconvenient practice, I must say, although permitted by statute), they must be taken to have found all necessary facts in the respondent's favour.

The appellants' theory—they had no witnesses who could say how the accident happened—was that the respondent walked into the excavation. The latter says that the ground gave way under his right foot and then he fell. This statement of the respondent has given rise to an interesting discussion on the law governing the support of land between neighbouring properties, but with all possible deference to the learned judges who thought otherwise, it is in my opinion unnecessary to express any opinion on this question. The legal problem which arises is the one I have stated above, and its solution depends on the answer given to the question whether the appellants owed any duty towards persons lawfully on the neighbouring property, and who, they knew, were likely to pass thereon in close proximity to the excavation, to guard the trench and have it lighted at night in order to prevent such an accident as that which occurred.

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No exactly parallel case has been cited, for different considerations apply to the highway cases and the question, I have said, is really not one of support of land. It may be admitted that Reid was within his rights when he dug the trench up to the boundary line of his property, as was also the respondent when he passed over the rear portion of the property at night in ignorance that an excavation had been made on the line of his neighbour's property. But rights of ownership and of enjoyment of property are not without certain limitations which the due protection of similar and co-equal rights renders necessary. The old maxim *sic utere tuo ut alienum non laedas* is an undoubted rule of law, although it must be applied with proper caution so as not to come in conflict with the equally venerable maxim *qui jure suo utitur neminem laedit.* Broom (Legal Maxims, 8th ed., p. 308) commenting on the rule *sic utere tuo,* etc., lays down five propositions which he deduces from the decided cases. I will cite the two first.

1. It is, *prima facie,* competent to any man to enjoy and deal with his own property as he chooses.

2. He must, however, so enjoy and use it as not to affect injuriously the rights of others.

The respondent among other cases cited the recent decision of the English Court of Appeal in *Kimber* v. *Gas, Light and Coke Co.* (1). In that case workmen, in repairing an old building and converting it into two dwellings, had left a hole in the floor of a dark landing, and the plaintiff, who visited the building during the work, under a permit with the view of renting the upper portion, and was admitted by the workmen but not warned of the existence of the hole, fell into the hole and recovered damages against the contractor. I find stated in the judgments there a legal principle which can be applied in a case like the one under consideration. I quote from the language of Scrutton, L.J., at p. 447:

> It is A's duty (A is a person carrying on work, and, *ex hypothesi,* lawfully doing so) to carry on his work with due precautions for the safety of those whom he knows, or ought reasonably to know, may be lawfully in the vicinity of his work.

Scrutton L.J., very pertinently cites the remark of Lord Macnaghten that the plainer a proposition is the harder it

(1) [1918] 1 K.B. 439.

often is to find judicial authority for it. The learned Lord Justice indeed goes as far back as *Corby v. Hill,* (1) to support his proposition. *Corby* v. *Hill* (1) was the case of building materials placed on a private road by a builder with leave of the owner, and the builder was held liable to the plaintiff whose horse was injured by coming in contact with the obstruction.

In deciding that Reid and his contractors and workmen were under a duty towards persons lawfully passing on the neighbouring property to guard the excavation he had dug out up to the boundary of his land, I am unconscious of unduly stretching the rule I have just quoted. Although I have not found any absolutely parallel case, I think this is a most reasonable, and, I may add, a common sense application of the old maxim *sic utere tuo ut alienum non laedas.* Such an excavation on a dark night was a real trap. Moreover the specifications had directed that guards should be placed around it, and this shows that such a precaution was considered reasonable by the parties themselves. In my opinion, the liability of the appellants for not having properly guarded his excavation cannot be questioned.

Mr. McPhillips argued that the respondent's action was framed as an action based on a nuisance and that the learned trial judge dealt with it in his charge to the jury as an action of negligence. I think however that the statement of claim sufficiently alleges the negligence of the appellants to stand as an action in tort.

There is no trespass established here. The respondent was where he was entitled to be when he fell into the trench.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellants: *Senkler, Buell & Van Horne.*
Solicitor for the respondent: *H. R. Bray.*

(1) 4 C.B. (N.S.) 556.