since the case was not within one of the exceptions to the rule that one is bound by the testimony of his own witness, it is submitted that the court's decision was unsound.

Where uncontradicted, non-conflicting testimony is given by unimpeached witnesses so that disinterested and reasonable men could reach but one conclusion, there is no question for the jury, and a case is established for a directed verdict.[11] In the principal case there was no evidence by which the plaintiff could sustain her burden of proof. The fact that the sole witness to the encounter was an employee of the defendant did not discharge plaintiff's burden.[12] For these reasons the court should have reversed the trial court's denial of defendant's motion for a directed verdict. There was no need to consider the question whether a party is bound by his own witness, which question was unnecessary and immaterial to the decision in the case.

REAL PROPERTY—LATERAL SUPPORT—RIGHT OF EXCAVATING CONTRACTOR TO RECOVER COST OF UNDERPINNING ADJACENT BUILDINGS

Warfel v. Vondersmith, 376 Pa. 1, 101 A.2d 736 (1954)

Plaintiff, a general contractor employed to excavate a city lot, notified defendant, who owned the adjacent lot, that he should take measures to prevent the collapse of his buildings abutting the property line. Defendant took inadequate measures. To prevent injury to workmen and others and to prevent interference with his work, plaintiff entered defendant's land with defendant's permission and underpinned the buildings. When plaintiff's building job was completed, he brought an action to recover the cost of the underpinning. The jury returned a verdict for plaintiff. Defendant's motion for new trial was granted. On appeal, the Pennsylvania Supreme Court affirmed and held that because the defendant was under no duty to provide temporary support for his own buildings, the excavator would have to bear the expense of any support which the excavator supplied.[1]

A landowner's right to lateral support of his land is well defined. If his land is unimproved, he can recover the damages resulting from a

---

11. Burdon v. Wood, 142 F.2d 303 (7th Cir. 1944); United States v. Barber Lumber Co., 172 Fed. 948 (C.C.D. Idaho 1909).

12. Moore v. Chesapeake & Ohio Ry., 184 F.2d 176 (4th Cir. 1950).

1. Warfel v. Vondersmith, 376 Pa. 1, 101 A.2d 736 (1954). It was impossible for the lower court to render a judgment *non obstante veredicto* in this case because of a counterclaim filed by defendant which was considered by the jury in assessing damages for plaintiff.

collapse of his land caused by an excavation on neighboring land.[2] His recovery is not defeated by a showing that the excavation was conducted with due care.[3] This absolute right does not extend to land where the lateral pressure is substantially increased by the presence of a building.[4] To recover damages for the building, it is necessary to show that the mode of excavating was negligent.[5] The privilege of a landowner to excavate is, of course, defined by the extent of the adjacent owner's right to lateral support. A corollary to these propositions is that the presence of buildings on land adjacent to a proposed excavation does not increase the rights of the adjacent owner to lateral support or limit the extent of the excavation.[6]

The duties of the excavating owner also are clear. He must not remove that land which is naturally necessary to support the adjacent land in its unimproved state.[7] If there are buildings on the adjacent land, the excavating owner must use due care,[8] which has been held to include such notice to the adjoining owner of the intent to excavate as will afford him ample opportunity to protect his buildings,[9] and the use of methods of excavation which create the least hazard to the

---

2. WALSH, A TREATISE ON THE LAW OF PROPERTY § 298 (2d ed. 1937).

3. Green v. Berge, 105 Cal. 52, 38 Pac. 539 (1894); Schultz v. Bower, 57 Minn. 493, 59 N.W. 631 (1894). *See* Miller v. State, 199 Misc. 237, 240, 98 N.Y.S.2d 643, 646 (Ct. Cl. 1950), *aff'd*, 279 App. Div. 1139, 113 N.Y.S.2d 220, *rehearing denied*, 280 App. Div. 882, 114 N.Y.S.2d 261 (4th Dep't 1952). RESTATEMENT, TORTS § 817 (1939).

4. Miller v. State, 199 Misc. 237, 98 N.Y.S.2d 643 (Ct. Cl. 1950), *aff'd*, 279 App. Div. 1139, 113 N.Y.S.2d 220, *rehearing denied*, 280 App. Div. 881, 114 N.Y.S.2d 261 (4th Dep't 1952); Wolcott v. State, 199 Misc. 229, 99 N.Y.S.2d 448 (Ct. Cl. 1950); Welsh Mfg. Co. v. Fitzpatrick, 61 R.I. 359, 200 Atl. 981 (1938). RESTATEMENT, TORTS § 817, comments *c* and *d* (1939); TIFFANY, THE LAW OF REAL PROPERTY § 753 (3d ed. 1939).

5. Jones v. Hacker, 104 Kan. 187, 178 Pac. 424 (1919). *Accord*, Gilmore v. Driscoll, 122 Mass. 199 (1877). RESTATEMENT, TORTS § 817, comments *c* and *d*, § 819, comment *e* (1939).

6. Miller v. State, 199 Misc. 237, 98 N.Y.S.2d 643 (Ct. Cl. 1950), *modified and aff'd*, 279 App. Div. 1139, 113 N.Y.S.2d 220, *rehearing denied*, 280 App. Div. 881, 114 N.Y.S.2d 261 (4th Dep't 1952); Welsh v. Fitzpatrick, 61 R.I. 359, 200 Atl. 981 (1938); Christensen v. Mann, 187 Wis. 567, 204 N.W. 499 (1925). TIFFANY, THE LAW OF REAL PROPERTY § 753 (3d ed. 1939).

7. Foley v. Wyeth, 84 Mass. (2 Allen) 131 (1861); Seimers v. St. Louis Electric Terminal Ry., 343 Mo. 1201, 125 S.W.2d 865 (1939). *See* Mullan v. Hacker, 187 Md. 261, 265, 49 A.2d 640, 642 (1946). TIFFANY, THE LAW OF REAL PROPERTY § 753 (3d ed. 1939).

8. In the absence of negligence, the excavator will not be held liable. Moore v. Anderson, 28 Del. (5 Boyce) 477, 94 Atl. 771 (1915); Jones v. Hacker, 104 Kan. 187, 178 Pac. 424 (1919); Gilmore v. Driscoll, 122 Mass. 199 (1877).

9. Flanagan Bros. Mfg. Co. v. Levine, 142 Mo. App. 242, 125 S.W. 1172 (1910); Christensen v. Mann, 187 Wis. 567, 204 N.W. 499 (1925). Notice may be acquired, however, by personal knowledge of the adjoining landowner, relieving the excavator of the affirmative duty to notify. Wigglesworth v. Brodsky, 30 Del. (7 Boyce) 586, 110 Atl. 46 (1920); Craig v. Kansas City Terminal Ry., 271 Mo. 516, 197 S.W. 141 (1917). *See* Gerst v. St. Louis, 185 Mo. 191, 208, 84 S.W. 34, 39 (1904). WALSH, A TREATISE ON THE LAW OF PROPERTY § 298 (2d ed. 1937).

buildings.[10] The excavator is under no duty to afford additional support to the adjacent buildings.[11]

The owner of unimproved land adjacent to an excavation has no duties. Furthermore, even if the land is improved, he is under no duty to prevent the improvements from collapsing on his own land.[12] If, however, they collapse on the excavated land without a breach of duty by the excavator, their owner will be liable for trespass.[13]

According to the Restatement of Restitution, where one person is under a duty which, if breached, would result in liability, and does nothing to perform that duty, another person who, in order to protect others, performs that duty for him is entitled under principles of restitution to recover the cost of performance.[14] The majority of courts, however, hold that the excavator cannot recover from the adjacent owner for the expense of providing additional support to the adjacent buildings to prevent their collapse.[15] The rationale of the these holdings is that the buildings' owner is under no duty to prevent their collapse;[16] he may allow them to collapse if he wishes, and therefore the excavator is a mere volunteer.[17] A minority of courts allow recovery on the ground that the excavator was forced to act

---

10. Gildersleeve v. Hammond, 109 Mich. 431, 67 N.W. 519 (1896); Larson v. Metropolitan Street Ry., 110 Mo. 234, 19 S.W. 416 (1892). The fact that buildings on adjoining land are in a state of disrepair and more liable to collapse has been held to increase the duty of care imposed upon the excavator. Bass v. West, 110 Ga. 698, 36 S.E. 244 (1900); Cooper v. Altoona Concrete Construction and Supply Co., 53 Pa. Super. 141 (1913); Walker v. Strosnider, 67 W. Va. 39, 67 S.E. 1087 (1910). See RESTATEMENT, TORTS § 819, comment *g* (1939).

11. Carpenter v. Reliance Realty Co., 103 Mo. App. 480, 77 S.W. 1004 (1903); Welsh v. Fitzpatrick, 61 R.I. 359, 200 Atl. 981 (1938). *See* Ceffarelli v. Landino, 82 Conn. 126, 129, 72 Atl. 564, 566 (1909).

12. First National Bank of San Francisco v. Villegra, 92 Cal. 96 (1891); Korogodsky v. Chimberoff, 256 Ill. App. 255 (1930); Braun v. Hamack, 206 Minn. 572, 289 N.W. 553 (1940).

13. Resnick v. Kazakas, 122 Neb. 489, 240 N.W. 585 (1932); Davis v. Sap, 20 Ohio App. 180, 152 N.E. 758 (1922). TIFFANY, THE LAW OF REAL PROPERTY § 753 (3d ed. 1939).

14. RESTATEMENT, RESTITUTION § 112 (1937). Although the language of this section is general enough to include tort duties, the cases cited in support of it do *not* involve tort duties. Comment *b* to the section, however, seems to invite a broad interpretation.

15. Cornet Stores v. Security Trust and Savings Bank of San Diego, 262 P.2d 77 (Cal. 1953); Korogodsky v. Chimberoff, 256 Ill. App. 255 (1930); Braun v. Hamack, 206 Minn. 572, 289 N.W. 553 (1940).

16. First National Bank of San Francisco v. Villegra, 92 Cal. 96 (1891); Korogodsky v. Chimberoff, 256 Ill. App. 255 (1930); Braun v. Hamack, 206 Minn. 572, 289 N.W. 553 (1940).

17. Braun v. Hamack, 206 Minn. 572, 289 N.W. 553 (1940); Flanagan Bros. Mfg. Co. v. Levine, 142 Mo. App. 242, 125 S.W. 1172 (1910). In Weisberger v. Maurer, 9 N.J. Misc. 117, 153 Atl. 626 (1930), *aff'd*, 109 N.J.L. 273, 160 Atl. 634 (1932), the court said that:

> I am impressed by the argument in defendant's brief, that "if I own a shack worth less than the cost of protecting it, it seems very high handed to allow the adjoining owner to protect it regardless of cost, at my expense. It may fall and do no damage. It may not fall at all."

Id. at 120, 153 Atl. at 628.

by the adjoining owner's inaction which removes him from the class of "volunteer."[18]

Although the principal case follows the majority rule,[19] the soundness of this rule is open to question. The reasoning of the majority of courts that the adjacent owner is under no duty to prevent the collapse of his buildings and that therefore there can be no restitutionary recovery is fallacious. Although the adjacent owner is not liable if the buildings fall on his own land,[20] he is liable if they collapse onto the excavated land.[21] This duty not to trespass is recognized by the majority of courts. If the excavator's action in supporting the buildings on the adjacent land is in fact associated with the performance of the adjacent owner's duty not to trespass, restitutionary recovery should be allowed.

---

18. Avery Brundage Co. v. Grand Lodge of the Independent Order of Vikings. 317 Ill. App. 376, 45 N.E.2d 889 (1942); Carpenter v. Reliance Realty Co., 103 Mo. App. 480, 77 S.W. 1004 (1903); Eads v. Gains, 58 Mo. App. 586 (1894). See the dissent by Stone, J., in Braun v. Hamack, 206 Minn. 572, 575, 289 N.W. 553, 555 (1940).

19. Warfel v. Vondersmith, 376 Pa. 1, 8, 101 A.2d 736, 739 (1954). See note 18 *supra*.

20. See note 12 *supra*.

21. See note 13 *supra*.