

Correspondence

LATERAL SUPPORT—EXCAVATION.

THE EDITOR, CANADA LAW JOURNAL:

Dear Sir:—In connection with *Foster v. Brown*, Hal. L.C. 1920, 48 O.L.R., p. 1, there is a New Zealand case which it is interesting to note. This case is *Byrne v. Judd* 1908, 27 New Zealand Law Reports 1106. The facts are as follows:—O'Brien, the owner of land in the City of Wellington, excavated land in such a manner as to remove the lateral support of the adjoining land. To prevent a subsidence he erected a wooden breastwork which he kept in repair. On his death, in 1896, the land passed, by devise, to Judd. After O'Brien's death the breastwork was not repaired. In 1903 heavy rains caused the breastwork to give way, and the plaintiff's land to slip into the excavation. To save his land, the plaintiff erected a concrete wall, and sued Judd for the cost of the wall.

The case was appealed twice and on the final appeal it was held that the injured land owner had a right only against the former owner who had actively removed the lateral support, and not against the person who happened to be the owner at the time when the support, then remaining, gave way, following *Greenwell v. Low Beechburn Coal Co.*, and *Hall v. Norfolk*. The owner of land may excavate as much as he pleases so long as he does not cause a subsidence of the adjoining land. If he causes a subsidence of the adjoining land he is liable therefor, but he is under no obligation to erect a breastwork. In his judgment, Edwards, J., says "If O'Brien was under no obligation to erect a breastwork he was under no obligation to keep it in repair, and if he was under neither of these obligations, the appellant (Judd) certainly could not be held liable."

The facts in *Foster v. Brown* are practically the same as in *Byrne v. Judd*.

From the judgment of the learned Chief Justice in *Foster v. Brown*, at p. 6, it could be inferred that the removal of lateral support imposes the duty on the remover of building a retaining wall. It is submitted that the opinion of the New Zealand Court of Appeal is the more correct. The duty is to refrain from causing a subsidence by removing support, otherwise a man in excavating rock would be required by law torevet it. This idea is untenable—see *Birmingham v. Allen* (1877) 2 Ch. 284. "There might be land of