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The Doctrine of Lateral Support in New York

Stanley S. Green

COMMENTS

THE DOCTRINE OF LATERAL SUPPORT IN NEW YORK

The law of lateral support conveniently divides itself into two main parts: the right to lateral support of land in its natural or unimproved state, and the right of lateral support when the land has been improved by the erection of buildings or other structures. Little or no controversy exists in regard to the rights, duties, and liabilities existing in the first field. Confusion and conflict exist in the second. The purpose herein is to consider the New York case law on the latter topic, but in order to do so it is necessary to review the basic principles involved.

Unimproved Land

At common law, if A is the owner of an unimproved lot, and B, an adjoining owner, so excavates on his land as to cause A's land to subside or slide into the excavation causing A substantial damage,[1] it is well settled that A may recover for such damage from B.[2] This is true although B has conducted his operations

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1. In order to maintain an action for loss of lateral support, substantial damage must have been incurred thereby, Smith v. Thackerah, [1866] L. R. 1 C. P. 564. Unlike an action for trespass to real property nominal damages are not recoverable. The reason for the rule is apparent. Damage is a part of the right. The act by which a landowner suffers loss of lateral support originates not on his land, but on the land of another; such owner has the right to use his land in any manner he chooses, so long as the adjoining landowner suffers no material injury thereby. Thus the landowner must show substantial injury before he establishes a cause of action. Smith v. Thackerah *supra*. A suitable maxim to fit the situation herein involved might be *de minimis non curat lex*. A landowner must suffer the minor inconveniences incident to the occupancy and use of adjoining lands.

2. Wilde v. Ministerly, 15 Car. 1 cited in 2 Rol. Ab. 564 (perhaps the earliest known case affirming the existence of this right); Gilmore v. Driscoll, 122 Mass. 199 (1877); Braun v. Hamack, 206 Minn. 572, 289 N. W. 553 (1940). Where the acts of a party in excavating make damage to the adjoining soil of his neighbor imminent through loss of necessary support, an injunction will lie to prevent further excavation. Farrand v. Marshall, 19 Barb. 380 (N. Y. 1853) *aff'd* 21 Barb. 409 (N. Y. 1855). *Contra* Lasala v. Holbrook 4 Paige 169 (N. Y. 1833) wherein the court dissolved an injunction granted to prevent excavations because of imminent danger of damage to the adjoining buildings. Most cases, however, restrict such injunctive relief to the situation where the excavation has already caused damage and continuing excavation will cause more. Trowbridge v. True, 52 Conn. 190, 52 Am. Rep. 579 (1884); Simon v. Nance, 45 Tex. Civ. App. 480, 100 S. W. 1038 (1907). It is not necessary for a wrongdoer to be the owner of the land upon which he excavates. An action will lie if he is a lessee. Mamer v. Lussem, 65 Ill. 484 (1872); or licensee, Gilmore v. Driscoll, *supra;* Wahl v. Kelly, 194 Wis. 559, 217 N. W. 307 (1928). Nor is it necessary that the land, whereon the act depriving another of lateral support to his land is done, immediately adjoin the injured party's land. An action will lie against a wrongdoer excavating on any land within the "natural zone of support." Home Brewing Co. v. Thomas

with all the foresight, ingenuity and care that human experience can dictate,[3] the theory of the action being that A has a natural right, attaching to, and by virtue of, the ownership of his land.[4] A cannot legally be deprived of the natural support of his land by any act of an adjoining owner. Hence, his right of lateral support gives rise to an absolute liability for loss or damage to the adjoining land without proof of negligence or want of care.[5]

Improved Land and the Doctrine of Prete v. Cray

Assume that A constructs a house or other improvement[6] upon this unimproved lot; that B thereafter excavates and as a result A's land subsides causing damage to his building. What are the rights of the parties?

It is substantially settled law that if the weight of the improvement caused or contributed to the subsidence there is no liability for damage to either

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Colliery Co., 274 Pa. 56, 117 Atl. 542 (1922); Murray v. Pannaci, 64 N. J. Eq. 147, 53 Atl. 595 (1902).

3. ". . . for any injury to his soil resulting from the removal of the natural support to which it is entitled, by means of excavation on an adjoining tract, the owner has a legal remedy in an action at law against the party by whom the work has been done. . . . This does not depend upon negligence or unskillfulness, but upon the violation of a right of property which has been invaded and disturbed." Foley v. Wyeth, 84 Mass. 131, 133 (1861); Braun v. Hamack, 206 Minn. 572, 289 N. W. 553 (1940).

4. Some controversy exists as to whether the right to lateral support is a natural right incident to the ownership of land, Lasala v. Holbrook, 4 Paige 168 (N. Y. 1833); Levine v. City of New York, 290 N. Y. Supp. 953 (2d Dep't 1936); or an easement "arising by natural right", WALSH, REAL PROPERTY (2d ed. 1927) 647; or a right "analogous to" an easement, Carrig v. Andrews, 127 Conn. 403, 407, 17 A. (2d) 520, 522 (1941). The better view would seem to be the first. There is no benefit or interest in another's property, but rather a right of the owner to have his land left in its natural state. The exact term to be applied to the right is academic in the case of damages to land in its natural state, caused by reason of the deprivation of support by an adjoining owner. As Professor Walsh states ". . . the term applied to [lateral support] is of no great importance, [its] nature being understood." Walsh, *loc. cit. supra.*

5. Levine v. City of New York, 290 N. Y. Supp. 953 (2d Dep't 1936). The duty imposed by the right to lateral support is therefore a negative one, a duty not to do any act which will impair one's neighbor's lateral support, rather than an affirmative duty to maintain it. In a recent case where natural forces caused excavations on defendant's land as a result of which plaintiff's land was deprived of lateral support it was held that defendant was not liable, being under no duty to refurnish lateral support removed by an agency beyond his control. Carrig v. Andrews, 127 Conn. 403, 17 A. (2d) 520 (1940).

6. Gildersleeve v. Hammond, 109 Mich. 431, 67 N. W. 519 (1896); 3 TIFFANY, REAL PROPERTY (3d ed. 1939) § 753. Shrubbery and fences are improvements [Gilmore v. Driscoll, 122 Mass. 199 (1877)] as well as a fruit orchard [Langhorne v. Turman, 141 Ky. 809, 133 S. W. 1008 (1911)]. *See also* 2 RESTATEMENT, TORTS § 363, Comment b, for a discussion of the meaning of "natural condition of land". *Cf.* Noel, *Nuisances From Land In Its Natural Condition* (1943) 56 HARV. L. REV. 772

land or building in the absence of negligence.[7] Likewise, if the improvement did not cause or contribute to the subsidence there is liability for such damage to the land in so far as it is in its natural state, irrespective of negligence.[8] Conflict arises upon the question as to whether in the latter case there is also absolute liability for the injury to the buildings and improvements.[9]

The case of *Prete v. Cray*[10] presented the last question. The defendant was the treasurer of the City of Providence, R. I., which had, as the court held, in the exercise of a corporate function, dug trenches in the street upon which the plaintiff's house and lot abutted. This land rested on quicksand which, despite excessive precautions by the city, flowed into the trench and caused the plaintiff's land with the buildings thereon to subside. The weight of the buildings in no way contributed to the sinking. The Supreme Court, in affirming a judgment for the plaintiff, held, one judge dissenting, that the defendant, although there was concededly no negligence proven, was liable for damage to both land and superstructures. The court based its decision upon the theory that when the land subsided of its own weight as a result of the defendant's act, the plaintiff's natural right to lateral support had been infringed. Being guilty therefore of this wrong, the city was liable for all the natural and probable consequences of it, which included the injury to the building.[11]

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7. The right is one to the support of land in its natural state. It would follow that damage proximately caused by reason of the land not being in its natural state, would not be recoverable as a violation of the right since the right could not then exist by very definition. *See* Young v. Mall Investment Co., 172 Minn. 428, 215 N. W. 840 (1927); Neyman v. Pincus, 82 Mont. 467, 267 Pac. 805 (1928).

8. Gildersleeve v. Hammond, 109 Mich. 431, 67 N. W. 519 (1896), restated in Bissell v. Ford, 176 Mich. 69, 141 N. W. 860 (1913); Wahl v. Kelly, 194 Wis. 559, 217 N. W. 307 (1928). The reasoning behind this rule is apparent. If the duty is to land in its natural state, and if no artificial construction or improvement has added to the lateral pressure, the least recovery to be allowed must include damage to the land in so far as it is in its natural state.

9. The right of lateral support to land may be negatived by contract, express or implied, or by the relation of parties. If land is conveyed with the reservation that the grantor may dig upon the adjoining land, such reservation will destroy the grantee's right to lateral support. Ryckman v. Gillis, 57 N. Y. 68 (1874). The relation of landlord and tenant may similarly curtail this right. In Beauchamp v. Excelsior Brick Co., 143 App. Div. 48, 127 N. Y. Supp. 686 (2d Dep't 1911) the defendant leased land to the plaintiff, adjoining a pit dug by the defendant. The plaintiff knew of this pit which was not increased in depth after the making of the lease. The court denied the plaintiff recovery for the subsidence which damaged the leased property.

10. 49 R. I. 209, 141 Atl. 609 (1928).

11. ". . . and under the general principle that a wrongdoer must make compensation in damages for all the direct results of his wrongdoing, B is entitled to recover compensation for the injury to his building solely because it is a part of his damage for the actionable wrong which A has committed." Prete v. Cray, 49 R. I. 209, 214, 141 Atl. 609 (1928).

The court in deciding this case said that the rule which they were enunciating had been developed by a line of English cases.[12] These cases squarely held the proposition that a landowner may recover damages for consequential injuries to his buildings when his land has been deprived of lateral support, provided that the improvements did not contribute to the subsidence of the land. *Brown v. Robins*,[13] one of the cases cited, was clearly in point on its facts. The plaintiff's land had subsided by reason of mining operations conducted by the defendant on adjoining land. The plaintiff recovered for the damage to his buildings which was caused by the subsidence. There was no finding of negligence. The court said, "But the moment the jury found that the subsidence of the land was not caused by the weight of the superincumbent buildings, the existence of the house became unimportant in considering the question of the defendant's liability. [It] resolves itself into this, that the land was injured; and the house was considered by the learned Judge solely with reference to the amount of the damages."[14]

A number of American decisions were cited, two of them New York cases.[15] Of the others, only two were in point.[16] *Prete v. Cray*, then, may not be said

12. Prete v. Cray, 49 R. I. 209, 213, 141 Atl. 609 (1928). *Accord:* 11 HALSBURY'S LAWS OF ENGLAND (2d ed.) § 640; JONES, EASEMENTS (1898) § 620.

13. [1859] 4 H. & N. 186, 193, 157 Eng. Rep. Repr. 809.

14. [1859] 4 H. & N. 186, 193, 157 Eng. Rep. Repr. at 812; *Accord:* Stroyan v. Knowles, 6 H. & N. 454, 158 Eng. Rep. Repr. 186 (1861).

15. Riley v. Continuous Rail Joint Co., 110 App. Div. 787, 97 N. Y. Supp. 283 (3d Dep't, 1906), *affirmed* without opinion, 193 N. Y. 643, 86 N. E. 1132 (1908) which was some authority for the proposition and will be subsequently discussed, and Booth v. Rome, W. & O. T. R. R., 140 N. Y. 267, 35 N. E. 592 (1893) which had no bearing on the subject, the question being whether damages could be recovered for injury to a building caused by a blasting concussion, in the absence of negligence. The court in discussing the principle of *damnum absque injuria* adverted to the doctrine of lateral support by way of example and said that there could be no recovery, for instance, where as a result of excavation, conducted in a careful manner the buildings of an adjoining owner are injured "provided the weight of the building caused the land on which it stood to give way." *Id.* at 275, 35 N. E. at 595. It must be noted that the sentence quoted above is pure dictum, and was repeated by way of analogy in a case which involved no problem of lateral support whatsoever.

16. This fact was pointed out in the dissenting opinion. 49 R. I. 209, 223, 141 Atl. 609, 615 (1928). The two American decisions which were in point, besides the Riley case were: Stearns' Ex'r. v. Richmond, 88 Va. 992, 14 S. E. 847 (1892) and Farnandis v. Great Northern R. Co., 41 Wash. 486, 84 Pac. 18 (1906). The remainder of the American cases cited, like Booth v. Rome, W. & O. T. R. R., 140 N. Y. 267, 35 N. E. 592 (1893), were blasting cases in which the analogy to lateral support is remote.

Prete v. Cray has been cited and followed with approval in *Bator v. Ford Motor Co.*, 269 Mich. 648, 257 N. W. 906 (1934) and *Muskatell v. City of Seattle*, 10 Wash. (2d) 221, 116 P. (2d) 363 (1941).

In *Welsh Mfg. Co. v. Fitzpatrick*, 61 R. I. 359, 200 Atl. 981 (1938) the court, while dis-

to have introduced an entirely new principle into the law of lateral support in the United States,[17] but it was the first case which clearly expounded the rationale of the doctrine for which it stood. It was, and still is, the rule of the majority that there can be no recovery for damage to buildings in the absence of negligence.[18]

The court said that there could be another basis for allowing recovery (if a different form of action were brought), namely, the City's liability for drawing off the *subjacent* support. A recovery based on this line of reasoning would be in accord with the majority view.[19]

The Doctrine of Prete v. Cray and the Law of New York

As stated above, *Prete v. Cray* relied on the case of *Riley v. The Continuous Rail Joint Co.*[20] which on similar facts held the same proposition. The plaintiff's land slid into an excavation made by the defendant, an adjoining owner, and the plaintiff's buildings were injured by the subsidence of the land. The court allowed damages for the decrease in the value of the realty or for the cost of the repair, whichever was the smaller sum. The damage sustained by the buildings was included in the amount recovered. Thus, upon its facts, the case is in accord with *Prete v. Cray*. While the court did say ". . . there is no evidence in this case that the buildings . . . were a burden thereon in any way

tinguishing this case from *Prete v. Cray,* quotes from the *Prete* case and reaffirms the holding of that case as the law of Rhode Island. When the *Welsh* case was up on appeal the second time, 61 R. I. 469, 1 A. (2d) 95 (1938), the court again stated that *Prete v. Cray* is still the law of Rhode Island and that it will be followed should similar circumstances arise. The point on which the *Welsh* case was distinguished from *Prete v. Cray* was that in the former case there had been no clear proof that the improvement had not added to the lateral pressure and did not contribute to the subsidence of the land in any other way.

17. Ladd v. Philadelphia, 171 Pa. St. 485 (1895); *see also* Stearns' Ex'r v. Richmond, 88 Va. 992, 14 S. E. 847 (1892); Farnandis v. Great Northern R. Co., 41 Wash. 486, 84 Pac. 18 (1906).

18. Scranton Coal Co. v. Graff Furnace Co., 289 Fed. 305 (C. C. A. 3d, 1923); Moellering v. Evans, 121 Ind. 195, 22 N. E. 989 (1889); Altoona Concrete Const. Co. v. Cooper, 231 Pa. 557, 80 Atl. 1047 (1911); Triulzi v. Costa, 296 Mass. 24, 4 N. E. (2d) 617 (1936). It must be stated, however, that in many cases cited as *contra* to *Prete v. Cray* the problem as to whether the land would have subsided even had there been no buildings thereon is not discussed. *See also* (1929) 77 U. OF PA. L. REV. 405 for the authorities in accord with or contra to the rulings in Prete v. Cray and an evaluation of their soundness; (1935) 19 MINN. L. REV. 587. *Cf.* Comment (1940) 14 TEMPLE L. Q. 243.

19. Cabot v. Kingman, 166 Mass. 403, 44 N. E. 344 (1896); *see also* Forbell v. City of New York, 164 N. Y. 522 (1900); Comment (1935) 82 U. OF PA. L. REV. 377. The reason for the more liberal rule in respect to the withdrawal of subjacent support is that such a withdrawal constitutes a trespass upon the wronged party's land.

20. 110 App. Div. 787, 97 N. Y. Supp. 283, *aff'd,* 193 N. Y. 643, 86 N. E. 1132.

increasing the lateral pressure at the line between the lands of plaintiff and defendant",[21] it did not discuss the reasons for making a holding which was so novel. It occupies a somewhat indecisive position in the New York law since it was affirmed by the Court of Appeals without opinion.[22] At the very least it clarified the confusion as to whether there was any absolute right to lateral support whatsoever in this state[23] and on its facts, is inconsistent with earlier cases holding that there could be no recovery for damage to buildings even where they did not increase the lateral pressure.[24]

The court in *Prete v. Cray* raises a nice question whether its ruling, allowing for damages to the buildings and improvements, relates to the matter of right or remedy, whether it changes the basic liability or affects only the extent of the recoverable damages. The court contends that its rule is merely one which applies the general rule that "a wrongdoer must make compensation in damages for all the direct results of his wrongdoing. . . ."[25]

Does *Prete v. Cray* change the fundamental *right* of lateral support, or does it merely apply "the general legal principle" allowing the injured party to recover all consequential damages immediately flowing from the act of wrongdoing? True, as the court states, the damages recoverable under its holding are immeasurably enlarged, but this concession does not prove that the enhancement of damages is unrelated to the essence of the natural right of lateral support. Consider the language of cases *contra* which limit the natural right

21. 110 App. Div. 787, 788, 97 N. Y. Supp. 283.

22. See *infra,* note 28 for the value of judicial affirmance without opinion.

23. In Radcliff's Executors v. The Mayor etc., of Brooklyn, 4 N. Y. 195 (1850) excavation operations in grading a street, conducted by the City of Brooklyn, resulted in the removal of an embankment which constituted a natural support to adjoining land of the plaintiff. As a consequence, a portion of the supported land subsided. The court held the corporation was not liable, and appeared to base its decision upon a denial of any natural right to lateral support, saying, "Nor will a man be answerable for the consequences of enjoying his own property in the way such property is usually enjoyed, unless an injury has resulted to another from the want of proper care or skill on his part." *Id.* at 200.

But in Farrand v. Marshall, 19 Barb. 380, *aff'd,* 21 Barb. 409 (N. Y. 1855) the right to lateral support was upheld and the *Radcliff* case was distinguished on the ground that it involved a municipal corporation engaged in a governmental function and was therefore not liable for the torts of its agents.

24. Panton v. Holland, 17 Johns. 92 (N. Y. 1819); People *ex rel.* Barlow v. The Canal Board, 2 Thomp. & C. 275 (N. Y. 1873). These cases were not expressly overruled; however, the court did discuss whether or not the defendant was liable for damage to the buildings. The *Riley* case, however, remains unsatisfactory not because there is uncertainty as to what was held, but because there is uncertainty as to why the court did so sold. There was no clear cut discussion of the exact nature and extent of the right of lateral support, and the recoverability of consequential damages for the breach of that right, such as was expounded in *Prete v. Cray.*

25. Prete v. Cray, 49 R. I. 209, 214, 141 Atl. 609, 612 (1928).

of lateral support to land in its unimproved condition. In *Gilmore v. Driscoll,* the court said:

"But this *right* of property is only in the land in its natural condition, and the damages in such an action are limited to the injury to the land itself, and do not include any injury to buildings or improvements thereon. While each owner may build upon and improve his own estate at his pleasure, provided he does not infringe upon the natural right of his neighbor, *no one can by his own act enlarge the liability of his neighbor for an interference with this natural right.*"[26]

Thus stated, it appears that the dominant American rule incorporated a limitation of damages as a part of the property *right.*[27] This limitation cannot accurately be dismissed as a mere collateral item of damages. True, this restricted *right* may be indefensible, as is later conceded, but it is highly questionable to define the enhanced recovery as an item determinable by the law governing consequential damages. The peculiar nature of the common-law right of lateral support indicates clearly that a limitation of recovery is imposed as an essential part of this right, whether wisely or unwisely. It seems that the over-all consequences of *Prete v. Cray* are to change materially the fundamental right of natural support by removing the basic qualifications that such right only applies when and if the land is in an unimproved condition. Whether the rule of *Prete v. Cray* smacks of *right* or *remedy,* it is concededly a substantial change, and one that calls for careful consideration before acceptance or rejection.

Conclusion

While the New York decisions do not appear to be opposed to the principles of *Prete v. Cray,* it is not definitely certain that New York would allow a recovery for injury to buildings caused by the withdrawal of lateral support, where the buildings in no way increased the lateral pressure. The reason for this uncertainty is that the Court of Appeals has not as yet made any affirmative and reasoned statement as to what course it would follow if the question were squarely presented to it. The *Riley* case is of doubtful value being

26. Gilmore v. Driscoll, 122 Mass. 199, 201 (1877). (Italics inserted). *Accord:* Scranton Coal Co. v. Graff Furnace Co., 289 Fed. 305 (C. C. A. 3d, 1923); Maellering v. Evans, 121 Ind. 195, 22 N. E. 989 (1889); Cooper v. Altoona Concrete Const. Co., 231 Pa. 557, 80 Atl. 1047 (1911); Triulzi v. Costa, 296 Mass. 24, 4 N. E. (2d) 617 (1936). *Cf.* "That such is the true principle—that is, that it is the subsidence and not the pecuniary loss which grounds the cause of action—is, I think, apparent from those decisions which establish that, on proof that the weight of a newly erected house has not contributed to the subsidence, its value may be recovered by way of damage consequent on the original injury in an action against the adjoining owner who has withdrawn the support of the adjacent land." Collins, J., in Attorney General *ex rel.* v. Conduit Colliery Co., [1895] 1 Q. B. 301, 312 (1894) quoted in Prete v. Cray, 49 R. I. 209, 214, 141 Atl. 609, 612 (1928).

27. Note, for example, that substantial damage is a necessary incident in the plaintiff's cause of action. *Supra,* notes 1, 4.

affirmed without opinion, and therefore, it would not necessarily be followed by the Court of Appeals.[28]

The problem resolves itself into this: since it is not certain whether New York would follow *Prete v. Cray*, should New York follow it? The only argument against the application of the rule of this case is the one put forth by the dissenting judge.[29] The rationale of this argument is that by allowing damages for injuries to buildings, there would be a tendency to discourage the improvement of land when it adjoined an already improved parcel because of the increase of the hazard of a large recovery of damages. This is hardly convincing in view of the fact that as the law in the majority of jurisdictions now stands, the one who first improves his property bears the risk of the adjacent owner's excavations, and yet this risk has not deterred landowners from improving their property.[30] What difference does it make whether the extraordinary hazard is placed on the excavating owner while he is improving his property (as in *Prete v. Cray*), or it is assumed by the adjoining owner after he has improved his property (as in *Gilmore v. Driscoll*).

Certainly, when we view the principle of the instant case in the light of effecting justice between the parties, there can be no doubt that this view is the

28. "Affirmance by this court without opinion does not mean that we have adopted the opinion of the court below in its entirety." Adrico Realty Corp. v. New York, 250 N. Y. 29, 44, 164 N. E. 732, 737 (1928). "Two decisions in the former General Term are cited by the adverse parties at bar. They are in conflict, but, although the actual determination of one was affirmed without opinion by this court [Court of Appeals], neither controls the rule to be applied by us. [Citations omitted]. We are free to accept or reject the argument of either opinion." Joseph v. Schatzkin, 259 N. Y. 241, 245, 181 N. E. 464, 466 (1932). For a discussion of this subject *see:* Marcus, *Affirmance Without Opinion* (1937) 6 FORDHAM L. REV. 212.

29. Rathbun, J., dissenting in Prete v. Cray, 49 R. I. 209, 217, 141 Atl. 609, 613 (1928).

30. Several states have enacted statutes requiring the excavator to give the adjoining landowner adequate notice of the proposed operations so that he may take the proper steps to protect his property. Ohio Code (Throckmorton, 1940) §§ 3782, 3783; S. D. Comp. Laws (1939) § 51.0702; N. D. Comp. Laws (1913) § 5354. An arbitrary excavation-depth has been set by some statutes at which point the loss in building damage shifts from the building owner to the excavator. Cal. Civ. Code (1941) § 832 (12 ft.); Ohio Code (Throckmorton, 1940) §§ 3782 (9 ft); N. J. S. A. (1940) 46:10-1 (8 ft). The problem becomes more acute in the larger cities because of the proximity of the building. In several cities excavation-depths have been regulated by local ordinance. An example of this type of legislation is the local ordinance of the City of New York which provides that the adjoining landowner must protect his own building if the excavation is ten feet or less in depth, and if more than ten feet deep then the excavator must be afforded a license to enter upon the adjoining land and protect the building; or if no license is afforded, the adjoining landowner must protect his own building. Administrative Code of the City of New York (1937) § C26-385.0 subd. a-b. *See also* Cleveland Mun. Code, 1924, § 1535 (c) (d) (9 ft.); Los Angeles Mun. Code, 1936, § 91,149 (12 ft.); Pittsburgh Mun. Dig., 1938, § 923(2) (15 ft). *See* POWELL, CASES ON POSSESSORY ESTATES 381 *et seq.* (2d ed. 1943).