

# TITLE ISSUES

## ILLINOIS LAW RELATING TO TREE ENCROACHMENTS

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Most real estate attorneys and title insurers, when discussing issues concerning encroachments as disclosed by a survey, think in terms of buildings, sheds, or fences. However, there is a whole body of law relative to encroachments of trees onto adjoining property. In today's urban and litigious society, it would not be uncommon for the practicing attorney to one day become embroiled in a neighborhood dispute concerning the encroachment of a tree onto or from a client's property. This article will summarize Illinois law concerning this subject.

### Boundary Tree Encroachments

There are three types of tree encroachments. The first is an encroachment of the tree itself onto the adjoining land. This was the issue in Ridge v. Blaha, 166 Ill. App.3d 662, 520 N.E.2d 980 (2nd Dist., 1988). In Ridge, the court allowed the issuance of an injunction, restraining the defendant from destroying a tree located on the boundary line between two parcels of land. The court stated the general rule that a tree growing on such a boundary line is the common property of the adjoining owners as tenants in common. Thus, neither party would have the right to cut, injure, or destroy the tree without the consent of the other.<sup>1</sup> This is the case, even if the majority of the trunk of a tree is located on one owner's land.<sup>2</sup>

The court also noted that the location of the tree is determined by the location of the trunk and not the roots or branches; specifically, the exact location of the tree *vis a vis* the adjoining land is determined at the point the tree emerges from the ground. 166 Ill. App. 3d at 666, 520 N.E.2d at 982. Thus, the fact that a tree's roots alone cross a boundary line is insuffi-

cient to create common ownership, even though the tree derives nourishment from both parcels of land. Thus, one who goes onto a neighbor's land in order to cut down a tree that straddles the boundary line between two properties could be guilty of trespass.<sup>3</sup>

For a case concerning the possible negligence of a municipality in allowing the continued existence of bushes and an evergreen at a street intersection, see First National Bank in DeKalb v. City of Aurora, 41 Ill. App.3d 326, 353 N.E.2d 309 (1976).

### Encroachments of Roots or Branches

The second and third type of encroachment consists of tree roots or tree branches that encroach onto adjoining property. Some cases leave the landowner to the common law remedy of self-help in regards to encroaching vegetation from adjoining property.

E.g., in Merriam v. McConnell, 31 Ill. App.2d 241, 175 N.E.2d 293 (1st Dist., 1961), the court refused to enjoin the defendant<sup>4</sup> from growing box elder trees on his property, even though the plaintiff alleged that the box elder bugs emanating from the trees were a private nuisance. The court, commenting on a Massachusetts case, stated:

The Court thought it wiser to adopt the common law practice of leaving the neighbor to his own protection if harm results to him from this exercise of another's right to use his property in a rea-

<sup>1</sup> Ridge indicates, however, that an adjoining landowner could trim the branches of a "boundary tree" that overhang his property, as long as the trimming would not interfere with the use of the tree by the other landowner. See further discussion, infra; see also 2 C.J.S., Adjoining Landowners sec. 55; 1 Am Jur 2d Adjoining Landowners sec. 22.

<sup>2</sup> See, e.g., Kimber v. Burns, 253 Ill. 343, 97 N.E. 671 (1912); here, a tree was eight inches on the plaintiff's lot, and 22 inches on defendant's lot, yet the court held that the defendant wrongfully removed the tree.

<sup>3</sup> Kimber v. Burns, *supra*; see also Simpson v. City of Gibson, 164 Ill. App. 147 (3rd Dist., 1911).

sonable way, than to subject that other to the annoyance, and the public to the burden of actions at law, which would be likely to be innumerable and, in many instances, purely vexatious. 31 Ill. App.2d at 245, 175 N.E.2d at 295.

The Ridge court also gave its seal of approval to self-help: "...[I]t would not have been proper to restrain defendants from trimming overhanging branches which cause them damage." 166 Ill. App. 3d at 669, 520 N.E.2d at 984 (emphasis added). Note, though, that the court was silent as to whether or not self-help is allowed when the tree branches are not damaging the adjacent owner's land. However, the court did note with approval Robinson v. Clapp, 65 Conn. 365, 32 A. 939 (1895) which did not require damage as a condition precedent to self help. 65 Conn. at 380, 32 A. at 942. Furthermore, the court in Simpson stated that if a tree were located on private property, but the branches hung over the street, the city would have the right to remove the tree branches, without compensation to the adjoining owner, if the branches "damaged the street or were an inconvenience to the public in the use of the street." 164 Ill. App. at 148. On the other hand, while Miriam, as noted above, does not state outright that damages is a prerequisite for self-help, it does speak of one exercising self-help "if harm results to him." 31 Ill. App.2d at 245, 175 N.E.2d at 295.

What appears to be dispositive of the issue is noted in 2 C.J.S. Adjoining Landowners sec. 54; it seems clear that the landowner has the right to remove tree encroachments whether they cause damage or not:

Even though a landowner has sustained no injury by the intrusion on or over his land of the branches or roots of a tree or plant on adjoining land, he may cut off the offending branches at the boundary line.<sup>4</sup>

The court in Bandy v. Bosie, 132 Ill. App.3d 832, 477 N.E.2d 840 (4th Dist., 1985) noted Merriam with approval. In Bandy, trees on the defendant's lot dropped sap and leaves on the plaintiff's property, and, roots from these trees entered and damaged the plaintiff's sewer line, causing water to back up in his basement. The plaintiff sought injunctive relief and damages, claiming the trees were a nuisance. The court in Bandy refused to grant relief and damages, stating that:

We do not consider trees that drop leaves on neighboring lands or trees that send out roots that

migrate to neighboring lands and obstruct drainage to necessarily constitute a nuisance. ...[U]nder the circumstances here, to permit the falling of leaves or the migration of the roots to give rise to injunctive relief would unduly promote litigation over relatively minor matters. Usually, the damage from the offending leaves would be minimal, and the accurate locating of the source of the offending roots would be difficult and expensive. 132 Ill. App.3d at 834, 477 N.E.2d at 842.<sup>5</sup>

Damage was not so minimal in Mahurin v. Lockhart, 71 Ill. App.3d 691, 390 N.E.2d 523 (5th Dist., 1979), where the court reached a different conclusion. Here the plaintiff sought to recover damages for personal injuries sustained when a dead branch extending over his property fell and struck him. The court discussed the traditional rule of nonliability for dangerous conditions arising out of purely natural causes. This rule developed at a time when land was mostly unsettled and uncultivated. As the landowner was unable to remedy all of the dangerous conditions arising out of purely natural causes, he was thus shielded from liability out of necessity.

The court stated that while there may be reasons to continue this traditional rule in rural areas, there is little or no reason to apply it in urban or suburban areas, as it would not be unduly burdensome for the property owner to inspect his property and take reasonable precautions against dangerous natural conditions. Thus, the court held:

[A] landowner in a residential or urban area has a duty to others outside of his land to exercise reasonable care to prevent an unreasonable risk of harm arising from defective or unsound trees on the premises, including trees of purely natural origin. 71 Ill. App. 3d at 693, 390 N.E.2d at 524-525.<sup>6</sup>

Although an appellate case, Chandler v. Larson, 148 Ill. App.3d 1032, 500 N.E.2d 584 (1st Dist., 1986) is probably the leading Illinois case dealing with these types of encroachments, as several of the previously-mentioned cases are discussed and distinguished. In Chandler, the court was faced with the issue of whether or not an urban landowner can state a cause of action for negligence where damage to his property results from the growth of roots of a tree which is located on the defendant's adjoining property. Here, the roots extensively damaged the plaintiff's garage. The court ruled that the defen-

<sup>4</sup> See also Bonde v. Bishop, 112 Cal. App.2d 1, 245 P.2d 617 (1952); Cannon v. Dunn, 145 Ariz. 115, 700 P.2d 502 (1985).

<sup>5</sup> But see Olson v. Westerberg, 2 Ill. App.2d 285, 119 N.E.2d 413 (1st Dist., 1954) for a contrary result. (abstract only); see also 2 C.J.S. Adjoining Landowners sec. 54.

<sup>6</sup> Note that the court in Bandy cited Mahurin with approval, stating that "[t]he Mahurin decision appears to be in line with a trend to place greater responsibility upon the owner of the lot where the tree is located." 132 Ill. App.3d at 833-834, 477 N.E.2d at 841. The court went on, though, to find in favor of the defendant, stating that Mahurin was distinguishable from Bandy in that in the latter case there was no allegation that the trees constituted a danger or that they were negligently maintained.

dant, an owner of urban property, owed adjoining landowners a duty of reasonable care, and that the plaintiff's amended complaint stated a good cause of action for negligence.

The court distinguished Merriam v. McConnell by noting that in Merriam the plaintiff did not allege negligent conduct on the part of the defendant. It notes that the court in Merriam stated:

The law is that defendants themselves would have to be guilty of some carelessness, negligence or willfulness in bringing, or helping to bring, about a harmful condition in order to entitle plaintiff to the relief sought in this particular prayer. The complaint does not allege that they were guilty in any of these ways. 148 Ill. App.3d at 1036, 500 N.E.2d at 587.

The court in Chandler also stated that "[i]n the present case, we have two adjoining owners of city lots, and consequently, the Merriam decision would not be directly applicable." 148 Ill. App.3d at 1038, 500 N.E.2d at 588.<sup>7</sup>

The court also discussed Bandy, commenting that this case involved parties who owned adjoining city lots. In this respect

the case was similar to Chandler. However, the court distinguished the two, noting that the plaintiff in Chandler, unlike the plaintiff in Bandy, made an allegation of negligence on the part of the defendant.

The Chandler court cited with approval the holding in Mahurin. It noted that in both cases the plaintiffs and defendants owned adjoining city lots.<sup>8</sup> Also, the plaintiffs in both cases stated causes of action for negligence in their complaints. Consequently, the court in Chandler commented:

The Mahurin opinion is in agreement with the trend to place greater responsibility upon the owner of the property where the tree is located. \* \* \* ...[T]he present matter is most analogous to the factual situation in Mahurin v. Lockhart. 148 Ill. App.3d at 1037–1038, 500 N.E.2d at 587–588.

There are only a handful of Illinois cases that deal with tree encroachments. Nonetheless, it is evident that these cases contain a myriad of issues. It is possible that the general practitioner will never have to deal with a client who has a tree encroachment problem. However, in the event that he does, it is hoped that this article will provide some insight.

<sup>7</sup>As noted above, Merriam appeared to involve adjoining landowners living in a wooded, suburban setting.

<sup>8</sup>Note, though, that the holding in Mahurin was not predicated on the fact that the lots were in an urban setting; indeed, the Mahurin court stated just the opposite: "While there are many reasons to continue the traditional rule [of nonliability] in regions that are largely rural, there is little or no reason to apply it in urban and other developed areas. \* \* \* [We] hold that a landowner in a residential or urban area has a duty to others outside of his land to exercise reasonable care. ... (emphasis added). 71 Ill. App.3d at 693, 390 N.E.2d at 524–525.