# Possible Surveyor Liability Relating to Tree Encroachments

By Richard F. Bales



Most real-estate attorneys, title insurers, and surveyors, 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 relating to encroachments of trees onto adjoining property. In today's urban and litigious society, it would not be uncommon for the surveyor to one day become embroiled in a neighbourhood dispute concerning property. This article will first summarize applicable case law concerning this subject. While much of this case-law is from Illinois, the issues discussed are appropriate in all jurisdictions. Secondly, the article will discuss the possible surveyor liability concerning tree encroachments.

## 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[1]. This is the case, even if the majority of the tree trunk is located on one owner's land.[2]

The court also noted that the location of the tree is determined by the trunk's location 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. 16 Ill. App. 3d 666, 520 N.E.2d at 982. Thus, the fact that a tree's roots alone cross a boundary line is insufficient to create common ownership, even though the tree derives nourishment from both parcels of land. Consequently, one who goes onto a neighbour's land in order to cut down a tree that straddles the boundary line between two properties could be guilty of trespass.[3]

> *"... the fact that a tree's roots alone cross a boundary line is insufficient to create common ownership, ..."*

## Encroachments of Roots or Branches

The second and third types of encroachments consist 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 regard to encroaching vegetation from adjoining property. For example, in *Merriam v. McConnell* 31 Ill. App.2d 241, 175 N.E.2d 293 (1st Dist., 1961), the court refused to enjoin the defendant 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 reasonable 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: "It 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).[4] 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.

What appears to be dispositive of the issue as to damage as a condition precedent to self-help 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."[5]

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 the roots 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 neighbouring lands or trees that send out roots that migrate to neighbouring lands and obstruct drainage to necessarily constitute a nuisance.....Under the circumstances here, to permit the falling 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.[6]

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 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.E2d at 524-525.[7]

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 that is located on the defendant's adjoining property. Here, the roots extensively damaged the plaintiff's garage. The court ruled that the defendant, 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 wilfulness 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 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[8]. 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 term to place greater responsibility upon the owner of the property where the tree is located ***...The 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.

At some point in all this an attorney for one of the neighbours may ask himself: "Is the surveyor liable for not showing the tree branch or root encroachment on the survey of my client?"

*"Does a tree branch encroaching onto a neighbour's property constitute 'evidence of possession' sufficient to warrant disclosure on a survey?"*

## Possible Surveyor Liability

The "Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys" were adopted by ALTA and the American Congress on Surveying and Mapping in 1992. While these national survey standards are designed to be used by surveyors when surveying any type of property, they are usually used only when surveying commercial, industrial, or larger vacant and residential properties.

Section 5 of these standards details what information should be shown on the plat of survey. Paragraph 5(i) deals with encroachments, which are set forth as "encroaching *structural* appurtenances and projections." (Emphasis added.) Thus, a surveyor's duty under these standards applies only to such encroachments. Since a tree branch is clearly not something of a "structural" nature, it does not appear that a surveyor would be liable under this paragraph for failing to show an encroaching tree branch on his plat of survey.

The only other applicable paragraph would be paragraph 5(f), which requires the surveyor to show "the character of any and all evidence of possession" on his survey. Thus, the question arises: Does a tree branch encroaching onto a neighbour's property constitute "evidence of possession" sufficient to warrant disclosure on a survey?

Possibly not, especially if one analyzes the above in terms of the elements of adverse possession. Note that it is true that a landowner owns at least as much of the space above the ground that he can occupy or use in conjunction with the land[9]. However, in order to establish title via adverse possession, there must be, among other things, some unequivocal act of ownership upon the land[10]. A tree branch extending over a neighbour's land (even for at least 20 years, the requisite statutory period in Illinois)[11] does not appear to qualify as an "unequivocal act of ownership."[12] Thus, any argument based on surveyor liability vis-a-vis paragraph 5(f) hardly seems tenable.[13]

Or does it? Paragraph 5(f) refers to *any and all* evidence of possession. One might argue that "adverse possession" is just one of several types of possession. The fact that there may not be adverse possession of a portion of a neighbour's land does not preclude the fact that a tree branch could constitute some other type of possession sufficient to warrant disclosure on a survey. However, it is possible that the doctrine of self-help would allow the surveyor to prevail in any litigation.

Surveyors in Illinois rarely use land title survey standards when performing surveys of one to four residential properties. While most of these surveys are not "certified" to a specific standard, it is probably safe to assume that such surveys are performed to a standard closely approximating the "boundary survey" standards adopted by the Illinois Professional Land Surveyors Association.[14]

Section "I" of these standards describes the field procedures to be undertaken by the surveyor. Paragraph I(d) states that "Any and all significant, visible encroachments, conflicts, protru-

sions and evidence of possession or prescriptive rights along or across boundaries must be physically located."

Section "J" sets forth those items that should be shown on the completed plat of survey. Paragraph I(n) directs the surveyor to "show any encroachments/occupation evidence."

> *"... one might argue that the surveyor could be liable for the failure to disclose any encroaching tree branches on his boundary survey."*

The land title survey standards require the surveyor to disclose only those encroachments that are structural in nature. The boundary survey standards contain no such limitation. The land title survey standards require the surveyor to note "any and all evidence of possession" on his survey, while the boundary survey standards require that the broader "any.....occupation evidence" be shown on the survey. Thus, one might argue that the surveyor could be liable for the failure to disclose any encroaching tree branches on his boundary survey. However, as noted earlier, the doctrine of self-help might allow the surveyor to escape liability in any litigation.

Generally speaking, the surveyor is only charged with showing on his plat of survey those items that would be disclosed by a surface inspection of the land.[15] Consequently, the surveyor would not be liable for failing to show on his plat any encroaching underground tree roots.

Some surveyors believe that they have no obligation to show trees and other vegetation on their plats of survey. Their rationale for this is that they feel they are only responsible for showing man-made "improvements" on their plats. However, as noted above, survey standards do not contain any such limitation.

Other surveyors believe that only "artificial" vegetation, such as trees planted by homeowners, should appear on a plat of survey, that "natural" plant life, such as trees growing "wild," need not be shown on the plat. Again, survey standards do not make this distinction.

This article has attempted to discuss surveyor liability for tree encroachments in the best possible light. It is hoped that this article will enlighten surveyors and allow them to make a decision as to whether or not they should show tree encroachments on their plats of survey.

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*The opinions expressed herein are not necessarily those of Chicago Title Insurance Company.*

Notes:

1 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: *Willis v. Maloof*, 184 Ga. App. 349, 361 S.L.2d 512 (1987).

2 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 the defendant's lot, yet the court held that the defendant wrongfully removed the tree.

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

4 See also *D'Andrea v. Guglietta*, 208 N.J. Super. 31, 504 A.2d 1196 (1986).

5 See also *Bonde v. Bishop*, 112 Cal. App.2d 1, 245 P.2d (1952); *Cannon v. Dunn*, 145 Ariz 115, 700 P.2d 502 (1985).

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

7 Note that the court in *Bandy* cited *Mahurin* with approval, stating that "The *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 84. 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.

8 Note, though, that the holding *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 non-liability) 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.

9 *United States v. Causby*, 328 U.S. 256, 66 S. Ct. 1062 (1946).

10 *Brooks v. Bruyn* 24 Ill 373 (1860); *Joinder v. Janssen*, 85 Ill 2d 74, 421 N.E.2d 170 (1981).

11 735 ILCS 5/13-101 (1992)(formerly, Ill Rev. Stat. 1991, ch. 110 sec. 13-101).

12 See, e.g. *Dempsy v. Burns*, 281 Ill 644, 118 N.E. 193 (1917), wherein the court said that the enclosure of a small lot by two smooth wires was not a sufficient act of possession; see also *Burlew v. City of Lake Forest*, 104 Ill App.3d 800, 433 N.E.2d 353 (2nd Dist., 1982).

13 See *Rozny v. Marnul*, 43 Ill 2d 54, 250 N.E.2d 656 (1969) for what has been described as the "seminal" case dealing with the liability of surveyors to third parties.

14 *Standards of Practice for Professional Land Surveyors in the State of Illinois* sec. 4.03 (R. Church ed. 1992).

15 But see item 11, Table A., of these land title survey standards.