

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

¹Ridge 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.

²See, 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.

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. 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.³

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). For a similar case, but one involving a utility company's alleged negligence, see Hammond v. SBC Communications, 302 Ill. Dec. 828, 850 N.E.2d 265 (1st Dist., 2006).

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 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: "...[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

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

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.⁴

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

⁴See 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).

N.E.2d at 842.⁵

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:

⁵ 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.

[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 524-525.⁶

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 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

⁶Note 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.

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 588.⁷

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 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.

The Restatement (Second) of Torts

The traditional rule concerning liability of landowners to third parties for harm caused by natural conditions on the land is set forth in section 363 of the Restatement (Second) of Torts:

(1) Except as stated in Subsection (2), neither a possessor of land, nor a vendor, lessor, or other transferor, is liable for physical harm caused to others outside of the land by a natural condition of the land.

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

⁸Note, 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.

(2) A possessor of land in an urban area is subject to liability to persons using a public highway for physical harm resulting from his failure to exercise reasonable care to prevent an unreasonable risk of harm arising from the condition of trees on the land near the highway.

Comment (a) to subsection (1) states that this is the rule, even though the landowner may be aware of the dangerous natural condition and the expense necessary to remedy the condition is slight. On the other hand, comment (e) to subsection (2) makes it clear that the urban landowner has a duty to travelers to inspect his property and take reasonable precautions against dangerous conditions. However, the court in Mahurin attacked this traditional rule, stating that the greater duty owed to persons using the highways should also be extended to adjoining landowners in urban and residential areas.

Note that subsection 1 of section 363 of the Restatement (Second) of Torts refers to natural conditions of the land. Subsection 1 of Section 840 of this Restatement states that, generally speaking "...a possessor of land is not liable to persons outside the land for a nuisance resulting solely from a natural condition of the land." Section 840, comment (a), states that vegetation is deemed "natural" when it is "not in any way the result of human activity." On the other hand, Section 839 imposes a duty upon an adjoining landowner to abate the condition when the encroaching vegetation is "artificial," and subjects the adjoining landowner to liability for failure to abate the "artificial condition."⁹

To date Illinois has not limited this Restatement rule that distinguishes "artificial" and "natural" conditions.¹⁰ Note, though, that the court in Melnick v. C.S.X. Corporation, 312 Md. 511, 540 A.2d 1133 (1988) discusses this rule at length. It states that while a few states follow this rule, most states do not. It notes further that some courts have commented that the distinction between "artificial" and "natural" vegetation is unworkable, and should not control the issue of a landowner's duty to an adjoining landowner. 540 A.2d at 1136-1137.

Practical Application of Case Law

Assume, then, that a client comes into your office and tells you that the branches or roots of a neighbor's tree are encroaching into his yard. The trunk of the tree is solely in the neighbor's yard. What do you tell him?

⁹An example of an "artificial condition", as noted in illustration 4 to comment a to Section 840, would be eucalyptus trees planted by an adjoining landowner near his boundary line; see also Noel, Nuisances from Land in its Natural Condition, 56 HARVARD LAW REVIEW 772 (1943).

¹⁰Nichols v. Sitko, 157 Ill. App.3d 950, 510 N.E.2d 971 (1st Dist., 1987); Burns v. Addison Golf Club, Inc., 161 Ill. App.3d 127, 514 N.E.2d 68 (2nd Dist., 1987)

The preceding analysis of Illinois case law indicates that he may cut off the branches or roots, but only up to the property line. He cannot cross into the neighbor's yard in order to cut off the branches or roots. Note that the doctrine of self-help would appear to be an appropriate measure in Illinois, even if the roots or branches are not causing damage to the client's property.

What if the client tells you that he fears that if he removes the roots of the offending tree, the tree will die? May he still remove the roots?

There does not appear to be any Illinois case on point in this area. However, note Higdon v. Henderson, Okl., 304 P.2d 1001 (1956). In this case the plaintiff sought damages for the destruction of a tree located on the boundary line between plaintiff's and defendant's property. Defendant, while constructing a residence on his lot, excavated land solely on his property. The excavation cut open and exposed the roots of the tree, which eventually died. The Supreme Court of Oklahoma acknowledged the same rule as set forth in Ridge v. Blaha, *supra*, namely, that a tree located on the boundary line between two adjoining landowners is the common property of both owners, and that neither owner has the right to damage or destroy the tree without the consent or permission of the other party. However, the court further stated that this rule is tempered by the fact that an abutting owner has the right to use his property in a reasonable way, and conversely, not in an unreasonable way. The court stated that the defendant was excavating on his own lot, and nothing more, which was not an unreasonable use of his property. Thus, the court denied relief, stating that the resultant injury to the tree did not create a right to recover damages. 304 P.2d at 1002.

Thus, it would at first appear that one could remove the roots with impunity. Note, though, Holmberg v. Bergin, 285 Minn. 250, 172 N.W.2d 739 (1969). In this case the defendant planted a tree on his property. The tree eventually grew to a point where the roots were damaging the plaintiff's property. The Supreme Court let stand the decision of the trial court, stating that an injunction, ordering the complete removal of the tree, rather than just the roots, was warranted, since the removal of only the roots would weaken the tree's stability, thereby endangering the homes of both parties in the event of a storm or high wind. In light of this decision, it would seem appropriate for the attorney to advise the client to not remove the roots, as the client could be liable in the event the tree were to fall and injure people or property. Instead, the attorney might consider asking for an injunction, ordering the removal of the entire tree.¹¹

If the roots or branches have damaged the client's property, the attorney may wish to file suit for damages. In that event, it would appear, from the preceding analysis of existing case law

¹¹See also 2 C.J.S. Adjoining Landowners sec. 56; 1 Am Jur 2d Adjoining Landowners sec. 23.

on the subject, that the suit should be one in negligence and not in nuisance. As the court in Merriam stated, citing, in part, 1 Wood, Nuisances 148-49 (3d ed. 1893):

[P]laintiffs have recovered damages...only where a human agency has intervened in a negligent, careless or willful way to turn [natural forces] into a nuisance.... * * * In order to create a legal nuisance, the act of man must have contributed to its existence. Ill results, however extensive or serious, that flow from natural causes, cannot become a nuisance.... * * * [A] nuisance cannot arise from the neglect of one to remove that which exists or arises from purely natural causes. But when the result is traceable to artificial causes, or where the hand of man has, in any essential measure, contributed thereto, the person committing the wrongful act cannot excuse himself from liability.... 31 Ill. App.2d at 245-246, 175 N.E.2d at 295-296.

Possible Defenses

By now the question may have arisen: Can the defendant/adjoining landowner assert any defenses to a possible cause of action? For example, assume that the client told his neighbor that he was going to cut off the branch that encroached into his yard. The attorney for the neighbor fires off a letter to the client, asserting that the neighbor has acquired that space occupied by the branch by virtue of adverse possession. Is such a statement tenable?

Most likely not. 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.¹² However, in order to establish title via adverse possession, there must be, among other things, some unequivocal act of ownership upon the land.¹³ A tree branch extending over a neighbor's land - - even for at least 20 years, the requisite statutory period¹⁴ - - does not appear to qualify as an "unequivocal act of ownership."¹⁵

At some point in all this the attorney may ask himself: "Is the title insurance company or surveyor liable for not showing the tree branch or root encroachment on, respectively, the title insurance policy or survey of my client?" Accordingly, discussion follows.

Possible Title Insurance Company Liability

¹²United States v. Causby, 328 U.S. 256, 66 S. Ct. 1062 (1946)

¹³Brooks v. Bruyn, 24 Ill. 373 (1860); Joinder v. Janssen, 85 Ill.2d 74, 421 N.E.2d 170 (1981).

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

¹⁵See, e.g., Dempsey 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).

Title company liability for any possible encroachment problem is for the most part predicated on the title company giving "extended coverage" over those general exceptions relating to survey matters.¹⁶ There are five general exceptions; the two generally considered to relate to survey matters and unrecorded easements are:

- (2) Encroachments, overlaps, boundary line disputes, or other matters which would be disclosed by an accurate survey and inspection of the premises.
- (3) Easements, or claims of easements, not shown by the public records.

Assuming that coverage over these exceptions was given, consider first the encroachment of the adjoining landowner's tree branch onto the client's land.

The title company would probably deny any claim tendered by its insured relative to the encroachment of a tree branch or above-ground tree root onto its insured's property. As has previously been discussed, the insured has had its own remedy from the beginning -- one of self-help. This would be the case, regardless of whether or not the branch had caused damage to the insured's property. As the Supreme Judicial Court of Massachusetts stated in Michalson v. Nutting, 275 Mass. 232, 175 N.E. 490 (1931): "His remedy is in his own hands." 275 Mass. at 234, 175 N.E. at 491.

¹⁶ATTORNEYS GUIDE TO TITLE INSURANCE (Ill. Inst. for CLE, 1980) 4-42 et seq.

Similarly, the title company would probably be able to deny liability based on policy coverage. The ALTA 1990 Owner's Policy, at paragraph 3(a), excludes from coverage "[d]efects, liens, encumbrances, adverse claims or other matters...created, suffered, assumed or agreed to by the insured claimant..." Any insured owner who acquires the land would do so with full knowledge of any encroaching tree branch. Any such owner who chose not to avail himself of the remedy of self-help would quite likely be estopped from asserting a claim.¹⁷

Finally, it is quite possible that the tree encroachment is of such a de minimis nature so as not to warrant the response of the title company. Brownstone Condominium Ass'n v. Geller, 91 Ill. App.3d, 823, 415 N.E.2d 20 (1st Dist., 1980) was concerned with the alleged encroachment of nine bolts into a neighbor's building. In this case the court said:

...[T]he mere fact there is a trespass does not warrant any affirmative action by the Court. The close quarters of an urban society demand flexibility when we encounter an intrusion on our personal bubble. In a metropolitan area of seven million people, none can deny that their rights, real or imagined, are infringed upon with regularity. The limitations on the judicial system make it obvious that

¹⁷See, e.g., Malkin v. Realty Title Ins. Co., Inc., 244 Md. 112, 223 A.2d 155 (1966), wherein the court noted this exclusion in denying relief to the plaintiffs. In this case the title policy inadvertently failed to include an exception relative to the existence of a paved roadway along the Westerly 33.8 feet of the insured land. The court affirmed the judgment of the lower court, noting that the plaintiffs had inspected the property and had reviewed a survey which disclosed the roadway; the plaintiffs thus had independent knowledge of the fact that the roadway burdened their property.

each of these transgressions cannot be litigated. 91 Ill. App.3d at 825-826, 415 N.E.2d at 22.

An encroachment of underground tree roots would probably elicit a similar response from the title company. The reason for this is that it appears that such an encroachment would most likely fall outside the boundaries of title insurance coverage.

General exception (2) concerns those matters which would be disclosed by a survey or an inspection of the land. A survey or inspection would not reveal the location of underground tree roots. Thus, the fact that this exception was deleted from a title insurance policy insuring land burdened by underground tree roots would not result in title company liability.

General exception (3) deals with unrecorded easements or claims of easements. Kayfirst Corp. v. Washington Terminal Co., 813 F.Supp. 67 (D.D.C. 1993) dealt with the seven foot encroachment of an underground step footing onto adjoining property. The court stated that the step footing, located four feet below the surface of the land, was not an implied easement by necessity or an easement by prescription, since the use of adjoining land was not apparent. Thus, the fact that the title policy issued to the plaintiff was subject to the aforementioned general exception (3) did not relieve the title company from liability because of the encroachment.

The court acknowledged that the step footing was an encroachment. However, it also noted that it was four feet beneath the surface of the ground. Since it was not visible from the surface, it would not have been disclosed by a survey or inspection of the land. Thus, similarly, the fact that the title policy was also subject to general exception (2) did not exempt the title company from liability.

The court went on to discuss the insuring provisions of the title policy. It noted that the title company insures against loss or damage which the insured may sustain by reason of four defects in the title of the insured. Specifically, it noted insuring provisions (2) and (4):

- (2) Any defect in or lien or encumbrance on such title;
- (4) Unmarketability of such title.

The court concluded that while there was no liability on the part of the title company by reason of the policy being subject to general exceptions (2) and (3), it did hold that the encroachment of the underground step footing was an encumbrance on the title; it also stated that the encroachment rendered the plaintiff's title unmarketable as well:

It has long been established that an encroachment may encumber title or render title unmarketable, particularly if the encroachment is substantial or interferes with the free development of the subject parcel. 813 F. Supp. at 76.

At first one might maintain that an underground step footing is analogous to underground tree roots, thus resulting in title company liability in the event of an encroachment thereof.

However, the court in Kayfirst made its determination based on the encroachment's size and the fact that the slab footing interfered with the commercial development of the site. It is doubtful that a court would ever conclude that tree root encroachments would be "substantial" or that they could interfere with the development of the adjoining land. This is especially so when one remembers the decision in Higdon v. Henderson, supra, wherein the court allowed the excavation of the defendant's land, even though the removal of tree roots caused the destruction of the tree.

Possible Surveyor Liability

The "Minimum Standard Detail Requirements for ALTA/ACSM Land Title Surveys" were adopted by the American Land Title Association (ALTA) and the American Congress on Surveying and Mapping (ACSM) in 1992.¹⁸ 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. However, in light of the previous discussion of adverse possession, any argument based on surveyor liability vis a vis paragraph 5(f) hardly seems tenable.¹⁹

However, surveyors in Illinois rarely use these land title survey standards when performing surveys of 1-4 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

¹⁸Miely, ALTA/ACSM Survey Standards, 37 REAL PROPERTY, August, 1991, at 1; Bales, The 1992 ALTA/ACSM Land Title Survey Standards, 39 REAL PROPERTY, November, 1993, at 3.

¹⁹See 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.

Surveyors Association.²⁰

Section "I" of these standards describes the field procedures to be undertaken by the surveyor. Paragraph I(d) states that "[a]ny and all significant, visible encroachments, conflicts, protrusions 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."

The land title survey standards require the surveyor to disclose only those encroachments which are structural in nature. The boundary survey standards contain no such limitation. Thus, one might argue that the surveyor could be liable for the failure to disclose any encroaching tree branches. However, as discussed in the section concerning title company liability, it is possible that the doctrine of self-help would allow the surveyor to prevail in any litigation.

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

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.

²⁰STANDARDS OF PRACTICE FOR PROFESSIONAL LAND SURVEYORS IN THE STATE OF ILLINOIS sec. 4.03 (R. Church ed. 1992)