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LAW LETTER

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Property Rights

Encroachments: Unwelcome Invaders

Landowners sooner or later encounter problems with neighbors. The problems may be minor, such as a barking dog or lack of property maintenance, or major, such as an easement right or disputed property line. Most problems with neighbors relate to the rights and responsibilities of land ownership.

In many instances, the complaining parties simply want to know their legal rights rather than to pursue a judicial remedy. A landowner faced with an encroachment, however, does have legal rights and remedies.

The definition of an encroachment is similar, if not identical, to that of trespass. Generally, a *trespass* applies to a person making an unauthorized entry onto another's land. An *encroachment*, on the other hand, applies to a structure or some other physical object that illegally protrudes or invades another's land. Case law supports this distinction.

According to *Allen v. Virginia Hill Water Supply Corp.*, 609 S.W. 2d 633, an encroachment is an improvement extending onto adjoining land, occupying or using that property without an agreement or easement.

The physical intrusion may be structural, nonstructural or vegetative. According to the case law, structural intrusions have been caused by:

- the eaves of a garage (*Dallas Land & Loan Co. v. Garrett*, 276 S.W. 471),
- a house (*Bollinger v. McMinn, 104 S.W. 1079)*,
- a fence (*Genador v. Hagerla*, 369 S.W. 2d 70) and
- a building (*Allen v. Virginia Hill Water Supply Corp.* [supra]).

One Texas case classified the unauthorized construction of a drainage ditch on another's property as a nonstructural encroachment. *Forty Oaks v. Westvale Corp.*, 324 S.W. 2d 615.

The two general causes of vegetative encroachments in Texas are trees and grasses.

The remedies for structural and nonstructural encroachments are discussed in *Martin v. Martin*, 246 S.W. 2d 718.

Two brothers lived on adjoining tracts. The plaintiff constructed a lateral septic line onto a disputed area claimed by both parties. The defendant, believing this to be an encroachment, summarily dug up the line, causing the sewage to back up into the plaintiff's house. The plaintiff sued the defendant for actual and exemplary damages.

On appeal, the court pointed out the general remedies available to a landowner faced with an encroachment. The landowner may treat the invasion as a nuisance and take certain action, including:

- remove physically,
- abate through a court order,
- sue for damages and
- sue for trespass-to-try title to determine title and possession of the property

This case is unique because the court was not asked to determine which brother owned the disputed area. Instead, the issue focused on the brother's right to physically remove an encroachment even though removal harmed the other landowner.

Here, the court interjected one exception to summarily removing a physical intrusion. Basically, removal is forbidden when ample time and opportunity are available for the court to effectuate an adequate legal remedy. In this case, the sewage drainage was in a remote area and not causing any harm or inconvenience.

Another exception to the general rule was added by *Rocha v. U.S. Home,* 653 S.W. 2d 53. In this case, the defendant built a retaining wall partially on the plaintiff's property. The plaintiff sought a judicial order for its removal. The court ruled the wall could not be removed. An encroachment must remain in place when its removal will seriously harm the defendant's land. (Here, the removal would harm structural foundations.)The plaintiff's sole remedy in such instances is to sue for damages.

The *Rocha* case detailed how damages are assessed. If the damages are permanent (the encroachment can not be removed), the decreased value of the land is the measure. This is found by the difference between the market value of the land before and after the encroachment. The cost of removal is irrelevant.

If the damages are temporary (the encroachment can be removed), the measure of damage is the cost of restoring the land to its condition immediately prior to the encroachment. In addition, the value for the lost use of the land, measured by its rental, is recoverable.

Encroachments by vegetation fall into two categories, i.e., intrusions caused by trees and by grasses.

The cases involving trees have centered on three issues: (1) when can the invaded landowner cut the trees, tree limbs or roots, (2) when can the owner of the tree prevent invading limbs and roots from being cut and (3) how are damages caused by trees assessed?

A tree with all its roots and branches belongs to the owner of the soil where the trunk rests. Trees forming the actual boundary line between properties can not be removed without the consent of both landowners (*Brown v. Johnson*, 73 S.W. 49). Here the landowners had agreed that the bois d'arc hedge was the property line. Thus, the removal of any of the trees required the consent of both property owners.

When trees growing entirely on one owner's land invade another's property, either landowner may cut the limbs or roots at the property line. This rule was reiterated in the case of *Flusche v. Uselton*, 201 S.W. 2d 58, involving a land sale gone awry. The plaintiffs who wanted to buy the land sued for damages. They desired the tract primarily for the shade cast by a large pecan tree; the trunk set six inches onto the neighbor's property. The court ruled that while the plaintiffs would receive the benefit of the shade, they would have no lawful right to prevent the owner from destroying the tree. Thus, one neighbor cannot dictate the preservation of another's trees.

One of the more interesting tree cases is *Ortiz v. Spann*, 671 S.W. 2d 909. The Spanns (defendants) attempted to remove limbs from three large live oak trees protruding onto their property. The plaintiffs (owners of the trees) sought injunctive relief to prevent the Spanns' trimming them at the property line. The plaintiffs asked for and received a summary judgment because the limbs had acquired an easement, created either by implication or prescription.

Even though the summary judgment was reversed on appeal and the issue remanded for trial, the question remains. Can a tree limb protruding onto another's land for a number of years create an easement insuring its future preservation? No further appellate cases have addressed the question.

Two Texas cases have addressed the issue of damages caused by trees. The case of *Galveston, H. & S. A. R. Co. v. Spinks*, 36 S.W. 780, involved damages caused by nonintruding trees. The defendant-railroad company owned a strip of land for its rail line. The plaintiff owned cultivated land on either side.

The strip contained tall shade trees. The trees damaged the nearby lands by the shade they cast and by the water and nutrients they drained from the soil. The plaintiff sued for damages.

The appellate court held that a landowner cannot be compelled to remove a natural growth of trees nor be liable for the damage they cause when the roots and branches do not penetrate or overhang (encroach) onto the neighbor's property.

Two recent unpublished Texas cases dealt with tree encroachments. The courts reached different results because one was based on case precedents (prior appellate decisions), while the other was based on the Restatement of Torts (what legal scholars think the law should be).

The first case, Withdraw v. Armstrong, 2006 WL 3317714, involved tree roots intruding on Neighbor A's property. The tree was located entirely on Neighbor B's property. Instead of cutting the roots at the property line, Neighbor A drilled holes and injected poison killing the tree. Neighbor B successfully sued Neighbor A for $5,000 in damages.

The primary issue was whether the injection of poison constituted a trespass. The appellate court held it did. "A person commits trespass by causing or permitting a thing to cross the boundary of the premises," citing City of Arlington v. City of Fort Worth, 873 S.W. 2d 765. "Every unauthorized entry is a trespass even if no damage is done," citing General Mills Rest, Inc. Tex. Wings, Inc., 12 S.W. 3d 827.

The second case, Westergard v. Whatley, 1995 WL 44700, involved a 65-year-old cedar elm tree overhanging Neighbor A's property. The tree trunk was located entirely on Neighbor B's property. At the roof tops of both neighbors' houses, the tree split into two large branches. One branch that weighed about 3,000 pounds extended above Neighbor A's house.

A 90 mile-per-hour wind blew through the area causing the branch to fall on Neighbor A's chimney and through the roof. Neighbor A sued Neighbor B for damages alleging the tree and the neighbor's actions constituted negligence, nuisance and a trespass.

The appellate court dismissed the charge for negligence and concentrated on whether a nuisance or trespass occurred. The definitions of nuisance and trespass cited by the court and contained in the Restatement of the Torts, required an intentional entry or invasion onto the land of another.

In this case, the tree branch extending across A's property was not intentional. "We further concluded this testimony provides some basis for reasonable minds to conclude that the Whatleys (Neighbor B) did not intentionally act to cause the tree to overhang appellant's (Neighbor A's) property." Thus, no liability arose in the case.

In summary, the definition of trespass varies considerablly between Texas case law and the Restatement of Torts. The outcome of the similar cases in the future involving trees and tree limbs depends on which definition the appellate court chooses to follow, giving uncertainty to the law.

According to Texas law, an unpublished appellate decision has no precedential value on future cases. The decisions may be used to ascertain how courts may rule in the future with no binding effect.

Finally, the court ruled on the issue of unlawful tree removal in *Burris v. Krooss*, 563 S.W. 2d 875. One landowner cut shade trees before ascertaining the boundary line. The neighbor who lost the trees sued for damages.

The court ruled that any landowner who intends to cut trees owes a duty to an adjoining landowner to ascertain the boundary line with diligence and care. The failure to do so subjects the landowner to damages measured by the difference in market value of the land before and after the unauthorized removal. The value of the trees is irrelevant.

The rules governing encroaching grasses are specified both by case law and statutes. As a general rule, when a grass spreads across boundary lines and takes root, it becomes the neighbor's property. Thereafter, the neighbor has unrestricted use.

Consequently, the question of encroaching grasses focuses on its initial introduction. For instance, an early Texas Supreme Court case involved the railroad company planting Bermuda grass along its embankments to stabilize the soil (*Gulf C. & F. R. Co. v. Oakes*, 58 S.W. 999). An adjoining landowner sued for damages when the grass spread.

While no damages were found in this instance, the high court ruled that the central question is whether the proposed use (introduction of Bermuda grass) was reasonable under all circumstances. The introduction of a mischievous grass (not defined here) that spreads and impairs the capacity of an adjoining farm to raise crops is unreasonable. The landowner introducing the grass would be liable to the neighbor for damages.

In another case, the state highway department was sued for planting Bermuda grass on its right of way (*Masheim v. Rollins*, 79 S.W. 2d 672). The plaintiffs alleged its spreading constituted a taking for which compensation was due.

In response, the court ruled that, in the absence of a statute prohibiting the planting of Bermuda grass, it is permissible. This is true even though the grass will eventually spread to adjacent land by wind, water and other natural causes.

The case mentions that Texas has statutes governing certain plants. The Texas Water Code, Section 11.089, states, "No person who owns, leases, or operates a ditch, canal, or reservoir or who cultivates land abutting a reservoir, ditch, flume, canal, wasteway, or lateral may permit Johnson grass or Russian thistle to go to seed on the waterway within ten feet of the high-water line if the waterway crosses or lies on the land owned or controlled by him."

Anyone violating the statute is guilty of a misdemeanor punishable by a fine between $25 to $500 or confinement in jail between 30 to 180 days, or both. However, the statute does not apply to lands in Tom Green, Sterling, Irion, Schleicher, McCullough, Brewster, Menard, Maverick, Kinney, Val Verde or San Saba counties.

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