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NUISANCE-LIABILITY FOR INJURY CAUSED BY ENCROACHING TREE ROOTS

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NUISANCE—LIABILITY FOR INJURY CAUSED BY ENCROACHING TREE ROOTS—Plaintiff and defendant were adjoining landowners. Roots of poplar trees on defendant's land extended onto plaintiff's premises, clogging the sewage system and extracting such nutritional value from the land as to injure her lawn and flower garden. Plaintiff brought an action for damages and equitable relief. Judgment was rendered for defendant on demurrer. On appeal, *held*, reversed. The encroaching roots constituted an actionable nuisance. Plaintiff was not limited to the self-help remedy of cutting the roots at the boundary line. *Mead v. Vincent*, (Okla. 1947) 187 P. (2d) 994.

The courts are unanimous in holding that one is privileged to cut off boughs and roots of trees owned by an adjoining landowner but extending across the boundary line.[1] The principal case, however, raises the controversial issue whether, and under what circumstances, a landowner has such a legally

[1] 18 A.L.R. 655 (1922); 76 A.L.R. 1111 (1932); 128 A.L.R. 1221 (1940). The self-help remedy is a mere privilege and should not be confused with ownership. Lyman v. Hale, 11 Conn. 177 (1836). However, Grandona v. Lovdal, 78 Cal. 611, 21 P. 366 (1889), indicates that in California a landowner owns the roots and boughs encroaching onto his property. If so, how is it possible to hold the neighbor liable when the damage is caused by the plaintiff's own property? But see Stevens v. Moon, 54 Cal. App. 737, 202 P. 961 (1921).

protected right to be free of these encroachments that he may shift the burden of removal onto his neighbor. If the courts were willing to treat root encroachments as trespasses it would be clear that the burden could be shifted.[2] Perhaps out of a fear of being swamped with litigation, no court has ever taken this point of view.[3] Instead, the avenue of nuisance has been chosen.[4] Following dictum in an English case,[5] the American courts have sometimes purported to make liability depend upon whether or not the encroachments are "poisonous" or "noxious."[6] The principal case expressly rejects that rule and makes recovery depend entirely upon the extent of actual harm. Under this rule no legal injury results from the mere fact of encroachment. For this, the only remedy is self-help, and not even nominal damages should be allowed.[7] Legal injury does occur, however, as soon as the roots begin to interfere with the use and enjoyment of property.[8] Whether one agrees with the decision depends

[2] 52 AM. JUR. 839 (1944). There would seem to be a sufficient interference with possession. Hannabalson v. Sessions, 116 Iowa 457, 90 N.W. 93 (1902); Minear v. Keith Furnace Co., 213 Iowa 663, 239 N.W. 584 (1931); Butler v. Frontier Telephone Co., 186 N.Y. 486, 79 N.E. 716 (1906). Whether ejectment would furnish an adequate remedy would depend primarily upon the ability and willingness of the sheriff to remove the roots. Butler v. Frontier Telephone Co., 186 N.Y. 486, 79 N.E. 716 (1906); Fisher v. Goodman, 205 Wis. 286, 237 N.W. 93 (1931); 27 YALE L.J. 265 (1917). Equitable relief might be refused because of the adequacy of either the legal or self-help remedies. Mechanics Foundry v. Ryall, 75 Cal. 601, 17 P. 703 (1888); compare Stamford v. Stamford Horse Railroad Co., 56 Conn. 381, 15 A. 749 (1888).

[3] Numerous suits might arise either because of quarrels between neighbors or for the more justifiable purpose of preventing the acquisition of a prescriptive right. The latter factor would seem to be an excellent reason for refusing to characterize the mere fact of encroachment as a violation of a legal right. Thus the Washington and New Jersey decisions, note 7, should be troublesome to those courts when finally called upon to decide whether one can obtain a prescriptive right to have his tree encroach upon his neighbor's land. Will those courts then find sufficient policy reasons for violating the orthodox conception of prescription and decide that the statute of limitations bars only the legal and equitable remedies and not the self-help remedy?

[4] For a general discussion see Macneil, "Growing Lawlessness of Trees," McMURRAY MEMORIAL LEGAL ESSAYS 375 (1935).

[5] Crowhurst v. Amersham Burial Board, 4 Ex. Div. 5 (1878).

[6] That the requirement is more verbal than real, see Buckingham v. Elliot, 62 Miss. 296 (1884).

[7] Smith v. Giddy, [1904] 2 K.B. 448; in Countryman v. Lighthill, 24 Hun. (N.Y.) 405 (1881), a judgment for nominal damages was reversed. But cf. Ackerman v. Ellis, 81 N.J.L. 1, 79 A. 883 (1911), and Gostina v. Ryland, 116 Wash. 228, 199 P. 298 (1921), which have the effect of making a nuisance synonymous with a trespass.

[8] Accord: Ackerman v. Ellis, 81 N.J.L. 1, 79 A. 883 (1911); Buckingham v. Elliot, 62 Miss. 296 (1884); Stevens v. Moon, 54 Cal. App. 737, 202 P. 961 (1921); Butler v. Standard Telephones and Cables, Ltd., [1940] 1 K.B. 399 is the first English decision directly on point. Contra: Michalson v. Nutting, 275 Mass. 232, 175 N.E. 490 (1931); in Smith v. Holt, 174 Va. 213, 5 S.E. (2d) 492 (1939), the court said it agreed with Buckingham v. Elliot, 62 Misc. 296 (1884), but did not consider injury to a lawn and flower garden sufficiently "sensible" to allow recovery.

upon the degree of responsibility he is willing to place upon such landowners as plaintiff to take the initiative by using self-help in order to protect their property against interference from without.

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