

ANNOTATION

WHEN DOES CAUSE OF ACTION ACCRUE, FOR PURPOSES OF
STATUTE OF LIMITATIONS, AGAINST ACTION BASED
UPON ENCROACHMENT OF BUILDING OR OTHER
STRUCTURE UPON LAND OF ANOTHER

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§ 1. Introduction

[a] Scope

This annotation investigates the question: When does the statute of limitations¹ begin to run² against a cause of action³ arising from the encroachment of a building or structure upon the land of another person?

1. The statute of limitations generally applicable is the one dealt with, and cases decided under statutes applying specifically to actions for encroachments have been excluded.

2. Cases deciding that an encroachment is a permanent or continuing invasion but

[b] Related matters

Nuisance by encroachment of walls or other parts of building on another's land as permanent or continuing. 29 ALR 839.

Rule that limitation begins to run when conditions causing a permanent injury to real property are created or when the permanent character of the

not specifically discussing when the cause of action accrues for purposes of the statute of limitations have been omitted.

3. The annotation does not treat the question of when the period of adverse possession begins to run.

TOTAL CLIENT SERVICE LIBRARY REFERENCES

1 AM JUR 2d, Adjoining Landowners § 124; Am Jur Limitation of Actions (1st ed §§ 130, 131)

ALR DIGESTS, Limitation of Actions §§ 141, 143

ALR QUICK INDEX, Encroachment; Limitation of Actions

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injury becomes obvious, as affecting later increase or change in the nature of the damages. 126 ALR 1284.

Statute of limitations applicable to action for encroachment. 24 ALR2d 903.

§ 2. View that cause of action accrues when encroaching structure is built

Some courts take the view that a building or other structure which encroaches upon the land of another constitutes a permanent injury for which the cause of action accrues at the time of the original encroachment.

If the injury or trespass caused by an encroachment is of a permanent nature the entire cause of action accrues when the injury is suffered or the trespass is committed, and therefore an action for such trespass not brought within the statutory period is barred by the statute of limitations, it was held in *Rankin v De Bare* (1928) 205 Cal 639, 271 P 1050. A two-story building belonging to the defendant was reconstructed partially, and after the additions were made it encroached upon the plaintiff's property by about $1\frac{1}{2}$ inches. The encroachment began prior to the time the plaintiff acquired ownership of the property in question, and he apparently did not learn of the encroachment until after the statute of limitations had run. The court said that the record disclosed that the injury or trespass was permanent in character and therefore all damages, past and prospective, must be recovered in one action, and that such action must be brought within the period of the statute of limitations.

A cause of action based on the encroachment of certain buildings upon the plaintiff's land was held to have accrued at the time the encroachment began, and thus was barred by the statute of limitations, in *Bertram v Orlando* (1951) 102 Cal App 2d 506, 227 P2d 894, 24 ALR2d 899. The encroaching

buildings had been built by the defendant's predecessors in interest at least 20 years before this action was brought. The three buildings in question were made of wood and set upon concrete piers. The court said that the buildings were obviously intended to be permanent, and therefore it was a trespass of a permanent nature which accrued at the time the trespass occurred.

Where encroachments of a permanent nature are erected upon one's land, the entire cause of action, for past as well as prospective damages, accrues when the trespass takes place, the court held in *Tracy v Ferrera* (1956) 144 Cal App 2d 827, 301 P2d 905, affirming the judgment of the lower court on that point. The trespass occurred when the defendants erected walls, foundations, pipes, and vents upon the plaintiff's property more than 3 years before this action was brought. Since the structures were of a permanent nature, the cause of action on this ground was held to be barred by the statute of limitations.

Construction of a building partly upon the land of another is a permanent encroachment thereon and the entire cause of action, for past as well as prospective damages, accrues when the trespass occurs, the court said in *Mattos v Mattos* (1958) 162 Cal App 2d 41, 328 P2d 269. The court distinguished this type of nuisance from those which may be discontinued at any time, or where the encroachment is abatable. The latter situations are continuing nuisances, said the court, and each recurrence thereof amounts to another wrong, giving rise to a new cause of action.

Where one party so constructs a permanent building that it encroaches upon the land of another, the trespass is regarded as permanent in nature and therefore the cause of action based thereon accrues when the trespass is committed, the court held in *Troeger v Fink*

(1958) 166 Cal App 2d 22, 332 P2d 779, affirming the judgment of the lower court which had held the action barred by the running of the statute of limitations. The court said that the one-story frame and stucco buildings allegedly encroaching upon the plaintiff's land were obviously permanent, within the definition suggested by other California cases. The court rejected the contention that the structures should be considered temporary invasions constituting successive or continuing trespasses.

The encroachment of certain buildings upon another's property is a trespass of a permanent nature where the buildings were constructed with no thought of moving them elsewhere, one being erected on concrete piers and the other on a "permanent continuous foundation," and thus the cause of action for trespass accrued at the time the buildings were so constructed, it was held in *Castelletto v Bendon* (1961) 193 Cal App 2d 64, 13 Cal Rptr 907. After discussing other cases on this point, the court said that while the word "permanent" is not used in the sense of everlasting, the fact that the buildings at the time of the action may be in a state of disrepair is not proof that when they were built they were not "permanent" as that term is used.⁴

The cause of action for encroachment of a retaining wall built by a city allegedly upon the land of the plaintiff was held to have accrued at the time the structure was built, and thus barred by the running of the statute of limitations, in *Hawkins v Elgin* (1954) 4 Ill App 2d 102, 123 NE2d 589. The court

found it unnecessary to decide whether the structure actually encroached upon the plaintiff's land, since the action was not brought for 19 years after the completion of the wall.

§ 3. Contrary view

The view has been expressed that an encroaching structure, even though of a permanent nature, may constitute a continuing trespass for which successive causes of action may accrue indefinitely.

An underground encroachment upon the plaintiff's property by a subway was held to be a continuing trespass giving rise to successive causes of actions, in *509 Sixth Ave. Corp. v New York City Transit Authority* (1964) 15 NY2d 48, 255 NYS2d 89, 203 NE2d 486, 12 ALR 3d 1258. The encroachment was about 30 feet underground and the plaintiff therefore knew nothing of it until his own construction was begun about 20 years later. The court said that this made no difference since if the trespass were of a permanent nature the cause of action would accrue at the time of the original trespass, regardless of actual harm or actual knowledge thereof. However, the court held that the encroachment was a continuing trespass, even though the structure itself was of a permanent nature. The court declined to follow what it called the "California rule," that is, that a permanent structure is ipso facto a permanent trespass, with the cause of action accruing at the time of the original trespass. It said that a cause of action based on a continuing trespass is barred only by the expiration of such time as would

4. In an earlier California case, *Kafka v Bozio* (1923) 191 Cal 746, 218 P 753, 29 ALR 833, a wall which encroached upon the air space above the plaintiff's land, and which encroached progressively more as it gradually sank into the ground, was held to be a continuing nuisance with a new cause of action accruing continuously. This case has apparently not been followed since

the later California cases distinguished it on the basis of its being an encroachment on the air space above the land rather than on the land itself. In the *Castelletto Case* (Cal) text above, the court said that if the usefulness as authority of the *Kafka Case* had not been canceled by such distinctions, it should be considered overruled.

create an easement by prescription or change title by operation of law.

§ 4. Effect of lack of knowledge of encroachment

The courts of both views are apparently agreed that plaintiff's lack of knowledge that a building or structure encroaches upon his property does not delay the accrual of the cause of action.

Even though the encroachment began before the plaintiff acquired ownership of the property in question, and the plaintiff apparently did not learn of the encroachment until after the period of the statute of limitations had passed, the court held that the cause of action accrued at the time of the original encroachment and thus was barred by the statute of limitations, in *Rankin v De Brae* (1928) 205 Cal 639, 271 P 1050.

The failure of the owner of certain property, upon which an encroachment has occurred, to know that certain buildings stand partially on his property, is not a ground for holding that his cause of action for trespass does not accrue until he becomes aware of such encroachment, it was held in *Castelletto v Bendon* (1961) 193 Cal App 2d 64, 13 Cal Rptr 907. There were three wooden buildings which had been standing for over 12 years with a toehold over the plaintiff's boundary line, and the court pointed out that the location of the buildings was quite apparent. The court held that the statute of limitations began to run at the time the trespass was committed, even though neither

party knew of such trespass for more than 12 years. The decision was based partially upon the wording of the statute providing for the limitation of certain actions, one section of which provided that for certain of the causes of action the time would not begin to run until the aggrieved party became aware of the fact constituting such cause of action. However, since this clause was omitted from the section concerning trespass to real property, the court said that it could neither hold the omission by the legislature to be unintentional, nor could it write such a clause into the statute.

It made no difference that the property owner knew nothing of the encroachment upon his land for 20 years after the original encroachment, the court said in *509 Sixth Ave. Corp. v New York City Transit Authority* (1964) 15 NY2d 48, 255 NYS2d 89, 203 NE2d 486, 12 ALR3d 1258. The encroachment was by the defendant's subway which was constructed about 30 feet underground, and the plaintiff knew nothing of it until he began his own construction about 20 years later. The court, although holding the trespass to be of a continuing nature, said that if the trespass had been of a permanent nature the cause of action would have accrued at the time of the original encroachment regardless of the plaintiff's lack of knowledge, and thus would have been barred by the statute of limitations.

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