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120 N.W. 976 (Iowa 1909)

142 Iowa 337

JESSIE J. KOONZ ET AL.

v.

LAFAYETTE HEMPY, Appellant

Supreme Court of Iowa, Des Moines

May 4, 1909

Appeal from Jones District Court.--HON. MILO P. SMITH, Judge.

SUIT to recover treble damages under section 4306 of the Code. Judgment for the plaintiff for a part of the damages claimed. Both parties appeal. The defendant will be designated as appellant.

Affirmed.

Chas. W. Kepler & Son, for appellant.

Randall, Courtney & Harding, for appellees.

OPINION

[142 Iowa 338] SHERWIN, J.

William Vanderbilt died in 1887 the owner of the land involved in this controversy. He left surviving him his wife, Sarah Vanderbilt, and certain heirs, among whom were the plaintiffs herein. He also left a will, which was duly probated, and which provided for the disposition of his estate, after the payment of his debts and the funeral expenses, as follows:

Second. I give and bequeath to my wife, Sarah Vanderbilt, all of my real estate both real and personal and mixed so long as she lives or remains my widow, but in case my said wife shall marry and ceases to remain my widow, then, in that case I order and direct that all my estate shall be converted into money by my executor hereinafter named and divided as follows: One-third to my said wife; and to my son John Vanderbilt ten dollars in addition to previous advancements made to him by me.

Third, And the remainder of my estate after all expenses are paid I give and bequeath to my daughters Emma, Ella E., and Jessie and my son Willie G. Vanderbilt, share and share alike.

The widow never remarried and died in

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1905. In 1898 she executed an agreement with the defendant, whereby she sold to him all of the timber on a timber lot of about six and one-half acres, which was a part of the estate left by her husband, and authorized him to remove the same at any time within fifteen years unless the land was sooner sold. In pursuance of said contract, the defendant cut and removed some of the timber before the death of Mrs. Vanderbilt, and soon after her death, and after he had been notified not to cut or remove any more thereof, he cut and took away the rest of the timber. This action is to recover damages against him for so doing.

John Vanderbilt, who is named in the will, was a son of the deceased, but did not join in this action, and the appellant urges that there was a nonjoinder of parties

[142 Iowa 339] plaintiff, and that the action can not be maintained because thereof. This contention is based on the proposition that, as Sarah Vanderbilt did not cease to remain the widow of William Vanderbilt, the will made no disposition of the remainder of his estate, and hence John Vanderbilt took an interest therein as one of the heirs of his father. The position of the appellant can not be sustained. The will gave to the wife a life estate only. *Shaw v. Shaw*, 115 Iowa 193, 88 N.W. 327; *In re Proctor's Estate*, 95 Iowa 172, 63 N.W. 670. And in the third clause of the will the remainder of the estate, after the life estate of the widow had ceased, was devised to the plaintiffs herein. The provision in the second paragraph of the will, which directed that in case of remarriage the life estate should cease, and the widow be given one-third of the proceeds from a sale of the estate, did not vest in the widow an estate in fee if she did not remarry, nor defeat the disposition of the remainder made in paragraph 3. There was then no reason for making John Vanderbilt a party plaintiff.

Appellant further says that, if liable at all, he was liable only for the difference in the value of the land before and after he removed the timber therefrom. It is a general rule that, where the thing destroyed or removed from real property, although it is a part of the realty, has a value which can be accurately measured and ascertained, without reference to the soil on which it stands, the recovery may be of the value of thing thus destroyed or removed, and not for the difference in the value of the land. *Rowe v. Railway Co.*, 102 Iowa 286; 3 Sutherland on Damages, 368. The timber in question was of such size as to give it a value independent of the soil, and the court very properly made its

value the rule of damages. The appellant is certainly in no position to complain of this. He had the timber, and, if he pays its value, he can not

[142 Iowa 340] complain. Moreover, in an action under section 4306 the measure of damages is fixed, at least when the thing injured has an independent value that may be ascertained and measured.

Both parties complain of the damages assessed by the trial court, the plaintiff because too little was allowed and because treble damages were refused, and the defendant because the award is too great. The appellant certainly has no just reason to complain, for the evidence fully warrants the amount found. Nor do we think the finding should be disturbed on the plaintiff's appeal. While the evidence would, perhaps, justify a finding of a larger amount as the actual value of the timber removed, the trial judge had the witnesses before him, and he was better able to determine the value of their testimony than we are.

The same observation may be made regarding treble damages. While there is some evidence which indicates wantonness in the removal of the timber after the death of Mrs. Vanderbilt, we are agreed that there is not sufficient to justify the penalty provided in section 4306. The section declares that whoever shall willfully injure, etc., and we have said that to warrant a recovery of treble damages thereunder it must be shown that the injury was wanton and without reasonable excuse. *Werner v. Flies*, 91 Iowa 146, 59 N.W. 18; *Parker v. Parker*, 102 Iowa 500, 71 N.W. 421.

We are satisfied with the judgment of the trial court, and it is in all respects *affirmed*.