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LEGAL RELATIONSHIPS OF TREES AND
SHRUBS IN IOWA

H. D. HARRINGTON

The purpose of this paper is to review in a general way the laws that exist in this state affecting woody plants and to give some suggestions of how these laws work out in certain definite cases. A word of explanation seems in order as to why one with no particular legal training should attempt a subject of this kind.

Most botanists are continually meeting the problem as to the rights of the property owner to the trees on his property, the boundary line or on the curbing. In cases involving personal disputes a lawyer may be consulted on the particular question. But other problems come up, often developing from questions asked by pupils or by some outside acquaintance, the answer to which necessitates the understanding of the general facts of law as they apply to plants. It seems probable that no one specifically trained in law will make such a broad study since their interests in the matter would necessarily be more definite. Accordingly the problem was taken up by the writer from a general viewpoint, not as an attempt to give legal advice on any specific problem but simply to give general trends and decisions of law as they apply to woody plants in this state.

We have in Iowa a code of statutes which are the cardinal laws unless they are found to be contrary to the state or federal constitution, or unless they are in conflict with other portions of the same code.

The interpretation of these laws in actual cases is left to the courts of law and hence the decisions of these courts become a part of the law itself. Then the vast body of rules and procedures of common law based on court decisions arising on disputed points not covered in the state code must be added. In this paper those laws in the Code of Iowa that refer to trees and shrubs are reported on. In addition is given a digest of judicial decisions upon those cases found to be related to woody plants.

PLANT DISEASES

The Code of Iowa appoints a State Entomologist who has the power to declare insect or disease infected products public nuisances. Such plants must be so treated by the owner as to prevent

the spread of this pest or disease. Failure to do so upon notice may result in having this work done by the state and the costs assessed against the owner. This includes of course the barberry and its relation to wheat rust (Code sec. 4062).

The nature and quantity of the contents of all packages brought into this state containing plants must appear on the outside with name of shipper and certificate of inspection from the official of the state from which it is sent (Code sec. 4062).

Plant products sold in the state must be inspected and certified by the State Entomologist. He may quarantine the state against any material containing a disease or pest. Also areas in the state may be quarantined. Violation of this action may result in 30 days imprisonment or a fine of from 25 to 100 dollars on conviction. (Code sec. 4062).

FOREST AND FRUIT TREE RESERVATIONS

An owner may select a permanent forest reservation not less than 2 acres in continuous area, with 200 growing trees per acre. These must be in groves over 4 rods wide and must be of ash, cherry, walnut butternut, catalpa, coffee tree, elm, hackberry, hickory, honey locust, Norway and Caroline poplars, mulberry, oak, sugar maple, European larch, other coniferous trees and all trees introduced for experimental purposes. Willows, boxelder, soft maple, cottonwood and other poplars can be included only as windbreaks to other trees. Only one-fifth of these trees can be removed each year except those that die naturally and no pasturing is permitted. Such a forest reserve is assessed on a taxable valuation of one dollar an acre (Code secs. 2606, 2607, 2608, 1609, 2610, 2614, 7110).

A fruit tree reservation not less than one acre and not more than 10 can be selected. This must include 40 apple trees per acre or 70 of any other fruit trees such as plums, cherries, peaches, and pears. These must be pruned and sprayed annually. All dead trees must be removed and replaced. No pasturing is permitted. A fruit tree reservation is assessed at a taxable evaluation of one dollar an acre for 8 years from the date of planting (Code secs. 2606, 2611, 2612, 2613, 2614, 7110).

In all other cases where trees are put on land for fruit, shade, ornament or as windbreaks, the assessor shall not increase the valuation of the property because of such improvements (Code sec. 7110).

SHADE TREES IN SCHOOL YARDS

The Board of each school corporation shall cause to be set out

12 or more shade trees in each school site when such are not already present. The County Superintendent should see that this is done (Code sec. 4248).

NATIONAL FORESTS IN IOWA

Consent of this state is given to the acquisition by the federal government of land needed for forests or game refuges providing the state has a concurrent jurisdiction over the area in regard to crimes committed therein (45 G. A. 1933-1934).

DEFACING TREES IN PARKS

The Commissioner of Parks can prescribe rules for government of public grounds and parks. Signs may be put up, such as those prohibiting the picking of flowers. The punishment for violation may be a fine of 25 dollars. For defacing trees in parks the fine may be not over 100 dollars or imprisonment for 30 days in jail (Code secs. 5806, 5825).

INJURY TO WOODY PLANTS ON PRIVATE LANDS

If anyone maliciously or mischievously bruises, breaks or carries away any woody plant growing on another's land, he shall on conviction be imprisoned for not more than one year, or pay a fine of not more than 500 dollars, or by both (Code sec. 13088).

Anyone entering an enclosure with such intent may be fined 5 to 100 dollars and costs, or imprisoned for 30 days or less in the county jail. For a second offence the fine may be 10 dollars to any amount and costs, or imprisonment for 30 days in jail. If the act occurs at night the penalty is a 25 to 100 dollar fine or imprisonment of 30 days or less in jail (Code secs. 13089, 13090).

A spring gun designed to discharge and wound thieves of grapes resulted in serious injury to a person who entered presumably to steal but who did not know of the gun. This person recovered damages (Hooker vs. Miller 37 Iowa 613).

For willfully injuring any tree or shrub on another's cultivated ground or lot the perpetrator must pay treble damages at the suit of the owner (Code sec. 12405).

When entry is not made by mistake, then the treble damage holds. A man climbed 3 fences, crossed a railroad and cut down the trees, carrying off the wood. He was held liable for treble damages (Wilson vs. Gunning 80 Iowa 331, 45 N.W. 920).

When entry, however, is made through a mistake then the treble damages do not hold. In such cases the damages as far as standing timber is concerned, is the value of the timber removed, and not the difference in value of the entire land before and after sever-

ence (*Koonz et al. vs. Hempy* 142 Iowa 337, 120 N.W. 976; *Grell vs. Lunsden* 206 Iowa 166, 220 N.W. 123).

But if the trees are removed by mistake the owner of the land cannot add to the damages any enhancement of the value of the trees by the defendant's labor of removal (*Streigal vs. Moore* 55 Iowa 88, 7 N.W. 413).

SELLING TIMBER FROM LAND

Timber can be sold from the land. This timber must be removed in a reasonable time if a specific time is not stated (*Sanders vs. Clark* 22 Iowa 275; *Lewisson vs. Axtell* 196 Iowa 977, 195 N.W. 622).

However in one case the owner of the land sold the timber rights to another "to have and to hold forever." In this case the owner of the land and his heirs lost the right of the timber on the land in the future (*Baker vs. Kenny* 145 Iowa 638, 124 N.W. 901).

TREES AS PART OF THE REALTY

Trees planted on the soil become a part of the realty and cannot be removed by the tenant. But nursery trees planted for sale on land rented expressly for such a purpose can be removed. However, nursery trees planted by the owner of the land become part of realty and pass to the purchaser of a mortgage foreclosure even if the trees were planted after the execution of the mortgage (*Price vs. Brayton* 19 Iowa 309).

In a case where a chattel mortgage was taken out on nursery trees before the judicial sale of the realty mortgage, the trees stand as part of the land and belong to the holder of the realty mortgage (*Adams vs. Beadle and Slee* 47 Iowa 439).

RIGHTS OF SETTLERS AND TENANTS TO TIMBER

Settlers on lands of the state on "claims" are allowed to take and use timber for purposes of cultivating and improving it (Code sec. 12409).

Cutting and removing trees by a tenant when the lease does not authorize such an action is not upheld by the courts (*Parker vs. Parker* 102 Iowa 500).

However in this state the right of a tenant to cut firewood from the premises is in force but this must not be done indiscriminately. When only dead trees or live ones of no value but for firewood were cut the court upheld the act (*Anderson vs. Cowan et al.* 125 Iowa 259).

TREES AS BOUNDARIES AND FENCES

A tree seems to be the property of the owner of the land on which it stands. An adjoining owner has no right to fruit that falls on his land from his neighbor's tree. If the branches or roots shade or injure his soil he may lop them off (Ebersole Iowa Law Dictionary Published by Ebersole 1903).

A partition fence consisting of a hedge must be cut back 2 times a year to within 5 feet (Code sec. 1830). But the trees on a boundary belong to both owners and cannot be removed without the consent of both (Harden vs. Stultz 124 Iowa 440, 100 N.W. 329).

This holds even when one land owner claims that the row of trees shades out part of his farm land (Musch vs. Burkhart 83 Iowa 301, 48 N.W. 1025).

STREETS AND HIGHWAYS LONG UNUSED

A street or alley dedicated to the public must be accepted by public resolution (Code sec. 5939).

Even if such a street is not used for a reasonable length of time, and the adjoining owners put fences and trees on it, the title does not pass from the city (Davies vs. Huebner 45 Iowa 574; City Eldora vs. Edington 130 Iowa 151; Kuehl vs. Town of Bettendorf 179 Iowa 1, 161 N.W. 28; McClenehen vs. Town of Jessup 144 Iowa 352; Biglow vs. Ritter 131 Iowa 213). But when the history of the original dedication is obscure, and buildings are put up with trees set out around them without any protest from the city then the title passes from the city (Corey vs. City of Ft. Dodge 118 Iowa 742).

The same rule seems to apply to highways. Failure to use a highway for some years does not deny the public the title to the land (Biglow vs. Ritter 131 Iowa 213). However, in cases where the road was never used and long periods of time have elapsed in which the adjoining owners have used and improved land without protest, then the public may lose the title (Davies vs. Huebner 45 Iowa 574; Orr vs. O'Brien 77 Iowa 273; Smith vs. Gorell et al. 81 Iowa 218).

In general the legal trend seems to be that in cases where the streets or roads have never been publicly accepted, where they have not been used for long periods in which adjoining owners improve the area without protest, perhaps not even being aware of the public's claim, then the public's rights may be forfeited. But mere failure to use the street or road for long periods does not mean the loss of the title by the public.

CONTROL OF TREES ON CURBINGS AND STREETS

A city has the care, supervision and control of all public highways and streets and shall cause the same to be kept free from nuisances (Code secs. 5945, 5739). Cities of special charter and with more than 50,000 inhabitants can declare cotton bearing trees nuisances (Code sec. 12396). But a city has no power to arbitrarily declare that any trees on the curbing or streets are nuisances unless they obstruct traffic, and legal decisions emphasize that it is in line with public policy to preserve shade trees whenever possible (*Burget vs. Greenfield* 120 Iowa 432; *Everett vs. City of Council Bluffs* 46 Iowa 66; *Waterbury vs. Morpew* 146 Iowa 313, 125 N.W. 205).

However, a hedge maintained in the street against the wishes of the city can be legally removed by them (*Philbrick vs. University Place* 88 Iowa 354), and objects like platform scales, since they are not considered to be of public benefit, can be removed by the city from the curbing (*Emerson vs. Babcock, City Marshall* 66 Iowa 256).

Once a grade on a street or alley has been legally established and recorded the city cannot change this grade without the payment of damages to adjoining land owners. The burden of proof in all such cases is to be with the city (Code secs. 5953, 5954, 5959, 5960).

If a grade has been definitely established and improvements have been made in accordance to it by lot owners, or if the city has proceeded without council action to unnecessary changes of the road bed which injures trees and shrubs, the courts have definitely upheld the land owners (*Trustees of Diocese of Iowa U. vs. City of Anamosa* 76 Iowa 538; *Burget vs. Greenfield* 120 Iowa 432; *Blanden vs. City of Ft. Dodge* 102 Iowa 441; *Delashmut et al vs. City of Oskaloosa* 94 Iowa 722, 62 N.W. 16; *Martin vs. Town of St. Ansgar* 165 Iowa 560, 146 N.W. 47; *Chiesa and Company vs. City of Des Moines* 158 Iowa 343, 138 N.W. 922).

However, a city has a right to improve its streets and even change completely unestablished grades if such changes are necessary. Unavoidable damage to trees and shrubs in such cases has no redress (*Gallaher vs. City of Jefferson* 125 Iowa 324; *Kemp vs. Des Moines* 125 Iowa 640, 101 N.W. 474; *Kepple et al vs. City of Keokuk* 61 Iowa 653, 17 N.W. 140).

It would seem to be the habit of the courts to act against the destruction of trees on the curbing or the street in *front of city* lots whenever such destruction can be avoided. In many cases

when the city was allowed to proceed with certain necessary street improvements, strong recommendations were expressed that every effort be made to preserve the trees along the streets.

EMINENT DOMAIN TO ORCHARDS OR ORNAMENTAL GROUNDS

The owner of land isolated from roads cannot have eminent domain to a roadway through an orchard on another man's land. Neither can an orchard be destroyed to construct a road or railroad to a mine. A dam cannot be erected unless a proposed damage to orchards is investigated (Code secs. 7806, 7846). The board of supervisors may change the course of a road when it is expedient but such a road cannot be established without the owner's consent through an orchard or ornamental ground contiguous to a dwelling (Code secs. 4607, 2566).

When the "orchard" is made up of bearing trees in fair condition the courts have upheld the owner of the land (*Junkins vs. Knopp et al* 205 Iowa 184, 217 N.W. 834). But when the "orchard" turned out to be a few old apple trees, some raspberry bushes, a wild plum tree etc., the court allowed the roads to go through (*Hubel vs. McAdon* 190 Iowa 677; *Hartley vs. Board of Supervisors et al* 179 Iowa 814; *Ballou vs. Elder et al* 95 Iowa 693).

Certain public utilities companies like railroads, telegraph, telephone and electrical transmission corporations may legally acquire the right of eminent domain and can take over property by payment of damages to owner (Code secs. 8429, 8302, 8322, 8303).

Land owners cannot be dispossessed of residences, orchards or gardens until damages have been determined and paid (Code sec. 7845).

Cities can condemn lands for public utilities, streets or parks (Code secs. 1800, 6134). But in so doing the value of trees and shrubbery on the condemned land is a proper consideration of the value of the entity of land before and after condemnation (*Kukkuk vs. City of Des Moines* 193 Iowa 444, 187 N.W. 209).

TREES ALONG OR ON HIGHWAYS

The Iowa Code provides that hedges along the highways must be trimmed to 5 feet once every 2 years (Code secs. 4830, 4831, 4832).

However, the courts did not uphold public officials who insisted on this trimming or removing when such hedges do not obstruct travel (*Jones et al vs. Thie* 141 Iowa 293, 119 N.W. 616).

It is true the code gives the public a limited right to remove trees on the highway but it hedges it around with so many exceptions

(Code secs. 4833, 7650, 7649, 4644), and in the latter code section cited, finally forbids destroying trees on or along highways when such are not obstructions to travel. If trees do impede travel they can be removed (*Patterson vs. Vail* 43 Iowa 142). If they do not obstruct traffic and public officials have attempted to arbitrarily cut down the trees on or along the highways the courts have been strong in condemning such actions (*Bills vs. Belknap* 36 Iowa 583; *Bolton vs. McShane* 67 Iowa 207, 25 N.W. 135; *Crismon vs. Deck* 84 Iowa 344, 51 N.W. 55; *Quinton vs. Burton* 61 Iowa 471). The courts have held that road supervisors are not judiciary in action and can be held personally liable for destroying trees needlessly (*McCord vs. High* 24 Iowa 336).

Another interesting ruling has been that when a road is established through the timber land of a property owner, the public acquires only the right of way and not a title to the timber on the road, except as such timber is used to repair the road itself (*Deaton vs. County of Polk* 9 Iowa 594).

The courts then seem very definite in upholding the rights of the land owner along the road to the trees on or along it when such trees do not obstruct or impede travel.

DAMAGE FROM FIRES CAUSED BY RAILWAYS AND ELECTRIC LINES

In the case of damage by fire caused by engines or wiring, negligence of the company is assumed unless rebutted by definite proof (Code sec. 8323; *Hamilton vs. Des Moines and Kansas City R. R. Co.* 84 Iowa 131; *Krejci vs. Chicago & N. W. R. R. Co.* 117 Iowa 344, 90 N. W. 708; *Thompson vs. Keokuk & Western R. R. Co.* 116 Iowa 215, 89 N. W. 975; *Burdick vs. Chicago Milwaukee & St. Paul R. R. Co.* 87 Iowa 384, 54 N. W. 439).

In cases where timber is destroyed by such fires the measure of damages is the actual loss of the timber by fire (*Burdick vs. Chicago Milwaukee & St. Paul R. R. Co.* 87 Iowa 384, 54 N.W. 439; *Greenfield vs. Chicago & N.W. R. R. Co.* 83 Iowa 270, 49 N.W. 95; *Leiber vs. Chicago Milwaukee & N.W. R. R. Co.* 84 Iowa 97, 50 N. W. 547).

However, when such fires destroy groves around buildings, hedges, and orchard trees the measure of the damage is the difference in value of the farm before and after the fire (*Walters vs. Iowa Electrical Co.* 203 Iowa 471, 212 N.W. 884; *Bradley vs. Iowa Central R. R. Co.* 111 Iowa 562, 82 N.W. 996; *Krejci vs. Chicago & N.W. R. R. Co.* 117 Iowa 344, 90 N.W. 708; *Rowe vs. Chicago & N.W. R. R. Co.* 102 Iowa 286, 71 N.W. 408; *Lanning vs. Chicago, Burlington & Quincy R. R. Co.* 68 Iowa 502, 27 N.W.

478; Thompson vs. Keokuk & Western R. R. Co. 116 Iowa 215, 89 N.W. 975).

TRIMMING TREES BY LINE COMPANIES

Companies, providing they have a legal franchise, have a right to trim trees in a reasonable way in order to put through their lines. But exercise of honest judgment on their part does not relieve them from liability if it can be proven that such trimming actually is unnecessary and unreasonable. In such cases the measure of damage is the difference in value of the farm with the trees *reasonably* trimmed and with the trees *unreasonably* trimmed by the company (Newland vs. Iowa Railway & Light Co. 179 Iowa 228; Thompson vs. Belmont Telephone Co. 179 Iowa 1242, 162 N.W. 610; Meyer vs. Standard Telephone Co. 122 Iowa 514).

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