

WITHERS *v.* BURKETT AND ANOTHER.**Circuit Court, E. D. Texas.*

January, 1883.

TRESPASS ON REAL ESTATE.

By the common law, and by the statute law of the state of Texas, neither a devisee of real estate nor the universal legatee of the testator can bring or maintain an action for damages for a trespass committed on said real estate during the life of the testator.

Texas Code, arts. 3128, 4858, 1201.

On Demurrer.

Chilton & Chilton, for plaintiffs.

Herndon & Crain, for defendants.

PARDEE, J. This case has been heard upon a demurrer to action brought by devisee of land and residuary legatee for damages committed during life of testator. The devisee claims by virtue of assignment from residuary legatee, who joins *pro forma* in the suit for the use of assignee. By the common law such action survives to neither heirs nor executors and administrators. 2 Wat. Tresp. § 980. The common law is the general rule of decision in this state. Texas Code, art. 3128. The law of the state does not authorize the devise of a claim for damages for trespass to real estate. See article 4858, Texas Code. But such action is saved to the executor or administrator. Article 1201, Texas Code.

It follows that neither of the parties now before the court as plaintiffs have authority to bring the action, and the demurrer should be sustained.

MORRILL, J., concurs.

* Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

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