REMEDIES FOR WASTE IN OHIO

The law of waste is concerned with limitations placed by law upon the use and enjoyment of land. The doctrine operates against the holder of a limited estate in the land and in favor of the holder of an interest in remainder or reversion. No act of a tenant will amount to waste unless it is or may be prejudicial to the reversion or remainder interests. Several remedies are available to protect these future interests. It is the purpose of this comment to explore the various remedies and their use in Ohio, with particular attention to the problem of the applicable statute of limitations.

Legal Action For Forfeiture

> A tenant for life in real property who commits or suffers waste thereto shall forfeit that part of the property, to which such waste is committed or suffered, to the person having the immediate estate in reversion or remainder . . .[1]

There has been a statute comparable to this in Ohio since 1887. There is an identical provision for forfeiture for waste committed by a tenant in dower which is of even older origin.[2] Note that the statute applies to voluntary ("commits") and permissive ("suffers") waste.

The general rule is that the forfeiture doesn't occur until there has been a judicial pronouncement to that effect.[3] However, there may be some question of its acceptance in Ohio. Under a statute which said that failure of a life tenant to list or pay the tax on lands shall forfeit the lands to the person entitled to them in reversion or remainder, the Ohio Supreme Court, in *McMillan v. Robbins*,[4] held that the life tenant's estate ended when he failed to pay the taxes. Therefore, the reversioner, but not the life tenant, was allowed to redeem from the tax sale. The rule was stated to be that the life estate terminates upon the happening of the event upon which the forfeiture depends, and the reversioner can then enter without a forfeiture being declared by a court.[5]

Although the tax delinquency statute, as now worded, prevents application of this rule,[6] it might be supposed that the rule would be

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[1] Ohio Rev. Code §2105.20

[2] Ohio Rev. Code §2103.07.

[3] Restatement, Property §152 (1936).

[4] 5 Ohio 28 (1831).

[5] Estabrook v. Royon, 52 Ohio St. 318, 39 N.E. 808 (1895) restates the rule, disapproving Johnson v. Pettit, 13 Ohio, Dec. Reprint 394 (1870).

[6] The statute now says the life tenant forfeits his estate if he fails to redeem within one year after the land is sold for delinquent taxes. Ohio Rev. Code §5719.22. The tax sale system employed in Ohio since 1917, does not provide for any redemption period after the tax sale. Ohio Rev. Code §5721.15, 5723.03. The sale itself cuts off the interest of both the life tenant and the remainderman. Since the event upon which the forfeiture occurs does not happen until a year after the land has been sold, the statute is ineffective to declare a forfeiture in this situation today. Leatherman v. Maytham, 66 Ohio App. 344, 33 N.E. 2d 1022 (1940).

applied to actions for forfeiture for waste. Since waste is the event upon which forfeiture depends, the forfeiture presumably would occur at that time. However, it is very likely that the courts would not hold this way. The remainderman should, and apparently does, have an election to sue for forfeiture or damages, or perhaps both. It is reasonable to require the bringing of an action to manifest that election. Furthermore, if the tenant automatically loses his interest in the land, the remainderman could bring an action of ejectment to regain possession. The statute of limitations on an ejectment action is twenty-one years.[7] Yet there is a specific statute limiting actions for statutory forfeitures to one year.[8] Finally, whether waste has been committed is a question of fact, often a very difficult one. The case of *Mitchell v. Long* involved a forfeiture of land by a devisee who failed to offer the will, under which she held, for probate within three years.[9] The court said,

> Again, it must be observed that it is not a self operating statute; that is, it does not declare a rule of property, but an action is necessary to effect the forfeiture it provides for. This feature is manifest from the fact that it is not delay and lapse of time alone which start its operation, but a state of facts additional must be established, which situation can be brought about only by a proceeding in court.

It is submitted that the same reasoning applies to forfeiture for waste and that the rule of *McMillan v. Robbins* is, therefore, inapplicable.

Who can be forced to forfeit? The answer seems to be the person who is seized of the life estate at the time the waste was suffered or committed.[10] It is obvious that a life tenant who has conveyed his whole estate has nothing to forfeit. By the same token, the life tenant's grantee, who has an estate *pur autre vie*, can be forced to forfeit to the reversioner or remainderman for waste committed by him because he is seized of the life estate.

In cases concerning liability for waste, a distinction is sometimes drawn between legal and conventional life estates. The former are created by act of law; examples are estates by dower or curtesy, estates tail after possibility of issue extinct, and jointures. The latter are created by convention of the parties. At common law it was held that an action for waste would not lie against the grantee of a conventional estate for life or years because the grantor might have protected the future interest by inserting a covenant against waste. The Statute of Gloucester[11] made the action for forfeiture maintainable against the grantee of

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[7] OHIO REV. CODE §2305.04.

[8] OHIO REV. CODE §2305.11. In this connection see Wright v. Conner, 200 Ga. 413, 37 S.E. 2d 353 (1946).

[9] 9 Ohio N. P. (n.s.) 113 at 116 (1909).

[10] Howell v. Howell, 122 Ohio St. 543, 172 N.E. 528 (1930).

[11] Statute of Gloucester, 1278, 6 Edw. 1, c. 5.

a conventional estate for life or years.[12] Chancellor Kent said that statute was imported to this country as part of the common law.[13] Two early Ohio cases raised the question whether the Statute of Gloucester was part of Ohio's law, but they did not answer it.[14] The 1887 statute, predecessor of OHIO REV. CODE §2105.20, enacted at least part of the Statute of Gloucester. It made life estates created by convention of the parties forfeitable for waste. Leasehold interests still are not forfeitable for waste if there is no provision for it in the lease. This is so even though it is a ninety-nine year lease renewable forever.[15] To that extent at least the Statute of Gloucester was not accepted into Ohio law.

The action for forfeiture is a legal action since the right to bring it is given by statute.[16] Therefore, the maxim that equity abhors a forfeiture should be of little avail in Ohio, although it has been used with effect where equity courts hear actions for forfeiture for waste.[17] It is to be expected, however, that the plaintiff will be forced to carefully and completely plead and prove his case.[18] The statutes of some states do not allow forfeiture unless the damage caused to the future interest by waste is at least as great as the value of the unexpired life estate.[19] Since that provision does not appear in the Ohio statute, it cannot be presumed that the legislature intended such a requirement. However, one limitation is found in the statute. It was also a part of the Statute of Gloucester. That is that only the place wasted shall be forfeited. For many years this has been interpreted to mean that if the place wasted can be conveniently separated from the rest of the land, only it is forfeited. If it cannot, the whole premises are forfeited.[20] This leads to unusual situations. In a Kentucky case,[21] the appellate court overruled a demurrer to a petition asking for forfeiture for waste which consisted of destroying a large part of the fence which surrounded the land. They admonished the trial court that only the part wasted should be forfeited

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[12] This is Lord Coke's version of the common law and the effect of the Statute of Gloucester. 3 THOMAS' COKE 247 (1818). Other commentators are not fully in accord. See II REEVES' HISTORY OF ENGLISH LAW 59 (1869).

[13] 4 KENT'S COMMENTARIES 80 (9th ed. 1858).

[14] Stauffer v. Eaton, 13 Ohio 322 at 335 (1844); Jenks v. Langdon, 21 Ohio St. 13 362 at 369 (1871).

[15] Fowler v. The Children's Home, 10 Ohio N. P. (n.s.) 557 (1910).

[16] Gard v. Beard, 36 Ohio App. 105, 172 N. E. 673 (1929); Brown v. Martin, 137 Ga. 338, 73 S. E. 495 (1912). But see Mohler v. Mohler, Ohio L. Abs. 138 (1936).

[17] Continental Fuel Co. v. Haden, 182 Ky. 8, 206 S. W. 8 (1918). In Kentucky, actions based on voluntary waste are legal actions. Only equity relieves against permissive waste.

[18] Roby v. Newton, 121 Ga. 679, 49 S. E. 694 (1905); Mitchell vs. Long, Ohio N. P. (n.s.) 113 (1909).

[19] Restatement, PROPERTY §199 (1936); See McCartney v. Titsworth, 104 N. Y. Supp. 45 (1907), where that requirement was met.

[20] 3 THOMAS' COKE 250 (1818); 56 AM. JUR., *Waste* §35.

[21] Smith v. Mattingly, 96 Ky. 228, 28 S. W. 503 (1894).

but made no suggestion as to how this could be workably done. To a large degree this problem is one for the jury.[22]

The action for forfeiture is available only to the owner of the "immediate estate in reversion or remainder."[23] An estate tail in expectancy is not such an estate.[24] Nor is a vested remainder subject to divestment;[25] nor a possibility of reverter;[26] nor a contingent remainder, according to the dicta of several cases.[27] Obviously a person who has conveyed his future interest cannot sue for forfeiture for waste committed before (and a fortiori after) the conveyance because he has no right to possession. Whether the grantee of the future interest can demand forfeiture for waste committed before he acquired his interest seems not to have been decided by the Ohio courts.

OHIO REV. CODE §2305.11 says, "An action . . . upon a statute for a penalty or forfeiture shall be brought within one year after the cause thereof accrued . . . ." The time of accrual of a cause of action founded on waste will be considered later.

LEGAL ACTION FOR DAMAGES

> . . . and such tenant will be liable in damages to such person for the waste committed or suffered thereto.[28]

At least three states have held that a reversioner who has sold his interest can still sue for damages for waste committed before the conveyance.[29] It is uncertain whether the same result would be reached in Ohio where the statute is strictly interpreted.[30] When there is an intervening estate between the estate of the person who wasted the land and the reversioner or remainderman, the latter cannot sue for damages or forfeiture.[31] Nor is an expectancy a sufficient estate to found an action for damages based upon waste.[32] A contingent remainderman cannot bring an action for damages because, until the contingency has been resolved, it cannot be known whether that person is injured by the waste.[33]

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[22] Thus, in Clemence v. Steere, 1 R. I. 272, 53 Am. Dec. 621 (1850), the jury was instructed to find whether various parts of the property had been wasted and, if so, to declare them forfeited.

[23] OHIO REV. CODE §2105.20.

[24] Cook v. Hardin County Bank, 76 Ohio App. 203, 63 N.E. 2d 686 (1945).

[25] Wright v. Conner, 200 Ga. 413, 37 S. E. 2d 353 (1946).

[26] Batten v. Corporation Commission of North Carolina, 199 N. C. 460, 154 S. E. 748 (1930).

[27] Rogers v. Atlantic G. & P. Co., 213 N. Y. 246, 107 N.W. 661 (1915); Watson v. Wolff-Goldman Realty Co., 95 Ark. 18, 128 S. W. 581 (1910).

[28] OHIO REV. CODE §2105.20.

[29] Dickenson v. Baltimore, 48 Md. 583, 30 Am. Rep. 492 (1878); White v. Wheeler, 25 N. Y. 252 (1862); Payne v. Meisser, 176 Wis. 432, 187 N. W. 194 (1922).

[30] Hatch v. Hatch, 1 Ohio Dec. 270 (1894).

[31] *Ibid.*

[32] Note 24, *supra*. An expectancy will not even be protected by an injunction against future waste. Hall v. Rohr, 10 Ohio Dec. Reprint 690 (1890).

[33] Latham v. Roanoke R. & Lumber Co., 139 N. C. 9, 51 S. E. 790 (1905).

Relief available to the contingent remainderman in equity will be discussed later.

The classes of people who may be held liable for damages are at least as many as those who may be forced to forfeit. There are some who may be liable for damages although they have nothing to forfeit. Some old cases held that the owner of a life estate created by law (*e. g.*, a tenant in dower) who has conveyed his estate may be sued for damages for waste committed by his grantee.[34] In *Howell v. Howell*[35] the issue was whether a conventional life tenant who had sold his interest was liable for waste committed by his grantee. The court held that he was not because the deed had not covenanted against waste. This case should not be taken to stand for the proposition that a conventional life tenant will only be held accountable for waste if there was a covenant to that effect in the instrument under which he took. It does stand for the proposition that there is no relationship between a remainderman and a conventional life tenant who has sold his estate which will found an action for waste committed by the tenant's grantee, if there was not a covenant against waste.[36]

An action for waste in England under the Statute of Gloucester involved both forfeiture and treble damages. The Ohio statute seems to allow both remedies to a single plaintiff, but none of the reported cases appear to give both forfeiture and damages, although both are often asked for.[37]

In Ohio the four-year statute of limitations applies to actions for damages for waste.[38]

EQUITABLE ACTION FOR INJUNCTION AND ACCOUNTING

The earliest cases of equitable intervention to prevent waste arose in situations where there was no legal remedy at all, *e. g.*, when complainant was a contingent remainderman or when there was an intervening estate between complainant and tenant.[39] It was somewhat later that mere inadequacy of the legal remedy prompted equitable action to enjoin waste. Common law theories about the uniqueness of land and the right of the owner in fee to receive the specific thing instead of the money equivalent made it comparatively easy to show inadequacy of damages at law. Threatened injury to buildings as well as to the land became grounds for an injunction.[40] In the course of a thorough discussion of injunctions, one Ohio court has said:

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[34] Cases cited in 71 A.L.R. 1189 (1931).

[35] 122 Ohio St. 543, 172 N. E. 528 (1930).

[36] Donald v. Elliott, 32 N. Y. Supp. 821 (1895). Of course, if the suit is on the covenant, it is not an action "for waste."

[37] Howell vs. Howell, 122 Ohio St. 543, 172 N.E. 528 (1930); Kent vs. Bentley, 10 Ohio Cir. Ct. R. 132 (1895).

[38] OHIO REV. CODE §2305.09 (D).

[39] Walsh, *Equitable Relief Against Waste,* 5 ALA. L. J. 253 at 256 (1930).

[40] *Id.* at 258; Fortescue v. Bowler, 55 N. J. Eq. 741, 38 Atl. 445 (1897); Poertner v. Russel, 33 Wis. 193 (1873).

> It is difficult to lay down any precise rule as to what mischiefs are deemed irreparable; but the term may be applied, not only in respect to the nature of the injury itself, as being one, where the damage cannot be fully compensated; but also to the position of the parties, where the evil, in contemplation of law, cannot well be remedied or prevented by any act of the parties themselves . . . As instances of the latter, may be stated waste by a tenant in possession of the lands . . . In all these cases the injury might be the subject matter of compensation in damages, but it is insusceptible of remedy by the mere act of the party himself, and will be prevented by injunction . . . Every man in possession of property is presumed to be able to resist of himself any encroachment upon it. But when he is not thus in possession, and cannot obtain possession, or otherwise prevent the act, without himself being a wrongdoer, then he may be aided by equity. Now, in the case of waste, the landlord could not enter upon the land, to prevent its commission, without himself being a trespasser . . . [He] therefore may have redress by injunction.[41]

There is no indication, aside from occasional dicta,[42] that injunction against waste is not a valuable remedy in Ohio. As one would expect, the right of the plaintiff must be clear and the evidence satisfactory.[43] If plaintiff meets this burden, the injunction will be issued, even against threatened permissive waste.[44] As mentioned before, the contingent remainderman has no remedy at law for waste. He can, however, institute a suit in equity to enjoin waste.[45]

In cases where the life tenant has already committed or suffered minor waste (as distinguished from such irreparable waste as cutting trees or mining), the most desirable remedy may be a mandatory injunction that he repair the premises. The objection to this is the requirement of judicial supervision and approval of the repairs. For this reason, the

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[41] Commercial Bank v. Bowman, 13 Ohio Dec. 125 at 131 (1855).

[42] "Common law waste as to life estates has never been recognized in Ohio, and waste of itself is not a substantive ground for equitable relief as the remedy at law is adequate." Gard v. Beard, 36 Ohio App. 105, 172 N. E. 673 (1929). This statement was challenged in 4 CLEVE. B. J. No. 4, p. 11. The authority cited for the proposition by the Court of Appeals was Crockett v. Crockett, 2 Ohio St. 181 (1853). An examination of that case shows the court felt an injunction would issue against waste in a proper case.

[43] Miller v. Miller, 28 Ohio App. 203, 162 N. E. 459 (1927).

[44] Piatt v. Piatt, 12 Ohio Dec. Reprint 250 (1858). A temporary injunction was asked for, pending determination of the parties' rights at law.

[45] Fisher's Ex'r. v. Haney, 180 Ky. 257, 202 S. W. 495 (1918). It is clear that this alone does not afford contingent remaindermen adequate protection. Accordingly, Arkansas has held that equity will allow an accounting for past waste and impound the money until the contingency has been determined. Watson v. Wolff-Goldman Realty Co., 95 Ark. 18, 128 S. W. 581 (1910).

remedy is refused in England.[46] However, there is authority for mandatory injunctions for waste in this country.[47]

When the facts are such that equity will grant an injunction, it will also allow an accounting for past waste, although this may involve determination of legal issues and the granting of legal remedies.[48] The reason given is to avoid circuity of actions and multiplicity of suits.[49] In *Jenks v. Langdon* the court does not even question the propriety of this, but says, "The relief by way of compelling an account for waste already committed was incidental to such a bill [in Chancery to stay waste], and always, in a proper case, formed part of the decree."[50] But if the court will not grant the injunction, neither will it allow an accounting if, standing alone, it is merely an action for money damages for which the law provides an adequate remedy.[51]

Equity may grant an accounting in some instances without requiring it to be ancillary to other equitable relief. Generally speaking, those instances are accounts of fiduciaries, whenever discovery procedures are required,[52] and when the accounts are extremely complicated.[53] It has accordingly been recognized in Indiana that an account for waste may be had on general equity principles, if it is a proper case, although an injunction may not be had.[54] It would seem that in those situations where an accounting is allowed in Ohio, an injunction should not be a prerequisite to an accounting for waste. Broad language was used in *Crockett v. Crockett*: "Certain trees were cut down; the complainants say unlawfully. If so, the law furnishes an adequate remedy. There was no good reason for coming into equity, unless an injunction was necessary."[55] The facts of that case showed no independent grounds for an equitable accounting. Therefore, it is not strong authority for a denial of the remedy when such facts do exist.

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[46] Walsh, *supra* note 58, at 260.

[47] *Id.* at 261; Klie v. Van Broock, 56 N. J. Eq. 18, 37 Atl. 469 (1897); Union Trust Co. v. Georke Co., 103 N. J. Eq. 159, 142 Atl. 560 (1928); Hamburger & Dreyling v. Settegast, 62 Tex. Civ. App. 446, 131 S. W. 639 (1910); Humphreys v. Humphreys, 15 Pa. Dist. R. 530 (1904).

[48] 16 O. JUR., *Equity* §100. An extreme case is State of Montana ex rel. Tillman v. District Court, 101 Mont. 176, 53 P. 2d 107 (1936). Plaintiff tax collector prayed for an injunction and $1107.69 for taxes. The owner of the land had torn down all but one small building "of little or no value." The threat to destroy it gave the equity court jurisdiction and they allowed the accounting.

[49] K-W Ignition Co. v. Unit Coil Co., 93 Ohio St. 128 at 141, 112 N.E. 199 (1915); Maholm v. Marshall, 29 Ohio St. 611 (1876).

[50] 21 Ohio St. 362 at 368 (1871).

[51] Crockett v. Crockett, 2 Ohio St. 181 (1953).

[52] OHIO REV. CODE §2317.48 allows substantial discovery procedures to parties at law, but equity may still afford a more adequate remedy. Bonnell v. B. & T. Metals Co., 52 Ohio L. Abs. 1, 81 N. E. 2d 730 (1948).

[53] 16 O. JUR., *Equity* §100. However, the author of 1 O. JUR. 2d., *Accounts and Accounting* §48 says an accounting will no longer be allowed in this situation.

[54] Rupel v. Ohio Oil Co., 176 Ind. 4, 95 N. E. 225 (1911).

[55] 2 Ohio St. 181 at 186 (1853).

Assuming equity will take cognizance of the case for purposes of an accounting, what period of limitations governs the action? The rule can be stated to be that legal actions and those to which law and equity are concurrently open are governed by the statute of limitations applicable to legal actions. The actions which are exclusively within the jurisdiction of the equity court are limited by the equitable statute of limitations (or, if there is none, by laches).[56] At most, equity's power to grant an accounting is only concurrent with that of the law courts.[57] That is, although the equitable remedy is more complete and adequate than the legal remedy, plaintiff would not be turned away from a court of law. Therefore, it would seem that the four-year statute of limitations would be applied by a court of equity to an action for an accounting for past waste.

Time of Accrual of Action

The cause of action accrues at the time the waste is committed or suffered. Although *Reams v. Henney*,[58] the authoritative case on this point, was an action for damages for waste, there is no reason to believe the same rule would not be applied to forfeitures and equitable accountings. This rule as applied to permissive waste is different from the rule of many states. Those states hold that an action based on permissive waste does not accrue until expiration of the life estate.[59] The reason they give is that until that time it cannot be determined whether the future interest has been injured by the failure to repair because the life tenant may still make the repairs.

The holding of *Reams v. Henney* puts a considerable burden on the reversioner or remainderman.[60] Let us assume he has not been vigilant enough to obtain the preventive remedy of injunction. If the property has fallen into disrepair, he must sue every four years in order to protect himself. At least he will not be able to recover for damages which occurred more than four years prior to the action. It can be seen that a recreant life tenant could cause the remainderman much expense and trouble. The multiple damage features of the Statute of Gloucester and many states (other than Ohio) prompt the tenant to make repairs instead

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[56] Glass v. Courtright, 14 Ohio N.P. (n.s.) 273, 23 Ohio Dec. 253 (1913).

[57] 1 O. Jur. 2d. *Accounts and Accounting* §44.

[58] 88 Ohio App. 409, 97 N.E. 2d 37 (1950).

[59] Re Stout, 151 Or. 411, 50 P. 2d 768 (1935); Fisher's Ex'r. v. Haney, 180 Ky. 257, 202 S. W. 495 (1918); Prescott v. Grimes, 143 Ky. 191, 136 S. W. 206 (1911).

[60] It should be mentioned that the period of limitations would not begin to run against contingent remaindermen at the time of the waste. As stated before, they have no legal remedy because they have no vested interest. Before the statute begins to run, the claim must have matured so an action can be brought on it. Taylor v. Thorn, Adm'r., 29 Ohio St. 569 at 574 (1876); Hoiles v. Riddle, 74 Ohio St. 173, 78 N.E. 219 (1906).

of waiting to be sued. The remainderman in Ohio will be more likely to seek a forfeiture than to bring repeated suits for damages.[61]

Dirken T. Voelker

[61] In 40 O. JUR., *Waste* §16, it is suggested that equity may allow the life tenant to repair the property and thus allay the forfeiture. The authority therein cited for this proposition is Johnson v. Pettit, 13 Ohio Dec. Reprint 394 (1870). However, the usefulness of that case is certainly questionable since Estabrook v. Royon, 52 Ohio St. 323, 39 N. E. 809 (1895). It may be significant that these two cases arose under the statute allowing forfeiture for tax delinquency and not under OHIO REV. CODE §2105.20. There is strong authority that equity will not stay a statutory forfeiture. 2 POMEROY'S EQUITY JURISPRUDENCE §458 (5th ed. 1941).