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The Amendment of the Waste Statute—Retrogression?

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COMMENT

THE AMENDMENT OF THE WASTE STATUTE—RETROGRESSION?*

"This court early in its history announced the doctrine that the rule allowing recovery of exemplary and punitive damages was unsound in principle, and held that such damages were not recoverable in this juris-

*"Waste is an unreasonable and improper use and abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession, which results in substantial injury thereto. It is a violation of the obligation of the tenant to treat the premises in such a manner that no

diction, unless expressly so provided by statute."[1] So stated Mr. Justice Fullerton in 1926 when the Washington court refused to award treble damages for a violation of the waste statute[2] in the leading case prior to the 1943 amendment.[3] In face of such a strongly stated judicial

harm be done to them, and that the estate may revert to those having the reversionary interest, without material deterioration." Moore v. Twin City Ice & Cold Storage Co., 92 Wash. 608, 611, 159 Pac. 779 (1916).

Cf. REM. REV. STAT. (1932) § 601. "Until the expiration of the time allowed for redemption the court may restrain the commission of waste on the property. But it is not waste for the person in possession of the property at the time of the sale or entitled to possession afterwards during the period allowed for redemption to continue to use it in the same manner in which it was previously used, or to use it in the ordinary course of husbandry, or to make the necessary repairs of buildings thereon, or to use wood or timber on the property therefor, or for the repairs of fences, or for fuel in his family while he occupies the property."

It is not the purpose of this comment to present an exhaustive discussion of the waste statute or problems. In fact there are relatively few waste cases in the Washington reports, and some of them do not present anything of particular importance. The problem arises usually when the landlord seeks either multiple damages or forfeiture of the tenancy.

In the following cases the court found there had been no waste: Morris v. Shell Oil Co., 167 Wash. 331, 9 P. (2d) 354 (1932) (Painting plaintiff's building in defendant's distinctive colors at tenant's request, no permanent damage, not waste, even though it may have offended the aesthetic sense); Lee v. Weerda, 124 Wash. 168, 213 Pac. 919 (1923) (Growth of Canadian thistles, neglect of fruit trees, destruction of berry bushes, merely ill hushusbandry, not waste); Moore v. Twin City Ice & Cold Storage Co., 92 Wash. 608, 159 Pac. 779 (1916) (Tenant piled sand and gravel on the land preparatory to use in building on adjoining land, left some to make a driveway; there was no decrease of commercial value ($2,200) although there might have been decrease of agricultural value ($200)); Byrkett v. Gardner, 35 Wash. 668, 77 Pac. 1048 (1904) (Failure to farm in good husbandlike manner or keep fences in repair, not waste).

In the following cases the acts were recognized to constitute waste but apparently no right to treble damages was found: DeLano v. Tennent, 138 Wash. 39, 244 Pac. 273, 45 A. L. R. 766 (1926) (Discussed in text); Cogswell v. Brown, 102 Wash. 625, 173 Pac. 623 (1918) (Mortgagor during period of redemption may get accounting for waste from cutting of timber for commercial purposes, but under REM. REV. STAT. (1932) § 601 (single damages) and not under §§ 939 and 940 (companion to waste statute; relating to "timber trespass")); Crodle v. Dodge, 99 Wash. 121, 168 Pac. 986 (1917) (In action to set aside deed, no accounting for rents and profits but removal of timber for commercial purposes was waste and accounting therefor allowed); McDowell v. Beckham, 72 Wash. 224, 130 Pac. 350 (1913) (Cutting timber by life tenant's grantees is waste, not a possessory act to base adverse possession; issue as to ownership of condemnation award when land was taken by City of Seattle).

The reluctance of the court to award forfeiture is indicated by Northcraft v. Blumauer, 53 Wash. 243, 101 Pac. 871 (1909) (Easement owner gravelled logging railroad right-of-way rather than timbered it; not such waste as would authorize forfeiture).

Miscellaneous other cases: Brundage v. Home Savings & Loan Association, 11 Wash. 277, 39 Pac. 666 (1895) (Mortgagee in possession committing waste, not alone authorization for appointment of receiver to collect rents, etc.); Arment v. Hensel, 5 Wash. 152, 31 Pac. 464 (1892) ("Waste" referred to in REM. REV. STAT. (1932) § 941 is not technical waste requiring act by one lawfully in possession); McLeod v. Ellis, 2 Wash. 117, 26 Pac. 76 (1891) (Court found action to be for conversion of trees severed, in order to find action transitory—the waste and timber trespass statutes are discussed).

[1] DeLano v. Tennent, 138 Wash. 39, 47, 244 Pac. 273, 45 A. L. R. 766, 771 (1926).

[2] REM. REV. STAT. (1932) § 938.

[3] WASH. LAWS 1943, c. 22, p. 40.

position and the apparent legislative acquiescence in the doctrine, it is a bit of a surprise to read the 1943 legislature's amendment of the waste statute which seems in direct opposition to the quoted doctrine.

In 1854, the territorial legislature enacted a statute[4] which upon a showing of waste authorized a judgment for compensatory damages, forfeiture of the estate, and eviction from the premises. Fifteen years later, in 1869, the statute was changed to provide that in an action of waste "there may be judgment for treble damages." The language of the 1869 statute[5] survived the Code of 1881[6] and finally appeared as Rem. Rev. Stat. (1932) Sec. 938. In Chapter 22, Laws of 1943, the legislature made the first change in seventy-four years, and on a preliminary reading the statute now seems to take the final retrogressive step[7] in a change from mere compensatory damages to *mandatory* treble damages.

The statute now after the 1943 change reads:

> If a guardian, tenant in severalty or in common, for life or for years, *or by sufferance, or at will, or a sub-tenant,* of real property commit waste thereon, any person injured thereby may maintain an action at law for damages therefor against such guardian or tenant *or sub-tenant;* in which action, *if the plaintiff prevails,* there *shall* be judgment for treble damages, *or for fifty dollars ($50), whichever is greater, and the court in addition may decree* forfeiture of the estate of the party committing or permitting the waste, and of eviction from the property. *The judgment, in any event, shall include as part of the costs of the prevailing party a reasonable attorney's fee to be fixed by the court.* But judgment of forfeiture and eviction shall only be given in favor of the person entitled to the reversion against the tenant in possession, when the injury to the estate in reversion is determined in the action to be equal to the value of the tenant's estate or unexpired term, or to have been done or suffered in malice.[8]

The most important change is the substitution of "shall" for "may" of the former statute in the clause "there shall be judgment for treble damages." The signficance of this change is clearer when *DeLano v. Tennent*[9] is considered. In that case the tenant at the end of the term had extensively damaged the leased premises by removing certain fixtures which he mistakenly, but in good faith, believed he was privileged to remove. The plaintiff landlord contended that treble damages should have been awarded under the statute, but the court rejected this contention, making the statement of policy quoted above and concluding that the statute penalized only wilful and wanton acts of waste, and that for waste committed innocently only compensatory damages could be recovered.

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[4] WASH. TERR. LAWS 1854, § 403, p. 206.

[5] WASH. TERR. LAWS 1869, § 555, p. 143.

[6] As § 601.

[7] Retrogressive, that is, assuming the policy stated by the court in the DeLano case is correct.

[8] REM. REV. STAT. (1943 supp.) § 938. The italicized parts are additions by the 1943 act; except for changing "may" to "shall," the 1943 act merely made additions to the statute without change of the existing language.

[9] *Supra* note 1.

It has generally been true that the provisions of waste statutes authorizing multiple damage awards are strictly construed,[10] but this normally has meant that multiple damages will be awarded for voluntary waste[11] whether innocently committed or not, and only single damages for permissive waste.[12] Although the variance between the permissive "may" and the mandatory "shall" might not compel the court to reach a different conclusion, under the limitation of the permissive language of the statute announced in *DeLano v. Tennent,* it would appear that the legislature by changing to "shall" has flatly rejected the policy against awarding multiple damages and has gone beyond the position normally reached in American jurisdictions.

Until the new statute is construed by the court, it cannot be determined just what effect the change will have, but despite its seeming drastic character, it is suggested that a preferable construction of the statute will make the Washington position the same as that elsewhere. The language of the statute can be divided into two general parts. The first part refers to the awarding of treble damages and authorizes an action "if a . . . tenant . . . *commit* waste . . ." The second part of the statute authorizes forfeiture against "the party *committing or permitting* the waste . . ." The second part also authorizes eviction, and provides that judgment of forfeiture and eviction shall be given only if the injury to the estate in reversion is determined "to be equal to the value of the tenant's estate or unexpired term, or to have been *done or suffered* in malice." (Emphasis supplied.)

In light of the policy or doctrine against punitive damages which was so vigorously stated by the court in the *DeLano* case, it is suggested that the variance in the language of the two parts of the statute justifies a construction that only *voluntary* waste is to be penalized by treble damages. Notice that the language relating to treble damages penalizes a tenant who *commits* waste, whereas the language with reference to forfeiture and eviction penalizes not only the tenant who *commits* but also the one who *permits* waste.[13]

The amendment also provides for a minimum recovery by the plaintiff of $50 and the award of reasonable attorney's fees to the prevailing party. There formerly were no similar provisions.

One additional problem should be pointed out. Before the 1943 amendment no tenant holding an estate less than an estate for years was within the scope of the statute. The 1943 amendment includes tenants by sufferance, tenants at will, and sub-tenants. If it was advisable to

[10] *See* RESTATEMENT, PROPERTY (1936) §§ 198, 199.

[11] An injury to the premises resulting from the tenant's affirmative act, *e.g.*, tearing down a shed, cutting trees, is voluntary waste. An injury resulting from the tenant's failure to act when it is his duty to act, *e.g.*, failure to keep the structure in repair, is permissive waste. *See* RESTATEMENT, PROPERTY (1936) § 138, "Duty not to diminish market value of subsequent interests," on voluntary waste; and *id.* § 139, "Duty not to permit deterioration of land or structures," on permissive waste. These two sections discuss a life tenant's duties but the discussion is also applicable to a leaseholder.

[12] Notes, "Construction and effect of statutory provision for double or treble damages against tenant committing waste." 45 A. L. R. 771 (1926).

[13] The fifth subdivision of the unlawful detainer statute also recognizes this distinction: "A tenant of real property for a term less than life is guilty of unlawful detainer . . . (5) when he commits or permits waste upon the demised premises . . ." REM. REV. STAT. (1932) § 812.

extend the coverage of the statute, it would seem that the inclusion of the periodic tenant would have been most important. Until the recent case of *Najewitz v. City of Seattle*,[14] it was rather generally thought that there were no tenants at will in Washington.[15] Certainly the ordinary tenant in this state for an indefinite time is a tenant from period to period (usually month to month) under the provisions of Rem. Rev. Stat. (1933) Sec. 10619.

Before the 1943 change it could have been argued that the periodic tenant is essentially a tenant at will with the statute defining the notice necessary to terminate his tenancy.[16] Such a conclusion would make inappropriate the inclusion of the periodic tenant within the waste statute, inasmuch as the tenant at will ordinarily cannot be guilty of waste. His act, which is of the same character as waste, technically, amounts to a termination of his tenancy, and he is held liable therefor as a *trespasser* and not as a wrongdoing *tenant*.[17] Now, it would seem, the amendment prevents finding a periodic tenant guilty of waste under the statute[18] even though other "lesser" tenants are included

The wisdom of the enactment of the 1943 statute is certainly open to doubt, and as the foregoing discussion indicates the new law may have raised problems just as serious as those (whatever they were) the amendment was designed to correct.

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[14] 21 Wn.(2d) 656, 152 P.(2d) 722 (1944). Noted, (1945) 20 WASH. L. REV. 169.

[15] *Cf.* RESTATEMENT, PROPERTY, WASH. ANNOT. (1940) § 21.

[16] It seems to be clear, at least, that the tenancy from period to period developed to avoid the undesirable features of the strict tenancy at will. *See* 7 HOLDSWORTH, HISTORY OF ENGLISH LAW (1926) 243-244.

[17] *See* TIFFANY, REAL PROPERTY (3d ed., 1939) § 631. This would mean recovery of single damages as against an ordinary trespasser, unless the damage was within the scope of the "timber trespass" statute (REM. REV. STAT. (1932) § 939.)

[18] This, of course, does not mean that a periodic tenant cannot be restricted by a covenant against waste. It could be argued that before the 1943 change the statute applied to (1) tenants in common generally, (2) life tenants, and (3) leaseholders, *i.e.*, that the phrase "tenant for years" was not used technically (referring to a tenant for a fixed term), but rather meant all leaseholders—non-freeholders. The express inclusion of certain non-freeholders by the 1943 change seems to indicate the exclusion of other non-freeholders.