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establish the route according to the reasonable convenience of both parties.[9] All persons to be affected by the location should be made parties to the action.[10]

Once equity has assumed jurisdiction it is not error for the chancellor to determine the width of the way. It is within his sound discretion to determine that which would be a reasonable width considering the purpose of the deed creating it, the intent of the parties, and the situation of the property.[11]

There is not a case precisely in point in West Virginia where the chancellor has located an easement, but in view of the preceding discussion it seems that a West Virginia court should determine its location if the necessity arises. H. P. S.

LANDLORD AND TENANT — COVENANT TO REBUILD — WHEN RIGHT OF ACTION ACCRUES THEREON. — A lessor brought an action for damages against his lessee, before the expiration of the term, based upon the breach of a covenant to replace buildings destroyed by fire contained in the twenty-year lease. *Held,* two judges dissenting, that the lessor may maintain such an action before the term of the lease has expired. *Campbell v. Kanawha & Hocking Coal & Coke Co.*[1]

The history of this question is both interesting and consistent. At the old common law, a tenant for years was liable for permissive waste, which included liability for buildings destroyed by fire, whether or not through the negligence of the tenant.[2] The Statute of Anne, passed in 1707, provided that a tenant would not be liable for fires which started accidentally.[3] Later English and American cases construed covenants to repair or leave in good condition as including accidental fires.[4] An English court went as far as to de-

Electric Co., 78 N. J. Eq. 434, 79 Atl. 326 (1911). The right to such easement must be clear or equity will not establish the route, inasmuch as this question should be settled at law.

[9] Stevens v. MacRae, 97 Vt. 76, 122 Atl. 892 (1923).

[10] Fox v. Paul, 158 Md. 379, 148 Atl. 809 (1929). The report of the commissioner or chancellor is usually final and binding upon the parties and appeal is usually the only remedy.

[11] Addison County v. Blackmer, 101 Vt. 384, 143 Atl. 700 (1928); Palmer v. Newman, 91 W. Va. 13, 112 S. E. 194 (1922).

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[1] 9 S. E. (2d) 135 (W. Va. 1940).

[2] 4 KENT'S COMMENTARIES (14th ed. 1896) 89.

[3] 6 ANNE c. 31 (1707), 11 STATS. 417, stating ". . . . no action shall be . . . . maintained . . . . against any person in whose house . . . . any fire shall . . . . accidentally begin . . . ."

[4] Church Wardens of St. Savior's Southwark v. Smith, 3 Burr. 1271, 97 Eng. Rep. R. 826 (1762); 1 MINOR, REAL PROPERTY (1908) § 416.

cide that an heir who accepted a devise of real property, on condition that it be kept in repair, was bound to rebuild structures which were burned thereon.[5] The rule as to liability of a tenant, under a covenant to repair, to replace buildings when destroyed by fire was carried over into the common law of Virginia.[6] An 1849 statute of Virginia provided that a covenant to repair does not mean to rebuild, and it has been construed to mean exactly that in several Virginia cases.[7] This statute is now a part of the law of West Virginia.[8] The point is well discussed in the case of *Arbenz v. Exley, Watkins & Co.*[9] Thus, it seems that an express covenant is necessary to accomplish the liability of a tenant as it existed at common law prior to the Statute of Anne.[10]

A covenant to rebuild, standing alone, might be interpreted to mean that the premises should be left in as good condition as when the tenant took possession, under which interpretation there would be no breach until the end of the lease.[11] However, in instances of covenants to rebuild or repair, courts have allowed the bringing of actions for damages, for not rebuilding, before the expiration of the term, without even discussing the question.[12]

In the present case, there were apparently three promises, although it is not clear whether these were in one covenant, namely, "*to keep* all the buildings *in good repair, to keep* the same properly *insured* against loss by fire, and to replace any structures destroyed by fire" (italics supplied). The implication of these promises together is that the structures will be maintained in an habitable condition during the lifetime of the lease. This conclusion is reinforced by the fact that, in the present case, the insurance money collected would otherwise be wholly under the control of the tenant up to the end of the lease. In other words, the tenant might either

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[5] Gregg v. Coates, 23 Beav. 33, 53 Eng. Rep. R. 13 (1856).

[6] Ross v. Overton, 3 Call. 309 (Va. 1802).

[7] Richmond Ice Co. v. Crystal Ice Co., 99 Va. 239, 37 S. E. 851 (1901); Vaughan v. Mayo Milling Co., 127 Va. 148, 102 S. E. 597 (1920); Willis v. Wrenn's Ex'x, 141 Va. 385, 127 S. E. 312 (1925).

[8] W. VA. REV. CODE (1931) c. 36, art. 4, § 13, stating that no covenant to repair shall require the replacement of buildings destroyed by fire or otherwise without fault of the tenant "unless there be other words showing it to be the intent of the parties that he should be so bound."

[9] 52 W. Va. 476, 478, 44 S. E. 149 (1903).

[10] 6 ANNE c. 31 (1707).

[11] Chipman v. Emeric, 5 Cal. 49 (1855); see dissent of Riley, P., in principal case.

[12] Moses v. Old Dominion Iron & Nail Works Co., 75 Va. 95 (1880) (covenant to repair); City of London v. Nash, 3 Atk. 512, 26 Eng. Rep. R. 1095 (1747) (covenant to rebuild); Bullock v. Dommitt, 6 T. R. 650, 101 Eng. Rep. R. 752 (1796) (covenant to repair).

invest the money and realize a substantial profit therefrom, without liability to account to the landlord,[13] or he might dissipate it so that the landlord would run the risk of the other's solvency during the balance of the lease.[14] In these circumstances, the conclusion seems proper that the tenant was under the duty of utilizing the insurance money to rebuild within a reasonable time after the destruction by fire; and an English court has so held on somewhat analogous facts.[15]

H. P. B., JR.

OIL AND GAS — LIABILITY OF LESSEE FOR NEGLIGENT OPERATION OF WELL — ACIDATION METHOD. — The lessee drilled a well on the fringe of a proven oil field (down the dome), large producers being to the north (up the dome), mediocre ones to the east and west, and either dry holes, salt wells or small producers to the south. The stratum was limestone with a "pay"[1] of approximately two feet in thickness, the oil being forced upward by the hydrostatic pressure of the salt water (which was known to be directly below). The flow being inadequate to justify normal operations, the lessee in good faith employed a chemical company to acidize the well, in order to enlarge the pores in the oil-bearing limestone. Production was greatly increased, but salt brines shortly impregnated the well, and it was abandoned a year or so later after a production of many thousand barrels. The lessor claimed negligence in acidation, having regard to the thinness of the "pay", the known proximity of the brine and the quantity of acid employed. It was testified that prudent development required the use of a "blanket"[2] of calcium chloride, because the acid, amenable to the laws of gravity, attacked

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[13] See majority opinion, p. 137, principal case.

[14] Moses v. Old Dominion Iron & Nail Works Co., 75 Va. 95, 102 (1880): "If the landlord is compelled to wait the expiration of the term before he can sue, he must of course run all the risks of the tenant's continued solvency."

[15] In a lease for 99 years there was a covenant to insure the buildings against loss by fire, and to repair and maintain the premises. Dwelling was struck and destroyed by German bomb. Action was brought to recover damages for breach of the covenant thirty-five years before the term expired and about two years after the destruction of the structure. Recovery allowed. Redmond v. Dainton, (1920) 2 K. B. 256.

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[1] "Pay" in the language of a driller means an oil or gas producing area in the strata.

[2] A "blanket" is an inert liquid forced into the well to resist the action of the acid and to direct it into the "pay". Great weight was given by the court to an advertising illustration of the Dow Chemical Company in 15 FORTUNE 201 (April, 1937). For a more scientific analysis see Putnam, *Development of Acid Treatment of Oil Wells Involves a Careful Study of the Problems of Each*, OIL & GAS JOURNAL, Feb. 23, 1933.