

November 1953

Injunctions Against Trespasses Where Title is in Dispute

R. A. K.

West Virginia University College of Law

Follow this and additional works at: <https://researchrepository.wvu.edu/wvlr>



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

R. A. K., *Injunctions Against Trespasses Where Title is in Dispute*, 55 W. Va. L. Rev. (1953).

Available at: <https://researchrepository.wvu.edu/wvlr/vol55/iss3/6>

This Student Note is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.

West Virginia Law Review

Published by the College of Law of West Virginia University. Official
publication of The West Virginia Bar Association.

STUDENT BOARD OF EDITORS

Willis Owen Shay, *Editor in Chief*
Lee Allen Strimbeck, *Associate Editor*

Jackson Lawler Anderson
Boyce Albert Griffith
John Marshall Holcomb
Robert Alan Klayman

Isaac Murray Lewis
George Maywood Scott
Giles D. H. Snyder
Carl Frederick Stucky, Jr.

Marlyn E. Lugar, *Faculty Editor in Charge*
Louise Farrell Conaway, *Business Manager*

STUDENT NOTES

INJUNCTIONS AGAINST TRESPASSES WHERE TITLE IS IN DISPUTE.—
There are many cases involving the question of whether equity has "jurisdiction" to enjoin a trespass when the title to the property is in dispute. It seems that it is not really a question of power, but rather a question of whether the court will choose to exercise its power or leave the question of title to the law court. Yet, the West Virginia court continues to speak of lack of jurisdiction, in the sense of power, rather than refusal to exercise jurisdiction where the title is in dispute.

There has been a recent tendency for the courts of equity to be more lenient with regard to granting injunctions against trespasses. However, the old rule that equity will not settle a title dispute still persists.

The early cases in this jurisdiction were very strict in laying down the rule that the plaintiff's title had to be either free from dispute or have been settled by an ejectment action to obtain injunctions against trespasses.¹

The next question that arose was whether the plaintiff could get a temporary injunction to restrain the trespass if he had an action pending at law, or was immediately going to bring such action, to settle the title question. The early cases held that even in such cases, in order to be granted the injunction, the plaintiff had to show irreparable injury, or that the defendant was insolvent so that the legal remedy would be worthless. It was held that the

¹ *McMillan v. Ferrell*, 7 W. Va. 223 (1874).

cutting and removal of timber was not an irreparable injury.² Dicta in a later case indicated that the removal of iron or coal might be considered an irreparable injury and that a temporary injunction would be granted in such case pending settlement at law of the title question.³

These holdings were followed in a series of cases on this question in the late part of the nineteenth century.⁴

With regard to restraining the defendant from the removal of oil and gas, it was held in *Bettman v. Harness*⁵ that such was an irreparable injury and that an injunction would lie in such case even though the title was in dispute. However, this holding was not in point with regard to the present question because the facts did not really involve a title dispute. *A* had made a lease to *P* who did not go into possession; *A* later made a lease to *D* of the same premises. *P* sought to enjoin *D* from drilling for oil and gas.

One of the leading cases on the question under discussion was *Freer v. Davis*.⁶ It involved an injunction against removal of oil and gas where the title was in dispute. The court distinguished this case from the *Bettman* case. There, the question as to the validity of the two leases was merely a question of law while in this case there was a boundary dispute which was a question of fact for jury determination. The court then summarized the law in West Virginia as to how far equity would go to enjoin a trespass when the title was in dispute. The strictness of noninterference in such cases had been relaxed only to the extent that equity would grant an injunction pending settlement of the title question at law, and even then, only if it were shown that there would be irreparable injury in the absence of the injunction. Thus, the court set the limit on the jurisdiction that equity would exercise in these cases. The proposition that where equity has taken jurisdiction for one purpose, it will do complete justice between the parties, even to the extent of determining legal rights, was held not to extend to the question of title.

However, these injunctions pending settlement of the title question at law were still denied when the plaintiff wanted to

² *Cox v. Douglas*, 20 W. Va. 175 (1882).

³ See *Becker v. McGraw*, 48 W. Va. 539, 541, 37 S.E. 532, 533 (1900).

⁴ *Burns v. Mearns*, 44 W. Va. 744, 30 S.E. 112 (1898); *Lazzell v. Garlow*, 44 W. Va. 466, 30 S.E. 171 (1898); *Watson v. Ferrell*, 34 W. Va. 406, 12 S.E. 724 (1890); *Kemble v. Cresap*, 26 W. Va. 603 (1885); *Schoonover v. Bright*, 24 W. Va. 698 (1884).

⁵ 42 W. Va. 433, 26 S.E. 271 (1896).

⁶ 52 W. Va. 1, 43 S.E. 164 (1902).

enjoin the cutting and removal of timber. Such was held not to be an irreparable injury.⁷ Then in *Pardee v. Camden Lumber Co.*,⁸ another leading case, the court held that the cutting and removal of timber is always an irreparable injury and expressly overruled the earlier cases on that point.⁹

The law seems to be well settled today in West Virginia that if the title is in dispute, equity will not grant an injunction unless there is an action pending or about to be brought at law. Equity will not settle the title question if it is a question of fact for the jury.¹⁰

If the title dispute involves only a question of law, there being no issues of fact for the jury, equity will exercise its jurisdiction to grant an injunction even though no action at law is pending to determine the title question.¹¹ In this case equity will assume jurisdiction to settle the title dispute and restrain the trespass in the same suit. To defeat equity jurisdiction, the title dispute must be of the type that makes intervention of a trial by jury necessary. If the title question involves construction of a deed or title papers, it is merely a question of law for the court. Thus, to this extent equity will try title.

It is also well settled that the plaintiff need not show irreparable injury to get an injunction against a continuing trespass where the title is *not* in dispute.¹² Thus, it would seem that an injunction

⁷ *Curtin v. Stout*, 57 W. Va. 271, 50 S.E. 810 (1905).

⁸ 70 W. Va. 68, 73 S.E. 82 (1911); *accord*, *Waldron v. Ritter*, 70 W. Va. 470, 74 S.E. 687 (1912). Note that in these cases there was an action pending at law to determine the title dispute.

⁹ *Marcum v. Marcum*, 57 W. Va. 285, 50 S.E. 246 (1905); *Curtin v. Stout*, 57 W. Va. 271, 50 S.E. 810 (1905); *Stephenson & Coon v. Burdett*, 56 W. Va. 109, 48 S.E. 846 (1904); *Burns v. Mearns*, 44 W. Va. 744, 30 S.E. 112 (1898); *Kemble v. Cresap*, 26 W. Va. 603 (1885); *Schoonover v. Bright*, 24 W. Va. 698 (1884); *Cox v. Douglas*, 20 W. Va. 175 (1882); *Western M. & M. Co. v. Virginia Cannel Coal Co.*, 10 W. Va. 250 (1877); *McMillan v. Ferrell*, 7 W. Va. 223 (1874).

¹⁰ *Huffman v. Chedester*, 126 W. Va. 73, 27 S.E.2d 272 (1943); *Stickler v. Bays*, 116 W. Va. 463, 181 S.E. 717 (1935); *United Fuel Gas Co. v. Hays Oil & Gas Co.*, 107 W. Va. 255, 148 S.E. 76 (1929); *McDonald v. Boggs*, 97 W. Va. 201, 124 S.E. 680 (1924); *Galford v. Henry*, 93 W. Va. 404, 116 S.E. 683 (1923); *Carrie v. Kennedy*, 80 W. Va. 694, 93 S.E. 807 (1917); *Barth v. Shepherd*, 80 W. Va. 218, 92 S.E. 317 (1917); *Beatty v. Edgell*, 75 W. Va. 252, 83 S.E. 903 (1914); *Hudson v. Iguano Land & Mining Co.*, 71 W. Va. 402, 76 S.E. 797 (1912).

¹¹ *Columbia Gas & Electric Co. v. Moore*, 81 W. Va. 164, 93 S.E. 1051 (1917); *Halstead v. Aliff*, 78 W. Va. 480, 89 S.E. 721 (1916); *Myers v. Bland*, 77 W. Va. 546, 87 S.E. 868 (1916); *Bradley v. Swope*, 77 W. Va. 113, 87 S.E. 86 (1915); *Ephriam Creek Coal & Coke Co. v. Bragg*, 75 W. Va. 70, 83 S.E. 190 (1914); *Electro Metallurgical Co. v. Montgomery*, 70 W. Va. 754, 74 S.E. 994 (1912); *Sult v. Hochstetter Oil Co.*, 63 W. Va. 317, 61 S.E. 307 (1908).

¹² *Lilly v. Bowling*, 120 W. Va. 169, 197 S.E. 299 (1938); *Henline v. Miller*, 117 W. Va. 439, 185 S.E. 852 (1936); *Dorsey v. Dorsey*, 109 W. Va. 111, 153 S.E. 146 (1930).

against a continuing trespass could be obtained even though the title is in dispute if there is an action of ejectment pending or about to be brought at law.¹³ If the situation is such that the court would grant an injunction if the title were not in dispute, it seems that an injunction should be granted if an action of ejectment is pending where the title is in dispute.¹⁴

From the foregoing discussion it is easy to see that although equity will settle title where the dispute involves merely a question of law, and will also grant an injunction to restrain trespasses when an ejectment action is pending or immediately to be brought at law, equity still refuses to exercise its jurisdiction to *settle* a title dispute where issues of fact for the jury are involved.

R. A. K.

JOINT AND MUTUAL WILLS IN WEST VIRGINIA.—The question of the validity of joint and mutual wills was presented before the court in the case of *Underwood v. Myers*.¹ The court, deciding against the defendant's contention that such wills are invalid, recognized the following principle:

"When mutual and joint wills were first considered by the English courts, they were disapproved and the earlier American decisions also pronounce against them; but the more modern views of the courts of both countries sustain the validity of such wills and declare they are not contrary to public policy."²

Therefore, it is seen that the West Virginia court clearly recognizes the validity of joint and mutual wills. With this as a starting point it will be the intended purpose to present the legal effect of such wills as determined from an examination of the West Virginia cases involving joint and mutual wills. It should be noted that this discussion will not consider the effect of attempted revocation prior to the death of either of the makers of the will.

In order to discuss intelligently joint and mutual wills, it is necessary that the terms be clearly defined. In West Virginia a joint will is a testamentary instrument with reciprocal provisions executed pursuant to an agreement or compact jointly signed by two or more persons. Perhaps, an extract from a West Virginia case will best illustrate:

¹³ See *Henline v. Miller*, 117 W. Va. 439, 443, 185 S.E. 852, 853 (1936).

¹⁴ Cf. *West Virginia Development Co. v. Preston County Development Co.*, 76 W. Va. 492, 495, 85 S.E. 668, 669 (1915).

¹ 107 W. Va. 57, 146 S.E. 896 (1929).

² *Id.* at 59, 146 S.E. at 896.