Volume 29 | Issue 3 Article 9

April 1923

Landlord and Tenant--Injunction to Stay Waste

J. D. D.
West Virginia University College of Law

ally a city or county, is made defendant in a suit where liability is based on alleged acceptance of a dedication. In such cases the courts by a great majority say that public user alone will not bind the dedicatee.[27]

The reason for the strictness of the West Virginia Supreme Court in determining what constitutes an acceptance of a dedication, and its opposition to public user as an acceptance, is found in the statute imposing absolute liability on a county or municipality for injury by reason of a public road being out of repair,[28] and the definition given in our statutes to the words "road and street."[29]

—R. J. R.

LANDLORD AND TENANT—INJUNCTION TO STAY WASTE.—The tenant in possession under a one year lease let out a part of the demised premises, a farm, to striking miners for a tent colony. The miners erected tents, frame houses of a temporary nature, dug holes, ditches and drains through the meadowland. The lessor filed his bill in equity against the lessee for an injunction, one of the grounds for relief being that the lessee and those under him were committing waste. The lower court granted the injunction. It appears that the waste complained of was not irreparable and of a substantial or permanent nature. Upon appeal, the Supreme Court reversed the decree of the lower court, holding, *inter alia,* that in a suit by the lessor to restrain the lessee from committing waste on the demised premises the bill must aver facts sufficient to show that the injury is irreparable by an action at law. *Gwinn* v. *Rogers,* 115 S. E. 428, (W. Va. 1923).

The Court cites as authority for this holding the case of *Greathouse* v. *Greathouse,* 46 W. Va. 21. In that case the Court refused to restrain the life tenant from committing waste on the ground that the waste proven was trivial and capable of pecuniary compensation; that the injury must be substantial and irreparable in order to give equity jurisdiction and authority to grant an injunc-

[27] Downing *v.* Coatesville Borough, 214 Pa. 291, 63 Atl. 696 (1906); Road Dist. No. 1 *v.* Beebe, 213 Ill. 147, 83 N. E. 131 (1907); Michaelson *v.* Charleston, 71 W. Va. 35, 75 S. E. 151 (1912); Host *v.* Piedmont etc. Ry Co., *supra. Contra,* State *v.* Birmingham, 74 Ia. 407, 38 N. W. 121 (1888).
[28] W. VA. CODE, c. 43 § 154.
[29] Talbott *v.* King, 32 W. Va. 6, 9 S. E. 48 (1889).

tion. That case cites as authority for so holding: *McMillan* v. *Ferrell,* 7 W. Va. 223; *Cox* v. *Douglass,* 20 W. Va. 175; *Watson* v. *Ferrell,* 34 W. Va. 406; *Bettman* v. *Harness,* 42 W. Va. 433. An examination of these cases reveal that the relation of the parties is not that of landlord and tenant, or that they stand in any privity of title, but are cases where the title is in dispute and consequently are cases involving trespass. Historically, there is a fundamental distinction between the use of an injunction to stay waste by a tenant and an injunction to restrain trespass. Originally the injunction was granted only upon the petition of the owner of the reversion to stay waste by the tenant in possession. Later, to afford relief in cases of trespass where the injury was irreparable, and consequently there was no adequate remedy at law, equity extended its jurisdiction to restrain such trespasses. POMEROY, EQ. JUR. § 1896-1901; LANGDELL, EQ. JUR. pp. 30-31. It seems that irreparability of injury was not a requisite for an injunction to stay waste, while that is the very basis of equity's jurisdiction to restrain trespass. This distinction still exists and has been recognized by some American courts, who assert and follow the doctrine that where there is privity of title between the parties an injunction to stay waste is proper regardless of the irreparability of the injury, but that as between strangers or parties claiming adversely there is no distinction between trespass and waste and the injury must be shown to be irreparable before an injunction will issue. *Georges Creek Coal, etc., Co.* v. *Detmold,* 1 Johns. Ch. 371 (Md.); *Brugh* v. *Denman,* 38 Ind. App. 486, 78 N. E. 349; *Bringham* v. *Overstreet,* 128 Ga. 447, 57 S. E. 484; *Woolworth Co.* v. *Nelson,* 204 Ala. 172, 85 So. 449; *Burton* v. *Steverson,* 91 So. 74, (Ala. 1921). Also, an injunction to stay waste will be granted in all cases where a legal action would lie to recover damages, while an injunction to restrain a trespass will not be granted unless the injury is irreparable. *Haymond* v. *Round,* 82 Neb. 598, 118 N. W. 328; *Hawley* v. *Clowes,* 2 Johns. Ch. 122, (N. Y.). One court goes even further in holding that an injunction to stay waste may issue even though the waste is so insignificant that there could be no recovery of damages at law. *Duvall* v. *Waters,* 1 Bland. 569, (Md.), 18 Am. Dec. 350. An injunction to stay waste will be granted almost as a matter of course. *Markeham v. Howell,* 33 Ga. 508; *Smith* v. *Rome,* 19 Ga. 89, 63 Am. Dec. 298. So far as the writer has been able to discover, West Virginia is the only American jurisdiction in which this point has been in question to adopt the view that as between landlord and tenant, or reversioner and tenant in pos-

session, equity will not give relief unless the injury is substantial and irreparable. —J. D. D.

WILLS—DEVISE OR BEQUEST FOR LIFE WITH POWER OF CONTROL OR DISPOSITION.—The testator by the residuary clause of his will, gave to his wife "all the residue of my personal property, consisting in money, credits or bonds to her for her own individual use during her lifetime and at her death after paying all her just debts and funeral expenses the residue, if any be left, to be divided equally among my four children." The wife in her bill against the executor, *inter alia,* asks the court to construe this clause. *Held,* the wife takes the property absolutely. *Blake v. Blake,* 115 S. E. 794, (W. Va. 1923).

Conceding that the language in the foregoing clause is such as to confer upon the wife an absolute power of disposal, the question of law presented is as to what effect the added power will have upon the life estate previously created by express language and further as to whether a gift over in such a case is well limited. The general rule is universally recognized and uncontroverted that where there is a perfectly general devise and the quantum of the estate can be determined only by implication, an added absolute power of disposal will pass the fee or absolute property. *Borden* v. *Downey,* 35 N. J. L. 74; *Jackson* v. *Robins,* 16 Johns. 537, (N. Y.); *Burwell* v. *Anderson,* 3 Leigh. 348, (Va.); Note, 6 L. R. A. (N. S.) 1186; Note, 17 Am. & Eng. Ann Cas. 480. Except in a few jurisdictions there is a well established exception to the above stated general rule to the effect that where a life estate is expressly limited to the first taker an added power of disposal will not elevate the life estate previously created to a fee or absolute property, nor render subsequent limitations over void. *Welsh* v. *Woodbury,* 144 Mass. 542, 11 N. E. 762; *Kirkpatrick* v. *Kirkpatrick,* 197 Ill. 144, 64 N. E. 267; *Burleigh* v. *Clough,* 52 N. H. 267; *Stuart* v. *Walker,* 72 Me. 145. The cases so holding treat the power of disposal not as property but as mere authority which the life tenant may or may not exercise as he pleases. In *Jackson* v. *Robins, supra,* the court said that a will should, if possible, be construed according to the intent of the testator and the power bestowed should be treated as a power and not as property in order to give effect to the limitation over. In *Stuart v. Walker, supra,* the court said that there was nothing inconsistent in these three