Cleveland State Law Review

Volume 16
Issue 2 *Real Property Torts (Symposium)*

Article

1967

Alterations by a Life Tenant or Tenant for Years as Waste

Frank C. Homan

Alterations By a Life Tenant or Tenant for Years as Waste

*Frank C. Homan**

THE LAW OF WASTE began sometime around the twelfth century. Protection of the succeeding owners of estates of inheritance against improper acts by the person in possession of the land was, and is, the essence of this action.[1] Generally it may be said that the person in possession of land is required to use it in such a way as not to unreasonably injure the interests in the land of one who has a future right of possession. Any failure to comply with this duty constitutes *waste*.[2]

In the thirteenth century the evolving common law saw the enactment of two statutes involving waste. The first was the Statute of Marlbridge, enacted in 1267,[3] and followed in 1278 by the Statute of Gloucester.[4] Both statutes forbade the commission of waste and imposed severe penalties on violators. However, nowhere in the text of either statute is there a definition as to what conduct constitutes waste. This definition and elaboration have been left to the judicial process.[5] It is the distinction between permissible and impermissible conduct which has occupied the courts in the intervening centuries.

At first, because land was described by reference to its physical appearance, any change in the character of the property was denoted as waste.[6] Today, the line of demarcation is not so clearly defined and, since property is now largely described by metes and bounds, there is the strong possibility that strict adherence to the old rule might retard the normal development of land and impose economic hardships on one who occupies either as a life tenant or as a tenant for years under a long-term lease.[7]

Such a tenant frequently has serious problems when he attempts to make alterations, or to remodel or replace existing structures. He could well find himself tied onto an uneconomic structure and yet, because of

---

* Asst. Prof. of Law, Univ. of Tulsa, College of Law.

1 5 Powell, Real Property § 637 (1962); Schwartz, Future Interests & Estate Planning §§ 2.10, 3.22 (1965); Walsh on Equity § 26 (1930).

2 2 Tiffany, Law of Real Property § 630 (1939).

3 52 Hen. III, c. 23 (1267).

4 6 Edw. I, c. 5 (1278).

5 Kircheway, Liability for Waste at Common Law, 8 Columbia L. Rev. 425 (1908). For a general view, see, 2 Encyc. of Negligence, 1748-1755 (1962).

6 2 Burby, Real Property, 38 (2d ed., 1954), Stephenson v. National Bank, 42 Fla. 347, 109 So. 424 (1926).

7 Melms v. Pabst Brewing Co., 104 Wis. 7, 79 N. W. 738 (1899); Crowe v. Wilson, 65 Ind. 497, 5 N. E. 427 (1886).

the doctrine of waste, be unable to make the changes necessary to bring about a more profitable return.

Life Tenant

The *Restatement* has recognized the problem insofar as the life tenant is concerned, and urged that it is not waste for a life tenant to add a new structure to the land when the addition would not lessen the market value of the interest of the remainderman or the reversioner.[8] The landmark case on which this concept is based is *Melms v. Pabst Brewing Co.*[9] There the life tenant had a lot on which there was a large dwelling house. As a result of the growth and development of the city the property became surrounded by factories and railroad tracks. The structure stood isolated about 25 feet above street level, and was absolutely undesirable as a residence and unsuited for any use as a business property. The life tenant removed the building and graded the lot to street level, enhancing the value of the property. The reversioners, relying on the common-law rule of waste, claimed that the changes were waste even though they enhanced the value of the property.

The court noted that there was a complete and permanent change in the surroundings that had deprived the realty of its value and usefulness. Since there was no agreement binding the life tenant to restore the property in the same condition in which he had received it, he was not guilty of waste. The court did, however, issue a *caveat* that its decision was not to be construed as permitting a tenant to make substantial changes in the leasehold property or the buildings on it to suit his own whim or convenience simply because the change was in some way beneficial.

A few years later, there appeared a New York case involving the same question, and the decision aroused a great deal of interest in real property circles. It involved the rich parties, a life tenant, and replacement of a structure that had outlived its usefulness.[10] A man named Brokaw (a leader of New York society) had built four palatial homes in New York City on the then fashionable part of Fifth Avenue. Three of them were occupied by his children and the fourth, by his testamentary devise, went to another child for life with contingent remainders in the alternative to the other children. The life tenant found himself with a white elephant on his hands. Even if he let the premises stand vacant and unused, his annual expenses for taxes, maintenance, and upkeep would have been $15,000 to $20,000 a year. Private residences of this

---

[8] Restatement, Property, § 139-140; Comment e of § 140 (1936) is limited to life estates, the authors seemingly unconcerned with landlord-tenant duties and liabilities. However, much of it is analogous.

[9] *Supra*, n. 7.

[10] Brokaw v. Fairchild, 135 Misc. 70, 237 N. Y. S. 6 (Sup. Ct. 1929), aff'd. 231 App. Div. 704, 245 N. Y. S. 402 (1930), Finch, J., dissenting; aff'd. without opinion, 177 N. E. 186 (1934); and see, note, 30 Mich. L. Rev. 784 (1932).

type were no longer in vogue and the life tenant could not even find another sub-tenant who would take it at $20,000 per year. So, the tenant asked for a declaratory judgment to the effect that it was permissible for him to replace the old home with a modern thirteen-story apartment building which would have an income of about $70,000 a year. The court rejected the application. Its reason was based on the law of waste, which it declared was anything that did permanent injury to the freehold. It felt that the law intended that the property should pass to the remaindermen or reversioners as unimpaired in its nature, character and improvements as was practicable.[11]

The prospect of valuable land in New York, especially on Fifth Avenue, being relegated to such an uneconomic use, apparently stirred the legislators, for as a direct consequence of the *Brokaw* decision a statute was passed applicable to estates for life and for terms of not less than five years. It provided, in effect, that if the replacement or alteration was one which a prudent owner seized of an estate in fee simple absolute would be likely to make in view of the surrounding circumstances, such a change would be viewed as one that would not reduce the market value of the future interests in the estate.[12]

The broad terms of the statute leave it to the courts to determine, under the "reasonable man rule," what alterations a life tenant or other holder may make. Certainly such factors as the nature of the surrounding areas,[13] character of the building,[14] and the extent of the alterations,[15] may be considered. The one absolute requirement of the statute is that there be no decrease in the market value. However, this means little unless one thinks the legislators intended to employ statistical valuations of life estates and remainders from mortality tables in order to provide the criteria. This approach ignores cases in which the grantor expresses an intention to allow the tenant to perform acts which would, under its rule, be waste.[16]

It is suggested that it is more reasonable to adopt the view that the life tenant is entitled to use the premises in accordance with the intention of the parties creating the tenancy. Where no intention is expressed, a reasonable use may be presumed.[17]

---

[11] Brokaw v. Fairchild, *supra,* n. 10, pp. 14-15.

[12] McKinney, Real Property Law, 537, subd. 2 (1937). See comments on the statute in 38 Columbia L. Rev. 532 (1938); 7 Fordham L. Rev. 136 (1938).

[13] Melms v. Pabst Brewing Co., *supra,* n. 7.

[14] Agate v. Lowenbein, 56 N. Y. 604 (1874).

[15] Abel v. Wuestein, 143 Ky. 513, 136 S. W. 867 (1913) (radical alterations forbidden).

[16] King v. Hawley, 248 P. 2d 491 (Cal. App. 1952): "power to consume or dispose of property limited only by life tenant's good faith." For other applications of the "good faith" rule, as applied to fiduciaries of estates, see also: In re Springett's Estate, 25 Misc. 2d 68, 206 N. Y. S. 2d 48 (Surr. Ct. 1960); In re Woolard's Estate, 295 N. Y. 390, 68 N. E. 2d 181 (1946); United States v. Lincoln Rochester Trust Co., 297 F. 2d 891 (2d Cir 1962).

[17] 5 Amer. Law of Prop. (Casner, ed.) § 20.1 (1952).

Tenant for Years

When a case involving waste arises, the courts should make a distinction between short-term or tenancies at will and long-term or life tenancies. So far as the tenant at will is concerned the landlord usually has his protection in his right to terminate at will.[18] In fact, in one decision that held a building alteration made by a short term lessee to be waste, the court indicated the result might have been different had the lease been for a long term.[19] In the short term lease situation the tenant is primarily interested only in obtaining temporary use of the facilities found in any particular building. By contrast, the long term lessee, especially in cases of terms of 99 years,[20] most frequently is interested in obtaining control of a particular site and expects to erect his own building thereon. In addition to the burdens of improvement, the long-term lessee often assumes payment of taxes and assessments. Thus, his possession actually closely resembles that of an actual owner. To deny the life tenant or the long-term tenant the right to replace obsolete improvements, by holding such replacement to be waste, is to deny effect to what must have been the intent of the grantor or lessor.

Meliorating Waste

In any event, it may be stated that acts can be waste even if they enhance the value of the premises. This statement is such a contradiction in terms that it has been treated as an anomaly in the law and is specially described as "meliorating waste." [21] A typical example of this doctrine is found in a Florida case[22] wherein it was stated:

"Under the common law any alteration of the buildings on leased premises by a tenant for years was waste, regardless of whether the alteration was beneficial to the owner of the reversion. This is the law in Florida today. . . ." Here the tenant under a five-year lease began alterations by constructing interior partitions and making some large openings on the exterior walls for the purpose of turning the property into an "arcade building" for rental purposes. The court enjoined the alterations.

Another striking example of this rule can be found in the *Chicago Auditorium Association v. Willing* case.[23] The plaintiff had taken a 198-

---

[18] Means v. Cotton, 225 Mass. 313, 114 N. E. 361 (1916).

[19] Klie v. Broock, 56 N. J. Eq. 18, 37 A. 469 (1897).

[20] See Pryor, Ninety-Nine Year Leases and Fortunes Made Therein (1928) (for an interesting account of the economic ramifications of such leases).

[21] The terms "meliorating" and "ameliorating" are synonymous. 1 New Century Dict. pp. 38, 1040 (1942).

[22] Stephenson v. National Bank of Winter Haven, 92 Fla. 347, 109 So. 424, 425 (1926).

[23] 20 F. 2d 837 (7th Cir. 1927); and see, Niehuss, Alteration or Replacement of Buildings by the Long-Term Lessee, 30 Mich. L. Rev. 386 (1932).

year lease on several adjacent lots and had erected an auditorium building on them. Changes resulting from the growth of the city had made the building financially unproductive and the lessee wanted to replace it with a modern building adapted to the new needs of the locality. Some of the lessors claimed that destruction of the building would be waste and would entitle them to claim a forfeiture of the leases. The underwriters who were to buy the bonds issued to finance the erection of the new building refused to do so until the court construed the leases. Although the question of the right of the lessee to remove the building was not directly in issue, the court noted the strong equities in the lessee's favor and indicated that a right to make such changes was to be implied from the great length of the demised term.

The decision attracted much attention and resulted in a spate of law review articles, all commenting favorably on the new spirit of Equity.[24] Alas, the hosannas were premature, for the decree was reversed by the United States Supreme Court,[25] because the suit was in effect a proceeding for a declaratory judgment which was not within the jurisdiction of the federal courts.[26]

A case which appeared to give encouragement to a lessee who wanted to make alterations in a structure came up in Illinois.[27] At the time of the commencement of the suit the building in question was over 35 years old and virtually worthless. The lessee, holding under a 99-year lease, wanted to replace it with a new twelve-story structure costing in excess of $2,000,000. The court permitted the lessee to make the improvements, saying that to hold otherwise would be to deny to him the right to devote the property to the highest and best use to which it would be suited. However, it should be noted that this was a trust case, and the courts usually are more readily willing to give aid and direction to the execution of trusts.[28]

Alterations

How general must changes be, or how extensive must the alterations or remodeling be, before they will be considered to be actionable waste?

Where the lessees under a 10-year lease were taking down partitions, moving doorways, and removing gas fixtures and chandeliers, and where

---

[24] See, Note, Quieting Title—What Constitutes a Removable Cloud on Title, 41 Harv. L. Rev. 104 (1927); Note, Quieting Title—Where the Alleged Cloud Is in the Plaintiff's Lease, 76 U. of Pa. L. Rev. 217 (1927); Note, Quieting Title—Cloud on Title, 1 Cinc. L. Rev. 488 (1927).

[25] 277 U. S. 274, 48 S. Ct. 507 (1928).

[26] For a criticism of the Supreme Court's decision, see Comment, 23 Ill. L. Rev. 595 (1929).

[27] Northern Trust Co. v. Thompson, 336 Ill. 137, 168 N. E. 116 (1929).

[28] *Ibid.* And see, In re Freeman's Estate, 181 Pa. St. 405, 37 A. 591 (1897); *cf.* Davis v. Skipper, 125 Tex. 364, 83 S. W. 2d 318 (1935), holding that a contingent remainderman generally may not bring an action for waste against a holder of a qualified or defeasible fee.

the lease provided that the lessees might make any inside alterations they thought proper, this was still considered to be waste. The court said the power to make alterations did not arise out of the mere right of user. The lease conferred only the right to the use of, and not the dominion over, the property. If the tenant exercises an act of ownership, then he is no longer protected by his tenancy.[29] However, more recently, in a case in New York, the lessee was a supermarket company. In order to utilize the structure more practically, the tenant made extensive changes. The lease required that no alterations be made without the landlord's consent. Nevertheless, the changes were held not to be waste, as no structural changes were made and the building could easily be restored to its original condition.[30]

The argument could certainly have been made in this case that the intent of the parties, in a lease of a building to a supermarket company, must have been that alterations could be made in order to effectively adapt the premises for use as a supermarket. Clearly, the intention of the parties at the time of the creation of the interests involved is the controlling one. Where such intention is clear, it should be given effect unless there is some strong overriding public policy involved. It would seem obvious to any reasonable man that if premises are leased for a specific purpose and are not entirely adapted to that purpose, then alterations clearly will have to be made, and specific permission of the landlord is irrelevant.

However, the reluctance of the courts to break away from the material alteration concept is illustrated by a Michigan case, where the tenant wanted to tear out a store front and put in a new one, made principally of tile, and also to put granolithic floors throughout and tile the walls and ceilings. There would be no question that the value of the premises was to be greatly enhanced. But the court refused to let the tenant proceed. It held that a tenant could not make changes in the demised premises to suit his own taste and convenience. Any material change in the premises made by a tenant, even if it enhanced the value of the property, would be waste.[31]

An Alabama case saw the tenant removing partitions and cutting doorways to connect with an adjoining building. Even though there was a covenant in the lease permitting alterations, the court felt that the tenant could not, properly, so materially change the character of the

---

[29] Agate v. Lowenbein, 57 N. Y. 604 (1874).

[30] Nadeline Inc. v. Spear & Company, 20 Misc. 2d 559, 195 N. Y. S. 2d 453 (Sup. Ct. 1959).

[31] Pearson v. Sullivan, 209 Mich. 306, 176 N. W. 597 (1920); Annot., 9 A. L. R. 445 (1920).

building and that such changes constituted waste, even if the property's value was enhanced.[32]

Where the tenant was ordered by the city building department to make the premises safe by repairing a wall, and undertook to alter the premises into a store, he was enjoined from so doing. Such radical changes in the character and nature of the leased building, even though the value was enhanced, would be waste.[33]

However, a different viewpoint was expressed in a relatively recent Mississippi case. Here the tenant, under a ten-year lease with an option to renew for an additional fifteen years, partitioned off half the building, converted half into offices, and removed part of a glass front, thus transforming it into a different kind of building. The court recognized that mere enhancement of value does not bar an action for waste if the changes are material and substantial. However, in view of the nature of the lease term it must have been within the contemplation of the parties that changes or rearrangements of lease space could and would be made. Also, the changes were temporary. The court apparently adopted the concept that the intent of the parties should be the governing factor, and not just the bare fact of making of changes in the structure.[34]

Also following this line of reasoning was a case where the premises were leased to a supermarket corporation for thirty-three years. The lease provided that the lessee might make such changes in the premises as would be desirable for its use. The tenant sublet to a motor-sales and repair garage firm, which cut a 14-foot door in the front of the building. The court held that the terms of the lease permitted this, and that such an act was not waste.[35]

There was an interesting Ohio case, some years ago, which involved a golf course. While no structures were changed, the premises were altered considerably. Here the lessees entered into a lease of 45 acres for a term of 25 years, with an option to renew for an additional 10 years, in order to develop a golf course. The lessees wanted to convert a nearby pond into an artificial lake, and decided to cut a channel through to nearby Lake Erie, so that pleasure boats could pass back and forth. The court enjoined the defendants from interfering with the lessee's plans and held that the changes were clearly within the contemplation of the parties, and that whatever was reasonably required to develop the property for the designated use was permissible. As the changes would not

---

[32] F. W. Woolworth Co. v. Nelson, 204 Ala. 172, 85 So. 449 (1920); Annot., 13 A. L. R. 824 (1921).

[33] McDonald v. O'Hara, 117 Misc. 517, 192 N. Y. S. 545 (Sup. Ct. 1921).

[34] Sparkman v. Hardy, 223 Miss. 452, 78 So. 2d 584 (1955).

[35] Turman v. Safeway Stores, 32 Mont. 285, 317 P. 2d 302 (1957); *cf.* Hamburger and Dreyling v. Settgast, 62 Tex. Civ. App. 446, 131 S. W. 639 (1910).

result in injury to the property, but would, instead, improve it, the court would not interfere.[36]

Erecting Buildings

There are few cases involving the question whether erecting additional buildings is waste. The earliest appears to be a New York case which involved erecting a livery stable on a vacant part of the land. It was not considered to be waste, provided that it could be done without destroying or materially injuring the other buildings and improvements.[37]

A rather unusual, similar case involved a building in Chicago which was erected by the lessee. Later the lease was assigned by the lessee to a railroad company, which proceeded to cut off a corner of the building in order to run elevated tracks through the cleared space. The lessor brought an action for waste. The court held for the plaintiff, stating that title to the building had vested at once in the lessor. The court noted the fact that the property, as improved with the building, was better security for rent. But it said that the improvement of one part does not carry with it a right to destroy another part.[38]

However, the more modern view is to look to the *intent* of the parties. Lessors and a bank, in another case, entered into a 95-year lease for a tract of land in downtown Dallas, Texas. The contract permitted the bank to construct part of a building on the premises. The bank wanted to connect that part of the building to another part on adjoining land. The lessors contended that the joining was common-law waste. But the court felt that if the lease permitted the lessee to build only a part of a building on the leased premises there was an inference that it could be connected with another part of a building on the adjoining lot.[39] It should be noted that the court did not overrule the old common-law of waste, but merely said that the contract gave the right to make the connection. Yet, this is clearly an example of the view that the intent of the parties, and not their acts, will govern.

Fixtures

The courts seem to be taking a more liberal and realistic view as to the tenant's use and enjoyment of the premises, as long as the landlord suffers no real or actual loss. This is demonstrated by a number of cases involving fixtures. Specifically, where a lessee placed a 40-foot-high electric sign on the roof, and the lease restricted the premises to certain

---

[36] J. H. Bellows Co. v. Covell, 28 Ohio App. 277, 162 N. E. 621 (1927).

[37] Winship v. Paige, 3 Paige 259 (N. Y. 1838).

[38] Bass v. Metropolitan West Side El. R. R. Co., 82 F. 857 (2d Cir. 1897).

[39] Minzer v. First National Bank in Dallas, 390 S. W. 2d (Tex. Civ. App. 1965).

types of business uses, the court ruled that because the lease described the premises by metes and bounds the lessee acquird the right, as an incident of the lease, to place appropriate signs thereon, and that the act was not waste.[40] The courts have also found for a tenant who removed the landlord's sink and stove from an apartment, placed them in the basement, and replaced them with the lessee's own sink and stove. The court held that there had not been a violation of a restriction against alterations without consent of the landlord.[41] Also, where a tenant removed his landlord's refrigerator and replaced it with his own without the landlord's consent, the court held that the substitution did not constitute an "alteration" nor such a material change in the nature of the property as to constitute waste;[42] nor was the installation of three air conditioners, each weighing 750 pounds, by a lessee of a restaurant, considered to be a material alteration.[43] Another situation involved a tenant who had maintained a movable washing machine for 4 years. When the landlord learned of it he started eviction proceedings on the theory that it might possibly cause damage or compel him to undergo great expense in "modernizing" the facilities. The court rejected this contention as too theoretical, and went on to say that the tenant could occupy and use the premises in any lawful manner, so long as he did not injure the inheritance or commit waste.[44]

Thus, it can be seen that the courts are beginning to adopt a more flexible approach to the law of waste and that the old rules are now largely a matter of history.

Remedies

Several states have considered the Statutes of Marlbridge and Gloucester to be part of the common law received from England and, in those states, the remedies of forfeiture and treble damages are available in an action for waste.[45] Following are some samples of the remedies available in some of the various jurisdictions:

In Kentucky, by both statute and judicial decision, treble damages and forfeiture are the remedies for waste.[46]

---

[40] Lyon v. Bethlehem Engineering Corporation, 253 N. Y. 111, 170 N. E. 518 (1930).

[41] Lansis v. Miklinsky, 10 App. Div. 2d 649, 198 N. Y. S. 2d 247 (1960).

[42] Parker v. Johnson, 26 Misc. 2d 31, 206 N. Y. S. 2d 594 (1960).

[43] Leong Won v. Snyder, 94 N. Y. S. 2d 247 (1949).

[44] A. & B. Cabrini Realty Co. v. Newman, 237 N. Y. S. 2d 970 (1963); see also Sigsbee Holding Co. v. Vanavan, 240 N. Y. S. 2d 900 (1963) (replacing cabinets); Buchfuhrer v. Tantleff, 112 N. Y. S. 2d 69 (1952) (installation of a T.V. antenna); but see, Patton v. U. S., 139 F. Supp. 279 (D. C. Pa. 1955) (failure to replace fixtures was waste).

[45] Restatement, Property § 198 (1936) (takes the position that the statutes were not part of the common law received by the several states; Simes and Smith, Law of Future Interests § 1658 (1956).

[46] Ky. Rev. Stat. § 381.350 (1932); Continental Fuel Co. v. Hadden, 182 Ky. 8, 206 S. W. 8 (1918).

Georgia's code provides for forfeiture of the estate,[47] but by interpretation this has been limited to wanton commissive waste.[48]

Idaho permits recovery of treble damages, by statute, but by interpretation there also must be wanton and malicious waste.[49]

An earlier statute in Washington was construed to allow treble damages where the waste was wanton and wilful.[50] This statute was then amended to require assessment of treble damages whether the waste was wilful or not.[51]

Arkansas has held that the Statute of Gloucester is not part of the common law of that state, so there is no forfeiture. But a remainderman may have a receiver appointed in cases of waste.[52]

Idaho also has held that the Statute of Gloucester is not part of its common law so far as forfeiture is concerned, but does permit treble damages.[53]

A decision refused to allow treble damages or forfeiture in Illinois. The court said that treble damages had never existed as remedies for waste in that state.[54]

A recent New York case held that a tenant who makes alterations with the tacit consent of his landlord is under no obligation to restore the premises to their original condition at the end of the term.[55]

Of course, the above citations are not to be taken as a comprehensive survey of the whole country, as far as the remedies of forfeiture and treble damages are concerned. But they are fairly typical.

In any event, as in other fields of law, the available legal remedies for waste have fallen short of providing substantial justice. As a result, Equity has been used as a means of providing supplementary remedies. One method has been the declaratory judgment, but this has met with only limited success.[56]

---

47 Ga. Code Ann. § 85-604 (1945).

48 Wright v. Connor, 200 Ga. 413, 37 S. E. 2d 353 (1946).

49 Idaho Code Ann. § 658.1 (1938); Pearson v. Harper, 87 Ida. 245, 392 P. 2d 687 (1964).

50 Delano v. Tennant, 138 Wash. 39, 244 P. 273 (1926).

51 Wash. Rev. Stat. Ann. § 938 (Supp. 1943); Grafell v. Honeysuckle, 30 Wash. 2d 390, 191 P. 2d 858 (1948).

52 Smith v. Smith, 219 Ark. 304, 241 S. W. 2d 113 (1951).

53 Idaho Code Ann. § 658.1 (1938); Worthington Motors v. Crouse, 80 Nev. 147, 390 P. 2d 229 (1964).

54 Wise v. Potomac Nat. Bank, 393 Ill. 357, 65 N. E. 2d 767 (1946).

55 Petrelli v. Kagel, 37 Misc. 2d 246, 235 N. Y. S. 2d 383 (1962).

56 Willing v. Chicago Auditorium Ass'n, 277 U. S. 274, 48 S. Ct. 507 (1928), holding that mere informal disagreement as to lessee's right to tear down building and construct a new one, absent an attempt by lessor to prevent such action, does not confer equity jurisdiction on the federal courts; Washington Detroit Theatre Co. v. Moore, 249 Mich. 673, 229 N. W. 618 (1930). A brief discussion of the use of declaratory judgments in waste cases may be found in Niehuss, Alterations or Replacement of Buildings by the Long-Term Lessee, *supra* n. 23.

The general rule seems to be that tenants for life or for years in threatened waste cases are subject to injunction.[57] As to monetary damages, it has been held that depreciation in value of the property due to acts of waste is not the correct measure of damages, but rather the measure is the cost of repairing the property or restoring it to the original condition.[58]

Conclusion

It would seem best to recognize that the old rule of waste, which was based on practically any physical change in the premises, is dead. The rule today would clearly seem to be that, to determine waste, one must decide whether or not the acts complained of violated the actual or presumed intention of the parties creating the estate. Certainly the least desirable approach to a determination of what is actionable waste is that which attaches liability to certain acts regardless of their desirability or practical context. It seems to be the rule today that the intention of the parties, or, the "reasonable man rule" should govern.

---

[57] Baltimore & P. S. Co. v. Ministers, etc. Starr M. P. Church, 148 Md. 390, 130 A. 46 (1925); Jennings v. Elliott, 186 Okla. 285, 97 P. 2d 67 (1939); McClintock on Equity § 132 (2d ed. 1948); Walsh, *op. cit. supra,* n. 1.

[58] Miller v. Belknap, 75 Ida. 46, 266 P. 2d 662 (1954); Stone Mountain Industries, Inc. v. Bennett, 112 Ga. App. 480, 145 S. E. 2d 591 (1965); Savin v. Gholson, 51 Ohio App. 443, 1 N. E. 2d 646 (1935).