NINTH REVISION

REVISED STATUTES

OF THE

STATE OF MAINE

1954

FIRST ANNOTATED REVISION

IN FIVE VOLUMES

VOLUME 4

THE MICHIE COMPANY
CHARLOTTESVILLE, VIRGINIA

Chapter 124.

Waste and Trespass on Real Estate.

Sec. 1. Remedy, if tenant commits waste.—If a tenant in dower, by curtesy, for life or for years commits or suffers any waste on the premises, the person having the next immediate estate of inheritance may recover the place wasted and the damages done to the premises in an action of waste against him; and an heir may recover in the same action for waste done in his own time and in the time of his ancestor. (R. S. c. 111, § 1.)

Privity of estate is foundation of action.—This section gives the action to the person having the next immediate estate of inheritance, against tenants in dower, by the curtesy, tenant for life or years, in which he shall recover the place wasted, and the amount of damages done to the premises. The statute thus recognizes the privity of estate as the foundation of the action, and defines with accuracy its limits. Leighton v. Leighton, 32 Me. 399.

And contingent remainderman cannot maintain action.—By this section it is provided that one having the next immediate estate of inheritance may maintain an action of waste against a tenant for life, who suffers or commits any waste on the premises. No such action can be maintained by one having only a contingent remainder. Hunt v. Hall, 37 Me. 363. See § 3.

Applied in Hasty v. Wheeler, 12 Me. 434; Stetson v. Day, 51 Me. 434.

Sec. 2. Damages; action on the case.—Any issue of fact shall be tried by a jury, with or without a view of the premises, as the court orders; and the jury that inquires of the waste shall assess the damages. An action on the case in the nature of waste may be substituted for the action of waste. (R. S. c. 111, § 2.)

Reversioner has choice of actions but cannot have both.—Under our present statutes, for waste committed or suffered by the tenant, the reversioner may have an action of waste to recover the place wasted, and the damages; or he may have an action of the case in the nature of waste to recover his damages only; but he cannot have both. Stetson v. Day, 51 Me. 434.

Sec. 3. Remainder man or reversioner may sue. — The remainder man or reversioner for life or for years only or in fee simple or fee tail, after an intervening estate for life, may maintain such action of waste and recover the damages which he has suffered by the waste. (R. S. c. 111, § 3.)

Applied in Stetson v. Day, 51 Me. 434.

Sec. 4. Action lies against executor, etc.—Such action of waste may be originally commenced against the executors or administrators of the tenant, or if commenced against him, it may be prosecuted against them after his death. (R. S. c. 111, § 4.)

Sec. 5. Part owners not to commit waste without giving notice. — If any joint tenant or tenant in common of undivided lands cuts down, destroys or carries away trees, timber, wood or underwood, standing or lying on such lands, or digs up or carries away ore, stone or other valuable thing found thereon, or commits strip or waste, without first giving 30 days' notice in writing under his hand to all other persons or to their agents or attorneys, and to mortgagors and mortgagees if any there are interested therein, of his intention to enter upon and improve the land; which notice to such persons interested as are unknown, or whose residence is unknown or who are out of the state may be published in the state paper 3 times, the first publication to be 40 days before such entry; or if he does any such acts pending a process for partition of the premises, he shall forfeit 3 times the amount of damages; and any one or more of the cotenants, without naming the others, may sue for and recover their proportion of such damages. (R. S. c. 111, § 5.)

Section strictly construed.—This section is not only in derogation of the common law, but is highly penal. It must, therefore, receive a strict construction; nothing can

be implied that is not expressed. The meaning of the terms used can neither be extended nor diminished to express any supposed intention of the legislature in passing the act. Richardson v. Richardson, 64 Me. 62.

But one-year limitation not applicable to actions under it.—This section is not a "penal statute" within the meaning of c. 112, § 102, and actions under it need not be brought within one year after the doing of the damage. Hall v. Hall, 112 Me. 234, 91 A. 949.

The damages provided for by this section are to be recovered by a cotenant. Richardson v. Richardson, 64 Me. 62.

And one having an estate of inheritance.—Upon reading the statute the first and most prominent idea received, and that which is the most natural meaning of the language used, is the mutual liability of the tenants. The one seeking a remedy apparently has an interest as extensive as the one committing the injury. All the tenants are contemplated as having similar interests or estates of the same nature in the land. This being so, what must the nature of extent of that interest be to bring it within the statute? The words describing it are "tenants in common of undivided lands." This would seem almost necessarily to mean the ownership of the whole property. The word "lands" in this connection, unlimited and unqualified as it is, cannot, without a too liberal construction, be held to include a less estate than one of inheritance. If the legislature in a statute like this had intended to have included a less estate or a different one, they would have used such language as would have expressed such an intention. Richardson v. Richardson, 64 Me. 62.

Thus, tenant for life not entitled to damages. — The cotenants suing can recover only their proportion of such damages; that is, such damages as may have arisen from the injuries previously enumerated. A tenant for life has an interest in the usual annual rents and profits only, while the statute refers only to such as accrue to the inheritance. Every injury enumerated may have been done to this land, and yet the life estate in no respect has suffered. As the damages are consequent upon the injury, where there is no injury there can be no damages. Richardson v. Richardson, 64 Me. 62.

Trespass quare clausum may be maintained to recover damages.—By this section, a tenant in common of undivided lands is subjected to the forfeiture and payment of treble damages for cutting timber, etc., on the common estate, without having given the preliminary notice required by the statute; or for cutting timber, etc., on the same estate pending a petition for partition. An action of trespass quare clausum can be maintained to recover such damages. Mills v. Richardson, 44 Me. 79.

Without the notice provided for in this section, a cotenant has no authority to cut wood or timber upon the premises, and is himself a trespasser if he directs it to be cut, and an action of trespass quare clausum fregit would lie against him for so doing. Hazen v. Wight, 87 Me. 233, 32 A. 887.

And they include damages done to share owned by defendant.—On a recovery in an action for cutting wood and timber without notice, brought by one tenant in common against another under this section, to prevent tenants in common, etc., from committing waste, the plaintiff is entitled to treble the whole amount of the damage done to the land, inclusive of that done to the share therein owned by the defendant. Hubbard v. Hubbard, 15 Me. 198.

Justification must be pleaded.—This section has limited the rights of tenants in common, and presumably one has not the right to cut wood or timber upon the common land without giving written notice to the others. The act is presumably unlawful. Hence justification must be pleaded. Hall v. Hall, 112 Me. 234, 91 A. 949.

Applied in Dwinell v. Larrabee, 38 Me. 464; Mansfield v. McGinness, 86 Me. 118, 29 A. 956.

Stated in Longfellow v. Quimby, 29 Me. 196; Fleming v. Katahdin Pulp & Paper Co., 93 Me. 110, 44 A. 378.

Cited in Maxwell v. Maxwell, 31 Me. 184; Davis v. Poland, 99 Me. 345, 59 A. 520.

Sec. 6. Defendant to pay only single damages in certain cases. — If the jury finds that the defendant in such suit has good reason to believe himself the owner of the land in severalty, or that he and those under whom he claims had been in exclusive possession thereof, claiming it as their own, for 3 years next before the acts complained of were committed, only single damages shall be recovered. (R. S. c. 111, § 6.)

Sec. 7. Injunction to prevent waste, pending a process for the recovery of lands, and on lands attached.—If a defendant in an action to re-

cover possession of real estate or a person whose real estate is attached in a civil action commits any act of waste thereon, or threatens or makes preparations to do so, any justice of the supreme judicial court or of the superior court in vacation or term time may issue an injunction to stay such waste; but notice shall first be given to the adverse party to appear and answer, unless the applicant files a bond with sufficient sureties to respond to all damages and costs; and the court may enforce obedience by such process as may be employed in an equity case and dissolve it when deemed proper. (R. S. c. 111, § 7.)

Cited in Spofford v. Bangor & Bucksport R. R., 66 Me. 51.

Sec. 8. Treble damages for waste, pending a suit.—If, during the pendency of an action for the recovery of land, the tenant commits strip or waste by cutting, felling or destroying wood, timber, trees or poles standing thereon, he shall pay to the aggrieved party treble damages, to be recovered in an action of trespass. (R. S. c. 111, § 8.)

Declaration need not describe kind of trees.—This section does not require a description of the kind of trees, and that averment might be stricken out of the declaration without impairing the plaintiff's right to recover. Maxwell v. Maxwell, 31 Me. 184.

Petitioner for partition may be liable under this section.—Where lands are held in common, one of the cotenants may, by action of trespass under this section, recover against another treble damages for strip and waste committed by him, during the pendency of a petition for partition, even though the defendant himself is the petitioner. Maxwell v. Maxwell, 31 Me. 184.

Sec. 9. Trespass on lands of another.—Whoever cuts down, destroys, injures or carries away any ornamental or fruit tree, timber, wood, underwood, stones, gravel, ore, goods or property of any kind from land not his own, without license of the owner, or injures or throws down any fences, bars or gates, or leaves such gates open, or breaks glass in any building is liable in damages to the owner in an action of trespass. If said acts are committed willfully or knowingly, the defendant is liable to the owner in double damages. (R. S. c. 111, § 9.)

Cross references.—See c. 36, § 62, re suit for damages to public land brought for benefit of individual; c. 131, § 33, re malicious damage to trees, etc.

This section is remedial and not penal. Reed v. Central Maine Power Co., 132 Me. 476, 172 A. 823.

Under this section, the word "owner" includes a mortgagee though not in possession. Burrill Nat. Bank v. Edminister, 119 Me. 367, 111 A. 423.

And he may have a remedy.—It must be assumed that the legislature intended by this section not to limit, but rather to extend and enlarge liability for wasteful trespass, i. e., for acts of trespass like those specified in the section. Before the enactment of the statute a mortgagee had a remedy for such trespasses. In affirming and enlarging the remedy for wasteful trespass, it is reasonable to believe that the legislature did not mean to exclude mortgagees. Burrill Nat. Bank v. Edminister, 119 Me. 367, 111 A. 423.

But trespass quare clausum cannot be maintained by a mortgagee of a farm, before entry for condition broken, against one who holds under the mortgagor, and cuts and takes off the grass growing thereon; for thereby, neither the estate nor the mortgagee's security is impaired. Hewes v. Bickford, 49 Me. 71.

Ownership is an essential allegation.—Under this section, it is only the owner who may bring an action. Hence, ownership is an essential allegation. Benner v. Benner, 119 Me. 79, 109 A. 376, holding that alleging the defendant to be a tenant at sufferance on land of the plaintiff is a sufficient allegation of ownership of the land by the plaintiff.

Of property carried away and glass broken. — The declaration should allege ownership of the property carried away, and that the glass broken was a part of a building owned by the plaintiff. Benner v. Benner, 119 Me. 79, 109 A. 376.

Licensee leaving bar-way open not liable in trespass.—One who has a license in fact to pass and repass over the land of another, and abuses it by leaving a bar-way open, whereby the cattle of others enter and do damage, is not liable in an action of trespass, but only in case, for a breach

of his duty to keep the bar-way closed. Hinks v. Hinks, 46 Me. 423.

The last sentence of this section relates only to the assessment of damages. Burrill Nat. Bank v. Edminister, 119 Me. 367, 111 A. 423.

To willfully break glass in a window of a building will render one liable to the owner of the building under this section. Benner v. Benner, 119 Me. 79, 109 A. 376, holding that an allegation that the defendant willfully and knowingly "broke the glass in the windows in the barn on the premises," alone sets forth a cause of action under this section.

As will willful damage to fence.—If the plaintiffs in fact owned the fence and the tearing down was willful, the plaintiffs are entitled to double damages. Baker v. Petrin, 148 Me. 473, 95 A. (2d) 806.

Jury to determine willfulness of trespass.—It is for the jury to determine whether or not the trespass was committed knowingly or willfully, and to return either double or single damages as the facts might warrant. Burrill Nat. Bank v. Edminister, 119 Me. 367, 111 A. 423.

Verdict for single damages for trespass alleged to be willful will not be set aside.—In an action under this section for trespass alleged to be willful, if a trespass is shown without evidence of willfulness, a verdict for single damages rendered upon appropriate instructions will not be set aside on motion. Burrill Nat. Bank v. Edminister, 119 Me. 367, 111 A. 423.

Applied in McCobb v. Pioneer Lumber Co., 143 Me. 400, 56 A. (2d) 73.

Cited in Black v. Mace, 66 Me. 49.

Sec. 10. Trespasses on property of county, town, parish. — Where trespasses are committed on buildings, enclosures, monuments or milestones belonging to a county, town or parish, the treasurer of such corporation may sue for the damages in its name; if the property injured belongs to a school district, the treasurer of the town may sue in the name of such district. (R. S. c. 111, § 10.)

Sec. 11. Trespass on improved or ornamental grounds. — Whoever enters on any grass land, dooryard, ornamental grounds, orchard or garden and cuts down, defaces, destroys or takes therefrom, without permission of the owner, any grass, hay, fruit, vegetable or ornamental tree or shrub is liable in an action of trespass to the party injured in treble damages. (R. S. c. 111, § 11.)

Cross references.—See c. 131, §§ 30, 38, re damage and trespass on improved lands and orchards, etc.; c. 131, § 39, re trespass on commercial or residential property.

The action and section are remedial and not penal. Black v. Mace, 66 Me. 49; Hall v. Hall, 112 Me. 234, 91 A. 949; Reed v. Central Maine Power Co., 132 Me. 476, 172 A. 823.

Section not limited to cases of willful trespass.—The language of the statute is general and comprehensive, and no reference is made to any particular class to relieve those differently situated from a liability to treble damage. If the legislature had designed to limit the section to cases of willful and malicious trespass they would have said so. Black v. Mace, 66 Me. 49.

It is not necessary under this section to allege a scienter on the part of the defendant. He is bound at his peril to know that he has the consent of the owner before entering upon improved lands and taking property of this description. Black v. Mace, 66 Me. 49.

And the plaintiff is not required specifically to allege that he is entitled to treble damages. Black v. Mace, 66 Me. 49.

It is not necessary to expressly claim treble damages in the declaration. It is sufficient to set forth facts showing that the plaintiff is entitled thereto. Elliot v. Sherman, 147 Me. 317, 87 A. (2d) 504.

If the declaration shows that the plaintiffs claim actual damages which, if found to have been sustained as claimed, will require the entry of a judgment in excess of the ad damnum, and all the information requisite to defend against the plaintiffs' claims is disclosed in the declaration, the failure to set the formal ad damnum clause in an amount sufficient to equal the treble damages is but a formal matter. The court below, after verdict, can allow motions to increase the ad damnum, without setting aside the verdict or granting a new trial. Elliot v. Sherman, 147 Me. 317, 87 A. (2d) 504.

Immaterial whether court multiplies verdict or instructs jury to return multiple damages.—In cases where multiple damages are claimed, it is immaterial whether the court, acting within its authority, multiplies the verdict for actual damages returned by the jury, or instructs the jury to determine the actual damages and return a verdict for the multiple damages. The principle is the same whether the multiple damages be double or treble dam-

ages. Elliot v. Sherman, 147 Me. 317, 87 A. (2d) 504.

Applied in Colby v. Tarr, 140 Me. 237, 36 A. (2d) 357.

Sec. 12. Trespass on islands in salt waters after notice. — Whoever, after notice by the owner, occupant or lessee in any of the ways provided in the following section, trespasses upon any island within salt waters, for the purpose of shooting or hunting thereon, is liable to such owner, occupant or lessee in exemplary damages to an amount not less than $20 nor more than $50, in addition to all actual damage sustained by said owner, occupant or lessee, and shall also forfeit to said owner, occupant or lessee, $5 for each bird of any kind shot, caught, taken or killed on such island, all to be recovered in an action of debt. The possession of guns, decoys or other implements of shooting or hunting shall be presumptive evidence that the purpose of the trespass was shooting or hunting. (R. S. c. 111, § 12.)

Sec. 13. Notices; injuring signboards.—Notices referred to in the preceding section shall be given by erecting and maintaining signboards at least 1 foot square in at least 2 conspicuous places on the premises, one of them near one of the usual landing places on said island, reading as follows: "All persons are forbidden to shoot or hunt on this island," with the name of the owner, occupant or lessee; or such notice may be given verbally or in writing by the owner, occupant or lessee of the island to any person and shall be binding on the person so notified, whether the signboards herein named are erected and maintained or not; and whoever tears down or in any way defaces or injures any such signboard forfeits $100, to be recovered by the owner, occupant or lessee of such island in an action of debt. (R. S. c. 111, § 13.)

Sec. 14. Damages and penalties.—Actions to recover any of the sums or penalties named in the 2 preceding sections may be brought in the superior court, or any municipal court, or before a trial justice in the county in which such island is situated or in any county adjacent thereto, or in the county in which either the plaintiff or defendant resides. (R. S. c. 111, § 14.)

Sec. 15. Imprisonment for nonpayment. — On nonpayment of any of the penalties aforesaid, the defendant shall be punished by imprisonment for not less than 5 days, and at the rate of 1 day for each dollar of the amount of the judgment, if it is over $5. (R. S. c. 111, § 15.)

Sec. 16. Waste on lands of an insolvent deceased. — If an heir or devisee of a person deceased, after the estate of the decedent is represented insolvent and before sale of the real estate for payment of debts or before all the debts are paid, removes or injures any building or any trees, except such trees as are needed for fuel or repairs, or commits any strip or waste on such estate, he shall forfeit treble the amount of damages, to be recovered by the executor or administrator in an action of trespass. (R. S. c. 111, § 16.)

Section not to be extended beyond its terms.—This section being in derogation of the common law, its meaning cannot be extended beyond what a fair construction of its terms requires. McNichol v. Eaton, 77 Me. 246.

And the burden of proof rests upon the plaintiff to bring his case within the provisions of this section. McNichol v. Eaton, 77 Me. 246.

Section applies only to improved lands after representation of insolvency.—This section applies only to waste committed after a representation of insolvency, and to improved, rather than wild lands; such as have buildings upon them and those in occupation have occasion to cut wood and lumber for fuel and repairs. McNichol v. Eaton, 77 Me. 246.

Sec. 17. Liability of executor or administrator for waste. — If such executor or administrator, being heir or devisee, commits such trespass or waste, on proof thereof before the judge of probate, he shall be liable to the same extent as the heirs or devisees; and in both cases, the damages, when recovered by

the executor or administrator or adjudged against him by the judge of probate, shall be accounted for in the administration account. (R. S. c. 111, § 17.)

See c. 154, §§ 12, 23, re bonds of executors and administrators; c. 157, § 22, re waste and trespass on real estate of insolvent intestate.

Sec. 18. One or more tenants in common may join in actions; notice to others.—All or any of the tenants in common or joint tenants of lands may join or sever in personal actions for injuries done thereto, setting forth in the declaration the names of all other cotenants, if known, and the court may order notice to be given in such actions to all other cotenants known, and all or any of them at any time before final judgment may become plaintiffs in the action, and prosecute the suit for the benefit of all concerned. (R. S. c. 111, § 18.)

Purpose of section.—The evident intention of the authors of this provision was that one cotenant in real estate should not be deprived, by a plea in abatement, of redress for an injury to his interest therein, by reason of refusal of his cotenants to join in a suit, or to allow him to use their names in the same, if they were known to him. The design was to relieve a cotenant, wishing to prosecute, of the previous embarrassment and not to increase it. Where the cotenants are known, he has the right to name them in his writ as such, for his and their benefit, without exposure to defeat. The statute was manifestly intended not to be imperative but optional. Such is its language. The condition is important. The party wishing to prosecute has the right to name other cotenants, if they are known. If they are not known, they cannot be named. If he claims the entire title and possession in the land, he will not name others as cotenants. Such would be an absurdity. Hobbs v. Hatch, 48 Me. 55.

Optional with plaintiff whether to name cotenants.—In an action of trespass, brought by a tenant in common of the locus in quo under the provisions of this section, it is optional with the plaintiff, whether to name his cotenants or not. Hobbs v. Hatch, 48 Me. 55.

Notice may be given to cotenant not named in writ.—The court may order notice to be given to all other cotenants known, implying that, before this action of the court, the case must be entered upon the docket. And cotenants may become plaintiffs at any time before final judgment, and the court may, without doing the least violence to the language of the statute, give notice to anyone not originally named in the writ, when it shall become known that he is a cotenant. Hobbs v. Hatch, 48 Me. 55.

Applied in Longfellow v. Quimby, 29 Me. 196.

Quoted in part in Linscott v. Fuller, 57 Me. 406.

Stated in Fleming v. Katahdin Pulp & Paper Co., 93 Me. 110, 44 A. 378.

Sec. 19. Judgment for damage; execution for plaintiffs' share; scire facias by cotenants.—The court shall enter judgment for the whole amount of the injury proved; but shall award execution only for the proportion thereof sustained by the plaintiffs; and the remaining cotenants may afterwards jointly or severally sue out a scire facias on such judgment, and execution shall be thereupon awarded for their proportion of the damages adjudged in the original suit. (R. S. c. 111, § 19.)

Stated in Fleming v. Katahdin Pulp & Paper Co., 93 Me. 110, 44 A. 378.

Cited in Martin v. Maine Central R. R., 83 Me. 100, 21 A. 740.

Sec. 20. If one or more joint tenants take whole rent, others may recover.—If any one or more of the joint tenants or tenants in common take the whole rents or income in the joint estate or more than their share, without the consent of their cotenants, and refuse for a reasonable time after demand to pay such cotenants their share thereof, any one or more of them may have an action of special assumpsit against the refusing cotenants to recover their proportion thereof. (R. S. c. 111, § 20.)

This section is remedial, and should be construed so as to give effect to the remedy, provided such construction is not inconsistent with the language used or the fundamental law. Cutler v. Currier, 54 Me. 81.

Action may be maintained against tenant taking more than his share of income.—It

is now well settled that, if one of the tenants in common takes the whole income, or more than his share of the income, without the consent of his cotenant, an action of assumpsit may be maintained against him, after demand. Dyer v. Wilbur, 48 Me. 287.

A tenant in common, independently of this section, may maintain indebitatus assumpsit against his cotenant who has received in money more than his share of the rents and profits of the common estate. Hudson v. Coe, 79 Me. 83, 8 A. 249.

And the section applies as well to the cases of personal occupancy by the cotenant as where he receives rent from a subtenant. Cutler v. Currier, 54 Me. 81.

A tenant in common may maintain assumpsit, independently of this section, against a cotenant who has received from subtenants more than his share of the rents and profits of the common estate; unless the plaintiff had been disseized by such cotenant when the rents and profits were received. By this section this right of recovery in assumpsit is extended to cases of personal occupancy, by the cotenant, of the whole, or more than his proportion, of the common estate. Richardson v. Richardson, 72 Me. 403.

Although the defendant did not occupy all the joint estate. Cutler v. Currier, 54 Me. 81.

Lack of consent must be alleged.—In a suit by one cotenant against another, based on this section, it must be alleged and proved, that the joint estate has yielded "rents or income," and that the defendant has taken the common property "without the consent of his cotenant." Moses v. Ross, 41 Me. 360.

Upon the severance of a reversion following a leasehold estate, the rental accruing thereafter is apportionable among the owners in accordance with their interests. The rights of such owners are several, not joint, and may not be prosecuted by two or more of such owners in a joint action. United Feldspar & Minerals Corp. v. Bumpus, 141 Me. 7, 38 A. (2d) 164.

Provision as to consent not applicable to disseizor.—The phrase, "without the consent of their cotenants," in this section does not refer to the case of a disseizor, receiving rents under an adverse claim, known to his cotenant. Richardson v. Richardson, 72 Me. 403.

And tenant disseized cannot maintain action.—Independently of the provisions of this section, one tenant in common could maintain an action of assumpsit against a cotenant who had received in money more than his share of the income of the estate; provided the plaintiff had not been disseized. That section does not enlarge the remedy in this respect. A tenant in common who has been disseized cannot now maintain such an action. The main purpose of the statute was to extend the right of recovery in such action to cases in which the defendant had had the use and occupation of the joint estate, or more than his share of it, or where he had himself received or taken more than his share of the rents or income thereof, in the products of the soil or otherwise than in money. Richardson v. Richardson, 72 Me. 403.

Stated in Carter v. Bailey, 64 Me. 458.

Cited in Hilliker v. Simpson, 92 Me. 590, 43 A. 495.