Controlling Farm Tenant Conservation Practices Through the Judicial Process
barment was too "excessive" a judgment in a suit instituted on the basis of Sacher's contempt conviction as counsel in the Dennis case.

These cases, although not completely symmetrical, would have provided the Court with precedent had the majority rechanneled its energies to find a regulatory burden unreasonable or excessive, instead of a punishment cruel and unjust. This would have been a happy alternative to the Court's disposition, for the present holding will only confuse and further tangle the distinction between punishment and regulation.

CONTROLLING FARM TENANT CONSERVATION PRACTICES THROUGH THE JUDICIAL PROCESS

The problems for soil conservation that are created by the divided ownership of farm lands are both perennial and still largely unsolved. When farm land is leased, the tenant's desire to secure maximum productivity from the soil conflicts with both the lessor's interest in preserving the value of his property and society's interest in conserving arable farm land. Social concern over the proper use of leased farm land was first manifested in the ancient common law action of waste. However, the standards applied to farm tenant practices were uncertain, while the remedies of injunctive relief and damages were either unavailable or the difficulties of assessing relief and damages were either unavailable or the

1. As of 1953, after close to twenty years of an intensive federal soil conservation program, this country suffered an estimated loss of 500,000 acres a year of soil originally suitable for cultivation. Erosion and other deteriorative factors were responsible. U.S. DEP'T OF AGRICULTURE, LAND FACTS 2 (1953). Furthermore, there is evidence that the incidence of soil depleting practices has a direct relationship to the incidence of farm tenancy. Cotton, Regulations of Farm Landlord-Tenant Relations, 4 LAW & CONTEMP. PROB. 509, 520 (1937).

The percentage of farm land under lease in the United States has declined since 1935 when it stood at 44.7%. However, in 1954 over one-third of the farm land in this country was still operated under some type of lease (35.1%). BUREAU OF THE CENSUS, DEP'T OF COMMERCE, A GRAPHIC SUMMARY OF FARM TENURE 134 (1954).


3. Damages. Modern waste statutes provide treble or double damages, or forfeiture where a case of waste is made out against the tenant. RESTATEMENT, PROPERTY § 199 (Supp. 1948) (citations to state waste statutes). The forfeiture provisions are frequently not applied if the waste complained of is permissive rather than voluntary. Richards v. Torbert, 8 Del. (3 Houst.) 172 (1865); Collins v. Security Trust Co., 206 Ky. 30, 266 S.W. 910 (1924). The difficulty of assessing damages when the soil has been depleted or permitted to erode is inherent in the nature of the injury.
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proved illusory because the tenant was not financially responsible.

The effect of soil conservation activities upon this area of the law has not been fully realized. The most basic attack upon the conservation problem was provided by two related programs of the United States Department of Agriculture. The Agricultural Conservation Program Service makes payments to farm operators (including tenants) for participation in selected farm conservation measures. The Soil Conservation Service provides technical service to farm operators through Soil Conservation Districts created by virtue of state enabling legislation. While the conservation standards that have been implemented under these programs have been made quite precise and are designed to achieve more than the necessary minimum of soil conservation protection, the success of these efforts has been vitiated to a certain extent because participation in these programs has so far been voluntary. Consequently, the obstinate farmer may refuse to engage in soil conservation practices, perhaps to the detriment of the rest of the district in which he lives. Furthermore, the vagaries of voluntary participation are such that the efforts of prior owners may be dissipated in case subsequent owners decide not to continue in the program, or to engage in practices that run

*Injunction.* While injunctions have been allowed against such injurious acts as pasturing cattle on wet ground, Friemel v. Coker, 218 S.W. 1105 (Tex. Civ. App. 1920); over-tilling the land, Wilds v. Layton, 1 Del. Ch. 226 (1822); removing top soil, City of White Plains v. Griffin, 169 Misc. 706, 8 N.Y.S. 2d 32, aff'd, 255 App. Div. 1003, 8 N.Y.S. 2d 462 (1938); and plowing sod grass to sow corn, Jones v. Whitehead, 1 Pars. Equ. Cas. 304 (Pa. 1847), the landlord whose tenant had merely failed to act would of course find this remedy unavailable and, indeed, of no benefit.

7. A program for each state is laid out by the Soil Conservation Service and is summarized in the form of a handbook, revised from year to year as deemed necessary by the Secretary of Agriculture, and published through the Agricultural Conservation Program. Section 10 of the Indiana Handbook for 1957 lists 30 practices for which the federal government will share costs to the extent indicated for each practice. Specifications are detailed for each practice which will be approved for federal cost-shares. A quotation from page 20 of the handbook will illustrate the precise and detailed standards established by the federal program:

"6. Establishment of contour strip cropping on nonterraced land. Guidelines must be established and all cultural operations performed as nearly as practicable on the contour. The crop stubble or crop residue must be left standing over winter . . ."

"The practice applies on cropland having slopes of 2 to 12 percent and not more than 400 feet long."

"Contour lines shall be laid out accurately with a level. Strips shall be laid out from the contour lines. The edges of the strips may vary from the contour by not more than 3 percent for a distance of 100 feet to adjust for waterways and ridges . . ."

8. See note 42 infra.
contrary to the policy and purposes of the federal act. The danger of abandonment seems particularly acute in the case of farm tenancies. Farm landlords, as well as farm tenants, may be interested only in the short term profit, and may not be willing to make the matching contribution that participation in the Department’s payments program necessitates.

This note will suggest that improvement in the nation’s soil conservation efforts might be achieved by combining the good features of both the common law and the grant-in-aid system of soil conservation control of tenant operations. The specification of more detailed and more adequate soil conservation practices by the federal agencies can give new vigor to the enforcement of proper practices by means of the action for waste. At the same time the federal soil conservation program, at the state level, might benefit from the inclusion of compulsory enforcement processes that can be borrowed from the common law forms of action. Perhaps a soil conservation program that can proceed along both lines can do a better job of arresting the inroads of erosion and waste on the more than one-third of the nation’s farm land now operated under some type of farm tenancy.

The Common Law Actions

Of course, express provisions in the lease, such as clauses relating to conservation practices and the allocation of their cost, can regulate the relationship between landlord and tenant and insure proper soil care. But written farm leases are still not common, and in the absence of express agreement the parties must be thrown back on the common law.

   “It is hereby declared to be the policy of this Act also to secure, and the purposes of this Act shall also include, (1) preservation and improvement of soil fertility; (2) promotion of the economic use and conservation of land; (3) diminution of exploitation and wasteful and unscientific use of national soil resources; (4) the protection of rivers and harbors against the results of soil erosion in aid of maintaining the navigability of waters and water courses and in aid of flood control . . .”

10. Participants in the federal program receive a maximum of 50% of the average cost of performing conservation practices, with certain exceptions where a greater cost-share may be established by the state committee and SCS representatives for practices having long lasting conservation benefits. Thus, tenant-participants must bear at least 50% of the cost of such practices. AGRICULTURAL CONSERVATION PROGRAM SERV. U.S. DEP’T OF AGRICULTURE. INDIANA HANDBOOK FOR 1957 § 3H(1) (2).

11. See note 1 supra.

12. It is estimated that only 20 to 25% of all farm leases in the United States are written. Letter from Gene Wunderlich, Acting Head, Land Tenure Section, Land and Water Research Branch, Agricultural Research Service, U.S. Dep’t of Agriculture, August 13, 1958, on file in Indiana University School of Law Library, Indianapolis, Division.
Since the enactment of the Statute of Marlborough in 1267, an action of waste has been maintainable against tenants for years. While recovery under this statute was limited to actual damages proved, the Statute of Gloucester of 1274 enlarged the remedy to include treble damages and forfeiture of the tenancy. These statutes were carried over into this country as part of our common law. However, most states have enacted legislation embodying the substance of the Statute of Gloucester.

The law of waste lacks definition. No standard of conduct can be gleaned from the cases which could be applied to every case. The most frequent requirement is a finding of "permanent" or "substantial" injury to the estate. This test, when applied to poor soil practices, presents the practical problem of showing a present diminution in the value of the land. The courts in cases involving poor tenant practices have sometimes relied on an implied covenant of good husbandry to which the tenant

13. 52 Hen. 3, c. 23, § 2: "... Fermors, during their terms, shall not make waste, sale, nor exile of house, woods, men, nor of any thing belonging to the tenements that they have to ferm, without special license had, by writing of covenant, making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciament grievously."

14. 6 Edw. 1, c. 5: "... a man henceforth shall have a writ of waste in the chancery against him that holdeth by law of England, or otherwise for term of life or for term of years, or a woman in dower; and he which shall be attainted of waste shall lose the thing that he hath wasted, and moreover shall recompense thrice so much as the waste shall be taxed at."

15. Kory v. Less, 180 Ark. 342, 22 S.W.2d 25 (1929) (wrongful act or omission resulting in permanent injury to the inheritance); Whitehead v. Whitehead, 21 Del. Ch. 436, 181 Atl. 684 (1935) (co-tenant; only such acts shown to be detrimental to the inheritance and contrary to the ordinary course of good husbandry); Pynchon v. Stearns, 11 Met. 304 (Mass. 1846) (life tenant; must be prejudicial to the inheritance); Sparkman v. Hardy, 223 Miss. 152, 78 So.2d 584 (1955) (any substantial injury done to the inheritance by one having a limited estate); Proffitt v. Henderson, 29 Mo. 325 (1860) (life tenant; lasting damage to the reversionary interest, or lessening in its value); McCullough v. Irvine, 13 Pa. 438 (1850) (life tenant; damages measured by the extent to which the inheritance injured); Keller v. Eastman, 11 Vt. 293 (1839) (life tenant; injury to the inheritance necessary). Cf. City of White Plains v. Griffin, 169 Misc. 706, 8 N.Y.S.2d 32, aff'd 255 App. Div. 1003, 8 N.Y.S.2d 462 (1938) (enjoined from removing topsoil because would cause substantial damage and impair security of the city's tax lien); Van Wick v. Alliger, 6 Barb. 507 (N.Y. 1849) (injunction denied since cutting timber not shown to render land inadequate security).


In Walker v. Tucker, 70 Ill. 527 (1873), in a suit by tenant under a mining lease for possession of the surface land, the lessors claimed there was an absence of intent to lease farm land because of a failure to include covenants as to care and cultivation, even though words of demise included farming lands. The court said: "By the demise of the farm land a covenant is raised, by implication of law, that they shall be used as such ... that the lands shall be farmed in a husbandlike manner ... ."
must conform. But there is surprisingly little judicial discussion of the relationship between waste and good husbandry, and sometimes it is not clear whether the court is considering good husbandry as a species of waste, or whether good husbandry is an independent covenant not part of the general duty not to commit waste. How the court views the good husbandry requirement becomes evident in its consideration of the applicable remedy. Some courts, when confronted with a case involving poor tenant farm practices have distinguished the implied covenant of good husbandry and have held that, unlike the act of waste, common law or statutory forfeiture does not result from a violation. However, the majority of cases require "permanent" or "substantial" injury to the estate to constitute waste, and when dealing with the covenant of good husbandry the same test is generally used—that "ill-husbandry" is waste.


17. In Schultz v. Ramey, 328 P.2d 937 (N.M. 1958), the implied covenant of good husbandry was recognized even though that express covenant had been deleted in a printed form lease. However, it was held that for the breach of such implied covenant the landlord was limited to his action for damages and could not seek cancellation of the lease unless the covenant had been made a condition by express provision in the lease. No claim was presented by the lessor that breach of the implied good husbandry covenant would amount to waste, permitting statutory forfeiture.

A co-tenant who had cut timber for making repairs was held not liable for waste in Whitehead v. Whitehead, 21 Del. Ch. 436, 181 Atl. 684 (1935), for only such acts as are shown to be detrimental to the inheritance and contrary to the ordinary course of good husbandry would amount to waste. Neither is a life tenant liable for waste for plowing meadow and laying out a street if it is a judicious and suitable mode of husbandry. Pynchon v. Stearns, 11 Met. 304 (Mass. 1846).

Cf. Lytle v. Payette-Oregon Slope Irr. Dist., 175 Ore. 276, 152 P.2d 934 (1944), in which a judgment creditor under an erroneous foreclosure judgment was held liable to the owner for waste for failure to farm and cultivate the land and for removing top-soil, because ill-husbandry carried to such extent as materially injures the rights of the landlord or reversioner constitutes waste.

18. See Richards v. Torbert, 8 Del. (3 Houst.) 172 (1865), holding that planting Indian corn three years in succession without fertilizing and failing to repair fences was mere ill-husbandry and not willful waste under the Delaware statute nor under the Statute of Gloucester so as to warrant forfeiture of the life estate. See also Schultz v. Ramey, supra note 17.

Cf. Lee v. Weerda, 124 Wash. 168, 213 Pac. 919 (1923). In an action to cancel a lease under a forcible entry and detainer statute, a demurrer was sustained, the court saying that failure to care for orchards and permitting the land to go uncultivated and grow up in weeds constituted mere ill-husbandry and not waste. Id.

19. See note 15 supra.
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if carried to the extent that it injures the estate. When this test is applied to the farm tenant's use of the soil, the implied covenant of good husbandry and the covenant not to commit waste are one and the same, that is, a covenant to farm the land in such a manner as not to commit injury to the estate.

The distinction between "permissive" and "voluntary" waste has also been made, most cases saying that common law or statutory forfeiture applies only to voluntary or willful acts of waste, such as destroying buildings and fences, removing topsoil, felling timber and destroying shrubbery and other cover. But more often than not the ill effects involved flow not from what the tenant has done but from what he has not done. For example, the tenant may not engage in contour plowing when the topography calls for it, or he may not rotate his crops, although sound agricultural practice may indicate that this is in order.

It is in these latter cases of omission that the courts have had the most difficulty. It is in these cases that the distinctions between voluntary waste, permissive waste and good husbandry are sometimes drawn, with the result that the tenant's liability may only be in damages. Yet it is in these cases that judicial relief in the way of forfeiture, injunction or specific performance would seem to be forthcoming as a matter of social necessity. Injunctions have been allowed against such injurious acts as pasturing cattle on wet ground, overtilling, and removing topsoil, but in a case where the tenant had merely failed to act there would of course be nothing to enjoin. No cases have been found where specific performance was sought in this type of situation, but presumably the equity rules would be applied denying specific performance where continuing


22. The demands of society for future food supply are not answered when damages are paid by the tenant. Pigou, ECONOMICS OF WELFARE 29 (1924):

[T]here is wide agreement that the State should protect the interests of the future to some degree against the effects of our irrational discounting and of our preference for ourselves over our descendants. The whole movement for "conservation" in the United States is based on this conviction. It is the clear duty of Government, which is the trustee for unborn generations as well as for its present citizens, to watch over and, if need be, by legislative enactment, to defend, the exhaustible natural resources of the country from rash and reckless spoliation.

23. See note 3 supra.
court supervision would be required or where the effect of such a decree would result in involuntary servitude.

The criterion applied to specific acts of the tenant leaves much to be desired in establishing a required standard of conduct. The courts have said that what constitutes good husbandry must be determined by the custom of the community. Even in the absence of such a judicial declaration the submission of forfeiture and damage cases to the jury means that a community standard will be applied. Because of the notoriously lax standards that historically have been applied by American farmers, even owners, in the care of the land, the jury-applied standard could not be expected to be very high. Especially since the applicable criteria of waste and good husbandry are in themselves elusive and ambiguous, the jury is given free rein. Jury verdicts have been returned acquitting tenants of soil practices that by desired standards would be considered deleterious to the soil.

Thus, the common law has not proved too effective in preventing wasteful farm practices by tenants. A judgment for damages may not be of much help against a tenant who is not responsible financially and who may not even be available. In any event a money judgment does not cure the damage to the soil. While forfeiture, if applicable, can rid the

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27. CHASE, RICH LAND, POOR LAND 82-117, 215-242 (1936); OSBORN, OUR PLUNDERED PLANET 175-193 (1948). These authors detail the staggering losses of natural resources suffered by this nation in some 300 years of poor farming practices: destruction of forests; exhaustion of the cropland by soil-depleting crops; serious loss of topsoil by erosion brought on by such farming methods, and the silting of waterways and washing of subsoil from higher land onto fertile valley land resulting from the erosion. As a consequence, it is urged that we face an inevitable crisis in feeding our growing population which cannot be met with current soil conservation efforts; that by 1975 our population will require more arable land than will be available, if present losses continue, to provide food at present diet levels. OSBORN, THE LIMITS OF THE EARTH 61-62 (1953).
28. E.g., permitting land in cultivation to lay out and grow up in pine trees, Wright v. Conner, 200 Ga. 413, 37 S.E.2d 353 (1946); allowing land to grow up in weeds and go uncultivated, contrary to express covenants in a written lease, Lee v. Weerda, 124 Wash. 168, 213 Pac. 919 (1923). Cf. Bert v. Rhodes, 258 S.W. 40 (Mo. App. 1924), where the tenant under a five year written lease recovered in an action for damages against his landlord for entering the land over the tenant's objections and sowing clover among wheat and oats planted by the tenant. The landlord contended the tenant had not rotated crops properly and that the clover was necessary to maintain soil fertility. A verdict for the landlord was reversed, the court saying that the custom in the community was inadmissible since the lease placed no restrictions on the tenant's cultivation of the land.
farm of an undesirable tenant, the lessor is faced with the practical problem of finding someone who will be responsible.

One avenue of help may lie in the possible liability of the lessor to the tenant for any capital improvements which the tenant might make to the soil. If the tenant who made such an improvement could count on judicial help to compel compensation from the lessor, a judicially-enforced private cost-allocation program could be the result. Unfortunately, the tendencies in the law of waste militate against such a solution. As a matter of fact, under some cases any improvements the tenant made to the farm might make him responsible in waste on the grounds that it constitutes a material change in the freehold. In any event, in the only American case in which a tenant claim for compensation was made, it was denied.

**Federal Soil Conservation Programs**

After intermittent efforts to establish better land use practices on a national level the Soil Conservation and Domestic Allotment Act was

34. This result has been achieved by statute in England. Permanent improvements made by the tenant may be compensated if made with the landlord’s consent. Consent of the landlord is not required to compensate the tenant for drainage work if the landlord is notified, and certain operations which are designed to increase soil fertility may be compensated for without notice or consent of the landlord. Agricultural Holdings Act, 1948, 11 & 12 Geo. 6, c. 47.


30. The law of waste is remedial and was designed to protect the land-holding class, rather than society’s interest in conserving land. An early Massachusetts case, in commenting on the enactment of the Statute of Gloucester (providing forfeiture and treble damages) only eleven years after the Statute of Marlborough (making tenants for years and for life liable for waste) expresses the social climate existing at that time as follows: “The short interval between the two statutes will warrant the belief that the frequency of waste and destruction by those who had no interest in the inheritance, by stripping the land of its valuable timber, suffering the buildings to become dilapidated, and other injuries, had excited the public attention, and called for the interposition of parliament, lest the reversioner should come to his estate without being able to enjoy it.” Sackett v. Sackett, 25 Mass. (8 Pick.) 309, 314 (1829).

31. F. W. Woolworth Co. v. Nelson, 204 Ala. 172 (1920); Palmer v. Young, 108 Ill. App. 252 (1903); Sparkman v. Hardy, 223 Miss. 452, 78 So.2d 584 (1955). The doctrine of ameliorative waste may be of help to the tenant in this area. That is, that which constitutes technical waste because it makes a material change in the nature of the freehold or its identity will not subject the tenant to common law or statutory liability for waste if it improves, or increases the value of the estate. Jackson v. Andrew, 18 Johns. 431 (N.Y. 1821); J. H. Bellows Co. v. Covell, 28 Ohio App. 277, 162 N.E. 621 (1927); Melms v. Pabst Brewing Co., 104 Wis. 7, 79 N.W. 738 (1899). However, the historic position of the common law, which protects the reversionary rather than the possessory estate, would work against the tenant’s right to compensation. See note 30 supra.

32. Bullitt v. Musgrave, 3 Gill. 31 (Md. 1845).

enacted in 1935 and amended in 1936. This act authorizes the Soil Conservation Service to extend educational and technical assistance and, through the Agricultural Conservation Program Service, to make financial payments to farm operators who inaugurate improved soil conservation practices on their land. Concurrently with the enactment of the federal program, the states have enacted enabling statutes authorizing the establishment of soil conservation districts, through which the farm operators participate with the SCS in improving conservation practices. The activities of the districts may be classified as non-regulatory, such as the power to make demonstrations and engage in research, and regulatory, including the power to enact agricultural land-use controls requiring minimum conservation practices. The districts may also require from the farmer permanent use covenants requiring certain minimum conservation practices. Covenants and land-use regulations of this type would of course bind tenant-farmers. The statute authorizing the payments program provides for payments to be made directly to tenants, but once a given project has been approved there is no statutory procedure to insure that proper practices will continue to be employed. However, the re-

36. See the compilation of state soil conservation statutes in Ferguson, Nation-Wide Erosion Control: Soil Conservation Districts and the Power of Land-Use Regulation, 34 IOWA L. REV. 166, 168, n. 23 (1949). See also SOIL CONSERVATION SERVICE, U.S. DEP'T OF AGRICULTURE, A STANDARD STATE SOIL CONSERVATION DISTRICTS LAW (1936), on which the state acts were modeled (hereinafter referred to as the "Standard Act").
37. See STANDARD ACT § 8.
38. See STANDARD ACT § 10. The laws of 34 states grant soil conservation districts the power to enact and enforce land-use regulations. Such regulations are proposed by the district supervisors and enacted only after approval of a majority of the land occupiers in the district by referendum vote. Failure to comply with such regulations is generally made a misdemeanor, punishable by fine. The supervisors are also given the power to provide by ordinance that any land occupier who sustains damages from a violation by another land occupier may recover damages in an action at law against the violator. Further provision is made for enforcement of the regulations by the district supervisors against the non-complying user in a court of equity. On failure to comply thereafter, the supervisors may enter upon the land, perform the work necessary to bring the land into conformity with the regulations, and recover the cost therefor from the occupier.
39. STANDARD ACT § 8 (11).
40. 49 Stat. 164 (1935), as amended, 16 U.S.C. § 590(e) (1952) provides in part: "Payments made by the Secretary to farmers under subsection (b) shall be divided among the landlords, tenants and sharecroppers of any farm, with respect to which such payments are made, in the same proportion that such landlords, tenants and sharecroppers are entitled to share in the proceeds of the agricultural commodity with respect to which such payments are made . . . Provided, that payments based on soil-building or soil-conserving practices shall be divided in proportion to the extent which such landlords, tenants, and sharecroppers contribute to the carrying out of such practices. Such payments shall be paid by the Secretary directly to the landlords, tenants, or sharecroppers entitled thereto . . ." (Emphasis supplied). Thus, in the case of an absentee landlord, or in the case of a wholly tenant-operated farm, payments made under the act may be made to the tenant entirely.
quirement that the specified practices be completed satisfactorily before payment is made does act as a brake on tenants (or owners) who would agree to carry out but then not fulfill certain approved programs.

What has distinguished the federal programs so far has been a complete lack of non-voluntary enforcement machinery. Apparently because of the virtues that are thought to inhere in a program of voluntary cooperation, land-use regulations have not been enacted by the soil conservation districts and covenants from farmers have not been required. Furthermore, continued use of good practices under the payments program depends on continued farmer cooperation. Apparently receipt of a payment does not bind the farmer in any way to the continuation of good practices. In one federal tax case it was suggested that payments

41. See Agricultural Conservation Program Serv., U.S. Dep't of Agriculture, Indiana Handbook for 1957 § 7, which provides, in part: "The sharing of costs by the Federal Government, for the performance of approved conservation practices on any farm under the 1957 program will be subject to the condition that the person with whom the costs are shared will maintain such practices throughout their normal life span in accordance with good farming practices as long as the land on which they are carried out is under his control." And further, "If the county committee finds, with the concurrence of the State Committee, that any person has adopted or participated in any practice which tends to defeat the purposes of the 1957 or any previous program, including, but not limited to, failure to maintain in accordance with good farming practices, practices carried out under a previous program, it may withhold, or require to be refunded, all or any part of the Federal cost-share which otherwise would be due him under the 1957 program." (Emphasis supplied.)

Section 5 of the Handbook provides that practices must be completed during the calendar year to be eligible for cost-shares, except in a few instances where the county committee determines that certain practices have been substantially completed and the farmer agrees in writing to complete the other component parts of the practice if cost-sharing is offered the next year. Such advance cost-shares are to be refunded if the practice is not completed within a specified time as determined by the county committee.

42. See Parks, Soil Conservation Districts in Action 26-28 (1952). The Soil Conservation Service originally felt that the power to enact land-use regulations was imperative if the federal program was to be effective in carrying out a nation-wide conservation program. Approval of state plans was withheld and no technical assistance was given to states whose acts did not contain provision for enactment of land-use regulations. States were classified as to the adequacy of their laws and aid was distributed according to such classifications. During World War II this practice was abandoned and the categories of assistance have never been reestablished. The adequacy of the state laws is no longer a factor in determining qualification of the state for participation in the program. As a result three states in 1945, Indiana, Michigan and Pennsylvania, repealed the sections of their acts providing for land-use regulations, increasing to 16 the number of states not having such provisions.

The SCS requires as a prerequisite to technical assistance that the farmer enter into an agreement with the district establishing adequate responsibilities of the farmer. Id. at 35-36. The form originally required specified that in the event the farmer intentionally failed to fulfill his commitments the district might terminate the agreement and be reimbursed by the farmer for the value of the labor and materials furnished. Present agreements are little more than an agreement to cooperate with the district and to use the equipment provided for the purpose for which they are furnished. No penalty is provided for failure to perform as promised. Id. at 38. Further, the SCS Washington office knows of no district which has attempted to recover the cost of assistance or materials it has made available to a farmer who has not complied with the agreement. Id. at 61.
under the program could not be "retained" if the recipient engaged in practices contrary to the spirit of the law. This might suggest that receipt of the payment implies a duty to continue proper practices, and that a tenant who did not do so could be forced to disgorge his payment at the behest of the government, or of the landlord who wished to apply it properly.

Other problems arise because of the voluntary nature of the program. The project must be initiated by the farm operator, and if the farm is operated by a tenant the conflicting interests of lessor and lessee may prevent them from agreeing on a joint program. The tenant may be interested only in the short-range effects of what he does, and the lessor not in possession may not have enough of a present interest to initiate a project. Furthermore, since participation in the program requires matching by the individual farmer, the farm tenant, who generally would be expected to be in a more impecunious position than the farm owner, may not be financially able to initiate a project.

These difficulties inhere in the very nature of the farm tenant problem, and little can be done to cure them short of a revision of the federal statute to consider the different needs of the farm tenant. But what of the situation in which the farm owner, or a prior tenant, has begun a project, and then leases or assigns the farm to another tenant? In some cases the local districts and the Department of Agriculture have required up to five year agreements with tenants, binding them to continue a project for the specified period of time. Yet, for the reasons indicated, the new tenant may not wish to continue the project. Would it be possible to bind a subsequent tenant to the terms of such an agreement? Under the present statutes this is doubtful, since the promise runs to the

43. Baboquivari Cattle Co. v. Comm'r of Internal Revenue, 135 F.2d 114 (9th Cir. 1943).
44. See note 10 supra.
45. For example, in Ohio, where approximately 25% of the farmers cooperating in the soil conservation program are tenants, there are numerous cases where approved methods are not adopted when the tenant is uncertain as to the length of his tenure. If he can be certain that he will stay on the farm long enough to recover enough benefits to pay him for his additional efforts, the practices will usually be adopted if the landlord is willing. Some cases have been noted where the tenant is willing to participate but the landlord is not. This is credited to cases of absentee-owners and owners who have poor knowledge of modern farming practices. See letter from R. H. Blosser, Associate Professor, College of Agriculture, The Ohio State University, April 7, 1958, on file in Indiana University School of Law Library, Indianapolis Division. See also Blosser, Problems Encountered by Farmers in Applying Soil Conservation Practices in Ohio, DEPT. OF AGRICULTURAL ECONOMICS & RURAL SOCIOLOGY, Mimeo, BULL. 227 (1951).
46. See note 42 supra. The power of the district supervisors to require covenants as to permanent land-use is not used in any effective manner. Agreements required of farmers now provide no penalty for non-compliance and no cases can be found where covenants have been enforced.
federal government or the local district, and the courts have always experienced difficulties in enforcing covenants in gross against assignees.\textsuperscript{47}

**SOME SUGGESTIONS**

By adapting the common law remedies for waste to the federal soil conservation program, some real control by lessors out of possession may be achieved over tenants who do not choose to continue a soil conservation project. Thus, provision could be made in the state soil conservation acts making the common law remedies for waste available to landlords who had decided to participate in the soil conservation program,\textsuperscript{48} using as the applicable criteria the standards of the federal program. However, more far-reaching changes in the soil conservation program might be needed, such as the enactment of land-use regulations by the districts.\textsuperscript{49}

\textsuperscript{47} Wood Fabricators v. Hayes, 250 Ala. 475, 35 So.2d 106 (1948); Coomes v. Aero Theatre & Shopping Center Inc., 114 A.2d 631 (Md. 1955); Craven County v. First Citizens Bank and Trust Co., 237 N.C. 502, 75 S.E.2d 620 (1953).

\textsuperscript{48} Despite statutes on waste in every state, the remedy has fallen into disuse. Application of the doctrine in the area of soil conservation has some merit. Courts which have denied recovery (forfeiture or damages, or both) on the theory that a permanent injury to the inheritance had not been shown will doubtless feel the impact of studies and data compiled and published during the last three decades on the magnitude of damage resulting to land from poor conservation practices. See generally \textit{Chase}, \textit{op. cit. supra} note 27; \textit{Osborn}, \textit{op. cit. supra} note 27. There should be little difficulty in showing that damage of an enduring nature occurs at the very inception of a practice now established to be contrary to good soil conservation, or on the failure of the farm tenant to take steps necessary to conserve the soil.

\textsuperscript{49} See note 42 \textit{supra}. The Soil Conservation Service now takes the position that "conservation cannot be achieved unless the land owner or operator wants to do a good job, and therefore he needs to be helped to become a conservation farmer rather than be forced into it. And if the public good finally indicates some type of compulsory action, it is not for the federal government to impose or suggest such action." Letter from D. A. Williams, Administrator, Soil Conservation Service, Washington, D. C., January 8, 1958, on file in Indiana University School of Law Library, Indianapolis Division.

Thus, the former position of the federal government, that the program could not be effective unless the state acts provided for compulsory action (see note 42 \textit{supra}), has changed to an attitude of making the best use possible of the state programs as the states themselves wish to design them. Mr. Williams' letter, \textit{supra}, indicates that there is no proposal to change the federal government's attitude in this respect.

Little use has been made of the power to enact land-use regulations where the state acts so provide. It is interesting to note the experience of one state, Colorado, in attempts of one of its districts to enforce such a regulation against breaking out for crop production of additional sod or brush land except upon approval of the district board of supervisors. A bitter controversy arose and the act was amended in the next legislature which made ineffective the land-use regulations provision of the act. All land-use regulations previously adopted were nullified unless readopted within 45 days from the effective date of the act by a new procedure which required 75 per cent of the votes cast at referendum, as opposed to the previous requirement of 51 per cent. In this particular instance, the most strenuous opposition to the regulations seemed to come from absentee land owners themselves rather than the tenants of their farms. See \textit{Parks, Soil Conservation Districts in Action} 147-159 (1952). Dr. Parks expresses the belief that the SCS is hoping that the authorization for land-use regulations will be retained by the states which have them, against the day when farmers will want to adopt land-use ordinances in event of economic depression or dust storms. \textit{Id.} at 159.
In the case of tenant-operated farms, it might be possible to give lessors who choose to enter into the program some control over their tenants during the lease period. This could be accomplished by amendments to soil conservation district laws, or to the statutes providing remedies for waste, enabling the landlord to enforce the agreement made with the federal government. For example, it might be possible to give the lessor the remedies of injunction and forfeiture. Then a subsequent tenant who did not want to live up to the agreement could be judicially compelled to do so, and if this remedy did not prove effective the lessor could secure a forfeiture of the estate. While the remedy of forfeiture may have its practical limitations here as in the enforcement of the common law duty not to commit waste, granting the injunctive power may help to bring into line the recalcitrant farm tenant who has the financial ability to continue the project, but who does not choose to do so. Otherwise, of course, the lessor out of possession has no remedy to enforce the higher standards of the federal act during the length of the lease, and may have to sit idly by while his farm deteriorates, even though he wishes to see cooperation in the federal program continue.

Concomitantly, the enactment of the federal program may have some beneficial effects on the common law responsibilities of tenants with respect to their farms. Since the enactment of the federal program it might be argued that the higher standards of soil conservation which it provides should be accepted as definitive of the common law duty of good husbandry. Especially would this be true in farm communities in which the voluntary participation in the federal program is high. The enlistment of a majority of the farmers in a given area may go far to show what the community standard is.

If the common law responsibilities could thus be invigorated, they might serve, in the case of farm tenancies, to implement the presently voluntary federal programs by requiring a type of soil care of all tenants that meets the standards of the federal act, regardless of whether the tenant chooses to participate in the program or not. By thus infusing the higher federal standards into the common law remedies for waste the federal program could be given a wider effect without any significant change in its present voluntary structure.

No cases have been found in which a lessor has argued that the standards of the federal program should be applicable in a common law action of waste. Some statutory change would aid in accomplishing this result. In light of the disinclination of farm lessors and lessees to resort

50. See note 7 supra.
to formal leases, statutory amendment to consider the pressing problem of soil conservation in the area of farm tenancies seems in order. This amendment might take the form of a farm tenancy act, which would regulate the relationship between the tenant and his farm. The statute might make the soil conservation standards of the federal program applicable to actions for waste. It could also experiment with new and more fruitful remedies. The lessor might be enabled by statute to make any required conservation improvement, the cost of which would then be a charge against the lessee to be enforced against his crops and other personalty. This power has been granted district supervisors under many state soil conservation laws.

Even more directly, the statute might enable the lessor to engage in farm conservation projects, and to bind the lessee by his decision. Conversely, the lessee should have similar powers and be able to recover from the lessor the cost of any such program which benefits the reversionary interest in the realty. This latter change would incorporate by statute the suggested recoupment remedy which was discussed earlier.

The landlord-tenant relationship is extensively regulated by statute in England. Of interest here is the power of the Minister of Agriculture, Fisheries and Food to issue orders placing the tenant under his supervision if the tenant is not farming the land in accordance with the rules of good husbandry. The Minister may give directions to require good husbandry practices, in default of which the tenant may be dispossessed and an approved tenant or the Minister himself placed in possession for the purpose of farming the land in accordance with the rules of good husbandry. The constitutionality of such state program is questionable in this country, but perhaps the police power would be adequate for this purpose by analogy to the urban rehabilitation laws of some

51. See note 12 supra.
52. See note 38 supra. For years a similar practice has been standard under municipal codes. If the property owner does not make the necessary repairs the municipality is enabled to do so and to collect the charges by way of a lien on the property. The constitutionality of this procedure was sustained in Adamec v. Post, 273 N.Y. 250, 7 N.E.2d 120 (1937). Similar procedures are authorized under more modern and more extensive rehabilitation acts. People ex rel. Gutknecht v. Chicago, 3 Ill.2d 539, 121 N.E.2d 791 (1954), which upheld the constitutionality of the Illinois Urban Community Conservation Act, did not reach a decision on the constitutionality of the lien procedure. Assuming the constitutionality of the lien procedure as applied to the urban slum, its application to deteriorated farm land is still arguable. Although the deteriorated urban slum is physically more apparent, a good case could be made that both conditions require the drastic remedy.
53. See note 32 supra.
54. Note 29 supra.
55. Agriculture Act, 1947, 10 & 11 Geo. 6, c. 48, § 11.
56. Agriculture Act, 1947, 10 & 11 Geo. 6, c. 48 § 14(1).
57. Agriculture Act, 1947, 10 & 11 Geo. 6, c. 48 §§ 17, 18.
While it has never been suggested that agricultural regulation should be as extensive in this country as it is in England, perhaps an adaptation of the English program is the ultimate solution to the serious farm tenant soil conservation problem in this country.

RECREATIONAL INJURIES AND WORKMEN'S COMPENSATION: INFUSION OF COMMON-LAW, AGENCY-TORT CONCEPTS

Recreation activities sponsored, encouraged or permitted in varying degrees by employers are a rapidly-growing and important phase of employee-relations programs in industry.¹ Accidents resulting from employee participation in these activities have raised knotty legal problems concerning the compensability of recreational injuries under workmen's compensation statutes. Court decisions under the various state acts are in sharp conflict, and it is difficult to predict accurately a company's liability for recreation accidents. This is both undesirable and illogical since the basic coverage formula authorizing compensation is substantially identical in all states.²

The prevailing confusion in the recreational injury decisions is due in large part to the attempted infusion by some courts of the common-law, agency-tort concepts of "scope of employment" into the workmen's compensation requirement that an injury to be compensable must "arise out of and in the course of employment."

Under the doctrine of respondeat superior, a master is liable for injuries to either person or property caused by the tortious conduct of a servant acting within the "scope of the employment."³ This phrase, often varied with "in the course of employment,"⁴ is used to delimit the unordered acts of a servant for which the master will be held liable. While it is relatively simple to state this vicarious liability rule, to deter-

58. See note 52 supra.
1. See notes 122-34 infra and accompanying text.
2. See note 17 infra.
3. 2 HARPER & JAMES, TORTS 744 (1956); RESTATEMENT (SECOND), AGENCY § 219(1) (1958). The doctrine that a master is liable for the torts of his servant is generally attributed to unwarranted dicta by Lord Holt in the early English case of Turberville v. Stampe, decided in 1697. 1 Ld. Raym. 264, 91 Eng. Rep. 1072 (K.B. 1697). See BATY, VICARIOUS LIABILITY 7-34 (1916). Much interesting speculation has been indulged in as to policies which support the doctrine. See BATY, op. cit. supra at 148.