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Reversions and Remainders--Recovery of Permanent Damages-- Measures of Damages

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by inexpensive acidation huge drainage from neighboring wells.⁶ Second, if he acidized with a "blanket" and entirely prevented the reaction of the acid with the limestone, by filling the well above the "pay", he might be charged with negligent acidation. If he were successful in the acidation with a "blanket", the withdrawal of the oil would yield precisely the same net result as in the third alternative where he did not take the precautionary measure of using a "blanket", because the water would follow close after the oil in a formation where the oil is known to be forced upward by the brine. The court, in holding the lessee liable in the instant case (the third alternative), by implication would seem to declare him liable whenever the water fills the well even though a "blanket" were used. This is hardly a desired result, since the recovery of oil is the principal object in the development of a lease.

The effects of the case are threefold: (1) Operators in fringe fields will now hesitate to acidize where there is any possibility of salt water encroachment. (2) The lessor will be prejudiced by drainage, the lessee lose his investment in such a well, and the state its resources which acid and acid alone can recover from latent wells of high potentiality. (3) But most important, the lessee is made an insurer of a profitable return from a highly speculative venture, acidizing at his peril, or refraining from utilizing this latest method of recovery and subjecting himself to possible liability for non-diligence.

K. W., JR.

REVERSIONS AND REMAINDERS — RECOVERY OF PERMANENT DAMAGES — MEASURE OF DAMAGES. — There being a life estate outstanding, *P*, the remainderman, sued to recover "damages for a wrong, trespass on land." The damage claimed grew out of *D*'s drainage of mine water across *P*'s land. In an action before a justice it was not clear whether *P* sought permanent or temporary damages. *Held*, that an action for permanent damages was the only one a remainderman could maintain for injuries to land, and

⁶ Ordinarily the lessee is the judge as to diligent operation because he bears the cost. *Trimble v. Hope Natural Gas Co.*, 117 W. Va. 650, 664, 187 S. E. 331 (1936). Since a complete acidation can be had for \$250, the diligence of the lessee would seem to be determinable by the standard set by the "reasonable man".

that the measure of such damages was the diminution in the market value of the land. *Swick v. West Virginia Coal & Coke Co.*¹

Where a tort upon realty affects the estate of both tenant and remainderman, the rights of both parties are clear, but they are separate and independent rights.² The instant case holds, for the first time in West Virginia, that a remainderman may recover only for permanent damages, although there have been West Virginia dicta to that effect.³

Permanent damages are those for which but one recovery may be had, compensation for all the injury the property has sustained in the past and will sustain in the future being included.⁴ The requisite elements of a cause of action for permanent damages to real property are permanency of the cause of the injury and constancy and materiality of the injury.⁵ The definition of permanent damages is clear but its application to different situations cannot always be predicated.⁶

In holding that the measure of permanent damages is the diminution in the market value of the land, the court followed the

¹ 7 S. E. (2d) 697 (W. Va. 1940).

² *Jordan v. City of Benwood*, 42 W. Va. 312, 26 S. E. 266 (1896); *Yeager v. Town of Fairmont*, 43 W. Va. 259, 27 S. E. 234 (1897); *Shaw v. Monongahela Ry. Co.*, 100 W. Va. 368, 130 S. E. 461 (1925); *Logan Central Coal Co. v. County Court of Logan Co.*, 106 W. Va. 578, 146 S. E. 371 (1929).

³ See *Jordan v. City of Benwood*, 42 W. Va. 312, 320, 26 S. E. 266 (1896); *Yeager v. Town of Fairmont*, 43 W. Va. 259, 265, 27 S. E. 234 (1897). See also 1 SEDGWICK, DAMAGES (9th ed. 1913) §§ 72, 74 (life tenant can recover damages for injury to his possession). See also 4 SUTHERLAND, DAMAGES (1916) § 1033; Note (1920) 8 A. L. R. 600. For argument and authority to the effect that a life tenant may sue for permanent injury to realty see Roberts, *A Possessor's Right to Damages for Permanent Injury to Realty* (1934) 28 ILL. L. REV. 919. A life tenant can enjoin any violation of his natural rights of possession, 1 TIFFANY, LANDLORD & TENANT (1910) § 353; (1940) 28 AM. JUR., Injunction § 132. To the effect that a remainderman is entitled to equitable relief in the form of an injunction if permanent injury to his land is threatened to be continued in the future see 2 TIFFANY, LANDLORD & TENANT § 353; *Fox v. Corbitt*, 137 Tenn. 466, 194 S. W. 88 (1917); Note (1920) 8 A. L. R. 600, 615.

⁴ See *McHenry v. City of Parkersburg*, 66 W. Va. 533, 535, 66 S. E. 750 (1910); *Chambers v. Spruce Lighting Co.*, 81 W. Va. 714, 718, 95 S. E. 192 (1918).

⁵ See *Bartlett v. Grasselli Chemical Co.*, 92 W. Va. 445, 450, 115 S. E. 451 (1922).

⁶ In *Bartlett v. Grasselli Chemical Co.*, 92 W. Va. 445, 115 S. E. 451 (1922), the court held that P was entitled to only temporary damages for injury to the fertility of his soil caused by fumes from a chemical plant. On the other hand a California court allowed the recovery of permanent damages for injury to soil caused by the diversion of a stream. *Heilbron v. Last Chance Water Ditch Co.*, 75 Cal. 117, 17 Pac. 65 (1888). A Pennsylvania case held that a reversioner could recover for injuries to his freehold when oil fumes destroyed the paint, blackened the walls and corroded the roof of his house. *Green v. Sun Co.*, 32 Pa. Super. 521 (1907).

general rule which it has laid down in past cases.⁷ Of course, this means a remainderman can recover only the diminution in the market value of his estate in remainder and not of the whole fee.⁸

H. L. W., JR.

TRUSTS — DEPOSIT OF TRUST FUNDS IN TRUSTEE'S PRIVATE ACCOUNT — LIABILITY OF BANK FOR SUBSEQUENT MISAPPROPRIATION. — A guardian received from a prior fiduciary the sum of \$4,210.84 for his ward which he placed in *D* bank in a separate account as guardian. The following day he transferred \$4,000.00 by check to his individual account in *D* bank, which at the time showed an overdraft. That same day he drew \$3,000.00 from his personal account by check and paid it to the cashier to be applied against his personal indebtedness to the bank. *P*, as surety for the guardian, having paid the amount of a judgment obtained by the ward, seeks, by right of subrogation, to recover from *D* the sum of \$3,000.00 which represents the amount received by *D* bank as credits on the guardian's personal indebtedness. *Held*, one judge dissenting, that when money deposited in a bank in a fiduciary capacity is transferred to the fiduciary's individual account, and later used to meet his individual indebtedness to the bank, the bank is liable to the beneficiary; or if the fiduciary's surety has made good the losses to the beneficiary, the surety will be subrogated to the beneficiary's rights. *United States Fidelity & Guaranty Co. v. Hood*.¹

It has been held generally by judicial and text authorities that a bank does not become liable when the fiduciary transfers money from the trust account to his individual account, whether they be in the same bank² or in different banks,³ and a bank is not

⁷ See *Jordan v. City of Benwood*, 42 W. Va. 312, 321, 26 S. E. 266 (1896); *Keene v. City of Huntington*, 79 W. Va. 713, 719, 92 S. E. 119 (1917). See also 3 SEDGWICK, DAMAGES § 947; (1938) 15 AM. JUR., DAMAGES § 109. Concerning the right of a remainderman to recover for the loss of rental value of his property, (1906) 3 L. E. A. (N. S.) 1060.

⁸ To calculate this diminution in the market value of the remainder one determines the diminution in the market value of the whole fee by determining the market value of the land before and after the injury. That diminution is apportioned between the life tenant and the remainderman. The value of the life estate is determined by multiplying its annual rental value by the length in years of the life estate as based on the expectation of life. *Jordan v. City of Benwood*, 42 W. Va. 312, 321, 26 S. E. 266 (1896).

¹ 7 S. E. (2d) 872 (W. Va. 1940).

² 3 SCOTT ON TRUSTS (1939) § 324.3; 4 BOGERT, TRUSTS & TRUSTEES (1935) § 908; *New Amsterdam Casualty Co. v. Robertson & West Coast Nat'l Bank*, 129 Ore. 663, 278 Pac. 963 (1929).

³ 3 SCOTT ON TRUSTS § 324.3; 4 BOGERT, TRUSTS & TRUSTEES § 908; *Cocke's Adm'r v. Loyall*, 150 Va. 336, 143 S. E. 881 (1928); *Empire Trust Co. v.*