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Nuisances--Permanent and Temporary

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vision in *Pratt v. Teffet.*[44] If our theory of the construction of the amendment is correct then the only effect of the amendment on the estate of curtesy is to change the husband's estate from a life estate in the whole of the lands of which the wife die seized to one-third thereof, making curtesy synonymous with dower only as to the quantity of the estate to be enjoyed by the husband and not to be governed by the laws of dower in attaching.

—J. R. D.

NUISANCES—PERMANENT AND TEMPORARY.—The determination of the question as to what nuisances are permanent and what ones temporary, or merely "continuing" is one of importance.[1] If a nuisance is permanent, the statute of limitations begins to run from the time the plaintiff first suffers damage, and the lapse of the statutory period thereafter forever bars an action. A prescriptive right to continue the nuisance is thereby acquired.[2] If a nuisance is temporary, its continuance is looked upon as constituting a tort separate and distinct from its creation so that, in legal contemplation, a new tort begins each week or month.[3] Likewise, the satisfaction of a judgment, in the case of a permanent nuisance, includes both retrospective and prospective damages as measured by the dimunition in value of the premises injuriously affected, and thereby purchases a license to continue the nuisance over the plaintiff's land.[4] A subsequent suit for damages, as well as equitable relief by way of injunction, is thereby barred.[5] In the case of a temporary nuisance the plaintiff cannot recover damages in excess of his injury up to the time of his suit. Thereafter, he may either pester the defendant with successive suits for damages, or ask for an injunction to abate the nuisance, or both.[6] A review of many cases and approved text writers shows that there is practical unanimity as to what constitutes a permanent nuisance.[7] The difficulty

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[44] *Supra,* note 23.

[1] Bartlett *v.* Grasseli Chemical Co., (W. Va. 1923) 115 S. E. 451.

[2] Cass *v.* Penn Co., 159 Pa. St. 273, 28 Atl. 161 (1893); Baldwin *v.* Oskaloosa Gaslight Co., 57 Ia. 51, 10 N. W. 317 (1881).

[3] Peck *v.* Michigan City, 149 Ind. 670, 49 N. E. 800 (1898); August *v.* Marks 124 Ga. 365, 52 S. E. 539 (1905).

[4] Guinn *et al. v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87 (1899); Hargreaves *v.* Kimberly, 26 W. Va. 787, 799 (1885).

[5] Consolidated Home Supply etc. Co. *v.* Hamlin, 6. Colo. App. 341, 40 Pac. 582 (1894); Guinn *v.* Ohio River R. Co., 46 W. Va. 151, 33 S. E. 87 (1899).

[6] Hargreaves *v.* Kimberly, 26 W. Va. 787 (1885).

[7] WOOD, NUISANCES, § 869; JOYCE, NUISANCES, §495; SEDGWICK, DAMAGES, § 95; SUTHERLAND, DAMAGES, § 1046.

arises in the application of the rule to the particular case.[8] The test is whether the defendant intends to maintain it permanently. The only evidence of such intent is the nature of the structure itself. The courts cannot indulge in conjecture or speculation as to how long the injurious structure will be maintained.[9] If the agency causing the injury is substantially built, and operated in accordance with the latest and best known scientific methods, and is apparently to continue indefinitely, a strict adherence to the established definition of a permanent nuisance would require that the judgment include both retrospective and prospective damages Satisfaction of such a judgment, as already indicated, would constitute a bar to a subsequent suit for damages, and thereby virtually give the plaintiff rights in the defendant's land in the nature of an easement. It is at this point that some courts refuse to adhere strictly to the definition, for they say, an owner of private property cannot be compelled to sell to another private person an easement over his land against his consent, and much less so by a court judgment.[10] The courts do not experience the same difficulty when the wrongdoer is a public or quasi public corporation, for in such case, the plaintiff's entire property could be taken, if need be, by a legitimate exercise of the power of eminent domain. Moreover, such operations of a public or quasi public utility as are necessary to effectuate its lawful purposes cannot be enjoined. For these two reasons the courts uniformly hold that a nuisance caused by a public or quasi public utility is permanent when the agency causing it is substantially built, operated according to the latest scientific methods, and is apparently to continue indefinitely. Judgment is for future damages, as well as past, and its satisfaction virtually purchases a right in the nature of an easement to continue the same. But, where the agency or structure causing the nuisance is owned by an individual or private corporation, the courts say the nuisance is temporary in spite of the fact that it fits the aforesaid definition as well as a similar plant owned by a public or quasi public utility. Is the distinction justified? Often the private concern represents an outlay of millions of dollars and is putting out a commodity closely connected with the public welfare and whose production gives thousands employment. It does not necessarily follow, especially in view of the present increasing tendency to socialize the law by a balancing of the interests involved, that

[8] Keene *v.* Huntington, 79 W. Va. 714, 719, 92 S. E. 119 (1917).
[9] Troy *v.* Cheshire R. Co., 23 N. H. 83 (1851); Powers *v.* Council Bluffs, 45 Ia. 652 (1877); Babb *v.* Curators of University of Missouri, 40 Mo. App. 173 (1890).
[10] Uline *v.* New York Cent. etc. R. Co., 101 N. Y. 98, 4 N. E. 536 (1886).

the continued operation of such a privately owned concern will be enjoined.[11] If the facts of the case are such that the continued operation of the privately owned concern will not be enjoined, then a court of law should not assume the inconsistent position of allowing successive damage suits and thereby indirectly bring about the same result by forcing the concern to suspend business rather than buy out surrounding landowners at exorbitant prices.[12] We conclude, therefore, that where a nuisance, permanent in the sense above indicated, is being perpetrated by a privately owned concern, whose operation upon a balancing of the interests involved a court of equity will not enjoin, then the damages should be permanent once for all, rather than permit a number of successive damage suits thereafter. The latter policy will force the concern to close down or be subjected to the designs of intriguing landowners. Whether or not the satisfaction of such a judgment could be properly said to convey an easement over plaintiff's land, certainly, as the Alabama court points out, the acceptance of such damages by the plaintiff would bar him and his privies from later complaining.[13] —M. H. M.

DEDICATION TO PUBLIC USE—WHAT CONSTITUTES—ACCEPTANCE. —Dedication may be concisely defined as an appropriation of land by its owner for the public use.[1] The bounds or limits of this doctrine were restricted at its inception to the gift of land to highway uses only, but this strict application has been lost at the present day.[2] Dedication to a public use has been held to include an appropriation of property as a common or square,[3] for use as a cemetery,[4] for educational purposes,[5] for the erection of public buildings,[6] and for numerous other public and quasi-public uses. Another departure from the strictness of the original doctrine is found in decisions declaring that the dedication need not be for the public generally but may extend only to a limited class of

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[11] See note in 9 COL. L. REV. 540; Bliss *v.* Anaconda Copper Mining Co., 167 Fed. 342 (1909); McCarthy *v.* Bunker Hill etc. Co., 164 Fed. 927 (1908).
[12] See note in 9 COL. L. REV. 540.
[13] Highland Avenue. etc. R. Co. *v.* Matthews, 99 Ala. 24, 10 So. 267 (1892).

[1] Winchester *v.* Carroll, 99 Va. 727, 40 S. E. 37 (1901).
[2] TIFFANY, REAL PROPERTY, § 479, citing Lade *v.* Shepherd, 2 Strough. 1004 (anno. 1735).
[3] Sturmer *v.* County Court, 42 W. Va. 724, 26 S. E. 532 (1896).
[4] Benn *v.* Hatcher, 81 Va. 25 (1885).
[5] Sturmer *v.* County Court, *supra.*
[6] Board of Supervisors of Frederick County *v.* City of Winchester, 84 Va. 467, 4 S. E. 844 (1888).