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Damages--Entire or Separable Damages--Basis for Recovery of Entire Damages

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act of the maker in failing to live up to his agreement, and it would therefore seem to be just that this reasonable expense should be borne by the party at fault.

For a citation of authorities and a more extended discussion of the principle involved in this case, see The Bar, Jan., 1916, 41.

**DAMAGES—ENTIRE OR SEPARABLE DAMAGES—BASIS FOR RECOVERY OF ENTIRE DAMAGES.**—Under authority of law defendant city had constructed a municipal incinerating plant on land adjoining the lot occupied by plaintiff as her residence. The jury found that plaintiff’s property was injured by smoke and odors incident to the operation of the plant, although it was constructed in the most approved manner and operated with due care and diligence. Held, that entire damages for a permanent injury be allowed. *Keene v. City of Huntington*, 91 S. E. 119 (W. Va. 1917).

In order to assess entire damages in cases of this kind, it is necessary (1) that the structure causing the damage be authorized by law, *City of Kewanee v. Otley*, 204 Ill. 402, 68 N. E. 385, 392; (2) that there be no negligence either in the construction or in the operation of the plant, and (3) that either the damage be permanent or the cause of damage be of reasonably definite continuance. See 4 *Sutherland, Damages*, 4 ed., §§ 1017, 1042; and 3 *Sedgwick, Damages*, 9 ed., § 924. All three elements exist in the principal case. If the plaintiff’s injury had been due to negligent operation of the plant, *City of Denver v. Davis*, 37 Colo. 370, 86 Pac. 1027, or had the location been temporary, *City of Chattanooga v. Dowling*, 101 Tenn. 342, 47 S. W. 700, only separable damages could have been recovered. If its maintenance were unauthorized and it was therefore a nuisance, besides equitable relief, plaintiff might recover separable damages in successive actions in case to compel its abatement. *Watts v. Norfolk & Western Ry. Co.*, 39 W. Va. 196, 19 S. E. 521; *Rogers v. Coal River Boom & Driving Co.*, 39 W. Va. 272, 19 S. E. 401. Since in the principal case it was authorized by law, there was no possibility for its compulsory abatement and therefore the reason is lacking for successive actions in case for separable damages to compel abatement. Whether at his option the plaintiff should be allowed to recover entire damages which would operate to license its future operation so far as plaintiff’s property is concerned is to be questioned. See 4 *Sutherland, Damages*, 4 ed., § 1039. Although not so stated in the principal case, it is said in earlier West Virginia cases, *Smith v. Pt. Pleasant & Ohio River Ry. Co.*, 23 W. Va. 451, 452; *Guin et al. v. Ohio River Co.*, 46 W. Va. 151, 33 S. E. 87, and in cases in other jurisdictions, *Park Com’r of Louisville v. Donahue*, 140 Ky. 502, 181 S. W. 285, 286; *Stodghill v. C. B. & Q. Ry. Co.*, 53 Ia. 341, 5 N. W. 495, 497; *Highland Avenue & B. R. Co. v. Matheus et al.*, 99 Ala. 24, 10 So. 267, 269; *Fowle v. New Haven & Northampton Company*, 112 Mass. 334, 339, that the granting of entire damages
is an assessment of "future damages." It is submitted that this displays a misconception of the foundation for recovery. Though legally not a nuisance because authorized by law, *Spencer v. Pt. Pleasant & Ohio River Ry. Co.*, 23 W. Va. 406, 427; *Watson v. Fairmont Ry. Co.*, 49 W. Va. 528, 540, 39 S. E. 193, still it is in fact a nuisance which, for reasons of public policy, may not be abated. *Geer v. Durham Water Co.*, 127 N. C. 349, 37 S. E. 474, 475. The person injured has a right of action for damages suffered by what is in its nature an exercise of the right of eminent domain to establish a nuisance as an easement over the plaintiff's property. *Hargreaves v. Kimberly*, 26 W. Va. 787, 799; *City of Nashville v. Comer*, 88 Tenn. 415, 12 S. W. 1027, 1029. The damages awarded are not future damages because: first, as held in the principal case, the immediate depreciation in the value of the property is damage already suffered; second, future damages are often in such cases not ascertainable; and, third, since in fact a nuisance, the rule should hold that damages created by a nuisance are not recoverable until suffered. See *Wood, Nuisances*, 2 ed., 1001; *Luther v. Winnisimmet Co.*, 9 Cush. (Mass.) 171, 175.

**Mines and Mining—Oil and Gas Lease—Division of Royalty on Lease by Adjoining Landowners.**—Owners of several adjoining tracts of land leased their tracts jointly as a single parcel for the purpose of producing oil and gas. A producing well was drilled on the land of the defendant who claimed all of the royalty. Held, that the total royalty must be divided among all the lessors in the proportion that the area owned by each bears to the whole tract. *Lynch v. Davis*, 92 S. E. 427, (W. Va. 1917).

The principal case differs from the case of *Wettengel v. Gormley*, 160 Pa. St. 559, 28 Atl. 934. In the latter case a tract was leased for oil and gas purposes and later devised in three portions to the lessor's three sons, thus severing the reversion, and it was held that the royalties should be divided equally among the devisees. In ordinary leases if the reversion is severed the general rule is that the rent must be apportioned according to the respective value of the parts. *Tiffany, Landlord and Tenant*, § 175; *Underhill, Landlord and Tenant*, § 341. This rule is not applicable to oil and gas leases, however, since the lessee has a right to take a part of the realty itself, instead of having the mere use of the premises as in the case of an ordinary lessee. Where there has been a severance of the reversion of an oil and gas lease into two or more parts, two cases have held that the owner of each part is entitled to all of the royalty from the mineral produced on his soil. *Northwestern Ohio Natural Gas Co. v. Ullery*, 68 Ohio St. 259, 67 N. E. 494; *Osborn v. Arkansas Territorial Oil and Gas Co.*, 103 Ark. 175, 146 S. W. 122. It would seem that these cases lay down the correct rule where the conveyance or conveyances which sever the reversion do not make provision for the division of the royalty, and such rule was approved by way of dictum in *Rymer*