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 RE-
COVERY OF ENTIRE DAMAGES.—Under authority of law defendant
city had constructed a municipal incinerating plant on land ad-
joining 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 dil-
gence. Held, that entire damages for a permanent injury be
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 perma-
nent or the cause of damage be of reasonably definite continuance.
See 4 Sutherland, Damages, 4 ed., §§ 1017, 1042; and 3 Smed-
wick, Damages, 9 ed., § 924. All three elements exist in the prin-
cipal case. If the plaintiff’s injury had been due to negligent oper-
ation 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
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 abate-
ment 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 plain-
tiff’s property is concerned is to be questioned. See 4 Suther-
land, Damages, 4 ed., § 1039. Although not so stated in the prin-
cipal case, it is said in earlier West Virginia cases, Smith v. Pt.
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,
131 S. W. 285, 286; Stodghill v. C. B. & O. Ry. Co., 53 Ia. 341,
5 N. W. 495, 497; Highland Avenue & B. R. Co. v. Mathews 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 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