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PROSPECTIVE DAMAGES TO REALTY—SUCCESSIVE ACTIONS OR SINGLE ACTION.

(*Continued from May Number, p.* 292.)

PERMANENT INJURIES FROM TORTS TO REALTY OTHER THAN TRESPASSES.—Here, also, there is a modification of the rule. For such permanent injuries but one action is maintainable, and in it all damages, present and prospective, may be recovered.

To this class belong all those injuries to realty which flow from the erection of permanent structures adjacent to the plaintiff's realty, *e. g.*, railways, dams, dykes and roads, which produce a permanent change in the condition of the property. We have seen that the application of the rule providing for successive actions was partly dependent on the temporariness of the condition causing the injury, and that exemplary damages are provided for as a stimulant to the defendant to hasten the removal of the wrongful condition.

INJURIES PERMANENT IN FACT.—But suppose that the condition created by the defendant is a permanent one—one which in nature and design is permanent and must permanently affect the value of neighboring property. Here it is no longer a question whether future damages may be averted or not. Here punitive damages will not stimulate the defendant to a change of the conditions. Here the application of the rule for successive actions, with recove-

ries limited to past damages, would produce what it is the policy of the law to prevent, viz., a multiplicity of suits; and the never-ending chancery suit of *Jarndyce* v. *Jarndyce*, would be outdone by the litigation incident to the erection of any permanent structure.

An additional reason for not applying the rule of successive actions in this class of cases is that in the greater portion of injuries of this class the injury is caused by a public work which is in itself lawful, and as to which all rules based on the temporary character and probable aversion of future damage under the stimulant of punitive damages can have no application. In these cases the permanent and lawful character of the work is established, and where a remedy for injuries of this kind is allowed, it ought not to be governed by rules which are developed from injuries caused by works of an unlawful or tortious character.

The rule of damages should be determined in view of the character of the work. The leading case in this class is *Troy* v. *Cheshire Rd.*, 12 N. H. 83. This was an action by the town of Troy against the railway company for damages caused by building a railroad bridge. The plaintiff recovered and was allowed to include in its damages the prospective increased cost of maintaining the highway. In delivering the opinion of the court, BELL, J., said: "Wherever the nuisance is of such a character that its continuance is necessarily an injury, and where it is of a permanent character that will continue without change from any cause but human labor, there the damage is an original damage and may be at once fully compensated, since the injured person has no means to compel the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means. But where the continuance of such act is not necessarily injurious, and where it is necessarily of a permanent character, but may or may not be injurious, or may or may not be continued, there the injury to be compensated in a suit is only the damage that has happened. Thus, the individual who so manages the water he uses for his mills as to wash away the soil of his neighbor, is liable at once for all the injury occasioned by its removal, because it is in its nature a permanent injury; but if his works are so constructed that upon the recurrence of a similar freshet, the water will probably wash away more of the land, for this there can be no recovery until the damage has actually arisen, because it is yet contingent whether any such damage will ever

arise. A person erects a dam upon his own land, which throws back the water upon his neighbor's land; he will be answerable for all damage which he has caused before the date of the writ, and ordinarily for no more, because it is as yet contingent and uncertain whether any further damage will be occasioned or not, because such a dam is not, of its own nature and necessarily, injurious to the lands above, since that depends more upon the manner in which the dam is used than upon its form. But if such a dam is, in its nature, of a permanent character, and from its nature must continue permanently to affect the value of the land flowed, then the entire injury is at once occasioned by the wrongful act, and may be at once recovered in damages. In one of the cases which arose from the building of the great canals of New York, the case was that a high dam was erected upon the falls of the Hudson for the purpose of diverting the waters of the river into a feeder for the canal; the lands of an owner were buried twenty feet under water, and their value to him, of course, entirely destroyed; the work was, in its nature and design, permanent. There it would be clear that the party injured would be entitled to recover the entire damages he had sustained, and must sustain in a single action; in truth, substantially, the entire value of his property." I have cited this case at length for its elaborate statement of the rule.

For other cases sustaining the same rule, see *Beckett* v. *Midland Rd.*, 3 L. R., C. P. 82; *Woods* v. *Nashua Mfg. Co.*, 5 N. H. 467; *Heard* v. *Middlesex Canal Co.*, 5 Metc. 81; *Warner* v. *Bacon*, 8 Gray 397; *Fowle* v. *New Haven & Northampton Co.*, 107 Mass. 352; s. c. 112 Id. 334; *Powers* v. *Council Bluffs*, 45 Ia. 654; *Stodghill* v. *C. B. & Q. Rd.*, 53 Id. 341; *Chicago & Alton Rd.* v. *Maher*, 91 Ill. 312; *Van Schoick* v. *Delaware, &c., Canal Co.*, 20 N. J. L. 249; *Seely* v. *Alden*, 61 Penn. St. 302; *Van Orsdol* v. *B. C. Rd. & N. Rd.*, 56 Ia. 470; *Duncan* v. *Sylvester*, 24 Me. 482; *Adams* v. *Hastings*, 18 Minn. 265; *Cadle* v. *Muscatine W. Rd.*, 44 Ia. 11; *Finley* v. *Hershey*, 41 Id. 389; *Ill. Central Rd.* v. *Grabill*, 50 Ill. 241; *Cooper* v. *Randall*, 59 Id. 317; *Elizabethtown, &c., Co.* v. *Combs*, 10 Bush 382; *Jeffersonville, &c., Rd.* v. *Esterle*, 13 Id. 667; *Ortwine* v. *Baltimore*, 16 Md. 387; *Chase* v. *New York Central Rd.*, 24 Barb. 273; *Easterbrook* v. *Erie Rd.*, 51 Id. 94; *City of North Vernon* v. *Voegler* (Ind.), 2 N. E. Rep. 821; *Fifth Nat. Bank* v. *New York Elevated Rd.*, 28 Fed. Rep. 231; *Bizer* v. *Ottumwa Co.* (Ia.), 30 N. W. Rep. 172.

In *Fowle* v. *New Haven & Northampton Co.*, 107 Mass. 352; S. C. 112 Id. 334, where the injury was a washing away of the defendant's land caused by building a railroad embankment, GRAY, J., said, "The embankment of the defendants was a permanent structure which, without any further act except keeping it in repair must continue to turn the current of the river in such a manner as gradually to wash away the plaintiff's land. For this injury the plaintiff might recover in one action entire damages, not limited to those which had been actually suffered at the date of the writ. And the judgment in one such action is a bar to another like action between the parties for subsequent injuries from the same cause."

In the second hearing, COLT, J., said: "The case at bar is not to be treated strictly in this respect as an action for an abatable nuisance; more accurately, it is an action against the defendant for the construction of a public work under its charter, in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is either permanent in its character or is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to past and probable future injury."

A similar class of cases which come within the same rule is that of torts to realty for which the measure of damages is the diminution in value of the property injured. This rule was adopted in *Chase* v. *New York Central Rd.*, 24 Barb. 273; *Easterbrook* v. *Erie Ry. Co.*, 51 Id. 94; *Hanover Water Co.* v. *Ashland Iron Co.*, 84 Penn. St. 279; *Seely* v. *Alden*, 61 Id. 302; *Minnequa Spring Co.* v. *Coon* (Penn.), 12 Rep. 763; *C., R. I. & P. Rd.* v. *Carey*, 90 Ill. 514; *Marsh* v. *Trullinger*, 6 Oregon 356; And see *Anon.*, 4 Dall. 147; *Ill. Central Rd.* v. *Grabill*, 50 Ill. 241, 246; *Ottawa Gas Light & Coke Co.* v. *Graham*, 28 Id. 73; *Decatur Gas Light Co.* v. *Howell*, 92 Id. 19.

But a permanent injury will not be presumed: *Cooper* v. *Randall*, 59 Ill. 317. In the cases of works of public utility of a large and costly character, as, for instance, the high dam to feed the canal, cited in *Troy* v. *Cheshire Rd.*, the court will take judicial notice of the character of the work; but, in general, the plaintiff has the burden of making out a proper case for such damages by allegations and proofs showing the permanent nature of the injury. In *Battishill* v. *Reed*, 18 C. B. 696, cited *supra*, CRESSWELL, J.,

said: "The plaintiff had no right to assume that things would remain as they were." In *Bare* v. *Hoffman*, 79 Penn. St. 71, where the damage complained of was caused by the defendant's inserting a pipe in the stream on his own land, the court said: "The act he committed was not of such a character as to assume it to continue through all coming time, and to justify the assessment of damages accordingly." And again: "A severance of the pipe would cause the water to run in the accustomed channel, and remove the whole cause of complaint." To same effect see *Duryea* v. *Mayor*, 26 Hun 120; *Whitmore* v. *Bischoff*, 5 Id. 176; *Adams* v. *Rd.*, 18 Minn. 260.

So where a railway company constructs an inadequate culvert in its track, which, in occasional seasons of freshet, causes injury to the adjacent lands, the law will not presume that such inadequate provision will be permanently maintained, and the recovery will not extend to a diminution of value on that basis, and successive actions may be maintained as often as the injuries recur: *Union Trust Co.* v. *Cuppy*, 26 Kan. 562; *Elliot* v. *Fitchburg Rd.*, 10 Cush. 191; *Miller* v. *Keokuk* (Iowa), 14 Am. & Eng. Rd. Cas. 293; *Benson* v. *Chicago & Alton Rd.*, 78 Mo. 504; *Abbott* v. *Kansas City, &c., Rd.*, 20 Am. & Eng. Rd. Cas. 103; *Louisville & Nashville Rd.* v. *Hays*, 11 Tenn. 284; *Little Rock & Fort Smith Rd.* v. *Chapman*, 39 Ark. 463; *Quinn* v. *C., B. & Q. Rd.* (Iowa), 17 Am. & Eng. Rd. Cas. 51; *Drake* v. *C., R. I. & P. Rd.*, Ibid. 45.

In *Quinn* v. *C., B. & Q. Rd.*, above cited, where the railroad company had made an excavation and wrongfully permitted water to accumulate therein, the court expressly said: "The plaintiff's right of recovery for diminution in the value of the use of the premises, *should have been limited to the time during which it was proven that the nuisance existed.*" For a similar case on changing the grade of a railway track in the street, see *Little Miami Rd.* v. *Hambleton* (Ohio), 14 Am. & Eng. Rd. Cas. 126. There the abutting owner has a property interest in the street. The court said: "The injury, as shown by the proof, is of two kinds: that resulting from overflow of water on the premises of the plaintiff and damage consequent upon it, and other injuries of a temporary kind, and injury in its nature permanent, resulting mainly from a change of grade of the railroad, whereby the relative level of the property of the plaintiff and the railroad is broken up and destroyed, and perma-

nent changes in the buildings and improvements of the plaintiff are made necessary, and in consequence of all which his property has been permanently injured. * * * The charge of the court on the trial below was correct so far as the causes of damages were affected by limitation, that is, that, for permanent injury, the limitation would be twenty-one years, the whole period during which the acts of the defendants in continuing the cause of such injury was without legal right. And that, for temporary injury, the plaintiff would be limited to four years *before his action for the same.*" Here the court treat the statute as to permanent injury as running from the time the injury was first committed; and as to temporary injuries they treat the cause of action as continuing, the statute of limitations advancing *pari passu* and limiting the damages to those accrued four years previous to action brought.

Uline v. *N. Y. Central Rd.* (N. Y.), 23 Am. & Eng. Rd. Cas. 3, is a very important case, similar to the last. The majority of the court hold that the recovery is limited to damages prior to action brought. DANFORTH, J., in a vigorous dissenting opinion, holds that the injury is permanent, and that the recovery must be once for all. The issue was clearly defined. EARL, J., in delivering the opinion of the majority, said: "The question, however, still remains, what damages? All her damages upon the assumption that the nuisance was to be permanent, or only such damages as she sustained up to the commencement of the action? We have here for consideration an important principle of law which has to be frequently applied, and which ought to be well known and thoroughly settled. There never has been in this state before this case the least doubt expressed in any judicial decision, so far as I can discover, that the plaintiff in such a case is entitled to recover damages only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of all the courts; and it is the prevailing doctrine elsewhere." Then follows a long list of citations of cases belonging mainly to all four of the preceding classes of torts rather than to the class in hand, and a few citations belonging to this class, but which are distinguishable and are distinguished therefrom in the dissenting opinion —all of which shows that the learned judge relied more upon dogmatic assertion and *vigorous* citation than upon a patient analysis of the facts in issue in the case at bar and in the several cases cited. The New York cases cited by him are distinguished by

DANFORTH, J., as we shall see. The Wisconsin cases I notice further on. The remainder of the citations made by EARL, J., will nearly all be found distributed among the first four preceding classes.

The facts in the case are thus stated by DANFORTH, J. "The plaintiff alleged and proved that she owned and occupied in person and by tenants certain improved lots of land lying on the northerly side of Colonie street, and extending to its centre; that between the houses on those lots and the travelled roadway was a sidewalk; and by her complaint alleged that the defendant entered upon the property (*i. e.* in the street), and tore up the pavement in Colonie street in front of the houses, raised the street higher than it was before, and also the street west of said premises and between said houses and the west side of Broadway, and tore up and raised the sidewalks in front of her houses, and raised and filled up the gutter in front of them, and so shaped the street and gutters as to pour the water therefrom down over said sidewalk and into the basements of said houses, by reason of which the premises are made liable to be flooded with water, and have been at different times flooded with mud, filth and water, and the property thereby injured, and the said premises rendered damp and unhealthy, and by which the rental value of said houses was greatly depreciated; and also that the shape given to the surface of said street by the defendant is such as to make the approach to said houses inconvenient and unsafe, and to interfere with the use of the same and depreciate its value; and that said street is made so steep in its decline on the north side that wagons cannot safely or conveniently stand in front of said premises of said plaintiff, and asked for damages sustained by reason of these facts. * * * The court held that there was nothing in the case to show that the alteration in the street and construction of tracks was for a temporary purpose, or a mere trespass, but on the contrary appeared to be of a permanent kind and character and held the complaint sufficient."

EARL, J., had distinguished several New York cases, viz., *Henderson* v. *Rd.*, 78 N. Y. 433; *Schell* v. *Plumb*, 55 Id. 592; *Williams* v. *Rd.*, *Story* v. *Rd.*, as being cases in equity, of which DANFORTH, says: "The defence (remoteness of damages) did not prevail, and unless a distinction favorable to the defendant can be drawn from the fact that this is an action at law and that a suit in equity, it is decisive here. In that case full compensation was

awarded upon conditions which when complied with, protected the defendants in the enjoyment of the property trespassed upon. * * * The appellant cites various cases in support of a contrary view, but I think them inapplicable so far as those from the courts of this state are concerned; they relate to acts which obviously were or might be of a temporary and not permanent character. The *Mahon Case*, 24 N. Y. 658, was of the former class. It was considered in the *Henderson Case*, and thought to be no obstacle in the way of allowing complete and final damages where the act causing the injury was necessarily permanent. In other states the courts differ." The New York cases, thus distinguished, include *Duryea* v. *Mayor*, 26 Hun 120, and *Plate* v. *N. Y. C. Rd.*, 37 Id. 473. EARL, J., cited *Harrington* v. *Rd.*, 17 Minn. 215, and *Adams* v. *Rd.*, 18 Id. 260. But the Minnesota rule is established by *Baldwin* v. *C., M. & St. P. Rd.*, 29 N. W. R. 5, distinguishing *Brakken* v. *Minneapolis & St. L. Rd.*, 29 Minn. 41; S. C. 31 Id. 45, and 32 Id. 425; in the following terms: "As the company had a right to and might at any time remedy the wrong, the court held it improper to assess the damages on the assumption that it would be permanent, and that they ought to be measured as they might accrue from time to time, until the company should remedy the wrong. In this case the wrong was at once fully complete and the injury permanent. The *locus in quo* not being in the possession of defendant, and it not having the right to re-enter on the street to fill the excavation, damages are not to be measured by the condition in which when completed it left the property. The case comes within the decision in *Karst* v. *St. Paul, &c., Rd.*, 22 Minn. 118, in which the proper measure of damages upon a wrong precisely like that in this case, was held to be the diminution in the value (not of the rental but of the property)."

In *Fifth Nat. Bank* v. *N. Y. Elevated Rd.*, 28 Fed. Rep. 231, damages subsequent to the date of action caused by a permanent injury by obstruction of light were recovered and the judgment sustained, but the court refrained from expressly ruling upon the point, citing with other cases, *Everson* v. *Powers*, 89 N. Y. 528.

In *Chicago & E. I. Rd.* v. *Loeb* (Ill)., 8 N. E. R. 460, the court were confronted with the exact question where there should be successive actions or one action for the injuries caused by the throwing of smoke, cinders and ashes upon plaintiff's premises by defendant.

They said; SHELDON, C. J., "It has frequently been held by this court that in an action brought for deterioration in the value of real estate from a nuisance of a permanent character, all damages for past and future injury to the property may be recovered; and that one recovery in such action will be a bar to all future actions for the same cause. *Ottawa Gas Co.* v. *Graham*, 28 Ill. 73; *Ill. Central Rd.* v. *Grabill*, 50 Id. 242; *Cooper* v. *Randall*, 59 Id. 321; *Decatur Gas Co.* v. *Howell*, 92 Id. 19; *Chicago & Alton Rd.* v. *Maher*, 91 Id. 312. * * * If the above doctrine as to entireness of recovery in one action where the cause of injury is of a permanent kind is to be admitted, it should apply peculiarly in this character of case. The cause of damage here is not a nuisance proper. * * * The action for damage may be regarded as in the nature of one kind of condemnation proceeding." The court cite for the same view, *Heard* v. *Middlesex Canal Co.*, 5 Metc. 81; *Chicago & I. Rd.* v. *Baker*, 73 Ill. 316; and *Chicago & P. Rd.* v. *Stein*, 75 Id. 41, all cases of eminent domain; but several of the cases first cited by the court are of private nuisance.

In Wisconsin it is held in *Ford* v. *Rd.*, 14 Wis. 609; and *Blesch* v. *Rd.*, 43 Id. 183, that the action for depreciation of property for such causes must be by statutory petition within the eminent domain law. Other cases, *Carl* v. *Rd.*, 46 Wis. 625; *Buchner* v. *C., M. & St. P. Rd.*, 56 Id. 403; s. c. 60 Id. 264, hold that such damages are recoverable only so far as accrued at date of action. This difference is probably due to the state of the eminent domain law in Wisconsin. There the constitution provides for compensation for a taking only, and not for damages to lands not taken. The courts have worked out the result that when part of a tract is taken damages to the *remainder* are recoverable once for all, but where no part is taken the character of the work will not be considered and such damages if recoverable at all are recoverable only as accrued. See *Washburn* v. *Milwaukee & L. W. Rd.*, 59 Wis. 364.

When a defendant, who has created such a permanent injury, has been subjected to payment of the permanent damages does he thereby acquire the right to maintain the cause of the injury?

In *Jeffersonville, &c., Rd.* v. *Esterle*, 13 Bush 667 or 678, the court answers: "The appellee, by his action, in effect consents that the appellants may continue for all future time to use the street as they are now using it, and in consideration therefor, to accept such judgment as may be herein rendered." But this ruling is in

view of the character of the railroad as a public work, lawfully in the street.

DANFORTH, J., in the *Uline Case*, cited *supra*, decides the same question the same way under the same limitation. He says: "The statutes referred to, allowing the assessment of compensation where the railroad company has, without right, placed its tracks upon the land of another, in terms apply to any such case, and go upon the assumption that the appropriation of the use of the land and the structure placed upon it, are permanent, and such is its nature. It is for the purposes of its incorporation public policy requires that it should remain; and although, in the first instance, without right, yet, after compensation has been determined and paid, the company become possessed of such land during the continuance of the corporation: L. 1847, c. 272, sect. 3."

These decisions answer the question as applied to public works. As applied to private nuisances the rational answer must be found in the meaning of the term "permanent." If a condition created by the defendant is permanent, it cannot be terminated. His tort is self-continuing and beyond his power to discontinue. And after he has paid for his mischief it is settled, both upon reason and authority, that he is entitled to the beneficial use of the condition so established. See the list of cases at the beginning of this division.

INJURIES PERMANENT IN INTENTION, BUT REMOVABLE IN FACT.—But there is a large class of injuries which are caused by conditions which, if left to themselves, would be permanent, but which are possibly capable of termination. What is the rule here? Rationally, the complainant would be left to his remedy by successive actions, vindictive damages, as hereinbefore stated, and by injunctions. (Gould, *Waters*, sects. 512–520; High, *Injunctions*, sect. 740 *et seq.*) And so, as was remarked by EARL, J., *arguendo*, "a railroad company may be restrained by injunction or expelled by ejectment from taking and using property in such a way," citing *Brown* v. *Galley*, Hill & D. 308; *Etz* v. *Daily*, 20 Barb. 32; *Redfield* v. *Utica, &c., Rd.*, 25 Id. 54. But suppose that the plaintiff avers that such injury is permanent, and the defendant does not take issue thereon, or taking issue is defeated by the proof. The plaintiff recovers damages upon that basis. He cannot afterwards recover exemplary damages or maintain an injunction bill. If, therefore, the defendant wishes to acquire the right to

maintain the structure or work in perpetuity, as against the plaintiff and those claiming under him he can do it by suffering a recovery of damages for a permanent injury.

In *Central Branch N. P. Rd.* v. *Andrews*, 26 Kan. 702, 710, 711, it is said: "The plaintiff has chosen to consider the obstruction of the alley as a permanent injury to his lots, as a *quasi* condemnation and permanent taking and appropriation of a certain interest in his property; and he can therefore recover merely for the consequent depreciation in value of his property by reason of such permanent injury, by reason of such permanent taking and appropriation, by reason of such *quasi* condemnation. He had the privilege to consider the obstruction of the alley as only a temporary injury, and to have sued for any special or temporary damage which might have occurred at any time by reason of the obstruction. But it seems he did not choose to so consider the obstruction; he *chose* to consider it as permanent, and as he has chosen to consider it as permanent, and amounting to a permanent taking and appropriation of an interest in his property, he must be governed by the rules generally governing condemnation proceedings. * * * * It seems to us that he then consents that this railroad company shall permanently appropriate his property in the alley, for he then brings his action because of such appropriation."

ADDITIONAL REMEDY BY INJUNCTION.—But again suppose that a proposed work will be permanent if suffered to remain, but the plaintiff does not desire to part with his property or suffer a diminution of the beneficial use thereof by reason of such work. In that case his remedy is by injunction.[1] The injunction will lie in the first instance where the permanency of the injury is evident, but in cases of doubt, whether the injury is more than a temporary deprivation, which can be compensated at law, the questions of the plaintiff's right and of the defendant's disposition to resist the persuasive influence of a verdict for compensatory damages at law, here, of course, the damages would be up to the date of action brought, for the suit proceeds upon the theory accepted by all parties and premised in the nature of the case that the injury is *removable* in fact. Here, where the defendant asserts the right or

[1] I have touched on the remedy by injunction incidentally only, as not strictly a part of the law on the recovery of prospective damages, but in order to point out that the rule does not compel a property owner to part with his property by a forced sale.

intention to maintain the structure, he would be estopped to deny its permanency under the doctrine of *Central Branch P. Rd.* v. *Andrews, supra.* The summary of the rule on permanent injury would therefore be—

(*a*) Injuries permanent and beyond the power of either party to terminate.

(*b*) Injuries continuous and permanent in intention, but capable of removal.

Plaintiffs may, where the injuries are by a public work, *elect* to treat them as permanent, and have the same remedies as in class (*a*); or where the work has not been *lawfully* erected, *elect* to treat them as temporary and compel a removal.

In proceedings upon an injunction bill the court would not be limited by the pecuniary amount of damages caused, but would hold an injury irreparable, which would materially lessen the enjoyment of property by its owner. A man is not compelled to take a verdict for damages in perpetuity, even where the amount is definitely ascertainable. Thus, in *White* v. *Forbes,* Walker's Ch. (Mich.) 112 or 114, on a bill to enjoin flowage by a mill-dam, which the defendant claimed the right to continue, MANNING, Chancellor, said: "The extent of the injury, provided there be a substantial injury done, is of no very great importance. Every man has a right to the enjoyment of his property undisturbed by another, and to be protected in that enjoyment; and, what one may consider of little value, another may esteem very highly. The court will not, in cases of this kind, be governed by dollars and cents alone, but will inquire whether the injury is of such a nature that it can reasonably be supposed to lessen materially the enjoyment of property by its owner."

So in *Attorney-General* v. *Sheffield Gas Consumers' Co.,* 3 DeG., M. & G. 304, CRANWORTH, L. J., said: "The court will not let a person set up a nuisance and say that it shall remain because it is very little. If it is a nuisance, and is likely to continue, the Lord Chancellor said, that shall not be allowed;" and KNIGHT BRUCE, L. J., said: "It has been argued that the annoyance (if any) felt, and, possible, to be feared, must be small, slight and unfit for this court's interference. But the frequent recurrence forever, or during a period probably long and unascertainable, of an annoyance, slight in itself (slight, I mean, if occurring but upon a single occasion, or recurring only at very rare intervals), may much interfere with the

reasonable convenience and comfort of life." And this proposition is supported in the notes to that case by the late J. C. Perkins, with great wealth of citations. So, in *Goldsmid* v. *Tunbridge Wells*, L. R., 1 Ch. 349, TURNER, L. J., said: "The interference of the court in cases of prospective injury very much depends, as I apprehend, upon the nature and extent of the apprehended mischief, and upon the certainty or uncertainty of its arising or continuing; and the fact of the nuisance having commenced raises a presumption of its continuance. * * * I think that it ought not to do so in cases in which the injury is merely temporary and trifling; but I think that it ought to do so in cases in which the injury is permanent and serious." Though, in these English cases, the injunction was not allowed it was on the ground that the permanent injury was not in fact made out, and the principle is sustained. And the law is so laid down with copious references in 2 Dan. Ch. *1637–8.

But this principle gives way in case of public works. The policy of the law favors such works, and, except in cases of wrongful entry or unnecessary damage, the law will leave the injured party to his remedy in damages. The remarks in the *Uline Case*, the *Loeb Case* and the *Kentucky Case* cited above, assimilating this remedy to a form of condemnation are conclusive upon this.

COST OF REMOVAL.—The confusion among the decisions on this subject called forth from Mr. Mayne the following: "In fact, the whole law upon the subject of damages in the case of continuing nuisances or trespasses seems in a very unsatisfactory state." He then proceeded to recommend a new rule for computing damages for continuing trespasses. He says: "The fair rule in such a case would be to give the plaintiff such damages as would compensate him for the loss sustained up to the time of the verdict, and would pay him for putting the land into its original state. If he chose to leave the trespass after this it would clearly be because he thought it advantageous to himself; and if so, he ought not to be allowed to sue again." He cites a case where this rule was applied in an action on a covenant to repair: *Shortridge* v. *Lamplugh*, 2 Ld. Raym. 798–803.

The case is plainly not in point in an action for a tort; and is useful more as suggesting a rule than as a precedent for a rule. The reporter of *Holmes* v. *Wilson*, 10 Ad. & E. 503, suggested the same rule in a note to that case, as follows: "*Quære*, whether the plaintiff, in the principal case, might not have recovered damages

in respect of the expense of removing the buttresses herself, and the effect of such recovery." This was considered by BREWER, J., in a case where it was directly in point in *Kansas Pacific Rd.* v. *Mihlman*, 17 Kan. 232. He said: "It seems to us very doubtful whether this ruling can be sustained upon principle. As suggested by the reporter, suppose the plaintiff had recovered, as a part of the damages in the first action, as he properly might, the expense of removing these buttresses, and this fact had appeared in the second suit, could the action have been maintained? And what difference, we ask, does it make whether he did actually recover for such expense? It was a proper matter of damages; it was a part of the amount necessary to place the land as it was before the trespass; he was entitled to recover it if he proved it; and if he failed to prove it, or if, after proving it, the court refused to allow it, neither the failure nor the error laid the foundation for a second action." It will be seen that he here takes the rule for granted as a proper one. But suppose that a tract of swamp land of trifling value has had an embankment wrongfully erected thereon. The cost of removal would be many times the entire value of the property and many times the amount of loss to the plaintiff by the obstruction and deprivation of the use of his property. Is the cost of removal a fair measure of damages in such case? It seems not. And for reasons similar to these it was rejected in *Easterbrook* v. *Erie Rd.*, 51 Barb. 94; *DeCosta* v. *Massachusetts Mining Co.*, 17 Cal. 613.

The same questions were in the mind of WALKER, J., in delivering the opinion in *C., R. I. & P. Rd.* v. *Carey*, 90 Ill. 514. He said: "Where there is a permanent injury that cannot be remedied, of course the measure is the depreciation in value of the property injured. In such case, the injury being continuous, and may be perpetual, is incapable of removal and cannot be obviated, and there can be no other rule adopted so fair and just as the depreciation in the value of the property; but where the cause of the injury may be removed at a reasonable expense by the party injured, that fact should be considered. If, however, the obstruction is on the right of way of appellant, appellees have no right to enter thereon to remove it, as the law will not require them to commit a trespass to remove the obstruction, even if it would, as contended, cost but a trifle, nor can appellant require them to enter its right of way to remove obstructions. "Again, if appellant has constructed these obstructions and will maintain them, it must pay all damages pro-