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Charles T. McCormick
Northwestern University

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INJURIES TO THE INTERESTS OF LANDOWNERS

By Charles T. McCormick*

1. COMPLETED INJURIES: WRONGFUL OCCUPANCY: DAMAGE TO BUILDINGS AND IMPROVEMENTS, CROPS, TIMBER, AND MINERALS.

Damages against wrongful occupant.—When one man has, without right, used and enjoyed the land of another, the owner recovers the possession of the land by an action which at common law was known as ejectment, and which retains that name in many states, though the traditional proceedings in the action have everywhere been greatly simplified by statute. One modification is to permit the owner to recover not only his land, but in the same action, compensation for the deprivation of its use.1 This last claim had formerly to be asserted in a separate action of trespass, for "mesne profits". The measure of damage is the amount of any waste or injury to the land2 and the reasonable rental value during the period of the defendant’s occupancy,3 with this proviso, that if the defendant has caused the land to yield more than its reasonable rental, he is liable for the value of the yield.4 If the defendant, though actually hav-

*Professor of Law, Northwestern University; A. B., Univ. of Texas (1909); LL. B., Harvard University (1912); contributor to various legal periodicals.

The substance of this article will form a chapter in a forthcoming textbook on Damages to be published by the West Publishing Co., St. Paul, Minn.

1 See Dec. and Curr. Dig., Ejectment, Sec. 127.
2 Wismer v. Alyea, 138 So. 763 (Fla., 1932), and cases cited Dec. and Curr. Dig., Ejectment, Sec. 129.
3 Profile Cotton Mills v. Calhoun Water Co., 204 Ala. 243, 85 So. 284 (1920), and cases cited Dec. and Curr. Dig., Ejectment, Sec. 132. If the defendant clears the land for cultivation, the measure is the rental value of the land as improved, not its value as he first took it. Anderson v. Sutton, 301 Mo. 50, 254 S. W. 854 (1923). In a suit for rents and profits it is the value of the corn or wheat on the farm, not the price at which it was sold, that governs. Anderson v. Sutton, 308 Mo. 406, 275 S. W. 32 (1925); but quaere, whether a count could not have been framed for money had and received.
4 The cases put it somewhat more mildly by saying that the actual yield is evidence of the rental value, but the intent seems to be as expressed in the text. See Nathan v. Diersen, 164 Cal. 607, 130 Pac. 12 (1913); Worthington v. Hiss, 70 Md. 172, 18 Atl. 534, 17 Atl. 1026 (1889); Capital Garage Co. v. Powell, 98 Vt. 303, 127 Atl. 375, 378 (1925) (Evidence of profits of garage business carried on by defendant on premises in which plaintiff had conducted similar business). Con-
ing no legal right of possession, believed that he had such right, and acting in good faith, made improvements upon the land, then under statutes common to most of the states, he may off-set against the "mesne profits" the value of the improvements.  

Injury to Buildings and Improvements.—For completed invasions, injuries or trespass, the most usual formula of compensation is to the effect that the owner may recover the amount of the decrease in value of the land affected, caused by the invasion. There are, however, several alternatives to this simple formula, each of which may be resorted to when more appropriate than the normal test of diminution in value. In the case of injury to some structure or improvement upon the land, such as buildings, fences, or wells, there are several methods of measurement available. First, if the improvement is destroyed, and may readily be treated as a unit in itself, apart from the land, as in case of a house or other buildings, the value of the improvement itself at the time of its destruction is usually taken as the basis of compensation, and in ascertaining this value, the origi-versely, if the defendant, by negligence and poor husbandry, allows the land to deteriorate and permits depredations of hogs and cattle, the plaintiff recovers not merely the value of what the defendant gathered, but the rental value. Credle v. Ayers, 126 N. C. 11, 35 S. E. 128, 48 L. R. A. 751 (1900), Bauer's Cases on Damages (2d ed.) 580.  

Thus, the New York Civil Practice Act, 1920, Sec. 1011, provides, that, "Where permanent improvements have been made in good faith by the defendant or those under whom he claims, while holding, under color of title, adversely to the plaintiff, the value thereof must be allowed to the defendant in reduction of the damages of the plaintiff, but not beyond the amount of those damages." And see cases collected, and statutes referred to, in Dec. and Curr. Dig., Ejectment, Secs. 142, 143.  


See Dec. and Curr. Dig., Damages, Sec. 111; 3 Sedgwick, Damages, Sec. 935a (9th ed., 1920); note, 54 A. L. R. 1278, "measure of damages for destruction or removal of fence."  

nal cost or the cost of replacement, with allowance for depreciation, may be considered. Second, if the improvement is merely damaged and not destroyed, damages are usually measured by the reasonable cost of repair or restoration to the condition before the injury, together with compensation for the loss of the use of the property during the period of repair.

(1923) (where property such as house, etc., has separate value, this separate value is basis of compensation plus injury, if any, to land as a whole); United States Torpedo Co. v. Liner, 300 S. W. 641 (16) (Tex. Civ App., 1927) (destruction of oil well which had cash market value, damages for destruction of well by negligent shooting, value of well less value of salvage). While market value is prima facie the standard, buildings seldom have a separate market value proportionate to their worth to the owner, and consequently the criterion is usually said to be the "reasonable" or "real" value considering cost, uses, age, condition and location. Chicago & E. R. Co. v. Ohio City Lumber Co., 181 C. C. A. 57, 214 Fed. 751 (Ohio, 1914); Close v. Ann Arbor R. Co., 169 Mich. 392, 153 N. W. 346 (1912). Interest upon the value from the time of destruction also may be allowed as damages, in some jurisdictions. See Davenport v. Intermountain Ry. Light and Power Co., 108 Neb. 387, 187 N. W. 905 (1922).

9 Conner v. Mo. Pac. R. Co., 181 Mo. 397, 81 S. W. 145 (1904) (destruction of mill by fire, original cost and replacement cost held admissible as evidence of value); Northwestern Ohio Nat. Cas. Co. v. First Cong. Church, 126 Ohio St. 140, 184 N. E. 512(2) (1933) (destruction of church building 23 years old, so that restoration impracticable, held, diminution in value of entire property correct measure, and cost of reconstruction was to be considered); note, "Cost of building or repairs thereto as necessary or proper element in fixing damages for its destruction or injury," 7 A. L. R. at 277. It is error, however, to instruct the jury to award, for the destruction of a barn, its replacement cost, instead of its "reasonable value". Illinois Cent. R. Co. v. Nuckols, 212 Ky. 564, 279 S. W. 964 (1926).


11 Linforth v. San Francisco Gas & Elec. Co., 156 Cal. 58, 103 Pac. 320, 19 Ann. Cas. 1230 (1911) (loss of rental during time required to make the repairs, under Civ. Code, Sec. 3333); Lexington & E. R. Co. v. Baker, 156 Ky. 431, 161 S. W. 228 (1913) (diminution in value of use, during period until restored); compare West v. Martin, 51 Wash. 85, 97 Pac. 1102, 21 L. R. A. N. S. 324 (1908) (loss of profits on toll bridge during repairs). But if the building is not merely damaged, but de-
This formula works well enough if the injured building or improvement was a reasonably new one, though even then the jury should be warned to make a deduction from the cost of repair for the fact that the repaired part would be newer and better than the corresponding part before the injury, but if the building is ancient and dilapidated, or not susceptible of repair, the courts are apt to prefer a different standard of recovery, that is, the amount of the lessening in value of the structure or other improvement, produced by the injury. If from the evidence the jury could ascertain both the cost of restoration, and the diminution in value due to the injury, then seemingly they should be instructed to allow damages on the basis of the reasonable cost of restoration, not to exceed the amount of the decrease in value due to the injury. Third, and finally, if the the injury, no allowance for loss of use can be made. Consequential damages may be recovered, within the limits of "proximateness" and certainty. See E. L. Chester Co. v. Wis. Power and Light Co., 211 Wis. 158, 247 N. W. 861 (1933) (gas explosion and fire in store, resulting in closing business for two months, causing loss of profits).


See, for example, Jefferson County v. Pohlman, 243 Ky. 556, 49 S. W. (2d) 344(5) (1933) (house 90 years old, injured by blasting). Compare Chicago and N. W. R. Co. v. Davis, 78 Ill. App. 58 (1898), where it was held erroneous to admit evidence of the cost of restoration of an old and dilapidated building, destroyed by fire.

Conn v. Lexington Utilities Co., 233 Ky. 230, 25 S. W. (2d) 370 (1930) (house damaged by fire, incapable of reasonable repair), and see note 10, supra.

See the following cases in which it is stated that the allowance for cost of restoration must not exceed the amount of the diminution in value of the "property," i. e., presumably the land as an entirety. City of Globe v. Rabogliotti, 24 Ariz. 392, 210 Pac. 695 (1922); Bates v. Warrick, 77 N. J. Law 387, 71 Atl. 1116 (Sup. Ct., 1909); Hartshorn v. Craddock, 135 N. Y. 116, 31 N. E. 997, 17 L. R. A. 426 (1892), Bauer's Cases on Damages (2d ed.) 547. This formula seems to have been expanded and distorted in California, into an affirmative rule that the plaintiff may recover the cost of restoration limited only by the requirement that it must not exceed the value of the entire property prior to the injury. Salstrom v. Orleans Bar Gold Min. Co., 153 Cal. 551, 568, 96 Pac. 292 (1908). As originally applied in this case, where the plaintiff's land was covered with gravel by the operation of the defendant's placer-mine, and where the plaintiff's land was rendered valueless for any purpose unless the gravel were removed, the changed formula reaches the same result as the original one. It makes a difference, however, in a later case, where the plaintiff's residence and yard were covered with mud and oil from the defendant's well. It appeared that the plaintiff's property was still substantially valuable, at least for oil development, even though it were not restored for residential purposes. Nevertheless, the court held that the plaintiff could recover the cost of restoration, up to the limit of the original value of the property. Green v. General Petroleum Corp., 205 Cal. 328, 270 Pac.
improvement which has been injured or destroyed is one which does not lend itself to separate valuation, or even in the case of buildings, according to a few decisions, the general standard of the diminution in value of the land as a whole, resulting from the loss or injury of the improvement, may be adopted.

952, 60 A. L. R. 475 (1928). This may be defensible, as enabling plaintiff to continue to use the land as a home, but the result of the application of the California formula in a later case is more questionable. In Dandoy v. Oswald, 113 Cal. App. 570, 298 Pac. 1050 (1931), the defendant had dumped upon the plaintiff's vacant lots, a large quantity of material excavated from a street. The trial court found that the value of the plaintiff's lots had actually been increased, and gave judgment for the defendant, but on appeal it was held despite the absence of material injury that the plaintiff was entitled to recover the cost of restoring the lots to their original condition, amounting to a substantial sum, since this would not exceed the original value of the lots. See critical comment, 5 So. Cal. L. Rev. 249. This is an extreme application of the idea which finds expression in Cincinnati, N. O. & T. P. R. Co. v. Falconer, 30 Ky. L. Rep. 152, 97 S. W. 727 (1906), wherein the court said: "If the houses burned and sued for in this suit added little or nothing to the market value of the land upon which they were situated, because perhaps there was no market at that place for a storehouse or tenement houses of that class, it is nevertheless true that the owner was entitled to them uninjured by the negligence of any one else, and her right is, as against any one tortiously destroying them, to have her condition restored by giving her such sum in money as will replace the destroyed tenements."


27 Pacific Express Co. v. Lasker Real Estate Assn., 81 Tex. 31, 16 S. W. 792 (1891) (House destroyed by fire; assessment of damage by trial judge on basis of cost of replacement, reversed: "A business house, residence, or house adapted to any other purpose, when erected in a given locality, may then have a value by reason of the adaptation of the place where it is built to the use for which it is intended, which it ceases to have in after time by the change of business, residence, or other centers, whereby, at the later period, the property could not be sold with the land on which it stands for one-fourth of what it would cost to reconstruct it, if destroyed. In such a case, to give to the owner of a house what it would cost to rebuild it, if partially or entirely destroyed, would be to give to him more than would be just compensation. In this time of rapid improvement in means of transportation and in all other directions, it is no unusual thing for a town to spring up rapidly at a place which for a time is the terminus of a railway, and for persons engaged in trade to erect expensive houses for business purposes, but in a short time the railway is constructed beyond that point and business goes with it, and then comes depreciation in value at the point which has ceased to be a business center; and houses then will not sell for anything like what it would cost to rebuild or repair if partially or wholly destroyed. In such a case the measure of compensation applied in this case would be manifestly unjust." Texas and N. O. R. Co. v. Jeff Chatson Town-Site Co., 290 S. W. 890(1) (Tex. Civ. App., 1927) (similar to last).
Under this last method of measuring the damages, if the building is ill-adapted, to the site,—an expensive residence in an industrial district, for example,—the jury would not be permitted to compute its value separately from the land, by the cost-less-depreciation method, but would be directed to ascertain only the diminution in the value of the entire property. This result seems desirable in many instances, and probably in any extreme situation would be approximated by the courts which use the value of the building as a basis, by a direction to the jury to consider in determining the value of the building before the injury, its suitability or lack of suitability to the location.\(^8\)

**Damage to Crops.**—A frequent source of litigation is the invasion, by fire, or water, or fumes, of land upon which crops are growing.\(^9\) If the invasion merely prevents the plaintiff from planting his land, the measure is not the value of the hoped-for crop, but the rental value of the land for the season.\(^20\) For a past and completed invasion, causing injury or destruction to a crop of a sort which is grown annually, such as cotton, corn, or wheat, the basis of compensation is usually said to be

\(^8\) In *Matthews v. Missouri P. R. Co.*, 142 Mo. 645, 665, 44 S. W. 802 (1897) the plaintiff recovered for the burning of a barn. The defendant assigned as error the trial judge’s instruction that the measure of recovery was the reasonable value of the barn, claiming that the diminution in value of the realty was the proper standard. The assignment was overruled, and the court said: “... It might often happen that a certain character of building would add nothing to the market value of the real estate upon which it is situated. For example, a cheap dwelling house, on a valuable lot in a business block, would possibly depreciate the salable value of the lot to the extent of the cost of removing it, yet it could not be fairly said that the house had no value, though it added nothing to the market value of the lot. The owner has the right to use his real estate in any lawful manner he may wish, and if the improvements he has chosen to erect upon it are destroyed by another, he is entitled to reimbursement for the lost he suffers. No rule is just which does not afford to the injured person fair compensation for the loss or damage he has sustained. If the building destroyed, although a part of the realty, has an ascertainable value, we can see no fairer rule for ascertaining just compensation for its loss than that given the jury in this case. The value of the barn in its condition as it stood upon the farm before its destruction is the loss plaintiff sustained and for which he is justly entitled to compensation. The jury, it is true, might have been required to ascertain the value of the barn with reference to its condition, locality and the uses to which it could have been applied in connection with the farm, yet the generality of the instruction does not constitute reversible error.”

\(^9\) See Dec. and Curr. Dig., Damages, Sec. 112.

the value of the unmatured crop at the time of the invasion, in case of destruction, or the difference between the value immediately before, and the value immediately after the invasion, in case of injury. How is this "value" to be determined? Certainly in the case of most kinds of crops, in most localities, it is not the custom to buy or sell growing crops, and consequently no effective market value ordinarily exists. Accordingly, the decisions usually sanction the practice of admitting proof, where the growing crop is destroyed, of the probable yield and value of the crop, when finally harvested and marketed at maturity, and of the cost of the further care and cultivation, harvesting and marketing, as evidence of the actual realizable value of the growing crop when destroyed. It is a short step from this

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Hoover v. Shott, 68 Colo. 385, 189 Pac. 848 (1930); Zuidema v. Sanitary Dist., 223 Ill. App. 138 (1921); Boudreaux v. Thibodeaux, 149 La. 400, 89 So. 250 (1921); Missouri P. R. Co. v. Sayers, 82 Kan. 123, 107 Pac. 641, 27 L. R. A. N. S. 168 (11910); Pulliam v. Miller, 108 Neb. 442, 187 N. W. 925 (1922); 17 C. J. 887, Sec. 190.

If a new crop can be planted after the destruction of the old, the reasonable profit realizable from the new crop must be taken into account. International Gt. Northern R. Co. v. Reagan, 36 S. W. (2d) 564 (Tex. Civ. App., 1931).


See Economy Light and P. Co. v. Cutting, 49 Ill. App. 422, 425 (1893), approved in St. L. M. B. Assn. v. Schultz, 226 Ill. 409, 80 N. E. 879, 883 (1907). In a few states, an attempt seems to be made to draw a line between crops so immature as to have no market value, and crops which are sufficiently mature to be sold, and to restrict the plaintiff in the former case to the rental value of the land. St. Louis, I. M. and S. R. Co. v. Saunders, 85 Ark. 111, 107 S. W. 194(2) (1905); Brown v. Arkebauer and Co., 182 Ark. 354, 81 S. W. (2d) 530(4) (1930).

Teller v. Bay and River Dredging Co., 151 Cal. 209, 90 Pac. 942, 12 L. R. A. N. S. 267 (1907), with annotation; Uhrman v. Morie, 293 S. W. 483(2) (Mo. App., 1927) (good illustrative case as to the kind of evidence received). Hall v. Brown, 102 Ore. 389, 202 Pac. 719 (1921) (opinion evidence as to what the crop would have produced, admissible); Gulf O. and S. R. R. Co. v. McGowan, 73 Tex. 355, 362, 11 S. W. 336(2) (1889); Lester v. Highland Boy Gold Min. Co., 27 Utah 470, 76 Pac. 341, 101 Am. St. Rep. 988 (1904) (following evidence proper: Kind of crops land can produce, average yield in this and other neighboring land, stage of growth of crops at time of injury, expenses of cultivating, harvesting, and marketing, market value at maturity); and see cases collected, Dec. and Curr. Dig., Damages, Sec. 174(3); 17 C. J. 887, Sec. 190. If the plaintiff proves merely the prospective value at maturity, without proving the prospective cost of raising the crop to maturity, he fails to make out his case. International Gt. N. R. Co. v. Reagan, 36 S. W. (2d) 564(11) (Tex. Civ. App., 1931).
to say directly, as many cases do, that the measure of damages is what the crop when harvested would finally have brought, less the prospective cost of cultivation, harvesting, and marketing. While the distinction between the two formulas seems of slight intrinsic importance, the instructions must be framed according to the form locally preferred. The more direct doctrine, allowing as damages, the prospective net proceeds, is perhaps less likely to invite difficulties over the question of whether there is a market value, or disputes over the kind of evidence which will be admitted to show value. The logical implications of the two formulas differ materially in one respect. What is to be done if it happens that the crop, destroyed on, say June 1, by fire from the defendant's locomotive, would have been destroyed in any event on June 15 by a flood which swept over the field on the latter date? What is to be done if the later weather conditions, as shown by the effect on the crops in neighboring fields, were merely unfavorable, resulting in less than usual yields? In the former case of subsequent destructive conditions, it seems just and desirable to apply the standard of the value at the time of the defendant's invasion, in which event the court could properly say that the value was measurable by the net proceeds that would have been realized from a crop of normal yield, disregarding the actual later flood, but counting in as part of the cost of production, a charge (comparable to the cost of crop-insurance) for the risk of consequences such as hail and flood. If on the other hand the later weather was merely

United Verde Copper Co. v. Ralston, 46 Fed. (2d) 1 (C. C. A. Ariz., 1931) (holding limited to cases where there appears reasonable certainty that crop would have matured, as in case of irrigated land); International Agricultural Corp. v. Abercrombie, 184 Ala. 244, 63 So. 549, 49 L. R. A. N. S. 415 (1913); Smith v. Hicks, 14 N. Mex. 569, 98 Pac. 138, 19 L. R. A. N. S. 938 (1908) (irrigated crop); and compare City of Portsmouth v. Weiss, 145 Va. 94, 133 S. E. 781 (18) (1926), where it was held proper to instruct the jury that the prospective proceeds of the crop less the prospective expense, "may be taken" as the value at the time of loss.

Zuidema v. Sanitary Dist. of Chicago, 223 Ill. App. 138(4) (1921) (loss of growing crop by overflow). Evidence showed later flood not caused by defendant; defendant's request for instruction that if later flood would have destroyed crop, plaintiff cannot recover, held properly refused; "the fact that afterwards . . . there was a flood which submerged the land would in no way change the amount of damages."

St. Louis, I. M. & S. R. Co. v. Yarborough, 56 Ark. 612, 20 S. W. 515(3) (1902) (destruction of crops by overflow caused by defendant's embankment which caused the backwaters of a river to enter the
unfavorable, the matter would be taken care of simply under either formula by directing the jury in estimating the probable yield to consider the effect of the weather on the actual yield of neighboring fields.\footnote{United States Smelting Co. v. Sisam, 112 C. C. A. 37, 191 Fed. 293, 37 L. R. A. N. 976, 977 (Utah, 1911) (damage to crop, from smelter fumes; "The stronger reason and the great weight of authority are that evidence of the kind of crop the land will ordinarily yield, of the stage of the crop's growth when injured or destroyed, of the average yield per acre of similar land in the neighborhood, the crop of which was cultivated in the same way, and was not injured, and of the market value of the probable crop without the injury, at the time of maturity, of the expense that would have been incurred after the injury in fitting for market the portion of the crop the wrongful act prevented from maturing, of the time of the injury, and of the circumstances which conditioned the probability of the maturing of the crop at that time in the absence of the injury, is competent, and may be weighed by the jury to find the damage to a growing crop at the time of its injury."); Toller v. Bay and River Dredging Co., 151 Cal. 209, 90 Pac. 942, 12 L. R. A. N. 287, 274 (1907) (approving statement that evidence of yield of neighboring fields should be proved); and cases collected in 17 C. J. Sec. 190, p. 889, n. 33. Contra: Ward v. Chicago, M. & St. P. R. Co., 61 Minn. 449, 63 N. W. 1104 (1895) (evidence of conditions subsequent to the loss, inadmissible).}

plaintiff's fields; on appeal the court held that in determining value at time of destruction, the then hazards must be considered, and said: "The water which destroyed them (the crops) was, as the plaintiff testified, backed onto his lands from the rear, and passed over them into the river. But the evidence shows that the overflow became general, and that a few days after the loss of the crops the river was out of its banks in front of the plaintiff's farm, and covered it with water flowing directly to it. It thus appears that the destruction of the crops by the general overflow was impending, if not inevitable, at the time the water was backed upon them. And yet it is evident from the damages assessed that the jury have valued the crops as if they might have matured but for the wrong ascribed to the railway. We think the proof did not warrant an assessment so large, and that the court erred in refusing to set aside the verdict."); St. Louis, S. W. R. Co. v. Ellis, 169 Ark. 682, 276 S. W. 996(3) (1925) (reversing for failure to give defendant's charge that hazards must be considered in valuing crop); Missouri Pac. R. Co. v. Sayers, 82 Kan. 123, 107 Pac. 641, 27 L. R. A. N. S. 168, 175 (1910) (hazards of hail and rain must be considered in valuing crop even though ready for harvesting); Gulf, C. and S. F. R. Co. v. McGowan, 73 Tex. 355, 362, 11 S. W. 336, 337 (1889) ("The crops were destroyed while growing, and before they had matured. As part of his evidence to establish their value at the time and place they were destroyed, plaintiff was permitted to prove the value of corn and potatoes of that year's crop in the fall, after they had matured, and were ready for market. We think the evidence was properly admitted. The only correct criterion for ascertaining the value of a growing crop at any period of its existence is to prove what that character of crop was worth at or near the place where it was grown, when matured, and to make proper estimates and allowances from ascertainable or ascertainable facts for the contingencies and expenses attending its further cultivation and care."); 3 Sdgwic, Damages, Sec. 937 (9th ed., 1920); 17 C. J. 890, n. 39.
In respect to damage to crops, as distinguished from their destruction, the same choice of formula, normally, presents itself. The usual standard adopted is diminution in value of the crop as it stood, immediately after the injury. This difference in value is to be ascertained from evidence as to the value of the prospective yield, the value of the actual yield, and the added cost of cultivating and harvesting the crop if uninjured. A few cases take this last directly as the measure of damages and not merely as evidence of the amount of the lessening in value of the crop at the time of injury. If the crop is one which

29 Sayrs v. Missouri Pac. R. Co., 82 Kan. 123, 107 Pac. 641, 27 L. R. A. N. S. 128 (1910) (action by landlord for damage to his interest in crops under share-rental tenancy; held, measure is diminution in value of interest in crops as it stood at time of injury, not in ultimate value of mature crop; manner of proving value of immature crop discussed in excellent opinion by Johnston, C. J.); Carter Oil Co. v. Halloway, 130 Okla. 272, 287 Pac. 274 (1928) (farmer's testimony as to value of immature crop before and after invasion by escaping oil, held sufficient basis for award); Abilene & S. R. Co. v. Herman, 42 S. W. (2d) 915 (1928) (condemning instruction fixing ultimate value of crop if it has matured less expense, as measure. This was evidence of value of immature crop but not measure of damage); Bader v. Mills and Baker Co., 28 Wyo. 191, 201 Pac. 1012 (1921); and references, n. 21, supra.

30 But if the injury is continuing during the life of the crop as in case of the repeated invasion of fumes, the measure is the difference between value of the probable crop at maturity if it had been uninjured and the value of the actual crop at that time less the expense which would have been incurred in fitting for market the part of the crop which did not mature. American Smelting and Ref. Co. v. Riverside Dairy and Stock Farm, 149 C. C. A. 582, 236 Fed. 510, 513 (Utah, 1916) (fumes); Peacock v. 412 Ariz. 397, 237 Pac. 184 (1925) (deprivation of irrigation water); Peacock v. Wisconsin Zinc Co., 177 Wis. 510, 188 N. W. 641 (1922); and in cases where the defendant's breach of contract to furnish water caused the damage, the contemplated profit on the crop at maturity may be used as the measure under the contract theory of damages (Abilene and S. R. Co. v. Herman, supra, at p. 919), and so also in the share-cropper's action against the landlord for breach of the contract to turn over the possession of the land. Rogers v. McGuffey, 96 Tex. 565, 74 S. W. 753 (1903).

31 See Sayrs v. Missouri P. R. Co., and Abilene and S. R. Co. v. Herman, in next previous note.

International Agricultural Corp. v. Abercrombie, 184 Ala. 244, 63 So. 549, 49 L. R. A. N. S. 415 (1913), and see 17 C. J. 888, n. 28, and cases cited in n. 25, supra.

In Texas there are pronouncements to the effect that while the difference in value when injured is the criterion, this may be arrived at by taking the value of the probable crop at maturity less expenses saved and less the net value of the actual crop. International and G. N. R. Co. v. Pope, 73 Tex. 501, 11 S. W. 526 (1889). In Iowa, the basis seems to be stated in the alternative—either the value in the field or the probable value at maturity less expenses. Farley v. City of Des Moines, 199 Ia. 974, 203 N. W. 287 (1925).
does not require annual planting, such as hay, alfalfa, or grass for pasturage, then if only the annual produce is injured or destroyed, it is separately valued as in case of annual crops, but if the injury goes deeper, and the roots are damaged or ruined, then the practice is to measure the damage by the diminution in value of the land itself, or as an alternative the cost of replanting, including the loss of use of the land while being restored.

Trees and Timber.—In the case of injury to or destruction of fruit trees or shade trees, some courts insist upon the standard of the diminution in value of the land, and others upon the

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32 Boulton v. Telfer, 52 Idaho 185, 12 Pac. (2d) 767, cert. den., 53 Sup. Ct. 115 (1932) (damage to grass by sheep); White River Sheep Co. v. Barkley, 37 Ariz. 49, 288 Pac. 1029 (6) (1930) (similar to last; measure is not rental value of land, but value to owner for pasturage of the grass, which has no market value; this value to the owner is to be proven by opinion evidence); Chicago, R. I. G. Ry. Co. v. Ward, 207 S. W. 902 (Tex. Comm. App.; 1919) (burning of grass; plaintiff cannot recover consequent cost of feeding cattle, but is limited—distinguishing cases of contract and of willful tort—to the value of the grass to the owner for pasturage, of which rental value of land is evidence). In California, the rental value of the land for pasturage, where the grass has no value for harvesting, seems to be the measure. Miller and Lux v. Pinelli, 84 Cal. App. 42, 257 Pac. 573, 575 (1927).

33 Baird v. Minn. & St. L. R. Co., 214 Ia. 611, 243 N. W. 515 (1932); Thompson v. Chicago & Q. R. Co., 84 Neb. 482, 121 N. W. 447, 23 L. R. A. N. S. 310 (1909) (injury to alfalfa by fire); Tex. Cent. R. Co. v. Qualls, 58 Tex. Civ. App. 120, 124 S. W. 140 (1909) ( sod injured by fire). But if there is not only permanent injury to the sod or roots, but also the destruction of the present annual crop, shall the diminished value of the land be assessed so as to include the loss of the standing crop? Yes. Black v. Highland Solar Salt Co., 93 App. Div. 409, 90 N. Y. S. 338 (1904) (injury to willow crop and roots). But most cases seem to allow the current damage and the permanent to be found as separate items. Hayden v. Missouri, K. & T. R. Co., 84 Kan. 376, 114 Pac. 384 (1911); Missouri, K. & T. R. Co. of Texas v. Malone, 59 Tex. Civ. App. 254, 126 S. W. 936 (1910).


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loss of the value of the trees considered separately,\(^{36}\) while a third group permits the plaintiff to choose either basis.\(^{37}\) This last flexible formula seems more likely to avoid needless difficulties of proof and wasteful reversals on errors in instructions.

When trees, valuable chiefly for timber are damaged or destroyed, by fire or other cause, it is frequently said that the plaintiff may sue either for the loss or injury of the trees, when the damages are measured by the market value of the standing timber, or he may sue for the injury to the land, determined by the amount of reduction in value of the realty.\(^{38}\) As to ma-

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\(^{37}\) Atchison, T. & S. F. R. Co. v. Geiser, 65 Kan. 231, 75 Pac. 68(3), 1 Ann. Cases 812 (1904) (fruit trees); Bailey v. Chicago, M. & St. P. R. Co., 3 S. D. 531, 54 N. W. 596, 19 L. R. A. 653 (1893) (trees and shrubbery); Fairview Fruit Co. v. H. P. Brydon & Bro., 55 W. Va. 609, 102 S. E. 231 (1920) (fruit trees: opinion evidence, based on hypothetical question, as to value per tree, approved: good opinion by Williams, P., reviewing decisions). See also, Stephenville, N. & S. T. R. Co. v. Baker, 203 S. W. 385 (Tex. Civ. App., 1918) (fruit and shade trees near residence), and Shell Pipe Line Corp. v. Sorcek, 37 S. W. (2d) 297 (1931) (pecan trees, valuable for commercial production), in which the value of the trees "for the use intended by the owner" is recognized as an alternative standard. Compare Spear v. Hoffses, 148 Atl. 146 (Maine, 1929) (held proper to instruct jury to find reduction in market value of land, by destruction of trees by fire, with regard to most valuable use, whether for timber or shade or beauty).

\(^{38}\) Bailey v. Chicago, M. & St. P. R. Co., 3 S. Dak. 531, 54 N. W. 596, 19 L. R. A. 653, annotated (1893); Dannielley v. Virginia R. Co.,
ture standing timber, these measures seem to reach the same result, but if some or all of the trees injured are immature and too small for cutting, then it behooves the plaintiff to shape his pleading and proof to support a judgment for the loss in value of the realty, as the mere recovery of the value of the young growth, if it had been cut for timber just before the injury, would not compensate him for its potential value.39

If the wrong complained of is not the injury or destruction of the trees but the cutting of them by the defendant and his appropriation of the timber,40 then if the defendant's depredation was done under an innocent mistake as to boundary or ownership, he will usually be held in an action in the nature of trespass to the land, as in the cases just discussed of negligent injury to the timber by fire or the like, only for the diminished value of the land or the value of the trees before cutting.41

39 W. Va. 97, 136 S. E. 691 (1927). Some decisions, however, insist upon the standard of the loss of the value of the trees, e. g., Kansas City & O. R. Co. v. Rogers 48 Neb. 653, 67 N. W. 602 (1896). Others, more numerous, adopt as the sole standard, the loss in value of the land. Reynolds v. Gt. Northern R. Co., 119 Minn. 251, 139 N. W. 30, 52 L. R. A. N. S. 91, annotated (1912); 3 Sedgwick, Damages, Sec. 933 (9th ed., 1920); 17 C. J. 891, 892, Sec. 191. Even under the latter doctrine, it is recognized that evidence of the value of the trees for timber may come into show the value they added to the land. Reynolds v. Gt. Northern R. Co., supra; Busche v. New York, S. W. R. Co., 159 Atl. 789 (3) (N. J. Sup., 1932); Williams v. Elm City Lumber Co., 16 N. C. 306, 70 S. E. 631, Ann. C. 1912A, 917 (prospective value of immature trees cut may be shown as bearing on diminution in value of land). But in an action for railroad's negligence in setting fire to standing timber which plaintiff had contracted to cut, the plaintiff was denied recovery for loss of profits on the contract. Thompson v. Seaboard Air Line R. Co., 165 N. C. 377, 81 S. E. 315, 52 L. R. A. N. S. 97 (1914).

40 Thus, in Danielley v. Virginia R. Co., 103 W. Va. 97, 136 S. E. 691 (3) (1927), where plaintiff sued for damage from fire, to immature trees, instead of suing for injury to the land, it was held that he was limited to the value of the young trees for present cutting for timber. See also, Hall v. Seaboard Air Line R. Co., 126 S. C. 330, 119 S. E. 910, 23 A. L. R. 292 (1923). In Feather River Lumber Co. v. United States, 30 Fed. (2d) 642 (7) (C. C. A. Cal., 1929), an action by the government for the destruction by fire of the young growth of timber on 4,000 acres of public land, it was held that the actual value of the trees was recoverable, and that this was not to be measured by the lessening in market value of the land, since there was no law authorizing its sale, but the cost of reforestation of the land may be shown.

41 See, in general, as to the measure of damages for cutting timber, Dec. and Curr. Dig., Trespass, Sec. 52; Sutherland, Damages, Sec. 1111 (4th ed., 1916).

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This hardly seems an adequate measure of relief to a plaintiff who intended to market his trees not by selling them as standing timber, but by cutting them and selling them as logs or lumber. Accordingly, if the plaintiff plants his case against the innocent taker of timber, on the theory of the conversion of

Stimms Lumber Co., 121 La. 627, 46 So. 674, 18 L. R. A. N. S. 244, annotated (1908) (value of the stumps); Powers v. Trustees of Caledonia County Grammar Schools, 93 Vt. 220, 106 Atl. 886 (1919) (stumpage value, with interest). Wood v. Weaver, 121 Va. 250, 92 S. E. 1001 (1917). In Wisconsin, by statute, the defendant by filing an affidavit that the cutting was done by mistake, and offering to pay therefor, may reduce his liability to the value of the logs, “when cut.” Wis. Stats., 1929, Sec. 331.18; see Fehrman v. Bissell Lumber Co., 188 Wis. 82, 204 N. W. 582, 205 N. W. 905 (1925).

The decisions of the Supreme Court leave some doubt whether the Federal rule (if there is one except that of following local doctrine) adopts stumpage value or value immediately after cutting, as the test. The decisions are reviewed and the former measure hesitantly adopted, in Trustees of Dartmouth College v. International Paper Co., 132 Fed. 92, 106 (6) (C. C., N. H., 1904), Crane’s Cases on Damages 1.

See Green v. Southern Timber Co., 291 Fed. 582, 584 (Dist. Ct., S. D., Ga., 1923), wherein Barrett, J., said: “Reckoning the damage on the basis of stumpage would be to disregard the unwillingness of the owner to sell. The defendant was a trespasser, even though unwittingly. Surely he should be content to forego any profit. After considering all of the cruises introduced in evidence, and with the full appreciation that certainty of accuracy does not attach to any one, I have concluded to adopt Jasspon’s as the most satisfactory and to adopt his second line estimate. This shows a total, exclusive of the hammocks, of 290,970 feet, and the hammocks 50,740 feet, making a total of 341,710 feet.” He awarded damages computed on the basis of the price for which the trespasser sold the logs, deducting therefrom only the out-of-pocket expense of cutting, skidding, loading and transporting, but refusing to include in such deduction any “overhead” charges, for cost of tram-road construction, general expense, and depreciation of equipment. See also, notes (45) and (51), infra.

The rich abundance of theories open to the pleader in these cases is indicated by the following passage: “Where standing timber on the plaintiff’s land is wrongfully cut, the plaintiff’s choice of remedies is more extensive. (1) He may bring an action of trespass quare clausum, wherein he will recover the damage done to the real estate; that is to say, the diminution in the value of the real estate caused by the cutting. If he alleges, by way of aggravation, a trespass upon his personal property, viz., the logs, after severance from the realty, he may recover for that also, thus joining his two causes of complaint in one action. (2) He may bring trespass de bonis asportatis, wherein he will recover the damage done by carrying off the logs wrongfully cut. (3) He may bring trover, in which case he will recover the value of the personal property—the logs—at the time and place of conversion. As to the three forms of action just mentioned, see Warner v. Abbey, 112 Mass. 355. (4) He may bring replevin. By this action he will, in some jurisdictions, recover the logs themselves, and in others will recover their value variously estimated. In some jurisdictions the action of replevin sounds altogether in damages, and differs but little from the action of trover. (5) He may physically retake his severed.
the timber, many courts will base the award upon the value of the trees when they first became personal property, i.e., immediately after being felled, but from this amount some of these courts will off-set the cost of the cutting by the innocent trespasser. But, if the defendant in cutting his neighbor’s property. By this act he will recover the property itself. Indeed, though he commits a breach of the peace in the recovery, yet he will still recover his property. His civil or criminal liability for his violence will not divest his title. See Pabst-Brewing Co. v. Greenberg, 117 Fed. 135, 55 C. C. A. 151. Other forms of action, such as detinue, or a bill in equity, may be employed in some jurisdictions and under some circumstances; and the injured man may sometimes pursue more than one remedy at once. It is plain that in some instances the damages recovered in an action of trespass quare clausum will be greater than those recovered in trover. In other instances the damages in trover will be the larger.” Lowell, Dist. J., in Trustees of Dartmouth College v. International Paper Co., 132 Fed. 92, 94 (C. C., Dist. N. H., 1904). Another important avenue of relief is the statutory action given in many states for treble damages, or other penalty; see notes (67) and (68), infra.

"United States v. St. Anthony R. R. Co., 192 U. S. 524, 542, 24 Sup. Ct. 333, 48 L. Ed. 548 (1903) (purchaser from innocent trespasser, “value of the timber where it was cut at the place where it was cut”); White v. Yawkey, 108 Ala. 270, 19 So. 360, 32 L. R. A. 199, 54 Am. St. Rep. 189 (1896) (same; value of the logs immediately after severance; emphasizing distinction between trespass to the land, and trover). Wright v. Skinner, 34 Fla. 454, 16 So. 335 (1894) (innocent trespasser chargeable for value at time of conversion, with no deduction for costs incurred before the logs are removed from the land).

"The variety of treatment of the problem by the courts has been well stated by Judge Lowell, as follows: “Unfortunately, the precise measure of the allowance to the defendant for his improvements has been stated by different courts—or by the same court—in many ways. In theory the allowance should equal the cost of the defendant’s improvement, not to exceed the consequent enhancement of value in the property converted. But sometimes the plaintiff has been limited to the recovery of (a) stumpage, or, in the case of coal, of reasonable royalty (Hilton v. Woods, L. R. 4 Eq. 432; Livingston v. Raeyards Co., 5 A. C. 25; United States v. Homestake Co., 117 Fed. 491, 54 C. C. A. 302; United States v. Northern Pacific R. R. (C. C.), 67 Fed. 890; King v. Herriman, 33 Minn. 47, 35 N. W. 570; Whitney v. Huntington, 37 Minn. 197, 33 N. W. 561; Chappell v. Puget Sound Co., 27 Wash. 83, 67 Pac. 391; Miss. Co. v. Page, 68 Minn. 269, 71 N. W. 4; Illinois Cent. R. R. v. Leblanc, 74 Miss. 626, 21 South. 748; Forsyth v. Wells, 41 P. 291, 39 Am. Dec. 617); sometimes the value after severance, less expense of severing (See Durant Mining Co. v. Percy Mining Co., 93 Fed. 166, 167, 35 C. C. A. 252; Colorado Co. v. Turk, 70 Fed. 294, 17 C. C. A. 123); sometimes (c) stumpage plus profit (Winchester v. Craig, 33 Mich. 205; Anderson v. Besser (Mich.), 91 N. W. 737); sometimes (d) value at severance, less what it would have cost the plaintiff to sever (see Morgan v. Powell, 3 Q. B. 278); sometimes (e) value at time of action brought, or at some other time after severance, less expense of improvement (see Jegon v. Vivian, L. R. 6 Ch. 742; United Merthyr Co., L. R. 15 Eq. 46; Powers v. United States, 119 Fed. 562, 56 C. C. A. 128; Herdic v. Young, 55 Pa. 176, 93 Am. Dec. 739); some-
timber acted deliberately, knowing that he was taking another’s property, he will be held liable for the value of the timber and its products as improved by his labor, without any allowance for the cost of cutting, milling or other processing. 48

This same distinction between the extent of the accountability of the innocent, and of the conscious wrongdoer, is applied in actions against those who unlawfully remove from another’s land gravel, ore, coal, oil and other minerals. 47 The innocent taker’s liability is ordinarily said to be measured by the times (f) value immediately after severance, on the theory that there can be no conversion of chattels until after severance from the realty (see United States v. Van Winkle, 51 C. C. A. 533, 113 Fed. 903; White v. Yawkey, 108 Ala. 270, 19 South. 360, 32 L. R. A. 199, 54 Am. St. Rep. 159; Ivy Co. v. Alabama Co., 135 Ala. 579, 33 South. 547, 93 Am. St. Rep. 46; Franklin Coal Co. v. McMillan, 49 Md. 549, 33 Am. Rep. 280; Blaen Co. v. McCulloh, 59 Md. 403, 43 Am. Rep. 560; Morgan v. Powell, 3 Q. B. 278; Martin v. Porter, 5 M. & W. 351; Beede v. Lamprey, 64 N. H. 510, 15 Atl. 123, 10 Am. St. Rep. 426); sometimes (g) value when removed from plaintiff’s land, because the conversion is not deemed complete until then (Wright v. Skinner, 34 Fla. 453, 16 South. 335); sometimes (h) defendant’s profit received (Colorado Mining Co. v. Turck, 70 Fed. 294, 17 C. C. A. 128); sometimes (i) value at time of action brought, or at some other time after severance, less value added by defendant (Coal Co. v. Coal Co., 24 Colo. 116, 48 Pac. 1045; Peters Co. v. Lesh, 119 Ind. 98, 20 N. E. 291, 12 Am. St. Rep. 367). Some of these rules seem to have been adopted as rough and ready measures of convenience, some without recognition of the difference between them. Each and all are deemed to furnish an allowance for the value of improvements made in good faith upon the property of another, and all show that diminished damages are permitted by way of allowance to a defendant, rather than are enhanced damages inflicted for his punishment.” Trustees of Dartmouth College v. International Paper Co., 132 Fed. 92, 97 (C. C. Dist. N. H., 1904), see n. (43), supra.

The most defensible solution seems to be the one reached in Green v. Southern Timber Co., 291 Fed. 582 (Dist. of S. D., Ga., 1923), supra, n. (42), that is, the highest value realized by the trespasser, less the out-of-pocket expense.


49 See, generally, Dec. and Curr. Dig., Trespass, Sec. 52, Mines and Minerals, Sec. 51 (6); 3 Sedgwick, Damages, Sec. 985 (9th ed., 1920); notes, “Right of the trespasser to credit for expenditures in producing . . . oil or mineral,” 7 A. L. R. 908, 23 A. L. R. 198.
value of the substance or mineral "in place", i.e., in the ground. Some courts measure this by the "royalty" value, that is, by the amount for which the land-owner could sell the privilege of mining or removing the mineral. This, however, allows the appropriator to make the customary profit upon the mining operation. Consequently, most courts would take as the measure the value of the material when brought to the surface, e.g., coal at the mouth of the pit, or oil as received in tanks or pipeline, less the direct cost of extracting and "lifting".


In a few states, however, as in the case of cutting timber, the innocent trespasser may be held, if suit is brought on the theory of conversion, for the entire value of the ore after it is taken out. Ivy Coal & Coke Co. v. Alabama Coal & Coke Co., 135 Ala. 579, 33 So. 547, 93 Am. St. Rep. 46 (1902); Galloway Coal Co. v. Bessemer Coal, Iron & Sand Co., 210 Ala. 537, 98 So. 779 (1924) (value of coal on cars less cost of moving and loading but with no deduction for cost of mining); Donovan v. Consolidated Coal Co., 187 Ill. 28, 58 N. E. 290, 79 Am. St. Rep. 206 (1900), and see Crane's Cases on Damages, 290, note, and annotation, 7 A. L. R. 908, at 927-932.

Ashurst v. Cooper's Admrs., 232 Ky. 498, 23 S. W. (2d) 916 (1930) (coal); Trustees of Proprietors of Kingston v. Lehigh Valley Coal Co., 241 Pa. 481, 88 Atl. 768 (1913) Crane's Cases on Damages, 288 (action by lessors, who had given a 999-year lease against persons claiming under lessee, for taking coal under circumstances constituting waste; held, royalty value allowable, there being a present market value on royalty basis; otherwise would be the acreage value of the coal in place).

Sometimes this measure, value after extraction less cost, is said to be the way to arrive at the "value in place." This is true, if "realizable" value, is meant rather than "market" value, which would be the royalty value. Value after extraction, less cost of extraction, may be more simply rationalized as a basis of compensation in itself, adopted in order to give the owner the benefit of any profit in the mining operation, rather than as a mode of measuring "value in place."

Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 536 (8), 59 L. Ed. 856 (Ill., 1915) (accounting in equity brought by earlier lessee for oil taken by one operating under later lease; defendant held liable for oil as sold in pipeline, less cost of improvements and operation, incurred before notice of earlier lease); Kahle v. Crown Oil Co., 130 Ind. 131, 100 N. E. 581 (1913) (oil); Cypress Creek Coal Co. v. Downsville Mining Co., 194 Ind. 187, 142 N. E. 645 (1924) (coal); Holliday v. Dunn and Baker, 125 Ore. 144, 265 Pac. 1096 (1928) (damages for rock used for surfacing highway, value when ready for use less expense of preparation); Bender v. Brooks, 103 Tex. 329, 127 S. W. 168 (1910), Bauer's Cases on Damages, 561 (3d ed.) (value of oil "when delivered at the surface or in tanks, deducting the cost of lifting it from the well and placing it in the tanks"); Spruce River Coal Co. v. Valco Coal Co., 95 W. Va. 69, 120 S. E. 302 (1923) (value of coal after it was taken from
deliberate and willful appropriator, however, must pay the value at the mouth of the pit, or sometimes its value when prepared and loaded in cars for final marketing, or even the amount of the proceeds realized by the wrongdoer, \(^5\) without recompense for his labor and disbursements in extracting, lifting and processing it. \(^6\)

mine or loaded on cars, less expense of severance); notes, 7 A. L. R. 908; 23 A. L. R. 193.

If the plaintiff, the owner, was himself equipped with plant and force to conduct mining operations, by which he could have extracted the ore if defendant had not, the defendant should only be given credit for those expenses which he has saved the plaintiff from incurring. Even if the plaintiff was not thus equipped, the defendant seemingly should not be able to charge against the product of another's land, the cost of maintaining his plant and organization, and if this is correct, no "overhead" charges should be deducted, See Clark-Montana Realty Co. v. Butte and Superior Copper Co., 233 Fed. 547, 577(23) (D. C., Montana, 1916) (accounting in equity for plaintiff's ore, mined and milled by defendant; only direct expense of mining, milling, and moving allowed; no deduction for "general expense" of plant and force); St. Clair v. Cash Gold Mining and Milling Co., 9 Colo. App. 235, 47 Pac. 466 (1897) (expense of running levels, etc., to reach the vein from which ore extracted not allowed, but only the expense of digging, tramming and hoisting the ore actually taken). See notes (42) and (45), supra.

\(^5\) If the action is based upon the theory of trespass or trover at law, the value at the pit-mouth or when ready for shipping will be taken, but if the plaintiff by seeking an injunction or otherwise, can claim an equitable accounting, he can recover the proceeds realized by the defendant. See cases cited in n. 53.

\(^6\) Big Sespe Oil Co. v. Cochran, 276 Fed. 216(10) (C. C. A., Cal., 1921) (willful trespasser who operated oil wells on plaintiff's land, liable on accounting in equity, for proceeds of oil produced, with no deduction except for taxes paid on the property); Elkhorn-Hazard Coal Co. v. Kentucky River Coal Corp., 20 Fed. (2d) 67(12) (C. C. A. Ky., 1927) (value of coal at pit-mouth with no credit for labor and expense of mining and lifting); Lightner Mining Co. v. Lane, 161 Cal. 689, 120 Dec. 777, Ann. C. 1013C 1093 (mine-owner through underground openings removes ore from adjoining land; chargeable with value of mineral after reduction with no deduction for mining and milling); Thompson v. Dentzelt, 232 Ky. 755, 24 S. W. (2d) 607 (1930) (value of coal at place taken, no deduction); Tracey v. Athens and Pomeroy Coal and Land Co., 115 Ohio St. 298, 152 N. E. 641 (1926) (value of coal at mouth of mine); Pittsburgh and W. Va. Gas Co. v. Pentress Gas Co., 84 W. Va. 449, 100 S. E. 296, 7 A. L. R. 901 (1919), Crane's Case on Damages, 291 (accounting in equity; trespasser held chargeable with proceeds of oil, with interest with no deduction for cost of producing and marketing but with allowance for royalty paid which plaintiff would have had to pay). Where the defendant's willful wrong consists not in taking, but in rendering unminable, the ore or coal under plaintiff's land, the same measure is not applied. New Coronado Coal Co. v. Jasper, 144 Ark. 53, 222 S. W. 22(10) (1920) (profits, here certainly ascertainable, which plaintiff would have derived from the coal rendered unminable); Pan Coal Co. v. Garland Pocahontas Coal Co.,

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Classifying trespassers as "innocent" and "willful" is easy, but actually distinguishing the sheep from the goat is not so easy. The trespasser has the burden of producing evidence of his good-faith. An honest mistake as to the boundary line, or a reasonable belief that an agent, in fact unauthorized, has power to permit the entry, and even an honest mistake as to the legal consequences of known facts, when such mistake is induced by the advice of reputable counsel, may support the claim of innocence. Of course, if the conduct of the owner appears acquiescent, this may help to absolve the trespasser of willfulness. Moreover, while it has been held that if the trespasser knows the facts upon which the true owner's rights are based, his mistaken belief that his own title is superior in law does not constitute "good faith", results reached in other cases

97 W. Va. 368, 125 S. E. 226(11) (1924) (value in place, plus punitive damages if malicious).

One who enters in good faith and begins mining operations, but holds over after he learns that his title is invalid, becomes then a willful trespasser, and should ordinarily be refused reimbursement for the cost of his operations after notice, but it is held in Oklahoma that in the case of oil and gas a different result should be reached, if the situation is such that if the trespasser closes down the well, the oil may be drained away or the well ruined by salt water. *Barnes v. Winona Oil Co.*, 83 Okla. 255, 200 Pac. 985, 23 A. L. R. 189 (1921), Bauer's Cases on Damages (2d ed.) 575.

*Liberty Bell Gold Mining Co. v. Smuggler-Union Mining Co.*, 122 C. C. A. 113, 203 Fed. 795 (1913); *Central Coal & Coke Co. v. Penny*, 97 C. C. A. 600, 173 Fed. 340 (1929); *Elkhorn-Hogard Coal Co. v. Kentucky River Coal Co.*, 20 Fed. (2d) 67(9) (C. C. A., Ky., 1927). But it has been held that the trespasser is not required to plead his good faith.


See, for example, *Bennett Jellico Coal Co. v. East Jellico Coal Co.*, 152 Ky. 338, 154 S. W. 922 (1913).

*Pan Coal Co. v. Garland Pocahontas Coal Co.*, 97 W. Va. 368, 125 S. E. 226(10) (1924) (question of mine superintendent's authority to make agreement allowing another mining company to take coal).

*United States v. Homestake Mining Co.*, 54 C. C. A. 303, 117 Fed. 481, 488 (1902) (timber cut by mining company from forest preserve under the coal agreement made by company's counsel with Secretary of Interior, which agreement was not authorized by law); *United States v. Midway Northern Oil Co.*, 232 Fed. 619 (Dist. Ct., Calif., 1916) (wells drilled and oil taken, on public lands, under mistaken advice of counsel that president's order withdrawing lands from entry was invalid).

See *Rock v. Belmar Contracting Co.*, 252 N. Y. S. 463(3) (Trial term, Sup. Ct., 1930) (owner of land knowing of road contractor's quarrying operations on his land without authority and failing to protest, precluded from enhanced damages).

*Pittsburgh and West Virginia Gas Co. v. Pentress Gas Co.*, 84 W. Va. 449, 100 S. E. 296, 7 A. L. R. 901 (1919), Crane's Cases on Dam-
suggest that this statement is too broad and that the question of "good faith" as opposed to "willful defiance", may hinge upon the activity, or lack of activity of the owner in asserting his claim. The facts and legal implications upon which a mining or timber claim is based may be exceedingly complex, and the final outcome of litigation may be actually unpredictable. Good faith in going ahead with production in the face of a known adverse claim, under such circumstances, is a question of degree upon which in jury cases the jury must pass.

The seemingly harsh treatment of those who appropriate the product of the land of others, may be justified as an attempt to so increase the risk of such conduct as to make it unprofitable, a result which might not follow if the only liability were for the market value of the thing appropriated with interest. This reason may go so far as to justify the practice of those few ages, 291 (senior oil leases of indefinite term were claimed invalid by fee-owners, who made junior leases; junior lessees sued for injunction against drilling by senior lessees, and this injunction was granted by trial court; pending appeal, junior lessees drilled and took oil; later, the decree was reversed and senior leases declared valid; held, on accounting in equity, that the junior lessees though honestly believing in the validity of their leases were "willful" trespassers, accountable for proceeds of oil, without deduction).

See Pan Coal Co. v. Garland Pocahontas Co., 97 W. Va. 368, 125 S. E. 226, 231 (1924), in which the doctrine of the Pittsburgh and West Virginia Gas Co. case, supra, n. 59, is questioned.

See Kahle v. Crown Oil Co., 180 Ind. 131, 100 N. E. 681 (1913) (defendant drilled wells and produced oil under a junior lease, which he took relying on a decree which canceled prior lease, and not knowing that an appeal could be taken; the decree was reversed, but he was held to be an "innocent" trespasser; compare with result in Pittsburgh and West Virginia Coal Co. case, supra, n. 59, in which the trespasser knew, at the time of drilling that the adverse claims would be strenuously contested to the last; United States v. Midway Northern Oil Co., 232 Fed. 613, 632 (Dist. Ct., Calif., 1916) ("The government agents and officers charged with the disposition of the public lands knew of the possession and development of the properties, and made no objection thereto, and while this does not estop the government from now asserting title or right to the possession (Pine River Logging Co. v. U. S., 186 U. S. 279, 22 Sup. Ct. 920, 46 L. Ed. 1164), it should not be overlooked by a court of equity in considering the character of the defendants' possession, or the damages which they should be required to pay." Cf. Williamson v. Chicago Mill and Lumber Corp., 59 Fed. (2d) 918 (6) (C. C. A., Ark., 1932) (corporation cutting and removing timber, after warning, and with knowledge that suit had been brought against it to quiet title, held "willful" trespasser despite belief that it had title).


Pan Coal Co. v. Garland Pocahontas Co., 97 W. Va., 368, 125 S. E. 226(10) (1924).
courts who hold even the appropriator who has been able to secure a finding that he was innocently mistaken in crossing over the boundary-line, for the value of timber immediately after cutting, or coal at the pit-mouth, with no deduction for cutting or mining, since this small added hazard may discourage those on the border-line of good faith from taking a chance. This policy finds expression also in the application here of the practice of awarding exemplary damages for willful wrongs, and even more pointedly in statutes, common in the timber and coal states, by which one who in bad faith removes trees or minerals from another’s land becomes liable for double or treble damages or other penalties.

2. DISTINCTION BETWEEN COMPLETED AND CONTINUING INVASIONS OF THE LANDOWNER’S INTERESTS: THE "PERMANENT NUISANCE" DOCTRINE.

We have seen that for direct invasions of land, called trespasses, which have been completed in the past, damages are recovered once and for all, and are usually measured by the loss

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44 See n. 44, supra.
45 See Alabama and Illinois cases, n. 48, supra.
46 Examples are Gowan v. Wisconsin-Alabama Lumber Co., 215 Ala. 231, 110 So. 31(6) (1926) (cutting timber); Barton Coal Co. v. Cox, 39 Md. 1, 30, 17 Am. Rep. 525 (1873) (mining coal); Baxley v. Barnwell Lumber Co., 113 S. C. 109, 101 S. E. 646 (1919) (cutting timber valuable for plantation). But it will be found that exemplary damages are actually very rarely awarded for taking minerals or timber in cases where the defendant is held liable for the enhanced value of the product. Would this be double punishment?
47 Such statutes exist in Arkansas (Crawford and Moses’ Dig., Sec. 10320) (timber); California (Code Civ. Prac., Sec. 733) (timber); Michigan (Comp. L., 1929, Sec. 15124) (timber, ore, plants, etc.); Minnesota (Gen. Stats. 1923, Sec. 9396) (timber and other products of soil); Missouri (Rev. Stats. 1929, Sec. 3281) (timber, minerals, plants, etc.); Oklahoma (Gen. L., 1921, Sec. 6007) (timber); Oregon (Code, 1930, Sec. 5-308) (timber); Pennsylvania (Stats., 1920, Sec. 11238, Sec. 15605, timber, minerals, etc.); Vermont (Gen. L., 1917, Sec. 6956); Washington (Rem. Code, 1925, Sec. 338) (timber). The foregoing list is not exhaustive; see Dec. and Curr. Dig., Trespass, Secs. 60, 61.
48 It has been held that a claim for treble damages under a state statute, for cutting timber, being penal, is not enforceable in a suit in equity in the Federal Court. Williamson v. Chicago Mill and Lumber Corp., 59 Fed. (2d) 918(14) (C. C. A. Ark., 1932).
49 Examples are Alabama (Code, 1923, Sec. 10371); Mississippi (Hem. Code, Sec. 3246); New Hampshire (Pub. St., 1901, C. 244); and New Jersey (4 Comp. St., 1910, p. 5396, Sec. 1), all relating to cutting timber. Decisions under these statutes are collected in Dec. and Curr. Dig., Trespass, Sec. 63.
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in the value of the land for sale or use; or the loss of the value of any products, such as timber, coal, or oil, taken or destroyed. The same practice obtains, of course, if the land has been injured by some less direct disturbance of the physical situation, as when fumes or cement dust, or seepages of oil, have come upon the land, or sewage has been deposited upon it, or floods of water have been diverted over it. For any such invasion, if a cause of action arises, all injury, past and prospective, may be recovered once and for all by the owner. Indeed,

See next previous section.

"Indiana Pipe Line Co. v. Christensen, 188 Ind. 400, 123 N. E. 789(3) (1919) (injury to land from oil which escaped from pipe line; held, plaintiff would be entitled to recover all future damage from past leakage, but not sufficient evidence of lasting injury to soil to justify award of diminution in value of land; illuminating opinion by Lairy, C. J.); Chicago, K. & W. R. Co., 45 Kan. 110, 25 Pac. 576 (1891) (excavation on plaintiff's land by defendant; instruction allowing diminution in market value of land, approved); Rockland Water Co. v. Tillson, 69 Me. 255 (1879) (injury to easement for carrying water across land, by undermining pipe; plaintiff recovers not merely past cost of repairs, but all prospective damage therefrom); Conlon v. McGraw, 66 Mich. 194, 33 N. W. 388(1) (1887) (action for destruction of wall: plaintiff not limited to damage accruing before action, but recovers prospective loss of profits to end of term). Cf. California Orange Co. v. Riverside Portland Cement Co., 50 Calif. App. 522, 195 Pac. 694 (1920) (damage to orange grove, due to deposit of cement dust on trees; not confined to loss in crops before suit, but can recover for later loss due to lasting effect of original deposit); Greene v. Gertz, 36 R. L. 105, 89 Atl. 16(3) (1913) (for past flooding of plaintiff's land, he can recover for damages accruing after the action was brought).

Similarly, it would seem that if the defendant encroaches upon plaintiff's land by building over the line, or piling dirt, rocks or refuse upon it, he should be liable for a single recovery of all damages, as for a completed wrong, since he is not privileged to enter upon the land to remove the object and hence his wrong is not continuing. Finley v. Hershey, 41 La. 388 (1875) (filling up plaintiff's pond); Ziebarth v. Yng, 42 Minn. 541, 44 N. W. 1027 (1890) (embankment built on plaintiff's land); Blankenship v. Kansas Explorations, Inc., 325 Mo. 998, 30 S. W. (2d) 471(4) (1930) (filling up plaintiff's mill pond by sludge from defendant's mine; plaintiff can recover depreciation in value of his land, provided cost of removal is shown to be greater than amount of depreciation in value of his land; Cherry v. Lake Drummond Canal Co., 140 N. C. 422, 53 S. E. 133, 111 Am. St. Rep. 350 (1906) (deposit of sand and mud). See Kafka v. Bocia, 191 Cal. 746, 218 Pac. 753, 29 A. L. R. 533 (1920) with annotation. But in England and some of the states successive actions for the mere loss of use, or of rental value, up to the time of suit are allowed, for such encroachments. Holmes v. Wilson, 10 A. and E. 503, 113 Eng. Reprint 190 (1839); Milton v. Puffer, 207 Mass. 416, 93 N. E. 634 (1911). And in some states a single recovery for the depreciation in value, or cost of removal has been denied. McGann v. Hamilton,
it is clear that the allowance of damages measured by the depreciation in the value of the land is itself a form of compensation for future harm. It is based on the assumption that the injurious change in the condition of the land, will diminish its availability for sale or use in the future.

Very frequently, however, the landowner becomes the victim of a situation in which his land is subjected not to one invasion merely, but to a succession of disturbances or invasions. His neighbor may repeatedly drive cattle across his land, or the neighbor may carry on blasting in a mine or quarry, or may have erected a dam or embankment which brings successive seasonal floods over the land, or he may be operating a calc-chute, a smelter, a packing-house, or a sewage-disposal plant, so that from day to day the land is invaded by dust, fumes, odors, or vibrations to such an extent as to be actionable as a nuisance. For such repeated trespasses and continuing nuisances, under the traditional common-law view, successive causes of action arise with each invasion or disturbance of the land, and damages could be given only for those causes of action which had arisen before the commencement of the action. While the plaintiff could include in his complaint all of the invasions which had occurred before he brought suit, and could recover all damages, past and prospective, for those invasions, he could recover nothing for any invasions or disturbances of the land after the institution of suit and before trial, and nothing for

58 Conn. 69, 19 Atl. 376 (1890) (wall); Stowers v. Gilbert, 156 N. Y. 600, 51 N. E. 282 (1898) (wall); Lyons v. Fairmont Real Estate Co., 71 W. Va. 754, 77 S. E. 525 (1913) (large stone fill). See Dec. and Curr. Dig., Trespass, Sec. 60; 3 Sedgwick, Damages, 924a (9th ed., 1920); 63 C. J. 1051, Sec. 253.

*Batishill v. Reed, 18 C. B. 696, 139 Eng. Reprint, 1544 (1856) (action by reversioner against neighboring owner who had built overhanging eaves; held, plaintiff cannot recover diminution in value of his property; repeated actions for continuance of nuisance allowable); Uline v. N. Y. Central and H. R. R. Co., 101 N. Y. 98, 4 N. E. 536, 54 Am. Rep. 661 (1886) (injury to abutting property by construction of railway in street; permanent damages not recoverable, but successive actions may be brought for past damage; reviewing decisions); Bartlett v. Grasselli Chem. Co., 92 W. Va. 445, 115 S. E. 451, 27 A. L. R. 54 (1922) (action for damages for nuisance created by operation of smelting furnace; held, even where both parties acquiesce, the court may not award damages as for a permanent nuisance, but only for the past impairment of the enjoyment of the land); 1 Sedgwick, Damages, Sec. 91-95 (9th ed., 1920); Dec. and Curr. Dig., Nuisance, Sec. 50 (3) (4).

*See n. 70, supra.

*This is well illustrated by N. K. Fairbank Co. v. Bahre, 213 Ill.
the diminution in the value of his land due to the prospect that it would be subjected to the continuance of the trespasses or the nuisance in the future. It was thought that it would be unfair to assess compensation upon the assumption that the offending conduct would continue indefinitely since the defendant might in fact cease from inflicting further harm.

The result of this rule is that the plaintiff is forced to bring successive actions for the past invasions; unless he can secure an abatement of the nuisance, or an injunction. The principal elements of damages in such actions are, in cases of nuisance, the inconvenience and the physical discomfort and injury to health suffered by the plaintiff, if he is the occupant, and his family and the diminution in the rental value of 636, 73 N. E. 322(3) (1905). In that case the defendant had deposited a large amount of soap stock upon its premises adjoining those of the plaintiff, who thereafter brought an action as for a nuisance, and alleged that the odors emanating therefrom polluted the air and injured the health of the occupants. The trial court admitted evidence of the pollution of the air, after the commencement of the action, and this was held to be erroneous. The court properly distinguished the case of Chicago & N. W. R. Co. v. Hoag, 90 Ill. 339 (1878), in which, before action, the defendant flooded the plaintiff's premises with waste water which froze, and it was held that the plaintiff could recover for inconvenience due to the fact that the ice melted after the suit was brought, and made the premises muddy. In one case the invasion of the plaintiff's premises by odors after the suit was excluded. In the other, the consequences of an invasion by water before suit, were admitted. However, if the claim for past damage arises in equity (which gives complete relief in suits for injunction by giving compensation) the award will cover all injury sustained down to the time of trial. Gerow v. Village of Liberty, 106 App. Div. 357, 94 N. Y. S. 949(1) (1905). And in some states, even in actions for damages alone, the sensible and practicable chancery rule is followed. Webb v. Virginia-Carolina Chem. Co., 170 N. C. 662, 87 S. E. 633 (1916); Comminge v. Stevenson, 76 Tex. 42, 13 S. W. 556 (1890). In England, the same result is reached under a rule of court. Hole v. Charlestown Union (1884), 1 Ch. 293. Cases are collected in Dec. and Curr. Dig., Nuisance, Sec. 50(3).

See n. 71, supra.

See Dec. and Curr. Dig., Nuisance, Sec. 50(1); 3 Sedgwick, Damages, Sec. 948 (9th ed., 1920).

Central Georgia Power Co. 1. Pope, 141 Ga. 186, 80 S. E. 642, L. R. A. 1916D, 358 (annoyance and discomfort from stagnant water in neighboring land); Chicago-Virden Coal Co. v. Wilson, 67 Ill. App. 443 (1896) (where occupant of home sues for nuisance from railway smoke, etc., not limited to loss of rental value, but may recover for discomfort); McCracken v. Swift & Co., 265 S. W. 91 (Mo., 1924) (odors from poultry yard; plaintiff occupant of neighboring apartment, not limited to loss in rental value but may recover for impairment of the enjoyment of the home by the family).

It is customary when suit is brought by the head of the household for the plaintiff to allege generally the discomfort to himself and the members of his family, and for this to be submitted generally as an
the land or the impairment of its enjoyment during the period for which the nuisance has endured up to the time the action was brought, or the actual loss of crops or other products of the land or income from an established business conducted

element of damages. See Daniel v. Ft. Worth & R. G. Ry. Co., 96 Tex. 327, 72 S. W. 578 (1903); 46 C. J. 827, Sec. 501. This is practical, and avoids a multiplicity of trivial claims by the members of the family. But in case of actual injury to the health of a member of the family, such person should sue, and the head of the house would have only the parent’s or husband’s right as in other cases of personal injury to recover for expenses incurred and loss of services. U. S. Smelting Co. v. Sisam, 112 C. C. A. 37, 191 Fed. 293, 37 L. R. A. N. S. 975 (1911) (husband may recover for discomfort of wife and for the consequences to himself of his wife’s sickness, due to fumes from smelter, and this despite code provisions enlisting the wife to recover for her own personal injuries); Millett v. Minnesota Crushed Stone Co., 145 Minn. 475, 177 N. W. 641, 179 N. W. 682 (1920) (dictum: wife owning home may recover not only for diminished value of its use, but also for discomfort of herself and for the discomfort and illness of the other members of family, so far as they affect her). The limitation upon the rule which allows the head of the family to recover for the discomfort of its members, implied by the last two cases, to the effect that he can recover only for the consequences to himself of such discomfort, is impractical and over-refined.

While the same condition which inflicts personal discomfort upon the owner-occupant and his family, also diminishes the rental value of the land, or lessens the value of its use and enjoyment, yet recovery for lessened rental value or diminished value of use, does not preclude recovery for personal discomfort. Millett v. Minnesota Crushed Stone Co., supra, and numerous cases cited therein. In Kentucky, however, this is considered a double recovery, and proof of discomfort is allowed, but only as evidence of loss of rental value or impairment of enjoyment.

Compensation for mental anguish in nuisance cases, except so far as this might be an accompaniment of the plaintiff’s own physical injury or sickness, is denied. City of Richmond v. Wright, 151 Va. 964 145 S. E. 732 (1928) (flooded residence, due to insufficient culvert), comment, 15 Va. L. Rev. 714; Brookside Pratt Mtn. Co., 196 Ala. 110, 72 So. 18 (1916) (flowage: anxiety over illness of children). A willful or wanton trespass to land may be ground for recovery for mental suffering, however. M. J. Rose Co. v. Lowery, 33 Ohio App. 163 N. E. 716 (1929); and see Quillen v. Schimpf, 133 Ore. 531, 291 Pac. 1009 (1930); comment, 16 Va. L. Rev. 276.

"The measure is loss of rental value if the land is rented or for rent, and the diminution of the value of the use, if occupied by the owner. Cumberland Torpedo Co. v. Gaines, 201 Ky. 58, 255 S. W. 1049 (1923); see Dec. and Curr. Dig., Nuisance, Sec. 50 (1) (2).


there, when suit is brought by the occupant. In addition, the plaintiff may recover any reasonable expenses which he has in-
curred on account of the nuisance, or which are necessary to be in-
curred, to prevent, reduce, or abate the nuisance. This form
of relief, by successive actions for invasions occurring before
suit, has been supplemented through the invention by American
courts of the conception of a “permanent” nuisance, for which
a single action may be brought for the entire damages which
the plaintiff will suffer in future from the harmful structure or
enterprise.

This doctrine seems to trace its origin to the case of The
Town of Troy v. The Cheshire Rail Road Company, decided
in New Hampshire in 1851. This was an action by the town
which was charged with the duty of maintaining the highway,
for its obstruction by the company through building the railroad
across it. It was held that the town was entitled to recover any
reasonable expenses necessary to be incurred to render the high-
way passable, or to lay out a new one, if the old one had been
rendered unusable, and that such recovery was allowable even
though no money had actually been spent therefor. Overruling
the defendant’s contention that this would violate the rule that
damages must be limited to claims arising before the action was
brought, the court said:

“Wherever the nuisance is of such a character, that its continuance

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Cases on the damage problems centering around the “permanent
nuisance” doctrine are collected in Dec. and Curr. Dig., Nuisance,

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 (not) 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. . . . The railroad is, in its nature and design, and use, a permanent structure, which cannot be assumed to be liable to change; the appropriation of the roadway and materials to the use of the railroad, is therefore a permanent appropriation; the use of the land set apart to be used as a highway, by the railroad company for the use of their track, is a permanent diversion of that property, to that new use, and a permanent dispossession of the town of it, as the place on which to maintain the highway. The injury done to the town is then a permanent injury, at once done by the construction of the railroad, which is dependent upon no contingency, of which the law can take notice, and for the injury thus done to them, they are entitled to recover at once their reasonable damages.”

These phrases have often been quoted in later decisions, which have greatly extended the notion of a “permanent” nuisance. This first case, it will be noted, was closely analogous to the actions for erecting a structure on another’s land, which is a trespass and for which entire damages can be given on the ground that it is a completed wrong. The holding was speedily and widely applied to cases of railway embankments causing overflows upon neighboring land, and to other dams and embankments which caused the flooding of near-by land. The doctrine found ready acceptance in all these cases since they are situations in which the harm results from the original construction, without any further activity by the defendant, and since, in most instances the dams and embankments are constructed by railroads or cities as public or semi-public work which usually last a long time.

Eventually, however, the doctrine was extended to situations where the nuisance is not a mere passive structure like a dam or embankment, but where the harm flows from the defendant’s active operation of some factory, plant, or establishment. Here

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65 23 N. H., at pp. 102, 103, 104.
66 See n. 70, supra.
67 An example is Stodghill v. Chicago, B. & Q. R. Co., 53 Ia. 341, 5 N. W. 495 (1888), Crane’s Cases on Damages, 343. See also Payne v. Lanham, 198 Ky. 564, 249 S. W. 995 (1923), and comment thereon in 8 Minn. L. Rev. 259.
again the offending enterprises are frequently public or semi-
public in character, as in cases of injuries inflicted upon neigh-
bors by the noise and smoke from the operation of railway coal-
chutes, or by the odors or the stream-pollution caused by
municipal sewage-disposal plants. Some courts have gone even
further, however, and have allowed recovery of entire damages.
for a "permanent" nuisance, even in cases where the nuisance
is incident to the operation of a private business not vested with
the power of eminent domain, such as an ice-factory, a cement-
plant, or an establishment for the manufacture of explosives.
Moreover, the use of the doctrine is not limited to cases of nui-
sances strictly, but is generally applied with equal facility to
cases of obstruction of easements, or of violation of landowners' rights in streams and waters.

In considering the question of when prospective damages
as for a permanent nuisance will be allowed, it will be useful to
mention some of the possible situations:

(1) The defendant may have acquired the lawful power
to maintain the injurious structure, or establishment, by eminent
domain proceedings.

(2) The defendant may be authorized by statute to ac-
quire this right, by eminent domain proceedings, but may have
neglected to do so.

(3) The injury may be caused by the negligent or unlawful construction or operation of a public or semi-public enter-
prise such as a defective city sewer-system, or a railway embank-
ment with insufficient culverts.

(4) The injurious structure or operation may not be pro-
tected by the power of eminent domain, and yet it may be such
that a court of equity would refuse to enjoin its continuance.

88 Missouri Pac. R. Co. v. Davis, 186 Ark. 401, 53 S. W. (2d) 851
(1932), and see comment thereon by H. Horrow in 27 Ill. L. Rev. 953.
89 Conestee Mills v. City of Greenville, 160 S. C. 10, 158 S. E. 113
(1931); and see City of Harrisonville v. Dickson Clay Mfg. Co., 289
90 Southern Ice & Utilities Co. v. Bryan, 53 S. W. (2d) 920 (Ark.,
1933).
91 Hardin v. Olympic Portland Cement Co., 69 Wash. 320, 154 Pac.
450 (1916).
92 International Shoe Co. v. Gibbs, 183 Ark. 539, 36 S. W. (2d) 960
(1931) (pollution of stream by septic tank); Rider v. York Haven
Water & Power Co., 251 Pa. 18, 35 Atl. 303 (1915) (diversion of water)
on the grounds that such injunction would be against the public interest.

(5) The injury may be caused by a passive structure, not connected with any public enterprise but relatively permanent in physical character.

(6) The injury may proceed from the active operation of some factory or establishment, not “affected with a public interest”, but substantial and apparently “permanent”, such as a shoe-factory, or a textile-mill.

(7) The injury may emanate from a relatively flimsy structure or a seemingly transient enterprise.

In respect to their willingness to allow damages as for a “permanent nuisance”, the courts may be roughly classified into these groups:

(a) Those which consistently refuse to give prospective damages based on the assumption that an injurious condition in the nature of a nuisance or continuing trespass will continue in future. Under this view, even if the enterprise is a public one, damages for future, anticipated injury may be collected, if at all, only by proceedings authorized under the eminent domain statutes; or occasionally entire, prospective damages may be given in equity, in lieu of an injunction. England,93 New York,94 Massachusetts,95 and California,96 are included in this group.

93 Battishill v. Reed, 18 C. B. 696, 139 Eng. Reprint 1544 (1856), expresses the traditional view that prospective damages will not be given for a nuisance. But in suits for injunction, the court is empowered even in case of a private enterprise constituting a nuisance, to give prospective damages in lieu of an injunction, and thus in effect to license the continuance of the nuisance. Leeds Industrial Co-Operative Soc. v. Slack, (1924) A. C. 851 (H. L.) (under Lord Cairns Act, 21 and 22 Vict. C. 27, S. 2).

94 Damages for prospective injury were held not to be recoverable in Ulune v. N. Y. C. & H. R. R. Co., 101 N. Y. 109, 4 N. E. 536, 54 Am. Rep. 661 (1888) (alleged improper construction of railway embankment in street); Reed v. State, 108 N. Y. 407, 15 N. E. 735 (1888) (dam improperly constructed, causing recurrent flooding of plaintiff’s land). But in the elevated railroad cases, where abutting owners sued for injunction, the defendant was allowed to pay permanent damages instead, on the ground that it could acquire the right to build and operate its structure, by eminent domain proceedings. Poppenheim v. Metropolitan Elevated R. Co., 128 N. Y. 436, 23 N. E. 516 (1891).

95 Oldworth v. City of Lynn, 153 Mass. 53, 26 N. E. 229, 10 L. R. A. 210, 34 Am. St. R. 92 (1891) (in action for improper construction of city reservoir and dam, recurrently flooding plaintiff’s adjoining land,
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(b) Those which allow prospective damages as for a permanent nuisance, in all cases in which the defendant's injurious structure, or plant, or injurious method of construction or operation, is not subject to be abated or enjoined, because authorized by eminent domain statutes. Among these are Illinois, and North Carolina, and probably Indiana, Kentucky, South Carolina, Tennessee and Oklahoma. However, if the injury is caused by the negligent, unlawful, or improper construction or operation of the enterprise, even though it is a public one, then since this may well be remedied in future, damages for the prospective continuance of the wrong, will not be awarded by this group of courts.

plaintiff cannot recover for prospective flooding; if construction and operation were not improper or negligent plaintiff's only remedy would be by petition, under eminent domain statute.

The privilege which such statutes give, of inflicting substantial and unusual inconvenience upon neighboring occupants of land, can be accorded to public utilities. Bartlett v. Grasselli Chem. Co., 92 W. Va. 445, 115 S. E. 451, 27 A. L. R. 54 (1922). If the neighboring landowner is threatened with special damage by the public improvement or plant, as in cases where his land may be subjected to flooding by a dam, he may be called in, under same eminent domain statutes, to assert his claim for prospective injury in the condemnation proceedings, but if none of his land is actually "taken," he will ordinarily not have such opportunity in those proceedings. These courts, in effect, permit him to come in later, when the dam or other improvement is built, and the injury apparent, to sue for his damage, once and for all. Usually this is permitted also, in cases where, although the defendant has not actually secured specific authority for its enterprise by eminent domain proceedings, the situation and the nature of the enterprise, is such that it could do so, if it were threatened with abatement. Rider v. York Haven Water & Power Co., 251 Pa. 18, 95 Atl. 803 (1915) (erection of dam by water company, which had power of eminent domain but had not taken condemnation proceedings).

(damages from proper operation of railway through city, from smoke and cinders, recoverable once and for all by occupant of adjoining land, at beginning of operation, and subsequent purchaser of adjoining land has no cause of action); Cotello v. Chicago B. & Q. R. Co., 298 Ill. 243, 131 N. E. 591 (1) (1921) (recovery allowed for depreciation in value of adjoining land, from lawful operation of railway coal chute).

Rhodes v. City of Durham, 165 N. C. 679, 81 S. E. 338 (2) (1914) (city sewage system polluting stream; held, either the plaintiff or the defendant may demand that entire damages be awarded, if the enterprise is public and non-abatable). The North Carolina cases are collected in a note by C. P. Rouse, in 7 N. C. L. Rev. 494.

See cases in next two notes.

Ohio & M. R. Co. v. Wachter, 123 Ill. 440, 15 N. E. 279 (2) (1888)-
continuance of the injury is wrongful, precludes this group also from allowing damages for prospective injury against any purely private business establishment. It seems also that in cases of class (4) mentioned above, when the injurious situation is technically a continuing nuisance or trespass, but where a court of equity would decline to enjoin the continuance, on the ground that the harm to the public or the hardship on the defendant from such injunction would outweigh the injury to the plaintiff, then the equity court in the injunction suit should...
asses permanent damages, and a court of law on the same grounds should give damages, once for all.

(c) In addition, there are some courts, chiefly in the midwest and south, which profess to make the allowance of entire damages for a continuing nuisance depend upon the physical "permanence" of the nuisance. This theory, originating in the old case of *The Town of Troy v. The Cheshire Railroad Company*, discussed above, is an extension by the courts to a different situation, often without the realization that it is different, of the orthodox practice of allowing prospective damages for the probable future consequences of a past and completed invasion of the plaintiff's land. Some of these courts, adopting the criterion of physical permanence would probably restrict the doctrine to instances of structures, such as dams or embankments, and would not extend it to nuisances which proceed from active, continuing operations by the defendant.

In discussing physical "permanence," the emphasis is sometimes laid upon the lasting and substantial qualities of the structure, in others upon the "permanence" of the injury.

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204 Of course, if an injunction is granted, only damages for past injuries can be given. *Meek v. De Latour*, 2 Cal. App. 261, 23 Pac. 300(7) (1905). But when a continuing wrong is found but an injunction denied on grounds of public interest or comparative injury, some courts have given a decree for past damages only. *Smith v. Staso Milling Co.*, cited in next previous note. Others have provided for an injunction if the defendant fails to acquire the plaintiff's rights by purchase or eminent domain. *Minto v. Salem Water, Light & Power Co.,* 120 Ore. 202, 250 Pac. 722 (1926). But if the injurious situation will continue indefinitely, the assessment of permanent damages in lieu of an injunction, will often be the most practical solution. *City of Harrisonville v. W. S. Dickey Clay Co.*, cited in next previous note (pollution of stream by city's sewage disposal plant); city unable to finance the purchase of auxiliary plant to correct the situation; decree for injunction and past damages reversed, decree ordered withholding injunction upon payment of the amount of the depreciation in value of plaintiff's land). Compare *Sussex Land and Line Stock Co. v. Midwest Refining Co.*, 294 Fed. 597 (C. C. A., Wyo., 1923), where for pollution of stream by oil wells, decree withheld injunction upon defendant's making periodical payments corresponding with future losses in rental value.

205 See note 84, supra.

206 See notes 69 and 70, supra.


208 *Harvey v. Mason City and Ft. D. R. Co.*, 129 Ia. 465, 105 N. W.
and in others upon the expense of abatement. In either event, the test is a rather vague one, as permanence is of course merely a relative term. The result is a flexible technique which provides the courts with a freer choice between the traditional successional recoveries, and a single recovery once for all, than is furnished by the test of the lawfulness under eminent domain statutes of the defendant's structure or operations. The "permanent nuisance" technique is actually used principally in cases of public works such as railway embankments, and city reservoir dams. It enables the court to settle the matter in one litigation, rather than prolonging the controversy by successive actions, in those cases where the alleged "defect" in construction of the public work or "negligence" in its operation cannot be avoided at reasonable expense. Occasionally, it is even used in cases of substantial private enterprise, such as factories and mills, where the plaintiff has chosen to sue for permanent damages. A jury has little difficulty in determining whether the structure

859, 960 (1906) (merely occasional floodings of neighboring land by insufficient railway culvert not a "permanent injury," and hence successive actions are proper); Jones v. Sanitary Dist., 252 Ill. 591, 97 N. E. 210 (5) (1912) (distinguishing permanent and intermittent flooding and allowing recurrent actions for latter). The cause of action for permanent damages does not arise, nor limitations begin to run, until it becomes "certain and obvious" that injury will result from the structure. Ellerson Floral Co. v. Chesapeake & Ohio R. R. Co., 149 Va. 809, 141 S. E. 834 (1928), and see L. R. A. 1916E, 1050, note.

Chicago, St. Louis & N. O. R. R. Co. v. Bujlock, 222 Ky. 10, 299 S. W. 1085 (1927) (action for flooding farm land, by blocking of railway drain ditches; held, since undisputed evidence showed that the ditches could be altered to prevent recurrence of damage at slight cost, trial judge properly refused to submit to jury the question of their permanence; but it is to be observed that under the Kentucky decisions seemingly only public enterprise having the power of eminent domain can be regarded as "permanent"; see note 101 and 102, supra).

International Shoe Co. v. Gibbs, 183 Ark. 512, 36 S. W. (2d) 961 (1931) (pollution of stream from sewage from septic tank; entire damages allowed, because permanent nuisance; court also relied on defendant's failure to object in trial court); Thackery v. Union Portland Cement Co., 64 Utah 437, 231 Pac. 813 (1924) (continuing nuisance from dust and smoke, not barred by limitations calculated from establishment of plant; but no error in submitting issue of permanent damages in absence of objection by defendant); Virginia Hot Springs Co. v. McCray, 106 Va. 461, 55 S. E. 216, 220, 10 L. R. A. N. S. 465, 10 Ann. C. 179 (1907) (pollution of stream by sewage system of large hotel; held, cause of action is for permanent damages and dates from beginning of pollution, and is barred; nuisance may be "permanent," though not protected by eminent domain); Haan v. Heath, 161 Wash. 128, 296 Pac. 815(4) (1931) (permanent damages for nuisance committed by undertaking establishment).
or injury was "permanent", but the injured landowner should not be required to decide at his peril whether the judge and jury will regard the situation as a "permanent" one.

The best solution and one which has been several times advocated by judges and textwriters, but which as yet has only been haltingly experimented with by the courts, is to make the recovery of entire, prospective damages a matter of the plaintiff's election. It should be elective in the sense that successive

33 See Strange v. Cleveland, C. C. & St. L. R. Co., 245 Ill. 246, 252, 91 N. E. 1036 (1910). This was a case of damage to land from overflows caused by a railway embankment with insufficient culverts. The defendant claimed that the defect was abatable and hence temporary, and that it was error to award permanent damages. In rejecting this contention the court said: "The apparent inconsistency in the decisions in cases of this character, we think, grows out of the fact that in some of the cases no recovery was sought for a permanent injury but the structure was treated by the landowner as temporary. It may well be that he may have an election to treat the structure as permanent or temporary under certain circumstances. The rule is well stated in Sutherland on Damages (Sec. 1046), as follows: 'The apparent discrepancy in the American cases on this subject may, perhaps, be reduced by supposing that where the nuisance consists of a structure of a permanent nature and intended by the defendant to be so, or of a use or invasion of the plaintiff's property or a deprivation of some benefit appurtenant to it for an indefinitely long period in the future, the injured party has an option to complain of it as a permanent injury and recover damages for the whole time, estimating its duration according to the defendant's purpose in creating or continuing it, or to treat it as a temporary wrong, to be compensated for while it continues—that is, until the act complained of becomes rightful by grant, condemnation of property or ceases by abatement.'"

In Ottumwa v. Nicholson, 161 Ia. 473, 143 N. W. 439, L. R. A. 1916E, 983, the plaintiff sued for injury to her property resulting from an insufficient culvert under the street which caused stagnant water to collect. Permanent damages were assessed in the trial court. On appeal the city contended that since the culvert was established before the plaintiff purchased her property, and the claim for permanent damages accrued then, she should not have recovered. Answering this contention, the court said: "From the foregoing we deduce the rule that if the condition wrongfully created is of a lasting character and permanent, and damage results therefrom that is, the value of the plaintiff's land is affected thereby, though all the damage has not yet made itself manifest, the landowner may elect to treat it as original injury and recover damages, not only for the injury then caused in the depreciation of the value of his land, but for all injury that appears reasonably certain to result in the future as a proximate result of the erection and continuance of the nuisance, and where he elects so to treat the wrong, and a judgment is obtained in an action tried upon that basis, such judgment will be a bar to any further claim on his part for any further damages that may arise by reason of the continuance of the nuisance, but he is not required to so elect, for it is not always possible to anticipate and know what damages may result from the erection and continuance of the nuisance." See also Risher v. Aceen Coal Co., 147 Ia. 459, 124 N. W. 764(2) (1910) where permanent

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actions for past injury would be regarded as the normal remedy, and only on the plaintiff’s manifesting his election by claiming them, would the cause of action for entire damages arise. The doctrine that if the continuing nuisance is “permanent”, the plaintiff has only a single cause of action for entire damages is pregnant with chances of injustice. If, for example, the plaintiff makes a mistake and sues for past injuries alone, thinking the nuisance a temporary one, and recovers a judgment for a small amount for past injuries, he would be barred from any further action if the court in a later suit should determine that the nuisance was a “permanent” one. Moreover, under that doctrine, only the person who owned the injured land when the permanent nuisance was established, can sue, and not a purchaser of the land. Again, if the single action for entire damages is the only remedy for a “permanent” nuisance, the plaintiff, who ought certainly to be given a continuing possibility of redress against a continuing wrong, finds himself blocked by

damages were allowed for maintenance of a large coal-pile, and it was suggested that the plaintiff might elect to treat it as permanent or continuing; and see Thompson v. Illinois Central R. Co., 191 Ia. 35, 179 N. W. 191, 196 (1920); 6 Iowa L. Bull. 181.

It was intimated that the plaintiff had a similar election, in Kafka v. Bosio, 191 Cal. 746, 218 Pac. 753, 756, 29 A. L. R. 833 (1923), which was a case of an overhanging wall, treated as a continuing nuisance, and a similar suggestion appears in Hockaday v. Wortham, 22 Tex. Clv. App. 419, 54 S. W. 1094 (1900), which was an action for maintenance of a cattle barn as a nuisance. See also, City of Texarkana v. Ryane, 56 S. W. (2d) 283 (1932).


In this way the plaintiff could have the benefit of settling the grievance in one suit, without incurring the danger of being “cut off by limitations on the theory that the cause of action arose when the continuing nuisance was first established. See Thackery v. Union Portland Cement Co., supra, n. 110, and 37 Harv. 598, et seq.

See Stodghill v. Chicago & Q. R. Co., 53 Ia. 341, 5 N. W. 495 (1880), Crane’s Cases on Damages, 343.

Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 8 N. E. 460, 59 Am. St. R. 341 (1884). Likewise, if the land in which a “permanent” nuisance is established, is sold to a purchaser who continues to maintain it, he is not liable. Byrne v. Monongahela West Penn. Pub. Service Co., 106 W. Va. 594, 146 S. E. 522 (1929).
a plea of limitations based on the claim that the only cause of action arose when the nuisance was first established.\textsuperscript{115} The drastic consequences of the assumption that the plaintiff’s right is from the very beginning, either a single recovery of all damage, or successive actions for damage as it occurs, with no choice, has led these courts, it seems, to drift toward making the remedies elective in fact if not in theory, by interpreting the particular situation in each case, as a “permanent” or a “transient” nuisance according to the manner in which the plaintiff has pleaded it, whenever the evidence makes this acquiescence at all possible. A more flexible practice in respect to the choice between a single recovery and successive actions for continuing wrong should be instituted in the various states, by statute or rule of court.\textsuperscript{116}

If entire damages as for a permanent nuisance are given, this precludes the plaintiff from claiming damages for the further continuance of the injury, and thus confers a privilege or easement upon the defendant.\textsuperscript{117} When compensation once for all for this future continuance of the injury is given, it is measured by the depreciation in the value of the land,\textsuperscript{118} or, as

\textsuperscript{115} Examples are Missouri Pac. Co. v. Davis, 186 Ark. 401, 53 S. W. (2d) 551 (1932) (operation of railway coal chute); Schlosser v. Sanitary Dist., 299 Ill. 77, 132 N. E. 291 (1921) (drainage canal); McDaniel v. City of Cherryvale, 91 Kan. 40, 136 Pac. 899 (1913) (discharge of sewage), see criticism, 2 Calif. L. Rev. 248.

\textsuperscript{116} The writer would suggest a statute or rule along these lines: In cases in the nature of trespass or nuisance, the normal measure of recovery shall be for past damages, but the complaint shall state whether or not the situation is a continuing one, and if so, the plaintiff may elect to claim entire damages for past and prospective invasions and injuries, which shall be allowed, and if the court finds that the injury will continue indefinitely, then the prospective damages shall include the depreciation in the value of the plaintiff’s land. In cases where the defendant’s structure or operations are protected by the power of eminent domain, or where a court of equity would decline an injunction on grounds of public convenience, the plaintiff’s choice shall not be conclusive, but the defendant, in showing these facts, may elect to pay entire damages, though the plaintiff has claimed past damages only; or if the plaintiff has claimed entire damages, the defendant may elect to pay past damages only, upon giving a sufficient bond or undertaking to remedy the injurious situation.

\textsuperscript{117} Thompson v. Illinois Central R. Co., 191 Ia. 35, 179 N. W. 191 (1920) (railway embankment); Payne v. Bevel, 99 Okla. 106, 225 Pac. 691 (1923) (same).

it would seem, by the reasonable cost of protecting the land from future injury, if that is less. In addition the past injuries, such as loss of crops\textsuperscript{110} or loss of rentals and the personal discomforts, ill-health and inconvenience of the plaintiff and his family,\textsuperscript{120} before the time as of which the depreciation is measured, or as of which the nuisance is recognized as becoming "permanent," must be paid for. The important problem of choosing the time that shall be taken for measuring the depreciation of the plaintiff's land and thus for licensing the further continuance of the injury, has not received the consideration it deserves. Frequently, it is assumed that the valuation shall be made as of the time when the permanent structure was completed,\textsuperscript{121} but more often, as of the time when the first physical invasion of the plaintiff's rights in land, air, or water, occurred,\textsuperscript{122} and occasionally, as of the time when the certainty of such invasions became apparent\textsuperscript{123} or even as of the time of the trial.\textsuperscript{124}

\textsuperscript{110}City of Amarillo v. Ware, 120 Tex. 456, 40 S. W. (2d) 57(11) (1931) (city system of storm sewers, causing recurrent overflows; plaintiff can recover depreciation in the land as of the time of the "injury," and the value of the crop then growing). But no recovery can be had, in addition to depreciation, for loss of crops or rentals accruing after the permanent injury began. Lone Star Gas Co. v. Hutton, 58 S. W. (2d) 19 (Tex. Com. App., 1933).

\textsuperscript{120}Daniel v. Ft. Worth & R. G. R. Co., 96 Tex. 327, 72 S. W. 578 (1903) (railway coal-chute); Texas & P. R. Co. v. Reeves, 256 S. W. 302 (Tex. Com. App., 1923) (round-house). But in cases where the location and character of the structure inflicting the injury are as required by law, only depreciation of the plaintiff's property may be recovered. St. Louis, S. F. & T. R. Co. v. Shaw, 99 Tex. 559, 82 S. W. 30, 6 L. R. A. N. S. 124, 122 Am. St. R. 663 (1906) (freight depot and spur tracks). This is usually in cases where the completion of the structure immediately brings injury. Southern Ice & Utilities Co. v. Bryan, 55 S. W. (2d) 920(5) (Ark., 1933) (ice plant; damages are difference in value immediately before and after erection and operation of plant); City of Greenville v. Elliott, 263 S. W. 1076 (Tex. Civ. App., 1924) (city incinerator plant).

\textsuperscript{121}The usual formula is that depreciation is measured as of the time of the "injury." Brown v. Virginia-Carolina Chem. Co., 162 N. C. 53, 77 S. E. 1102, 45 L. R. A. N. S. 773 (1913) (chemical plant established, raising value of plaintiff's nearby property: some years later the plant was changed by adding sulphuric acid chambers, thus inflicting noisome odors; held, depreciation to be measured as of time of beginning of odors not original establishment of plant). City of Amarillo v. Ware, supra, n. 119; 46 C. J. 829, n. 29.

\textsuperscript{122}See the discriminating discussion by Sharp, J., in City of Amarillo v. Ware, supra, n. 119; 46 C. J. 829, n. 29.

\textsuperscript{123}Sherman Gas & Electric Co. v. Beiden, 103 Tex. 59, 123 S. W. 119(3), 27 L. R. A. N. S. 237 (1909) (plaintiff's residence affected by smoke and vibration from electric light plant; held, plaintiff entitled
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the courts to assume that the time for determining when the statute of limitations begins to run, the time for ascertaining which of successive owners can sue, and which can be sued, and the time adopted for measuring damages, must all be the same. If one time of cleavage is to be adhered to, the time when the first physical invasion occurred, seems the fairest, but different time-criteria may well be worked out for these different purposes. If the flexible procedure, above suggested, of giving the plaintiff the right to successive recoveries but with a power of election to take permanent damages, should be adopted, then the time of trial might well be used as the date for the assessment of the permanent damages, with past damages up to that time, except in cases of public enterprises for which the time of the establishment of the enterprise, or of the commencement of the injury, might be more appropriate.

3. Right to Damages When the Land is Under Lease.

If land which is occupied by a tenant, or other holder of a limited interest, is injured, as by flood or fire or fumes, or by one who enters and cuts timber, or any other past and completed invasion, the question arises of the extent of the claims of the occupant. The courts which have passed upon the question are fairly evenly divided, one group holding that the occupant may recover only for the injury to his own tenancy or other interest, leaving the landlord or other holder of the remaining
to damages for personal inconvenience and for depreciation as of time of trial in value for any available use, of his property: instruction fixing time of original establishment and operation of plant, as time for measuring depreciation, disapproved). See, however, later Texas cases in notes 121, 122, supra.

125 Brown v. Woodliff, 89 Ga. 413, 15 S. E. 491 (1892) (life-tenant); Zimmerman v. Shreve, 59 Md. 357 (1882), Warren's Cases on Property, 71 (life-tenant); Sherman v. Fall River Iron Works Co., 2 Allen (Mass.) 524 (1861) (life-tenant); Shell Petroleum Corp. v. Parker, 37 S. W. (2d) 1064 (6) (Tex. Civ. App., 1931). It has even been held that when the lessee has taken an assignment of the landlord's claim, that the lessee cannot recover the full damages, and that each must sue separately, in which event the actions can be consolidated. Logan Central Coal Co. v. County Court, 106 W. Va. 578, 146 S. E. 371 (1929).

But in some states where the pleading has been modernized, the holders of the different interests in the land, though their interests are separate and not joint, could join as co-plaintiffs. Oos v. Corrigan Steel Co., 248 Ky. 426, 58 S. W. (2d) 625 (1933).

See note, "Right of action in case of damage to reversion or remainder by stranger," L. R. A. 1916A, 792, 805; and notes, 8 A. L. R. 500, Ann. C. 1916C, 851; 13 Minn. L. Rev. 736 (1929).
interest to sue separately for the damage to that. There are, however, strong arguments of convenience in favor of the contrary rule, adopted in New York, and some other states, which permits the tenant or other limited owner in possession, to recover the full damages to the land as if he were the holder of the complete title. This practice seems calculated to reduce the number of actions. The wrongdoer is protected against a second recovery by the landlord, and the occupant who recovers full damages holds all the surplus beyond compensation for his own injury, as trustee for the landlord or ultimate owner.

Still more difficult problems arise in cases where the structure or operations on the lands of the defendant produce continued invasions by way of nuisance or trespass, over a considerable period. We may suppose that the injurious situation is first established, after the owner of the injured land has leased his land to a tenant, and during the occupancy by the tenant. In this situation, if only "temporary" damages for the past invasions and their results are to be sought, there is little difficulty. The owner recovers for injury to the freehold, whereas the tenant must sue for any injury to the usable value, loss of crops, or damage to the possessory interest, accruing after his tenancy began. More doubt and dispute arise in cases where the nuisance was already established and in operation at the time that the tenant took his lease. In this situation, when the question is as to who may recover in successive actions for continuing "temporary" injury, the New York cases hold, as in the situation just previously mentioned, that the line of division is just the same,—that is, "temporary" damages for loss of use

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126 Cargill v. Sewall, 19 Me. 288 (1841) (minister, against trespasser on church land); Rogers v. Atlantic Gulf & Pac. Co., 213 N. Y. 246, 107 N. E. 661, L. R. A. 1916A, 787, Ann. C. 1916C, 877 (life-tenant; power to sue not dependent upon his being liable to the reversioner for injury to the land by third persons); Willey v. Laraway, 64 Vt. 559, 25 Atl. 436 (1892) (widow entitled to dower against one cutting wood).


or loss of rental value before the beginning of the lease belong to the owner, or other person then having the right of occupancy, but for those arising after the beginning of the term, the tenant alone can recover. This is a logical application of the general doctrine that for interference with the use or possession of land, the person then entitled to such use or possession should recover. Nevertheless, the results are not always just. Usually the existence of the injurious situation will diminish the rent which the landlord will be able to demand, and if the tenant after getting the land at a reduced rent, is allowed to recover against the wrongdoer for the injury to the usable value, he will be unjustly enriched. This has led the Iowa court to adopt the rule, that while for a nuisance beginning during the occupancy of a tenant, the landlord can not recover for loss of rental value during such occupancy, yet if the nuisance began before the lease was made, and caused the owner to lease the land for less than its normal value, then the owner may recover for such diminution in rental value up to the time of action brought.

This latter view would seem to leave to the tenant who leases land already subjected to a nuisance a claim only for personal discomfort, unless the court were disposed to adopt a more flexible practice of permitting the tenant upon showing the consent of the owner, to recover the full damage arising during his occupancy, unless the owner has already recovered for loss of rentals.

There seems to be but little discussion in the cases of the question of how the damages shall be apportioned between landlord and tenant in cases of so-called "permanent" nuisance, wherein a recovery of the depreciation in the sale-value of the land is allowed, upon the hypothesis that injuries invasions

129 Baumann v. New York, 227 N. Y. 25, 124 N. E. 141, 8 A. L. R. 595 (1919) (plaintiff, tenant at will, may recover for diminished rental value due to a continued operation of wells by defendant, draining plaintiff's land, though wells were operated before beginning of plaintiff's tenancy; previous decisions in New York reviewed in opinion).

See also, Sherman v. Fall River Iron Works, 84 Mass. 524, 79 Am. Dec. 799 (1861); McKee v. St. Louis, Etc., R. Co., 49 Mo. App. 174 (1892); Halsey Lehigh Valley R. Co., 45 N. J. Law, 26 (Sup. Ct., 1883); 4 Sutherland, Damages, Sec. 1056, 1057 (4th ed., 1916); notes, 3 L. R. A. N. S. 1060 (1906); 8 A. L. R. 614.

130 Stovem v. Town of Calmar, 204 Ia. 983, 216 N. W. 113 (2) (1927) (pollution of creek running through plaintiff's land, by sewage system, causing the plaintiff, owner, to have to rent the land for less).

131 See Sec. 75 and 76, supra.
will continue indefinitely.\textsuperscript{132} It seems reasonably clear, however, that if the land is in possession of the owner when the nuisance comes into operation as a permanent injury, then under the assumption of many of the cases that only one cause of action can arise, this cause of action would go to the owner, and a tenant who later secured his lease would have no claim whatever for damage to his interest in the land.\textsuperscript{133} Under this same assumption, if the nuisance becomes permanent while the land is under lease, the tenant would recover the prospective injury during the period of the term, the landlord the prospective injury to the reversion,\textsuperscript{134} and both recoveries should not exceed, in theory, the diminution in the value of the land as a whole if it were not under lease. If the practice of giving the owner an election to convert his claim from one for recurrent injuries into one for permanent damages\textsuperscript{135} were adopted, then it would seem that, if the land were under lease at the time when such election were sought to be exercised, both the owner and the tenant would have to join in the election, which if effectuated would subject the use of the land to this burden.

\textsuperscript{132}But see, in general, Winchester v. Stevens Point, 58 Wis. 350, 17 N. W. 3, 517 (1883), a leading case to the point that where permanent damages for a continuing invasion are sought, mere rightful possession in plaintiff is not sufficient to maintain the claim, and the state of the title should be shown, as in condemnation proceedings. See also W. Lewis Roberts, A Possessor’s Right to Damages for Permanent Injury to Realty, 28 Ill. L. Rev. 919 (1934).

\textsuperscript{133}Chicago, R. I. & P. R. Co. v. Humphreys, 107 Ark. 330, 155 S. W. 127, L. R. A. 1916E 962 (tenant entering after construction of permanent culvert, cannot recover for overflow). See Kernochan v. New York Elevated R. Co., 128 N. Y. 559, 29 N. E. 66(1) (1891), in which it was held that an owner whose property was injured by the construction of an elevated railway, and who later made a lease, could recover the damage to the land, to the exclusion of the tenant. See the interpretation of this decision in Miller v. Edison Electric Illuminating Co., 184 N. Y. 17, 76 N. E. 734, 3 L. R. A. N. S. 1060 (1906).

\textsuperscript{134}“That a landlord may maintain an action against a stranger for a permanent injury to his lands in the possession of a tenant cannot be doubted. By virtue of the lease an estate is carved out of the fee and is vested in the tenant, but the landlord still has an inheritance technically designated as the reversion. For a trespass upon the possession of the tenant or for injury to his estate, the right of action is in him. An injury which affects the reversion is a wrong to the landlord, to be redressed by an action by him, although the tenant is in possession. 24 Cyc. 925; Arneson v. Spawn, 2 S. D. 268, 49 N. W. 1066, 39 Am. St. Rep. 783. The wrong may be such as to affect both these distinct interests. This gives a right of action to the owner of each.” Custer Consol. Mines Co. v. City of Helena, 45 Mont. 146, 122 Pac. 567, 569 (1912) (dictum).

\textsuperscript{135}See the next previous section.