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Notes and Comments

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NOTES AND COMMENTS

THE PERMANENT NUISANCE DOCTRINE IN ILLINOIS

The doctrine of the so-called "permanent nuisance" is based primarily upon distinctions between completed invasions of the land-owner's interest and continuing invasions of his interest. Where the continuing invasions are caused by a condition, structure, or activity which may be regarded by the law as permanent, many courts have treated such condition, structure, or activity as constituting the original and completed tort, creating but a single cause of action. According to this theory the creation or operation of the source of the subsequent injuries is conceived to give rise to a single cause of action and the subsequent invasions of the land-owner's interest are considered mere items of injury flowing from the original tortious source.

The courts of the various states are not in agreement as to what situations may properly be regarded as permanent. The courts are also at variance in regard to how far the doctrine may be applied as a damage theory without violating fundamental principles. Before examining the extent and limitations of the permanent nuisance concept in Illinois, it will be of value to survey historically the reason which led to the invention of this new principle and the judicial process by which it has been evolved.

The permanent nuisance doctrine has never been recognized in England, New York, and a few other jurisdictions.[1] These courts still hold to the orthodox proposition that, for continuing or recurrent invasions of the land-owner's interest due to the wrongful conduct of another (even though the source of such invasions may be of such a character as to threaten future invasions beyond the right of the land-owner to prevent by injunction or abatement), only such damages may be recovered as have actually accrued in fact up to the time the action is brought. This proposition is based upon the theory that each invasion of a legal right by the wrongful conduct of another is a separate and distinct cause of action regardless of the fact that the source of that invasion may be for all practical and legal purposes permanent in its nature and therefore reasonably certain to be the continuing cause of similar future invasions. The above proposition thus limits the damages recoverable to those consequential injuries which have accrued or will probably accrue from a past and completed invasion. The English doctrine does, however, permit recovery for injurious consequences which are reasonably certain to flow from any distinct tres-

[1] Battishill v. Reed, 18 C.B. 696, 139 Eng. Rep. 1544 (1856); Uline v. New York Cent. & H. R. R. Co., 101 N.Y. 98, 4 N.E. 536, 54 Am. Rep. 661 (1886); Aldworth v. City of Lynn, 153 Mass. 53, 26 N.E. 229, 10 L.R.A. 210 (1891); Coates v. Atchison, T. & S.F.R. Co., 1 Cal. App. 441, 82 P. 640 (1905).

pass or disturbance, but it does not permit recovery of damages for future recurrences of the physical invasion.[2]

Objections to the Doctrine

The jurisdictions which have refused to recognize the permanent nuisance doctrine have based their objections chiefly upon the contention that the permanent nuisance as a legal concept is illogical, in that it treats a potential source of nuisance as itself an existing and subsisting tort, confusing cause and effect and regarding the latter as the former.[3]

These jurisdictions also reject the doctrine upon the ground that damages are too speculative, inasmuch as the court does not have the means of ascertaining with any reasonable degree of certainty the duration of the nuisance.[4]

Furthermore, the doctrine places upon the injured party the perilous task of ascertaining correctly the nice legal question of whether any particular nuisance is temporary or permanent, with severe penalties in the event that he misconceives his precise cause of action. The misconception of the precise nature of the nuisance may result in the plaintiff's conferring by his failure to choose the correct theory of action, immunity upon the tort-feasor by virtue of the effect of the Statute of Limitations.[5]

Finally, it is contended that, although a multiplicity of suits may in certain situations be an unavoidable hardship upon the injured party in cases of continuing nuisances, the remedies at law and in equity are substantially adequate to meet all situations.[6]

Formulation of the Permanent Nuisance Doctrine in America

The doctrine of permanent nuisance was first announced judicially less than a century ago. In 1851 the Supreme Court of New Hampshire rendered its decision in the case of *Town of Troy* v. *Cheshire Railway Com-*

2 See Battishill v. Reed, 18 C.B. 696, 139 Eng. Rep. 1544 (1856).

3 "That evidence was rejected, because that might be the subject of another action. The attempt to recover substantial damages in the first instance is certainly inconsistent with the theory of the action. At common law, the freeholder would in a case like this have had an assize of nusance." Battishill v. Reed, 18 C.B. 696 at 717, 139 Eng. Rep. 1544 at 1552 (1856).

4 See Aldworth v. City of Lynn, 153 Mass. 53, 26 N.E. 229, 10 L.R.A. 210 (1891); Uline v. New York Cent. & H. R.R. Co., 101 N.Y. 98, 4 N.E. 536 at 550 (1886).

5 See Schlosser v. Sanitary Dist. of Chicago, 299 Ill. 77, 132 N.E. 291 (1921).

6 "The rule . . . which I contend is the true one, gives any party who has suffered any legal damages by the construction or operation of a railroad ample remedy. He may sue and recover his damages as often as he chooses—once a year, or once in six years—and have successive recoveries for damages. He may enjoin the operation of the railroad, and compel the abatement of the nuisance by an action in equity, and where his premises have been exclusively appropriated, or where a highway, in the soil of which he has title, has been exclusively appropriated by a railroad, he may undoubtedly maintain an action of ejectment." Uline v. New York Cent. & H. R. Co., 101 N.Y. 98, 4 N.E. 536 at 550 (1886).

pany.[7] This was an action by the town, which was charged by law with the duty of maintaining a highway, for the obstruction of the highway by the company, which had built a railroad across it. The defendant contended that damages must be limited to claims arising before the action was brought. However, the court overruled the defendant's contention and held that the town was entitled to recover any reasonable expenses necessary to be incurred to render the highway passable or to lay out a new one in case the old highway had been rendered unusable and that such recovery was allowable even though no money had been spent therefor. The court supported its holding upon the ground that whenever the nuisance is of such a character that its continuance is necessarily an injury and where it is necessarily of a permanent character, which will continue without change from any cause but human labor, the damage is original and may be at once fully recovered, since the injured person has no means to compel the wrongdoer to abate the cause of injury.

It is readily apparent that this decision, although significant in its damage theory, represented only a very limited departure from established principles. The injury was in its nature a direct trespass and complete in its effect upon the land as soon as it was done. It was a passive structure. Most significant of all, the injury was inflicted by a corporation serving a public interest and therefore entitled to exercise powers of eminent domain. Because of the power of eminent domain possessed by the defendant, the court found it entirely logical to assume that the damage would continue to be inflicted.

The doctrine laid down in the New Hampshire case was adopted by the courts of other states with considerable extension in many instances.[8] The orderly classification of Professor McCormick[9] upon this subject may be followed with only slight modifications thereof as a convenient approach to the Illinois doctrine of permanent nuisance, as viewed in the light of the positions taken by other jurisdictions.

(1) *Cases in which the Defendant has acquired the Lawful Right to Maintain the Structure or Operation Constituting the Nuisance by Eminent Domain Proceedings*

Where the defendant has acquired the lawful right to maintain the nuisance because he is vested with powers of eminent domain, and the nuisance and the injury which it will probably inflict are necessarily substantially permanent, most American jurisdictions, including Illinois, will

[7] 23 N.H. 83, 55 Am Dec. 177 at 188, 189 (1851), which states, "The railroad is, in its nature and design and use, a permanent structure, which cannot be assumed to be liable to change. . . . The injury done to the town is then a permanent injury, 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."

[8] Southern Ice & Utilities Co. v. Bryan, 187 Ark. 186, 58 S.W. (2d) 920 (1933), involving an ice factory; Missouri Pac. R. Co. v. Davis, 186 Ark. 401, 53 S.W. (2d) 851 (1932), concerning railway coal chutes; Hardin v. Olympic Portland Cement Co., 89 Wash. 320, 154 P. 450 (1916), involving a cement plant.

[9] Charles T. McCormick, Handbook on the Law of Damages, 500 et seq.

regard the continuing nuisance as permanent and will therefore allow recovery of all damages, past, present, and future, in a single action.[10] However, the Illinois authorities apparently confine the doctrine under this head to nuisances properly created by structures and operations within the sphere of eminent domain, with certain qualifications.

Two reasons have been chiefly relied upon for treating continuing nuisances under this general head as permanent and allowing prospective damages under the single cause of action theory. One reason is that where defendant possesses power of eminent domain there is no remedy in favor of the plaintiff to abate the nuisance. In *Schlosser* v. *Sanitary District of Chicago*,[11] a sanitary district having powers of eminent domain and being affected with a public interest turned the waters of the canal of the Sanitary District of Chicago into the Illinois River by lowering the dam at Lockport, Illinois, thus injuring a riparian land-owner by the flooding of his land. In an action for damages brought by the land-owner against the district, the court held that actions for damages arising from the operation of a Sanitary District must be brought within five years from the time the original nuisance was first created. The court also held that damages in such action must be recovered in a single suit and that such suit concludes the question of damages for all time, regardless of whether or not the extent of the injuries could have been forseen at the time of bringing suit.

The other chief reason relied upon for invoking the doctrine in cases coming under this head is based upon an expansion of the eminent domain powers incorporated into the revised Constitution of Illinois of 1870. The Constitution provides that private property shall not be taken or damaged for public use, without just compensation, and that such compensation, when not made by the state shall be ascertained by a jury, as shall be prescribed by law.[12] Under the Constitution an action by a lot owner for a physical injury to his property, resulting from the construction and operation of a railway in the public street near his lot, may be regarded as a proceeding to recover compensation for the damage to private property in the furtherance of the public good. In such a case, the assessment being full compensation for all present and future damages, one recovery will bar any subsequent action for the same cause.[13]

[10] Horner v. Baltimore & O.S.W.R.Co., 165 Ill. App. 370 (1911); Bernhardt v. Baltimore & O.S.W.R.Co., 165 Ill. App. 408 (1911); Missouri Pac. R. Co. v. Davis, 186 Ark. 401, 53 S.W. (2d) 851 (1932); Stodghill v. C. B. & Q. R. Co., 53 Iowa 341, 5 N.W. 495 (1880).

[11] 299 Ill. 77, 132 N.E. 291 (1921). In Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 8 N.E. 460 (1884), the court elaborated upon the principles of the instant case and reasoned that the just compensation to be made for damaged land is intended as an indemnity, not for successive, constantly accruing damages as they may afterwards be suffered, but for all the landowner may suffer from all the future consequences of the careful and prudent operation of the proposed public structure, improvement, or operation. The question was also discussed exhaustively by Justice Brandeis in Harrisonville v. W. S. Dickey Clay Mfg. Co., 289 U.S. 334, 53 S. Ct. 602, 77 L. Ed. 1208 (1933).

[12] Ill. Const. 1870, Art. II, § 13.

[13] Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 8 N.E. 460 (1884).

The decision in *Ohio and Mississippi Railway Company* v. *Wachter*[14] also touches this point, holding that all special damages, present and prospective, to the owner of lands, resulting or to result from the proper construction, maintenance, and operation of a railroad under the laws of Illinois, constitute as to such land-owner one indivisible cause of action, which may be enforced under the eminent domain statute or any other appropriate form of action. Thus the courts have taken cognizance of the words of the eminent domain provision in the Constitution including damage to property as equivalent to a taking thereof and have construed them to allow damages for a permanent nuisance to be recovered in a single action by analogy to the proceeding to condemn under the eminent domain powers.

It should be noted that the cases which base the application of the single cause of action theory of damages upon the test of lawfulness and upon the constitutional guaranty are not confined to instances where the defendant has acquired the right to maintain the permanent nuisance by eminent domain proceedings, but include also instances where the defendant is authorized by statute to take or damage property by eminent domain proceedings but has failed to take such proceedings. In the situations last indicated the defendant is deemed to have an inchoate right to render the taking or the damage lawful and therefore immune from abatement or injunction if suit for such abatement is threatened.[15] It is also apparent that the application of the doctrine to this general classification of cases based upon the test of lawfulness is not restricted to mere passive structures, such a dams, culverts, and embankments,[16] but extends to actual invasions of the plaintiff's land caused directly by active operations, such as smoke, coal dust, and noxious odors, in the absence of wrongful conduct.[17]

(2) *Cases in which the Defendant has Powers of Eminent Domain but has created the Structure or Carried on the Operation Willfully or Negligently*

Some jurisdictions permit actions to be based upon the permanent nuisance concept where the injury is caused by the negligent or willful creation of a defective structure or the negligent or willful carrying on of an active operation affected with a public interest.[18] These jurisdic-

14 123 Ill. 440, 15 N.E. 379 (1888). See also Catello v. Chicago, B. & Q. R. Co., 298 Ill. 248, 131 N.E. 591 (1921); Miller v. Sanitary Dist. of Chicago, 242 Ill. 321, 90 N.E. 1 (1909); Vette v. Sanitary Dist. of Chicago, 260 Ill. 432, 103 N.E. 241 (1913); Barry v. Chicago, I. & St. L. S. L. Ry. Co., 149 Ill. App. 626 (1909). But as to temporary nuisances, see Cleveland, C., C. & St. L. Ry. Co., v. Pattison, 67 Ill. App. 351 (1896).

15 Catello v. Chicago, B. & Q. R. Co., 298 Ill. 248, 131 N.E. 591 (1921); Schlosser v. Sanitary Dist. of Chicago, 299 Ill. 77, 132 N.E. 291 (1921).

16 Ohio & M.R.Co. v. Wachter, 123 Ill. 440, 15 N.E. 279 (1888).

17 Chicago & E. I. R. Co. v. Loeb, 118 Ill. 203, 8 N.E. 460 (1884).

18 Harvey v. Mason City & Fort Dodge R. Co., 129 Iowa 465, 105 N.W. 958, 3 L.R.A. (N.S.) 973, 113 Am St. Rep. 483 (1906); see also Bartlett v. Grasselli Chemical Co., 92 W. Va. 445, 115 S. E. 451, 27 A.L.R. 54 (1922).

tions support their holdings principally upon the ground that a power to create and continue such a nuisance, immune to abatement because of the public or semi-public interest being served, is, for all practical purposes, tantamount to the potential or actual lawful right to do so. On the other hand other jurisdictions have refused to extend the concept to cases of this sort, for the reason that to do so would require the courts to presume the continuance of wrongful conduct in the future under circumstances where such wrongful conduct might well be remedied voluntarily by the defendant at any time.[19] Further, the doctrine would permit the tort feasor by his own wrongful conduct to acquire a permanent interest in the land of a party who is wholly innocent of either wrong or laches.

The Illinois decisions appear to draw a line of distinction between cases of such wrongful conduct resulting from active invasions due to active processes and operations, on the one hand, and cases of wrongful conduct in the construction of purely passive structures, on the other hand, rejecting the application of a permanent nuisance doctrine to the former and allowing it to be invoked in the latter situations, with certain limitations and even some conflicts of authority.

In *Chicago and Eastern Illinois Railroad Company* v. *Loeb*,[20] it was held that damages from the proper construction and operation of a railroad through the city from smoke and cinders must be recovered in a single action by the occupant of adjoining land at the beginning of the operation of the railroad and a subsequent grantee of the land has no cause of action. The plaintiff alleged negligence in the operation of the railroad but was unable to sustain this allegation by the evidence. In that case the court stated, by way of obiter dicta, that the adjacent property holders may recover from time to time for damages resulting from willful or negligent acts as to which the company would not have been protected by its charter and the license of the city council to lay its tracks in the street. The case of a lawful activity as distinguished from a negligent or willful one seems to be clearly suggested.

Thus the construction of a permanent nuisance, such as a railroad, vests the right of action in the owner of the land upon the construction of the nuisance, and a subsequent grantee of the land cannot maintain an action for the proper use of such a permanent structure after his purchase.[21] However, a different rule will probably prevail when the subsequent owner seeks to recover for negligence and consequent damages in the operation.[22]

While the above references indicate a flat refusal on the part of our courts to extend the doctrine to continuing or recurrent nuisances caused by active and wrongful operations, the decisions are less clear as to whether the doctrine should be applied to purely passive structures upon the land of the defendant which cause injuries to the adjoining land of the plaintiff. In one of the early cases in which a purely passive structure

[19] Stein v. Chesapeake & O. R. Co., 132 Ky. 322, 116 S. W. 733 (1909); Perry v. Norfolk Southern R. Co., 171 N. C. 38, 87 S. E. 948 (1916).

[20] 118 Ill. 203, 8 N.E. 460 (1884). [21] Ibid.

[22] C., B. & Q. R.R. Co. v. Schaffer, 124 Ill. 112, 16 N.E. 239 (1888).

caused recurrent injuries to an adjacent land-owner because of defects in its construction, the court refused to apply the permanent nuisance doctrine.[23]

This case held that notwithstanding the condemnation of land for a railroad and the payment of the compensation or damages awarded the land-owner, the company will be liable to him or to his grantee for damages resulting from its negligence, either in the construction, maintaining or operating of its road. The court seems to reason that the taking or damaging of property for public use under eminent domain powers is permitted only to the extent that such taking or damage is necessary for such use. Since the allowance of the permanent nuisance doctrine and the recovery of prospective damages in a single action has the practical effect of giving the tort-feasor a permanent easement or license in the plaintiff's land, the invoking of the doctrine accomplishes practically all that a proceeding in condemnation could accomplish. The courts are unwilling to regard a negligent or wrongful taking or damaging of property as necessary and they are even more unwilling to permit greater rights to be acquired by a negligent or willful wrongdoer than could be acquired by a rightful and proper exercise of eminent domain powers.

However, a subsequent decision[24] by the Illinois Supreme Court should be contrasted with the case just discussed. Here the facts were strikingly similar to those involved in the preceding case, and the court, speaking through Justice Farmer, points out that where a railroad embankment has been constructed as intended by the company for continuous future use, an abutting owner whose land is damaged by the obstruction of the flow of water is not obliged to resort to some proceeding to compel the company to perform its duty by making more or larger openings for the water, nor is he obliged to treat the embankment as temporary and bring successive actions for damages as they accrue. The court takes the position that if the defendant considered and intended its structure to be permanent, the plaintiff might also treat it as permanent. The fact that it was not impracticable or impossible to remedy the source of the damage did not necessarily require plaintiff to treat the structure as temporary. The fact that he might have done so and have declared for damages only up to the time of commencing the suit, and not for permanent injury, did not require him to do so. Justice Farmer concludes the opinion in the main case by this significant suggestion: "It may well be that he (the land-owner) may have an election to treat the structure as permanent or temporary under certain circumstances."

Thus it appears that there is some confusion in the decisions coming within this classification, with a general tendency to refuse to apply the doctrine to continuing nuisances caused by public enterprises improperly constructed or conducted, although there is some proclivity to let in the doctrine where the injuries are caused by defects in purely passive structures.

[23] Ohio & M.R.Co. v. Wachter, 123 Ill. 440, 15 N.E. 279 (1888).

[24] Strange v. C., C., C. & St. L. Ry. Co., 245 Ill. 246, 91 N.E. 1036 (1910).

(3) *Cases in which the Defendant Causes the Continuing Nuisance by the Construction of a Passive Structure or by the Active Operation of an Establishment of a Purely Private Character*

Some jurisdictions extend the permanent nuisance concept to continuing nuisances caused by structures and even active operations where the plaintiff is precluded from obtaining abatement because of some public inconvenience which would result therefrom or because of a balance of equities in favor of the defendant.[25] It is clear that the utilization of the doctrine cannot here be supported upon the test of lawfulness. However, even in jurisdictions which adhere strictly to the lawfulness test the court decisions almost invariably contain references to the physical test of permanence as a make-weight argument. It will be recalled that the decision in the original case of *Town of Troy* v. *Cheshire Railway Company*[26] was based to a large extent upon the proposition that an injury which will continue without change from any cause but human labor is a permanent nuisance. A few jurisdictions have elevated this last-mentioned proposition to the station of a primary and self-sufficient sanction for letting in the doctrine of the single cause of action. However, the Illinois courts have not as yet clearly indicated an acceptance of this technique.

In considering and applying the test of physical permanence the various jurisdictions have differed as to the precise meaning to be given to the term. (1) Some courts place the emphasis upon the lasting and substantial qualities of the source or structure itself.[27] (2) Others stress the permanence of the injury involved.[28] (3) Still other courts give the greatest weight to the expense of abatement.[29]

Illinois seems to place the emphasis upon the permanence of the injury, although, as already pointed out, our courts apparently accept the physical test of permanence only to the extent of using it as a make-weight argument in the cases which are primarily supported by the test of lawfulness. Thus the physical test is employed secondarily in *Jones* v. *Sanitary District of Chicago*,[30] where it is said that it is the permanency of the injury, and not merely the permanency of the structure causing the injury, which is the test in determining whether damages for all time to come may be recovered in one action. This case presented a situation where the structure could not be inherently a nuisance because the method of its operation and the action of the forces of nature had to be considered in determining whether a continuing injury would result. This decision distinguishes between permanent and intermittent flooding and allows recurrent actions for the latter as divisible, temporary nuisances.

25 See Harrisonville v. W. S. Dickey Clay Mfg. Co., 289 U.S. 334, 53 S. Ct. 602, 77 L. Ed. 1208 (1933).

26 23 N.H. 83, 55 Am. Dec. 177 (1851).

27 Martin v. Chicago S. F. & C. Ry. Co., 47 Mo. App. 452 (1891).

28 Harvey v. Mason City & Fort Dodge R. Co., 129 Iowa 465, 105 N.W. 958, 3 L.R.A. (N.S.) 973, 13 Am. St. Rep. 483 (1906).

29 Chicago, St. L. & N.O.R.Co. v. Bullock, 222 Ky. 10, 299 S.W. 1085 (1927).

30 252 Ill. 591, 97 N.E. 210 (1912). See also Suehr v. Sanitary Dist. of Chicago, 149 Ill. App. 328 (1909), aff'd 242 Ill. 496, 90 N.E. 197 (1909).

The criterion of the permanency of the injury was therefore of practically primary value in deciding the case, although the court would doubtless have refused to give the test so much weight if the case could have been determined upon the usual test of lawfulness alone.

In *N. K. Fairbank Company* v. *Bahre*,[31] the following situation was presented. An action on the case for nuisance was brought for the depositing of a quantity of soap stock upon a lot adjoining plaintiff's premises which caused noxious odors and fumes to pollute the premises of the plaintiff. It was held that plaintiff's right of recovery was limited to damages up to the commencement of the suit and that it was error to allow recovery for pollution occurring subsequently as far as that suit was concerned. Under the facts of this case the decision was clearly sound.

In *Schlitz Brewing Company* v. *Compton*,[32] the proceeding was also an action on the case for a nuisance. The defendant company maintained a building adjoining the premises of the plaintiff. The roof of the defendant's structure sloped toward the plaintiff's premises in such a manner as to cause recurrent discharge of rain water upon plaintiff's premises whenever storms occurred, thus causing injury to the land-owner. Plaintiff's damages were limited to those accruing before suit was brought and it was error to allow evidence of injury by storms and consequent flooding occurring after the suit was commenced.[33] The court states that the recovery of damages for an unlawful act, such as the erection of a private nuisance, will not render the act or the continuance of the nuisance legal. There is a legal obligation to remove a nuisance, and the law will not presume the continuance of the wrong, nor allow a license to continue a wrong, or a transfer of title to result from the recovery of damages for prospective misconduct.

In *N. K. Fairbank Company* v. *Bahre*,[34] the opinion refers to the earlier decision here under consideration and makes mention of the fact that the brewing company's roof and drains could easily and readily have been altered so as to abate the nuisance. This suggests that the court is taking care not to lay down too broad a rejection of the permanent nuisance doctrine, even in regard to private establishments, especially where such establishments are passive structures and substantially permanent. The temporary character of the nuisance in the case under consideration might also have been supported upon the fact of the intermittent character of the flooding caused by the defective passive situation. In *Jones* v. *Sanitary District of Chicago*,[35] under similar conditions, a nuisance was held to be merely temporary even where caused by a structure created and maintained by a defendant serving a public interest. There seems to be no Illinois case squarely presenting the situation of a purely passive and substantially permanent private establishment causing continuous injury. If such a case were presented with equities in favor of extending the

[31] 213 Ill. 636, 73 N.E. 322 (1905). [32] 142 Ill. 511, 32 N.E. 693 (1892).

[33] See Cooper v. Randall, 59 Ill. 317 (1871); C., B. & Q. R.R. Co. v. Schaffer, 124 Ill. 112, 16 N.E. 239 (1888).

[34] 213 Ill. 636, 73 N.E. 322 (1905). [35] 252 Ill. 591, 97 N.E. 210 (1912).

doctrine of permanent nuisance to private enterprises the court would find little difficulty in constructing a rationale consistent with the general trend of the Illinois cases upon which to so extend it.

Legal and Practical Consequences of the Application of the Permanent Nuisance Doctrine

The result of the limitation to a single cause of action is that the judgment rendered operates practically to grant a license or easement to the defendant which will burden the land of the plaintiff and his grantees for all time to come. The plaintiff does not suffer serious hardship for he is compensated therefore, but his grantee has no remedy for invasions flowing from the original tort and this is true even though no judgment has been rendered in favor of his grantor, since it is held that the cause of action for a permanent nuisance is not transferred to the grantee by the conveyance of the title to the land.[36]

In the case of a permanent nuisance the period required to bar the action is computed from the time the original structure was created or the original activity commenced which constitutes the nuisance and from which source all invasions of the land-owner's interest are deemed to flow.[37] This means that he who owned the land at that time must bring his action, if ever he is to bring it successfully, within the statutory period as measured from that time. If he waits longer he is barred from recovery, not only for injuries of longer standing than the statutory period, but also for all injuries whatever, or whenever suffered, as a result of that original tort. On the other hand, if the plaintiff conceives the nuisance to be permanent and sues within the statutory period he may be unable to perceive the ultimate extent of the injuries involved. If the plaintiff conceives the nuisance to be merely temporary and the court holds otherwise, his damages will be limited to the past invasion which he has proved by reason of his misconception of his cause of action. To obviate these difficulties, it is submitted that statutory[38] or judicial[39] reform is advisable, permitting the plaintiff to elect as of the time of bringing his action whether he will treat a continuing nuisance as temporary or permanent.

T. H. OVERTON

36 Chicago & E.I.R. Co. v. Loeb, 118 Ill. 203, 8 N E. 460 (1884).

37 Schlosser v. Sanitary Dist. of Chicago, 299 Ill. 77, 132 N.E. 291 (1921); Horner v. Baltimore & O.S.W.R. Co., 165 Ill. App. 370 (1911); Bernhardt v. Baltimore & O.S.W.R.Co., 165 Ill. App. 408 (1911); Fincher v. Baltimore & O.S.W. R.Co., 179 Ill. App. 622 (1913).

38 Charles T. McCormick, Handbook on the Law of Damages, 514, advocating such a statute. See also note, 27 Ill. L. Rev. 953.

39 Under Strange v. Cleveland, C., C. & St. L. R. Co., 245 Ill. 246, 91 N.E. 1036 (1910), it would be an easy matter for our Illinois courts to allow such an election.

NOTES ON PREVIOUSLY DISCUSSED CASES

EVIDENCE—WEIGHT AND SUFFICIENCY—WHETHER IT IS NECESSARY IN CIVIL ACTION TO PROVE CRIMINAL OFFENSE BEYOND REASONABLE DOUBT.—The Illinois Supreme Court has stated positively, in *Sundquist* v. *Hardware Mutual Fire Insurance Company of Minnesota*,[1] that the burden of proof in all civil cases will be satisfied by a mere preponderance of the evidence, even in those cases where the commission of a felony by the other party is pleaded. Previous to this, a long line of Illinois cases, though not strongly supporting the proposition, had conveyed the impression that Illinois, even in a civil case, required proof beyond a reasonable doubt where the other party was charged with a felony by the pleadings.[2] The overwhelming weight of authority over the country was, however, to the contrary.[3] In the instant case, the Appellate Court, following the traditional Illinois stand, held that a felony must be proven beyond a reasonable doubt in all civil actions.[4] The Supreme Court, while disapproving this position and affirming that "the reasonable doubt rule . . . will no longer be adhered to in this court," did not reverse the Appellate Court, inasmuch as the error complained of was the mere refusal to give an instruction, which was deemed to be cured by the giving of other instructions and interrogatories.

R. W. BERGSTROM

WILLS—REVOCATION—DIVORCE AS EFFECTING REVOCATION BY IMPLICATION.—The Supreme Court of Illinois in *Gartin* v. *Gartin*[1] decided, reversing the Appellate Court, that neither divorce coupled with property settlement nor any other facts not provided for in the Illinois statutes[2] will operate as revocation of a will. The language of the case of *Phillippe* v. *Clevenger*[3] to the effect that Section 17 "of the wills act only applies to the revocation of a will where there is an express intention on the part of the testator to re-

1 371 Ill. 360, 21 N.E. (2d) 297 (1939).

2 See note, 17 CHICAGO-KENT LAW REVIEW 79.

3 Ibid.

4 Sundquist v. Hardware Mutual Fire Ins. Co. of Minn., 296 Ill. App. 510, 16 N.E. (2d) 771 (1938), noted in 17 CHICAGO-KENT LAW REVIEW 79.

1 371 Ill. 418, 21 N.E. (2d) 289 (1939). For a discussion of the decision of the Illinois Appellate Court in 296 Ill. App. 330, 16 N.E. (2d) 184 (1938), see 17 CHICAGO-KENT LAW REVIEW 97.

2 Ill. Rev. Stat. 1937, Ch. 148, § 19: "No will, testament or codicil shall be revoked, otherwise than by burning, canceling, tearing or obliterating the same, by the testator himself, or in his presence, by his direction and consent, or by some other will, testament or codicil in writing, declaring the same, signed by the testator or testatrix, in the presence of two or more witnesses, and by them attested in his or her presence; and no words spoken shall revoke or annul any will, testament or codicil in writing, executed as aforesaid, in due form of law."

Ill. Rev. Stat. 1937, Ch. 39 § 10: "If, after making a last will and testament, a child shall be born to any testator, and no provision be made in such will for such child, the will shall not on that account be revoked; but unless it shall appear by such will that it was the intention of the testator to disinherit such child, the devises and legacies by such will granted and given, shall be abated in equal proportions to raise a portion for such child equal to that which such child would have been entitled to receive out of the estate of such testator if he had died intestate, and a marriage shall be deemed a revocation of a prior will."

3 239 Ill. 117, 87 N.E. 858, 16 Ann. Cas. 207 (1909).

voke a will, and that said section does not apply to the revocation of a will, or a part thereof, arising by implication of law" was discounted on the grounds that the case merely decided that a conveyance of the bequeathed property by the testator to the legatee resulted in an ademption, despite the subsequent reacquisition of the property by the testator.

The Court in the instant case recognized the existence of decisions[4] in other states opposed to its holding but declined to recognize those cases as authority in this state on the grounds that the statutory provisions of Illinois are materially different from those of the other jurisdictions.

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CIVIL PRACTICE ACT CASES

JURY—RIGHT TO TRIAL BY JURY—EFFECT OF PLAINTIFF'S FILING INADEQUATE COUNTER-AFFIDAVITS TO MOTION TO DISMISS UNDER SECTION 48—Some light on the interpretation to be given to Subsection 3[1] of Section 48 of the Illinois Civil Practice Act has been shed by the case of *Fitzpatrick* v. *Pitcairn*.[2] The plaintiff therein, as administratrix, sued the defendant railway company to recover for the wrongful death of her intestate. More than a year after the accident, the plaintiff amended her complaint by adding the receivers of the defendant railway company as additional parties defendant. The receivers filed a motion to dismiss relying on Subsection (f)[3] of Section 48, and in their motion they set forth chronologically the proceedings up to that point. The plaintiff filed counter-affidavits in which she inadequately sought to explain her failure to sue the receivers of the railway company at the outset, and she requested a jury trial on the issues of fact alleged to be created by the defendant's affidavits and her counter-affidavits. The trial court refused to dismiss the defendant's motion and thus force him to file an answer[4] in order that a jury trial might be had. The court held that, since the plaintiff had not controverted the facts set out in the defendant's motion, the only issue was one of law, and this holding was affirmed on appeal.

The practice as outlined in Section 48 and as now interpreted in the Fitzpatrick case thus appears to require that if the plaintiff does

4 For a discussion of these cases, see 17 CHICAGO-KENT LAW REVIEW 97.

1 "If, upon the hearing of such motion, the opposite party shall present affidavits or other proof denying the facts alleged or establishing facts obviating the objection, the court may hear and determine the same and may grant or deny the motion; but if disputed questions of fact are involved the court may deny the motion without prejudice and shall so deny it if the action is one at law and the opposite party demands that the issue be submitted to a jury." Ill. Rev. Stat. 1937, Ch. 110, § 172(3).

2 371 Ill. 203, 20 N.E. (2d) 280 (1939).

3 "That the cause of action did not accrue within the time limited by law for the commencement of an action or suit thereon." Ill. Rev. Stat. 1937, Ch. 110, § 172(f).

4 Under the former practice such new matter had to be introduced into the record by an appropriate plea upon which issue could be taken and trial had before the appropriate forum.