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## *Damages For Loss of Trees*

*Evelyn Stebbins\* and  
Charles G. Sabo\*\**

TREES ARE INCREDIBLE MACHINES. They help create soil, they convert minerals into new forms, help clean the air, modify the temperature, help to create breezes, and prevent soil erosion. No engineering marvel of man is as efficient as a tree's root system in channeling water back into the earth to refresh the dwindling water table. Trees also shield unsightly views and absorb harsh sounds. In some places they are wind breaks.

As air conditioners, trees are unmatched. The daily evaporation from a single well-watered tree can produce an estimated cooling effect of more than a million BTU's—equal to ten room-sized air conditioners operating twenty hours a day.<sup>1</sup>

The wholesale felling of trees can trigger a whole chain of disastrous consequences. To quote the warning of Scottish science journalist Robert Chambers, "When the forests go, the waters go, fish and game go, crops go, herds and flocks go, fertility departs. Then the age-old phantoms appear, stealthily one after another—flood, drought, fire, famine, pestilence."<sup>2</sup>

Have we recognized all the values of trees in past litigation? The difficulty of determining the value of irreplaceable trees has recently been in the news. Cyrus Eaton brought an action against the Cleveland Electric Illuminating Company alleging an abuse of an easement on his property and seeking damages for the cutting of over four hundred trees, some of which were over three hundred years old.<sup>3</sup> Although this is an unique case because of the age and number of trees removed, the wrongful cutting of trees is not an uncommon occurrence in America. Gas and oil companies, electric companies, telephone companies, and construction firms have repeatedly entered the land of another and wrongfully cut trees as trespassers or in abuse of an easement.<sup>4</sup> The companies cite progress and better service as the reasons for their actions in ravaging man's environment. The landowner who returns home to find his yard barren of trees due to the errors of such companies, thinks not of progress but of restoring his environment.

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<sup>1</sup> CLEVELAND METROPOLITAN PARK DISTRICT, EMERALD NECKLACE, Jan., 1970.

<sup>2</sup> ROTARIAN MAGAZINE, June, 1970 at 46.

<sup>3</sup> Cleveland Electric Illuminating Co. v. Eaton, No. 286012 (C. P. Summit County, filed Oct. 20, 1970).

<sup>4</sup> Burden v. Woodruff, 79 Ga.App. 197, 53 S.E.2d 218 (1949); Windfohr v. Johnson's Estate, 57 S.W.2d 215 (Tex. Civ. App. 1932); Western Union Tel. Co. v. Ring, 102 Md. 677, 62 A. 801 (1906); Barnes v. Arkansas-Missouri Power Co., 220 Mo. App. 141, 281 S.W.93 (1926); Delaware & Madison Counties Tel. Co. v. Fisk, 40 Ind. App. 348, 81 N.E. 1100 (1907).

The purpose of damages is to compensate an individual for an injury or wrong,<sup>5</sup> where the loss or diminution is proximately caused by the negligent or wrongful act or omission of another.<sup>6</sup> The purpose of a measure of damages is to ascertain what compensation to award the injured person. The courts have held that the general measure for damage to real property is the difference between the market value of the property before the injury and its value after the injury.<sup>7</sup> Although there is no fixed, arbitrable, or absolute rule regarding damages for the loss of trees to realty,<sup>8</sup> the courts generally look upon a loss of trees as an injury to the land and apply the general measure of damage for real property, known as the "before and after" rule. They have recognized the limitations of the general rule and regard the facts of the case as a determinant as to what other measures of damages may be used. In determining what measure or rule to use for the loss of trees to realty, four classifications are used; (1) timber, (2) fruit, nut and other productive trees, (3) shade and ornamental trees, and (4) nursery trees and stock.<sup>9</sup>

### Ornamental and Shade Trees

The measures of damages for the loss of ornamental and shade trees are still developing. Generally, the "before and after" rule is used in determining damages where trees are grouped in this classification.<sup>10</sup> There are instances, however, where an award based on the general measure would not justly compensate an injured landowner, since it does not take into consideration a special value of a shade tree. An unique case exemplifying this is *Lucas v. Morrison*,<sup>11</sup> where a sole shade tree was cut down from the middle of a grazing meadow. The loss of this tree neither diminished the value of the land nor caused a loss of timber worth anything to the owner. Instead the owner lost the benefit of a shade tree for his cattle; and the court awarded damages based on compensation for his loss of a tree with "intrinsic value" or a "separate value" from the land. The "separate value" rule is an exception to the general rule, and at trial an election by the wronged party is permitted. The owner's election is based on the "separate value" of the trees as personalty, or the decrease of market value of the land due to the injury to the realty.<sup>12</sup> In this way the courts distinguish the value of the trees from the value of the land.

<sup>5</sup> Spackman v. Ralph M. Parsons Co., 147 Mont. 500, 414 P.2d 918 (1966).

<sup>6</sup> H. OLECK, DAMAGES TO PERSONS AND PROPERTY, §4 (Rev. Ed. 1961).

<sup>7</sup> Phoenix v. Graham, 349 Ill. App. 326, 110 N.E.2d 669 (1952).

<sup>8</sup> Klein v. Garrison, 91 Ohio App. 418, 108 N.E.2d 381 (1951).

<sup>9</sup> Annot., 161 A.L.R. 549 (1946); Annot., 69 A.L.R.2d 1335 (1960).

<sup>10</sup> Cleveland Electric Illuminating Co. v. Merryweather, 6 Ohio L. Abs. 528 (1928); Klein v. Garrison, 91 Ohio App. 418, 108 N.E.2d 381 (1951); Ohio Collieries Co. v. Corke, 107 Ohio St. 238, 140 N.E. 356 (1923); O'Brien v. Dewey, 120 Vt. 340, 143 A. 2d 130 (1958).

<sup>11</sup> 286 S.W.2d 190 (Tex. Civ. App. 1956).

<sup>12</sup> Pettengill v. Turo, 159 Me. 350, 193 A.2d 367 (1963).

The general rule also does not take into consideration aesthetic values an individual may express in maintaining a wooded lot around his home. To remedy this loss, the courts have adopted a measure of damages based on the cost of restoration.<sup>13</sup> The loss sustained by Cyrus Eaton of the trees on his farm may fall in this classification with the possibility that this measure may be used. This form of compensation has generally been limited to cases where the trespass was wrongful, the owner has a special interest in maintaining an aesthetic surrounding, and where the restoration is practicable.<sup>14</sup> Practicability may prevent its use in the Eaton case. However, in cases where restoration costs may be awarded, the courts have also allowed the election of either measure of damages, the general rule or this exception, restoration costs.<sup>15</sup>

*Samson Construction Co. v. Brusowankin*,<sup>16</sup> is an illustrative case in which the court allowed as a measure of damages an election based on the "before and after" rule or restoration costs. In its decision the court stated that restoration costs do not necessarily award an *exact* restoration, but an approximate restoration, and the award may be greater than a measure of damages the "before and after" test would provide.<sup>17</sup> The purpose of allowing such an election is:

An owner of real estate has a right to enjoy it according to his own taste and wishes, and the arrangement of building, shade trees, fruit trees, and the like may be very important to him . . . .

When his land and trees are damaged,

the disturbance of that arrangement . . . might not impair the general market value . . . . The owner of property has a right to hold it for his own use as well as to hold it for sale, and if he has elected the former he should be compensated for an injury wrongfully done him in that respect, although that injury might be unappreciable to one holding the same premises for purpose of sale.<sup>18</sup>

The court granted an election to the wronged party of damages for the loss in value of his land or for his particular loss of use. Although the court found the *actual* restoration was impractical, it awarded an amount equivalent to one required for replanting and reseeding as a fair measure of damages.<sup>19</sup>

<sup>13</sup> *Thatcher v. Lane Constr. Co.*, 21 Ohio App.2d 41, 254 N.E.2d 703 (1970); *Huber v. Serpico*, 71 N.J. Super. 329, 176 A.2d 805 (App. Div. 1962); *Lucas v. Morrison*, 286 S.W.2d 190 (Tex. Civ. App. 1956); *Gilman v. Brown*, 115 Wis. 1, 91 N.W. 227 (1902); *Schankin v. Buskirk*, 354 Mich. 490, 93 N.W.2d 293 (1958); *Brereton v. Dixon*, 20 Utah2d 64, 433 P.2d 3 (1967); *Samson Constr. Co. v. Brusowankin*, 218 Md. 458, 147 A.2d 430, 69 A.L.R.2d 1326 (1958); RESTATEMENT OF TORTS §929 at 661 (1939).

<sup>14</sup> *Samson Constr. Co. v. Brusowankin*, 218 Md. 458, 147 A.2d 430, 69 A.L.R.2d 1326 (1958).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Gilman v. Brown*, 115 Wis. 1, 7, 91 N.W. 227, 229 (1902).

<sup>19</sup> *Samson Constr. Co. v. Brusowankin*, 218 Md. 458, 147A.2d 430, 69 A.L.R.2d 1326 (1958).

It appears that the "separate value" and restoration cost rules complement the general rule by considering the individual's use of land as a relevant factor. In the determination of the owner's particular use of land, evidence may be introduced to show the present use and even the contemplated use of his land.<sup>20</sup> In adopting these rules and allowing such evidence, the courts have attempted to arrive at measures of damages which compensate an individual for the loss of his chosen use of ornamental and shade trees.

### Timber

The measure of damages for loss of trees used for timber is generally well settled within each jurisdiction. Commercial interests have created a great amount of litigation on this point. For the loss of timber the market place can accurately determine the value.

Within the jurisdiction measures of damages have been developed which reflect the market value of timber at various stages of cutting and production and the court's determination of whether the trespasser's entry was "innocent" or "willful." Where there is a removal of timber by an innocent trespasser, a recovery of the value of the cut timber is recognized even though enhanced in value.<sup>21</sup> Other courts have held that where an innocent taker has enhanced the value of the timber by his labor, the rightful owner may recover the loss of profits and the value of the timber by deducting the value of the cost of manufacturing from the value of the manufactured product.<sup>22</sup> If there is a willful or wanton removal of timber, the injured party may recover the value of the timber and its products without any allowance for the labor and cost of increasing the value of the timber.<sup>23</sup> Only two jurisdictions allow the owner whose timber was wrongfully taken the value of the timber and loss of profits, and not the value of the manufacturing of the product.<sup>24</sup>

There are several tests as to whether a trespasser who converts timber is an "innocent" or "willful" taker, none of which can accurately differentiate the sheep from the goat.<sup>25</sup> An honest mistake as to the boundary line,<sup>26</sup> induced by the advice of reputable counsel,<sup>27</sup> or acquiescent conduct of the owner,<sup>28</sup> may be indications that the behavior of the trespasser was "innocent." A "willful" taker may be one who knows the nature of the true owner's claim and, believing

<sup>20</sup> *Schankin v. Buskirk*, 354 Mich. 490, 93 N.W.2d 293 (1958).

<sup>21</sup> *Simmons v. Cochran*, 252 Ala. 461, 41 So.2d 579 (1949).

<sup>22</sup> *Randleman v. Taylor*, 94 Ark. 511, 127 S.W. 723 (1910).

<sup>23</sup> *Brewer v. Fletcher*, 210 Ark. 110, 194 S.W.2d 668 (1946).

<sup>24</sup> *Randleman v. Taylor*, 94 Ark. 511, 127 S.W. 723 (1910); *State v. Rathbone*, 144 La. 835, 81 So. 334 (1919).

<sup>25</sup> *C. McCORMICK, DAMAGES* § 126 at 497-499 (1935).

<sup>26</sup> *Bennett Jellico Coal Co. v. East Jellico Coal Co.*, 152 Ky. 838, 154 S.W. 922 (1913).

<sup>27</sup> *United States v. Midway Northern Oil Co.*, 232 F. 619 (S.D. Cal. 1916).

<sup>28</sup> *Rock v. Belmar Contracting Co.*, 141 Misc. 242, 252 N.Y.S. 463 (Ct. App. 1930).

his own title superior, enters the land as a trespasser.<sup>29</sup> The true owner's protest or failure to protest the trespass may also determine whether the entry was in "willful defiance."<sup>30</sup>

Another means of ascertaining damages for wrongfully cut timber is its stumpage value.<sup>31</sup> The stumpage value is the value of the timber standing in the trees.<sup>32</sup> This measure and the "before and after" measure based on the difference in the market value of the realty before and after the cutting of the timber may always be used by a timber land owner.

### Fruit, Nut and Other Productive Trees

Three rules are utilized by the courts to measure the damages for the loss of fruit, nut, and other productive trees.<sup>33</sup> In the majority of jurisdictions the "before and after" rule is applied.<sup>34</sup> However, the "separate value" rule, discussed above in relation to shade and ornamental trees, is also a major measure, treating such trees as personalty and not as a loss or injury to land.<sup>35</sup> This rule more adequately compensates the owner whose land value is not diminished, where the worth of the wood is almost nothing, but the trees have been used for a particular purpose.<sup>36</sup>

The third rule allows the wronged party to elect either the "before and after" or the "separate" value rules in determining the measure of damages.<sup>37</sup> This flexible rule more fairly compensates the owner for a loss of fruit or productive trees, however, it may impede the introduction of the award of restoration costs in cases where the lower costs of grafting would economically compete with the higher costs of the other measures of damages.

### Nursery Trees and Stock

Where a nursery has suffered a loss of trees, the proper measure of damages is more like the loss of a stock of goods than the loss of productive trees, unless there is a permanent injury to land.<sup>38</sup> The measure of damages is the market value of the trees at the time of loss, market price being the bulk or lot price and not the retail price.<sup>39</sup> For the loss of mature Christmas trees, the value of the trees at the nearest market is the measure of damages excluding the loss of potential profit.<sup>40</sup>

<sup>29</sup> *Pittsburgh & W. Va. Gas Co. v. Pentrose Gas Co.*, 83 W. Va. 449, 100 S.E. 296 (1919).

<sup>30</sup> *Kahle v. Crown Oil Co.*, 180 Ind. 131, 100 N.E. 681 (1913).

<sup>31</sup> *Titus v. Poland Coal Co.*, 275 Pa. 431, 119 A. 540 (1923).

<sup>32</sup> *Burbridge v. Bradley Lumber Co.*, 218 Ark. 897, 239 S.W.2d 285 (1951).

<sup>33</sup> Gillard, *Damages—Destruction of Fruit Trees—A Proper Rule of Valuation*, 14 WAYNE L. REV. 1211 (1968).

<sup>34</sup> *Hill v. Morrison*, 88 Cal. App. 405, 263 p. 573 (1928).

<sup>35</sup> Gillard, *Supra* Note 34.

<sup>36</sup> *Lucas v. Morrison*, 286 S.W.2d 190 (Tex. Civ. App. 1956).

<sup>37</sup> *Breerton v. Dixon*, 20 Utah2d 64, 433 P.2d 3 (1967).

<sup>38</sup> *Austin v. Howard*, 158 S.W.2d 556 (Civ. App. Tex., 1941).

<sup>39</sup> *Id.*

<sup>40</sup> *Mink v. New York Central R.R.*, 31 Pa. D. & C.2d 518 (C. P. Mercer County 1963).

## Consequential and Punitive Damages

For the tortious removal of trees from realty the trespasser may be held liable for consequential damages for annoyance, illness, and inconvenience.<sup>41</sup> For willful wrongs to trees, including shade trees,<sup>42</sup> on another's land, exemplary damages have been awarded.<sup>43</sup> Some states have statutes which allow or compel an award of double or treble damages for the cutting of another's trees.<sup>44</sup> When awarded, such damages are considered punitive.<sup>45</sup>

It should be noted here that criminal sanctions are used in many states as a deterrent against wrongful removal of trees. In Ohio, if the value of timber severed from the land is \$60 or more, the punishment may be imprisonment for not less than one year nor more than three.<sup>46</sup>

## Conclusion

Without plant life in our world, humans could not exist. Together, and left alone, land, air, and water work well as an ecosystem, to maintain the great chain of life, and the delicate balance of nature from ocean depth to mountain top. Man is just beginning to understand ecosystems and his dependence on the balance in nature. The more trees we cut, the more we diminish our life-giving oxygen supply. The many values of trees need to be considered in awarding damages for their loss.

Increased damage awards for the loss of trees can be anticipated through introduction of scientific evidence. For example, the fact that a single tree can provide the cooling equivalent of ten room-sized air conditioners provides a measure for loss of the homeowner's comfort.

The restoration cost rule will, in all probability, be expanded as more successful methods of grafting are developed and new "breeds" of trees are grown. In light of these innovations, attorneys might be able to ease or eliminate the practicability limitation of restoration costs and have damages awarded on the basis of the cost of grafting new trees on the stumps of old trees or the planting of a new fast growing breed of tree to compensate a loss of ornamental or shade trees.

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<sup>41</sup> *Portable Drilling Corp. v. Guinn*, 204 Okla. 68, 226 P.2d 923 (1961).

<sup>42</sup> *Hubing v. Henderson*, 161 Pa. 553, 29A. 276 (1894).

<sup>43</sup> *Gowan v. Wisconsin-Alabama Lumber Co.*, 215 Ala. 231, 110 So. 31 (1926).

<sup>44</sup> CAL. CIV. PRO. § 733 (West 1968); IDAHO CODE § 6-202 (1948); IOWA CODE ANN. § 658.4 (1950); MO. REV. STAT. § 537.340 (1959); MICH. COMP. LAWS ANN. § 600.2919 (1968); OKLA. STAT. ANN. tit. 23, § 72 (1955); ORE. REV. STAT. § 105.815 (1969); PA. STAT. ANN. tit. 32, § 481 (1967); VT. STAT. ANN. tit. 13, § 3606 (1959); WASH. REV. CODE ANN. § 64.12.030 (1966).

<sup>45</sup> *Kinzua Lumber Co. v. Daggett*, 203 Ore. 585, 281 P.2d 221 (1955).

<sup>46</sup> OHIO REV. CODE §§ 981.15, 981.16, 981.99 (Page 1968).

Landowners and society suffer economic and environmental losses when trees are removed from realty. Statutes requiring the replacement of trees lost because of governmental activity might be adopted. After all, the federal government has long fostered the replenishing of our forests in lumbering areas. With the public more interested in preserving natural resources and more skeptical of "progress" at the sacrifice of a healthy environment, more municipalities may require that the landscape "be preserved in its natural state, insofar as practicable, by minimizing tree . . . removal . . ." <sup>47</sup>

The common lawyer will be the catalyst in bringing about these changes. Although the rules of damages for the loss of trees set forth in this paper have been the rules the courts have followed, he should keep in mind the most basic rules of damages. The only inflexible rule of damages is the rule of compensation. Since a compensable element of damages must be subject to measure, it will be up to the attorney's ingenuity to utilize scientific developments and facts pertaining to the value of trees for his client's benefit.

The growing modern destruction of trees, shrubs, and topsoil, especially by builders and in construction work, now is producing a sharp public reaction. As moral, civic, and aesthetic considerations seem to have small effect on the reckless pursuit of pecuniary gain in this respect, a hardening of the law of damages here is required and widely desired, lest the country be turned into an ugly asphalt desert. <sup>48</sup>

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<sup>47</sup> C. Lindbloom, *Environmental Design Review*, "Model Ordinance—ENVIRONMENTAL DESIGN REVIEW," 54 (1970).

<sup>48</sup> H. OLECK, *DAMAGES TO PERSONS AND PROPERTY*, §217 at 397-8 (rev. ed. 1961).