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TRESPASS TO LAND IN NORTH CAROLINA
PART II. REMEDIES FOR TRESPASS†

Dan B. Dobbs*

Having discussed the substantive law of trespass to land in the preceding issue of this volume, the author now turns to an examination of the remedies available in an action for trespass in North Carolina. A reading of the article suggests that the availability of both legal and equitable remedies affords the North Carolina judge considerable latitude in fashioning relief to fit the particular facts of each case. The author covers the legal remedy of money damages, including statutory and restitutionary measures of damages, and the equitable remedy of injunction.

INTRODUCTION

Part I of this article considered the substantive law of trespass to land in North Carolina.** When substantive law determines that a trespass has been committed, there remains the problem of selecting an appropriate remedy. A money recovery as “damages,” is, of course, the most common remedy. Less common, but important, is the money recovery based upon a restitutionary measure, the kind of thing involved in “waiving the tort and suing in assumpsit.” Equitable relief against trespass is perhaps more and more common, and it constitutes an important segment of the remedies law of trespass today. This part considers each of these remedies for trespass to land and the subsidiary issues raised when these remedies are sought.

DAMAGES

Possessory Interests—Nominal and Parasitic Damages

Anyone who is entitled to recover under the substantive rules of trespass is always entitled to recover at least nominal damages.† This is in

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* Professor of Law, University of North Carolina; Visiting Professor, Cornell Law School, 1968-69.
** Dobbs, Trespass to Land in North Carolina—Part I. The Substantive Law, 47 N.C.L. Rev. 31 (1968) [hereinafter cited as Dobbs, Part I].
part a historical hangover and in part a modern recognition that even an entry that does not cause physical harm to the land is, absent a privilege, nevertheless an invasion of the sanctuary the occupant ought to have, and that such entries ought to be discouraged by assessment of damages.\(^2\)

Damages in this situation—where there is no physical harm to the land or its structures—are recoverable by the possessor, not the owner, if the ownership and possession are in different persons, since it is "possession" or dignitary rights that have been injured, not "ownership" or economic rights.\(^3\)

Damages are not limited here to purely nominal damages. If the invasion is substantial, juries are allowed to award what might be called "general" damages, which, though subject to judicial control, are still more than nominal sums of one dollar or the like.\(^4\) In addition to these damages, the plaintiff may recover any other loss he suffers as a direct result of the trespass.\(^5\) Typical of this group of damages is the mental anguish, or emotional distress, damage resulting from the trespass or the way in which it was carried out.\(^6\) In addition, punitive damages may be awarded if the trespass is carried out "maliciously"\(^7\) or with violence. The usual formula emphasizes "malice" as the basis for the award of punitive damages, but any serious form of aggravated misconduct seems to be sufficient; certainly violence is,\(^8\) and possibly extreme rudeness.\(^9\) The subjective state of mind of the trespasser suggested by talk of "malice" does not, in fact, seem to be what courts are considering.

**Physical Damage—Timber, Minerals, and Structures**

Where timber is cut, there are two alternative measures of damages

\(^2\) Dobbs, *Part I*.

\(^3\) Id.

\(^4\) See Duncan v. Stalcup, 18 N.C. 440 (1836).


\(^6\) E.g., May v. Western Union Tel. Co., 157 N.C. 416, 72 S.E. 1059 (1911).

\(^7\) Id.

\(^8\) E.g., Wylie v. Smitherman, 30 N.C. 236 (1848).

\(^9\) Duncan v. Stalcup, 18 N.C. 440 (1836). In this case, the defendant allegedly shot plaintiff's dog and cattle, killed his horses and hogs, and burned his stables and stacks. Punitive damages were allowed, since "it is scarcely possible that the trespasses complained of could have been committed without wanton malice and insult." Id. at 442.

\(^9\) Remington v. Kirby, 120 N.C. 320, 26 S.E. 917 (1897), where the court spoke of trespass committed "through malice, or accompanied by threats, oppression or rudeness to the owner or occupant." Id. at 325, 26 S.E. at 917.
available apart from statute. One gives the landowner the difference in the value of his land immediately before and immediately after the cutting; that is, it gives him the diminution in value of his land by reason of the trespass. The other gives him the value of the timber as timber. It seems probable that in some cases damages will be higher when the diminution in value of land is used as a measure, and that in other cases damages will be higher when the timber value is used. Since the aim is to fully compensate the plaintiff for any losses, it seems clear that he should have an option and should recover on the basis of the highest yield. Apparently, he does in fact have such an option in North Carolina and may claim either measure of damages. Historically this may have been true because timber cutting might easily be regarded as a trespass to land and the diminution-in-value of land test used, or it might equally be regarded as a conversion of personal property and the timber value test used. Since the departure of the forms of action, however, it no longer seems relevant to consider whether timber is personalty or realty for purposes of assessing damages, and either measure of damages is available to the plaintiff.

The measures of damages discussed above may be enhanced in two ways. By statute a trespasser cutting "wood, timber, shrub or tree" is liable to the landowner "for double the value" of the timber cut or removed. The statute formerly imposed liability only when the timber cutter was an intentional wrongdoer, but the present version imposes not only double, but strict, liability as well. The statutory liability is

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11 Jenkins v. Montgomery Lumber Co., 154 N.C. 355, 70 S.E. 633 (1911); Williams v. Elm City Lumber Co., 154 N.C. 306, 70 S.E. 631 (1911); Brickell v. Camp Mfg. Co., 147 N.C. 118, 60 S.E. 905 (1908); Waters v. Greenleaf-Johnson Lumber Co., 115 N.C. 648, 20 S.E. 718 (1894). In Owens v. Blackwood Lumber Co., 212 N.C. 133, 193 S.E. 219 (1947), the Court said that the measure of damages was the reduced market value of the land where there was not total destruction and the injury was "negligent." Id. at 139, 193 S.E. at 223.
12 Wall v. Holloman, 156 N.C. 275, 72 S.E. 369 (1911); Bennett v. Thompson, 35 N.C. 146 (1851).
13 See Williams v. Elm City Lumber Co., 154 N.C. 306, 70 S.E. 631 (1911).
14 See cases cited notes 11 & 12 supra.
16 For some purposes it remains important to classify property as "real" or "personal," and there are rules for classifying timber. N.C. GEN. STAT. § 25-2-107 (1965). But the classification appears to be immaterial for purposes of damages in trespass cases.
17 N.C. GEN. STAT. § 1-539.1 (Supp. 1965).
18 Caldwell Land & Lumber Co. v. Hayes, 157 N.C. 333, 72 S.E. 1078 (1911).
“for double the value of such wood, timber, shrubs or trees,” and this presumably authorizes a doubling of the timber value, but not a doubling of the loss in value of the land. In other words, the plaintiff apparently has an option to seek either the statutory damages of double the timber value, or the diminution in value of the land, not doubled. The latter might be preferable to the landowner, for example, if the timber cut had little or no commercial value, but its removal reduced the value of the lot considerably.

Damages may also be enhanced if the trespasser is a knowing wrongdoer, for in such a case the North Carolina Supreme Court would apparently follow the rule that the landowner may recover not only the value of the timber at the stump, but any value added to it by the trespasser’s labors. For example, if defendant, a willful wrongdoer, cuts plaintiff’s timber, it may be worth 100 dollars at the stump. But the defendant may transport it ten miles downstream to a mill where it will bring 300 dollars. Defendant’s labor and expense of transport have increased the value of the timber. In this situation, the intentional trespasser is apparently held liable for the entire value of the timber.

The double damages statute is ambiguous in respect of timber removed and enhanced in value by the defendant’s labors. Damage to be recovered is “double the value of such wood . . . cut or removed.” But this might mean “double the value where cut,” or “double the value any time up until sale by the trespasser.” Thus, the plaintiff in the illustration above might recover 200 dollars under the statute (the 100 dollar value of the timber doubled). Or he might recover 600 dollars (the 300 dollar value of the timber after defendant had transported it, doubled). Still another possibility is that in this situation the statute has no application at all and the plaintiff recovers 300 dollars, the enhanced value of the timber. It must be emphasized again, that the enhanced value is recovered only if the defendant is a willful wrongdoer.

Minerals have been of less economic importance in North Carolina

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20 See Wall v. Holloman, 156 N.C. 275, 72 S.E. 369 (1911), adopting the rule that “in absence of willful wrongdoing compensatory damages are intended as a pecuniary equivalent for the property lost by defendant’s wrong, and where property is lost, converted, or destroyed, the owner is compensated when he receives its full value in money.” Id. at 278, 72 S.E. at 370. In that case the timber cut was worth 24 dollars where it was cut, but 84 dollars at the place to which the trespasser had transported it. The plaintiff was allowed to recover only 24 dollars under the rule quoted above, since the trespasser was not a willful wrongdoer. The implication is that plaintiff could have recovered 84 dollars—the value of the timber as enhanced by the trespasser’s labors—had the trespass been willful.

21 N.C. GEN. STAT. § 1-539.1(a) (Supp. 1967).
than timber, but the interest a landowner has in minerals is obviously similar in some respects to his interest in timber. Though there is a dearth of case law on the subject of minerals, there is a statute imposing liability for double the value of minerals “mined or carried away” by a trespasser.\textsuperscript{22}

Damage to structures on the plaintiff’s land is also sometimes compensated by giving the plaintiff the diminution in the market value of his property resulting from the trespass.\textsuperscript{23} Here again, however, the objective is to afford full relief, and repair costs may in some instances furnish an equally acceptable measure of damages and are certainly entirely relevant to test “the reasonableness of the opinion expressed by the witnesses as to the market value . . . .”\textsuperscript{24}

\textit{Replacement Cost—Restorable Trees and Structures, Removable Debris}

Where a trespasser destroys or removes ornamental trees or shrubs, or damages structures on the land such as fences or buildings, there are at least two appropriate measures of damages. One measure is the diminution in land value caused by the trespass, that is, the difference between the value of the land as a whole immediately before and immediately after the trespass.\textsuperscript{25}

This will often operate as an accurate reflection of losses. At other times, however, this measure of damages will be inadequate. Removal of an ancient oak may actually increase the value of the land for commercial

\textsuperscript{22} N.C. GEN. STAT. § 74-32 (1965). The wording of the statute is quite different from the timber statute, note 17 \textit{supra}, and it also provides a means of calculating the value of minerals carried away by use of an “average assay.”


\textsuperscript{24} Broadhurst v. Blythe Bros., 220 N.C. 464, 469, 17 S.E.2d 646, 649 (1941).

\textsuperscript{25} This, of course, is the general rule where land itself is involved. \textit{E.g.}, Bickwell v. Camp Mfg. Co., 147 N.C. 118, 60 S.E. 905 (1908). Where a manufacturing plant was damaged by shunting railroad cars, the reduced market value test was applied in West Constr. Co. v. Atlantic Coast Line Ry., 185 N.C. 43, 116 S.E. 3 (1923). The Court said that “the rule generally adopted is to allow the plaintiff the difference between the market value of the property immediately before the injury occurred and the like value immediately after the injury is complete.” \textit{Id.} at 46, 116 S.E. at 5. In Paris v. Carolina Port. Aggregates, Inc., 271 N.C. 471, 157 S.E.2d 131 (1967), the defendant allegedly caused cracks in plaintiff’s house by blasting in a quarry. The Court said “the correct rule for the measurement of damages is the difference between the market value of the property before and after the injury.” \textit{Id.} at 484, 157 S.E.2d at 141. Unless the structure is one with a ready separate market, presumably this language means the measurement includes the whole property, both land and structure. Broadhurst v. Blythe Bros., 220 N.C. 464, 17 S.E.2d 646 (1941) (structure cracked and moved, diminution in market value of “the property” is measure of recovery); \textit{cf.} Wylie v. Smitherman, 30 N.C. 236 (1848) (county court house, perhaps an ambiguous opinion).
purposes; but if the plaintiff wishes to use the land as his home, removal of the tree takes away from him something he is entitled to have. Thus, if he has a reason to replace destroyed trees or shrubs—as he normally will where the land is a homesite—replacement cost is the appropriate measure of damages, and several courts have so held, even where replacement cost exceeds the total value of the land. Where the trees are timber trees and the landowner has no particular reason to replace them, replacement cost is not used as a measure of damage and one of the normal measures is used instead.

Replacement cost is also an appropriate measure whenever the trespass destroys structures that normally would be replaced or that the landowner intends to replace, such as fences, for example. The same is true where the trespass does not destroy structures but leaves obstructions on the land which normally would be removed. And a similar rule is appropriate where repair rather than replacement is in order.

It is perfectly appropriate to award replacement costs to landowners in certain cases, but there should be some guarantee that the landowner in fact does replace the property in its original condition. The landowner may have two distinct interests in cases of this sort. One is financial: he does not live on the land or use it personally, but merely wishes to sell or rent it at a good price. The other interest, though compensable in money, is not financial. It is the interest in using the land, enjoying it, exercising dominion over it in any way, however idiosyncratic, short

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26 Elowsky v. Gulf Power Co., 172 So. 2d 643 (Fla. App. 1965). Here the court allowed recovery for diminution in property value plus additional loss of shade value to landowner and held that creature comforts "constitute property rights . . . separate and apart from the isolated value of the tree itself as part of the reality." Id. at 645. See also Samson Constr. Co. v. Brusowankin, 218 Md. 458, 147 A.2d 430 (1958) (homesite was bulldozed "as bare as a board but not as smooth"); cost of replacement with trees as large as practical and as many as needed allowed; replacement cost is appropriate though it exceeds value of lots); Huber v. Serpico, 71 N.J. Super. 329, 176 A.2d 805 (1962) (verdict of 6500 dollars sustained for cutting of shade trees though total value of portion of lot cut was only 3000 dollars).

In McKinnon v. Benedict, 38 Wis. 607, 157 N.W.2d 665 (1968), defendant trespassed upon plaintiff's land and bulldozed a small portion of it. Although no substantial tree growth was on the land, the small hill removed by the bulldozing had screened plaintiff's land. The Wisconsin court sustained an award of 750 dollars for planting trees even though none had existed there before, since the trees would serve, as the hill had, to screen the remainder of the plaintiff's land.


28 See cases cited notes 11 & 12 supra.


30 Id.

of creating a nuisance on it. Thus, if the landowner wishes to have a
tree on the land, this interest is protected only if the trespasser is forced
to pay the cost of restoring the tree he has removed. And the trespasser
should be required to restore the tree—by paying enough money to allow
restoration—even if there is no purely financial loss and the market value
of the land has not been depreciated by the removal of the tree.

Suppose, however, the landowner recovers the cost of replacing the
tree and then, instead of replacing it, sells the land. If the absence of
one tree did not affect the market price, the landowner has recovered a
windfall—he has recovered enough to allow him to personally enjoy the
use of the land by replacing trees, even though it now appears that his
motive was not in use and enjoyment at all, but in selling the land. And,
as a saleable property, the land has not been damaged. In such a situation,
the landowner recovers a windfall over and above the nominal damages
to which he otherwise would be entitled. To avoid this, replacement cost
should be allowed only if the plaintiff shows an intention to replace. Pos-
sibly a court might insist upon an even better guarantee. This might
be done, for example, by entering a conditional decree or by requiring
plaintiff to post a bond or by ordering defendant to pay damages into
court to await replacement by the plaintiff. Since all of these things are
normally associated more with equity courts than with law courts, such
guarantees of the plaintiff's good faith might be difficult to come by.
Yet, in systems where law and equity are merged, as in North Carolina,
some special form of judgment to protect against abuse by a plaintiff
seems appropriate.

Crops

There has been a certain amount of difficulty over the problem of
assessing damages for destruction or injury to growing crops.32 In an
erly case the North Carolina Supreme Court said, somewhat ambigu-
ously, that the plaintiff was to recover the highest price the crops were
worth where the defendant trespasser destroyed them.33 But it did not
indicate the period of time in which the price was to be the "highest." Another case allowed recovery for such sum as would "cover the injury
done to the crop before the plaintiff knew of the irruption of the hogs
and had time to drive them out . . . ."34 A somewhat similar instruction
to the effect that plaintiff should recover "the reasonable value of the

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33 Denby v. Hairston, 8 N.C. 315 (1821).
crops destroyed" was approved in still another case.\(^{36}\) In *Sanderlin v. Shaw*,\(^{38}\) the defendant flooded plaintiff's land, destroying or damaging corn. The plaintiff put on evidence as to the value of corn on the market at Norfolk and Elizabeth City, not the value of a growing crop but of mature corn. This the Court held proper, since "it was impossible to ascertain the extent of the damage . . . without an inquiry into the value of that article in its matured condition."\(^{37}\) Apparently, the Court approved the use of this evidence, not as a measure of damages per se, but as one piece of evidence helpful in ascertaining the loss plaintiff has sustained. Other evidence available to establish the value of crops includes opinion evidence and market research and reports.\(^{38}\)

Here as elsewhere it is helpful to remember that damages are designed to compensate the plaintiff, and any measure of damages that tends to do this may be an appropriate one. Thus, in some instances the cost of replanting a crop might be a more appropriate measure than the market value of the matured crop, and in other instances rental or market value of the land might be appropriate. What is required is a careful assessment of the money needed to fully compensate the landowner for the losses he in fact suffers, and it should be realized that no one measure of damages will be appropriate in all cases.

*Rental Value of Land*

In some situations, rental value of the land during the period of trespass is the accepted measure of damages, in addition, of course, to any other distinct damage done. Obviously this is not a satisfactory measure of damages where there is only an isolated trespass. On the other hand, it may be a satisfactory measure where plaintiff is deprived of the use of the land for any substantial time, even where defendant does not get a corresponding benefit. "Where the trespass suspends or impairs the enjoyment of the premises, compensation may be given on the basis of the rental value . . . ."\(^{39}\) It is likewise appropriate to allow rental value where defendant actually occupies or uses the land, of course.\(^{40}\) Thus, where defendant constructed and used a railroad on plaintiff's land, the plaintiff was allowed to recover the rental value of


\(^{36}\) 51 N.C. 225 (1858).

\(^{37}\) Id. at 229.


\(^{40}\) See *Hughes v. Oliver*, 228 N.C. 680, 47 S.E2d 6 (1948).
the land "actually occupied by defendant" and in addition the reduction in rental value of the surrounding land. The rental value in some cases may be estimated by determining the actual profits or rents defendant obtains from the land, but the recovery is not limited to the value received by defendant, and defendant is liable "for the actual rental value of the land, and not what the defendant actually gathered from the land."

The recovery of rental value as a measure of damages in trespass is associated to some extent with the recovery of mesne profits. The recovery of mesne profits in turn is associated with the action of trespass following a successful ejectment suit by the plaintiff. Ejectment was the form of action to recover possession of land, and it would lie when the person having the rights to possession was actually dispossessed. This train of association might lead to the conclusion that rental value is a proper measure of damages in trespass only when an ejectment-type situation is involved, that is, only when the owner is actually dispossessed. If this view were followed, a repeated use of the land of the plaintiff for a parking lot would not necessarily involve dispossession and would not justify recovery of rental value. But the train of association of rental value with mesne profits and of mesne profits with ejectment and dispossession is misleading. Whatever the issue was before the codes, the issue today is simply one of fair and reasonable damages. Thus, it does not matter whether there is a single and "continuous" trespass or whether there are many separate trespasses. All a court need decide is whether rental value is a fair and reasonable measure of damage or is a fair element in estimating damage in a particular case. This view

42 See Womack v. Carter, 160 N.C. 286, 75 S.E. 1102 (1912) (plaintiff could recover actual rent received by trespasser on the theory that he waived the tort); C. McCormick, DAMAGES 482 (1935). See also pp. 368-79 infra (restitution and other recoveries compared).
43 See pp. 368-79 infra. (restitution).
44 Credle v. Ayers, 126 N.C. 11, 16, 35 S.E. 128, 129 (1900). The remedy sought for the trespass in this case, as in a number of cases, was an action of ejectment with a claim for mesne profits.
45 See Brothers v. Hurdle, 32 N.C. 490 (1849). Here the Court stated that [t]he action of trespass quare clausum for the mesne profits is a continuation of the action of ejectment .... Originally, the plaintiff in ejectment recovered actual damages. It was only for the sake of convenience, that the Courts adopted the practice of trying the title only in the ejectment with sixpence damages, and then ascertaining the actual damages in a new action for the mesne profits and damages.
47 Id.
seems in accord with the decisions of the North Carolina Supreme Court. The only requirement stated for recovery of rental value is that the trespass suspend or impair the enjoyment of the premises.\(^{48}\)

**Lost Profits**

There are at least some cases in which profits lost as a result of a trespass may be recovered. When entry upon land damages a structure, the plaintiff may recover the difference between the market value of the property immediately before and immediately after the injury.\(^{49}\) In addition, evidence that the damage required a going business to shut down temporarily or to cut back an operation, is admissible to show the reduction in the market value of the property.\(^{50}\)

In *Johnson v. Atlantic Coast Line Railroad Co.*,\(^{51}\) defendant negligently caused a fire to burn plaintiff's premises. This destroyed certain manufactured crates and raw materials used in manufacturing crates. Plaintiff had a contract to provide these manufactured goods at a fixed profit, which he lost because the goods destroyed by the fire were irreplaceable. The Court held that the plaintiff could recover his loss of profits if they were sufficiently established. However, the Court drew the line at profits expected under contracts, holding that profits might have been made apart from existing contracts would be speculative. An earlier case in which a trespasser destroyed fixtures in a theatre reached a similar result, allowing the plaintiff theatre owner to recover lost profits, but only on engagements for which he had already contracted.\(^{52}\)

Theoretically, at least, there are two distinct problems about loss of profits. One problem is that no one can be certain how much loss the trespass actually caused, since profits to be made in the future are necessarily uncertain.\(^{53}\) The other problem is that even where loss of profits is proved with reasonable certainty, some losses are so remote that, as a matter of policy, courts refuse to hold the defendant liable. Where the defendant is a wrongdoer, however, doubts about both these problems are appropriately resolved against the defendant and liability is extended fairly liberally in comparison with breach of contract cases.\(^{54}\) It may

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\(^{48}\) See note 39 supra.


\(^{50}\) Id.

\(^{51}\) 140 N.C. 574, 53 S.E. 362 (1906).

\(^{52}\) Willie v. Branch, 94 N.C. 142 (1886); cf. Bowen v. King, 146 N.C. 385, 59 S.E. 1044 (1907); Sledge v. Reid, 73 N.C. 440 (1875).


also be true that the more certain the proof of loss, the less the problem of "remoteness."

PERMANENT DAMAGES—CONTINUING AND PERMANENT TRESPASSES

Many trespasses are committed in a single event. A man walks onto another's land and then walks off again; the trespass is over and completed. Other trespasses may continue more or less indefinitely. They may be repeated, as where an intruder takes a short cut across the land every day, or they may be continuous, as where an intruder dumps a load of trash which remains on the land indefinitely. For the most part, these two situations are treated alike. The landowner may sue for damages accruing up until the time of trial, and if the offending deposit remains on his land or the intruder continues to use the land as a short cut, he may sue again. Theoretically, this may keep up indefinitely, though the defendant may soon become tired of paying claims and remove the trash or cease to use the land; or the plaintiff may stop the trespasses by procuring an injunction or perhaps by procuring an ejectment judgment.

There are other situations, however, where the courts do not allow successive actions by the landowner. In these situations, often classified as involving a nuisance, the landowner is allowed to bring only one suit—a suit for "permanent" damages that includes all future damages. This is treated as a taking of an interest in the land and is measured by the reduction in the value of the land resulting from the taking or trespass.

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66 Webb v. Virginia-Carolina Chem. Co., 170 N.C. 662, 87 S.E. 633 (1916). Here the Court stated: "[D]amages may be awarded to the time of trial if the nuisance continues to that time." Id. at 666, 87 S.E. at 635. See also Dale v. Southern Ry., 132 N.C. 705, 44 S.E. 399 (1903); Ridley v. Seaboard & R.R.R., 118 N.C. 996, 24 S.E. 730 (1896).

68 Ridley v. Seaboard & R.R.R., 118 N.C. 996, 24 S.E. 730 (1896). The Court said that "[o]rdinarily where a trespass results in a nuisance, not only is the original wrong actionable, but successive suits may be brought for its continuance." Id. at 997, 24 S.E. at 731. See also Anderson v. Town of Waynesville, 203 N.C. 37, 164 S.E. 583 (1932); Webb v. Virginia-Carolina Chem. Co., 170 N.C. 662, 87 S.E. 633 (1916).

67 See pp. 351-65 infra.


69 Beach v. Wilmington & W.R.R., 120 N.C. 498, 26 S.E. 703 (1897). The Court stated:

The amount recovered is not the estimated sum of all future damages expected to result from a continuing trespass, for such damage, running indefinitely, perhaps forever, would be utterly incapable of calculation; and, moreover, it would be giving the defendant a right to commit a wrong. The sum recoverable is the damage done to the estate of the plaintiff by the appropriation to the easement of so much of his land.
This stands in contrast with the damages recoverable in successive actions, which might include, instead of reduction in land value, such actual losses as result from the trespass—crop damage, for example. In general the recovery for permanent or prospective damages is forced upon a plaintiff—and sometimes upon a defendant—when two conditions coincide: first the trespass or nuisance involves a physically permanent structure, such as a railroad or a highway, and second, the trespass is one legally permanent—that is, sanctioned in the public interest and not abatable by an injunction, usually because the defendant has the power of eminent domain and could acquire the land for a fee in any event. This is put in a leading North Carolina decision in this way:

[W]here the injuries are by reason of structures or conditions permanent in their nature, and their existence and maintenance is guaranteed or protected by the power of eminent domain or because the interest of the public therein is of such an exigent nature that the right of abatement at the instance of an individual is of necessity denied, it is open to either plaintiff or defendant to demand that permanent damages be awarded; the proceedings in such cases to some extent taking on the nature of condemning an easement.

Since the award of permanent damages entitles the intruder to use the land permanently, it is clear enough that when permanent damages are awarded, some of the landowner's property is taken; unless he agrees to the assessment of permanent damages, such a radical intrusion should.

Id. at 502-03, 26 S.E. at 707; Clinard v. Town of Kernersville, 215 N.C. 745, 3 S.E.2d 267 (1939). In this case the Court held that

[the damages are to be ascertained upon the basis of the difference between the fair and reasonable market value of the property just before the defendant began to use the stream and the fair and reasonable market value thereof just after the beginning of such use, assessed upon the theory that the defendant at that time took and appropriated an interest in the property of the plaintiffs for which it must pay.]

Id. at 752, 3 S.E.2d at 273. In Lambeth v. Southern Power Co., 152 N.C. 371, 67 S.E. 921 (1910), the Court approved an instruction given by the trial court on permanent damages that the recovery was to be "the difference between the fair market value of the land before the right of way and easement was taken, and its impaired value, directly, materially and proximately resulting . . . ." Id. at 372, 67 S.E. at 922.


Rhodes v. City of Durham, 165 N.C. 679, 81 S.E. 938 (1914). A common way of expressing this is to say that either party has the option to insist (in a proper case) upon the assessment of permanent (i.e., prospective) damages. See Note, 7 N.C.L. Rev. 464 (1929). Ordinarily, however, the defendant is seeking assessment of permanent damages.

be limited to cases in which there is a real justification for it. And, conversely, the landowner cannot have permanent damages "as a matter of right" except where public interest dictates. This usually means that the defendant must have the power of eminent domain, which would be indicative of the public interest in allowing defendant to "trespass" permanently. In one case, Justice Barnhill went so far as to say that the right to permanent damages for diminution in land value exists only against defendants with power of eminent domain. This seems too narrow, because other public interests may intervene to justify permanent damages, although this would be rare. In any event, Justice Barnhill in the same case espoused the broader formula, which would afford a recovery of permanent damages when the permanence of the trespass is guaranteed either by the power of eminent domain or some other public interest.

Most of the cases in North Carolina involve takings by railroads or utilities since all these agencies have eminent domain powers, it seems appropriate to allow assessment of permanent damages when their intrusions on land are in fact physically permanent in nature and are required in the public interest. Indeed by statute in the case of railroads, permanent damages must be assessed.

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66 See Leigh v. Garysburg Mfg. Co., 132 N.C. 167, 43 S.E. 632 (1903) (permanent damages available only when defendant's activity is "impressed with a public use").
67 Id. at 750, 3 S.E.2d at 280.
Most permanent damages cases do not involve a physical structure
built directly upon the plaintiff's land. They involve instead indirect en-
tries upon the land. A railroad culvert is not large enough and water backs
up on the plaintiff's land,\(^1\) or a city sewage plant pollutes a stream run-
ning through the plaintiff's land\(^2\)—these are the typical situations in-
volved. Some of the cases, however, involve direct entry upon the land
and construction of a permanent structure there.\(^3\) So far the Court has
not drawn any distinction between the two situations.\(^4\) Even though a

\(^1\) Davenport v. Drainage Dist., 220 N.C. 237, 17 S.E.2d 1 (1941) (canal clogged,
water ponded on plaintiff's land); Louisville & N.R.R. v. Nichols, 187 N.C. 153,
120 S.E. 819 (1924) (diversion of surface waters); Bardliff v. Norfolk &
S.R.R., 175 N.C. 114, 95 S.E. 39 (1918) (diversion of water in ditches); Pickett
v. Atlantic Coast Line R.R., 153 N.C. 148, 69 S.E. 8 (1910) (diversion of waters
from natural course); Dale v. Southern Ry., 132 N.C. 705, 44 S.E. 399 (1903)
(filled a ditch, backing up water on plaintiff's land); Lassiter v. Norfolk &
C.R.R., 126 N.C. 509, 36 S.E. 48 (1900) (ponding and diverting water, exceed-
ning right to discharge water in natural course); Beach v. Wilmington & W.R.R.,
120 N.C. 498, 26 S.E. 703 (1897) (railroad construction caused flooding); Rid-
ley v. Seaboard & R.R.R., 118 N.C. 996, 24 S.E. 730 (1896) (road-bed and bridge
cause ponding of water on plaintiff's land).

\(^2\) Veazey v. City of Durham, 231 N.C. 357, 57 S.E.2d 377 (1950); Clinard
v. Town of Kernersville, 215 N.C. 745, 3 S.E.2d 267 (1939) (stream pollution);
Other non-trespassory invasions or takings include those resulting from construc-
tion, outside the land, of an unsightly and glare-producing water tank. McKinney
v. City of High Point, 239 N.C. 232, 79 S.E.2d 730 (1954); McKinney v. City of
High Point, 237 N.C. 66, 74 S.E.2d 440 (1953); City of Raleigh v. Edwards, 235
N.C. 671, 71 S.E.2d 396 (1952).

\(^3\) Lambeth v. Southern Power Co., 152 N.C. 371, 67 S.E. 921 (1910); Cherry
v. Lake Drummond Canal & Water Co., 140 N.C. 422, 53 S.E. 138 (1906); Phi-
lips v. Postal Tel. Cable Co., 130 N.C. 513, 41 S.E. 1022, rev'd on other grounds,
131 N.C. 225, 42 S.E. 587 (1902). In some of the cases involving ponding of
water, it is also clear that the defendant has physically entered the land at some
point. There is also Fore v. Western N.C.R.R., 101 N.C. 526, 8 S.E. 335 (1888),
where a railroad, with no authority to condemn gardens, built its road in plaintiff's
garden and within thirty feet of his house. See discussion in Dobbs, Part I 46-49.

\(^4\) Such a distinction is made in W. PROSSER, TORTS § 13, at 75 (3d ed. 1964). Dean Prosser cites Cherry v. Lake Drummond Canal & Water Co., 140 N.C. 422,
53 S.E. 138 (1906), in support of the view that permanent damages may be recov-
ered where there is actual trespass without regard to permanency in fact. W. Pro-
sser, § 13, at 75. That case does in fact lend some support to his view. There was a
canal company as trespasser so an analogy was drawn to railroads and other
 corporations and the requirement of "legal permanency" was satisfied. However,
the trespass consisted of an embankment of sand and mud dredged up from the
canal when it was deepened and widened and presumably could be removed. Thus,
the physical permanence of the trespass was doubtful. If permanent damages can
be allowed in this case, it may be because there was a physical trespass upon the
land, which distinguishes this from other cases. However, the Court in its dis-
 cussion assumed that there were permanent damages, and hence put the case on
the same footing as any other permanent damages case, though the assumption
may have been unjustified. In any event, the Court did not purport to apply a
different rule for cases where there were physical trespasses to land as distinct
from cases where the permanent condition occurred off the plaintiff's land.
corporation has eminent domain powers, however, it should not be privileged to enter at will and take property without following the procedures prescribed by the legislature for a taking. Where there is bad faith, as there is likely to be when a defendant builds its structure directly upon the plaintiff's land, the Court might well force removal of the structure by injunction or ejectment or might grant temporary damages in successive suits in order to force the condemnor to follow the legislatively prescribed procedures. There is at least one case that would support such a view.  

Sometimes a defendant with no statutory power of eminent domain erroneously builds a structure in whole or in part on another's land. In some such cases, courts will force a removal of the structure either by injunction or in an ejectment action. However, if the structure is only minimally trespassing, if the defendant acted in good faith and reasonably, and if there are no special equities with the landowner or against the defendant, courts usually refuse to force removal where to do so would work a hardship upon the trespasser. This, of course, is a matter of equitable discretion. In such a case the Court would presumably assess damages on a permanent basis and award the landowner the loss of value of his property rather than allow him to bring successive trespass actions, although this precise issue has not been adjudicated in North Carolina.

In addition to the requirement of "legal permanency" of the structure—the requirement that it be "guaranteed" by the defendant's eminent domain power or some other valid reason to allow the structure to stand—the structure must be physically permanent. That is, it must be the kind of structure that will not in the nature of things be removed. If defendant builds a railroad or a highway the structure is physically permanent; kept in repair, it will last indefinitely. This is not true if the

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75 Carolina & Nw. Ry. v. Piedmont Wagon & Mfg. Co., 229 N.C. 695, 51 S.E.2d 301 (1949). Here the Court stated:
The accepted doctrine, in most jurisdictions, now is that where a railroad company proceeds to build its road upon land to which it has not acquired title by condemnation or conveyance, the owner may have his action for damages or for the value of the land, or may maintain ejectment or other possessory action, or may enjoin the company from appropriating or using such land, provided he proceeds with reasonable promptitude. . . .

Id. at 698, 51 S.E.2d at 304.

76 See pp. 351-65 infra (injunction).


78 See pp. 351-65 infra (injunction).

The general formula usually adopted (quoted in the text accompanying note 62 supra) is broad enough to allow permanent damages in an appropriate case of this sort.
defendant deposits a load of ice on the plaintiff's land, and in such a case, even if the defendant has eminent domain powers, there is no permanent damage to assess, and of necessity the plaintiff must recover nominal damages or damages for any actual harm done rather than the diminished value of the land.

Veazey v. City of Durham is an example, though a complicated one, of the rule that the offending condition must be physically permanent to justify assessment of permanent damages. There the defendant had a leak in its sewer lines and as a result discharged sewage into a watercourse on plaintiff's land. The defendant was held to pay permanent damages (for which it would acquire a right to transport sewage in a proper manner), but was also enjoined to repair the leak. In other words, the permanent damages are not assessed to compensate for damages that could be avoided and were not permanent; permanent damages are assessed only when the structure is physically permanent, as well as legally permanent in the sense that courts will not force its removal. The same idea is behind the rule that denies permanent damages where the nuisance or trespass results from the defendant's method of operation, which can be changed and hence is not permanent. This was the situation, for example, in Webb v. Virginia-Carolina Chemical Co., where defendant operated a guano plant. The operation of the plant near the plaintiff's house subjected the plaintiff to offensive odors, and he brought suit to recover permanent damages. The trial court refused to submit his claim for permanent damages and he appealed. The Supreme Court held that the trial court was correct. Since the offensive odors were not necessarily permanent—they resulted from activities of the defendant, not its structure—permanent damages were inappropriate. The Court said that "[e]ntire damages may be recovered when the 'source of the injury is permanent in its nature and will continue to be productive of injury independent of any subsequent wrongful act.' "

When, on the other hand, injury may cease because the defendant ceases his conduct, permanent damages may not be recovered; in such a case there is no permanence of the conduct, which may change. Thus the rule is that permanent damages can be justified only where there is physical permanence of the offending structure, as well as legal permanence.

In the reverse situation, the structure may be physically permanent,
but there is no eminent domain power nor any other special reason to allow the intruder to condemn land. If the intruder builds a hamburger stand on another’s land, there may be some relief under a betterments statute or in equity if he has made a reasonable mistake and the landowner chooses to keep and use the structure. But the physical permanence of the structure does not justify allowing the entrepreneur to force a sale of the land to himself through an award of permanent damages. Physical permanence must be accompanied by a public interest in favor of the intruder that justifies him in taking some or all of the land of another at a valuation.

In some situations, at least, landowners have been allowed to recover both (1) permanent damages, i.e., the reduction in land value resulting from the trespass, and (2) any other losses, such as crop damage, that occurred up to the time of trial. In Lassiter v. Norfolk & Carolina Railroad, the defendant railroad had ponded water and then had diverted it, exceeding its right to discharge surface water in its natural course. This was a trespass to the plaintiff’s lands. The trial court allowed the plaintiff to recover permanent damages, but refused to allow the plaintiff also to recover past damages. The Supreme Court on appeal held that, although the plaintiff was limited to one action for damages, and though he was by statute to recover his “entire damages” in that one action,

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83 N.C. Gen. Stat. § 1-340 (1953). This statute provides:
A defendant against whom a judgment is rendered for land may, at any time before execution, present a petition to the court rendering the judgment, stating that he, or those under whom he claims, while holding the premises under a color of title believed to be good, have made permanent improvements thereon, and praying that he may be allowed for the improvements, over and above the value of the use and occupation of the land.

Id. The statute goes on to authorize assessment of the damages to the plaintiff and the allowance to the defendant for improvements.

84 One who builds on the land of another, as a result of a good faith mistake of ownership, is entitled either to remove the structure or to receive from the landowner the increased value of the land, at the election of the landowner. Beacon Homes, Inc. v. Holt, 266 N.C. 467, 146 S.E.2d 434 (1966); Navin, Contracts, Survey of North Carolina Case Law, 45 N.C.L. Rev. 895, 898 (1967); Equitable Remedies, Survey of North Carolina Case Law, 39 N.C.L. Rev. 370, 371 (1961); Note, Statute of Frauds—Part Performance—Damages, 15 N.C.L. Rev. 203 (1937).

85 In Leigh v. Garysburg Mfg. Co., 132 N.C. 167, 43 S.E. 632 (1903), a lumber company trespassed upon the plaintiff's timber lands by constructing a tramway across them for hauling timber out from lands beyond. When sued, the lumber company asked that “permanent damages” be assessed so that it would acquire a permanent right to the tramway easement. The Court held permanent damages to be improper since the lumber company “was not a quasi public corporation, and its tramway was in no sense impressed with a public use.” Id. at 172, 43 S.E. at 634.

86 126 N.C. 509, 36 S.E. 48 (1900).
nevertheless he could also recover "yearly damages" already accrued, such as crop damage done in the past. "The one is compensation for a wrong; while the other is the conveyance of a right, as the allowance of permanent damages under this act is in effect the condemnation of land to the use of a statutory easement."\textsuperscript{87}

In other cases, however, only the reduction of the value of the land by reason of the trespass is awarded, and in some of these cases the court has seemed unusually reluctant to admit evidence of specific harm that bears on the diminution in land value. In \textit{Clinard v. Town of Kernersville},\textsuperscript{88} the defendant town polluted a stream and also straightened it in a way that caused it to overflow. The plaintiff produced evidence that mosquitoes had been more prevalent since this alleged nuisance and the trial court admitted it, but on appeal the Court held that the evidence was inadmissible. It reasoned that the diminution in the value of the land was the test of damages in a "permanent" nuisance situation like this one, and that, therefore, specific harms were not elements of damages. Similarly, in \textit{Fore v. Western North Carolina Railroad},\textsuperscript{89} a railroad built its track into the plaintiff's garden and within thirty feet of his house. The Court in this case held that evidence of danger of fire was improperly admitted since the danger of fire was not an injury done to it as property. Both cases seem too narrow. Though diminution in the value of the land is the test of recovery in permanent trespass cases, specific harms or dangers do have bearing on the value. They are not conclusive evidence, but they certainly seem relevant, and there is recognition of this in some of the other cases. For example, in \textit{Hines v. City of Rocky Mount},\textsuperscript{90} the defendant city created a nuisance that caused sickness in the family. Even though permanent damages were awarded, sickness was held relevant "on the question of the diminished value of the property . . . ."\textsuperscript{91} This seems a more desirable approach than the relatively narrower one taken in the \textit{Fore} and \textit{Clinard} cases.

\textbf{Injunction Against Trespass}

\textit{In general—types of injunctions}

It is probably accurate to say that an injunction will issue today to enjoin trespass where there is a genuine need for it and where there is no

\begin{footnotes}
\item \textsuperscript{87} \textit{Id. at} 513, 36 S.E. at 49.
\item \textsuperscript{88} 215 N.C. 745, 3 S.E.2d 267 (1939).
\item \textsuperscript{89} 101 N.C. 526, 8 S.E. 335 (1888).
\item \textsuperscript{90} 162 N.C. 409, 78 S.E. 510 (1913).
\item \textsuperscript{91} 162 N.C. 413, 78 S.E. 511. \textit{See} D. STANSBURY, NORTH CAROLINA LAW OF EVIDENCE § 100 (2d ed. 1963).\
\end{footnotes}
special reason to deny the injunction, although historically courts showed considerable reluctance to let an injunction go against trespass.\textsuperscript{92} The ancient formula is that the injunction will not issue at all if there is an adequate remedy at law,\textsuperscript{93} and this rule remains current though sometimes ignored\textsuperscript{94} In any event, there has been an enormous shift in the concept of what remedies at law are adequate, so that it is probably fair to say that if the plaintiff has any real need for the injunction, his remedies at law are inadequate and the injunction will issue.\textsuperscript{95}

\textsuperscript{92}Dunkart v. Rinehart, 87 N.C. 224 (1882) (injunction will be denied absent threat of irreparable injury, and cutting trees by solvent trespasser not irreparable); McCormick v. Nixon, 83 N.C. 113 (1880) (denying preliminary injunction against timber cutting where both parties claimed title); German v. Clark, 71 N.C. 417 (1874) (injunction against heirs entering land denied to creditors absent threat of irreparable injury); Bell v. Chadwick, 71 N.C. 329 (1874) (denying injunction where injury to land is not irreparable and defendant is not insolvent); Thompson v. McNair, 62 N.C. 121 (1867) (denying injunction where plaintiff had not proved insolvency of defendant); Gause v. Perkins, 56 N.C. 177 (1857) (denying injunction before title is proved, probably to preserve right of defendant to jury trial and to avoid halting production of turpentine from the land); Lyerly v. Wheeler, 45 N.C. 267 (1853) (decided in a period when actions in equity were tried without a jury; denied injunction). A statute put an end to the old requirement of insolvency of the defendant as a prerequisite to injunction. N.C. GEN. STAT. § 1-486 (1953), first passed in 1885. N.C. Laws 1885, ch. 401. The statute had an immediate liberalizing effect, as can be seen in John L. Roper Lumber Co. v. Wallace, 93 N.C. 22 (1885), where the court again denied an injunction, but this time appointed a receiver to account for the income from the land until a final decision as to title could be had.

Waste and nuisance, though often closely resembling trespass, were enjoined without much reluctance. See, e.g., Jones, Lee & Co. v. Britton, 102 N.C. 166, 9 S.E. 554 (1889) ("injury in the nature of waste").

\textsuperscript{93}Most of the issues arise on preliminary injunction and before a full trial on the merits; in such cases courts usually purport to require a showing of "irreparable injury" before an injunction will issue. This appears to be merely an emphatic way of saying that plaintiff must genuinely need such emergency relief before it will be granted and that other relief available is not adequate. Puryear v. Sanford, 124 N.C. 276, 32 S.E. 685 (1899); Frink v. Stewart, 94 N.C. 484 (1886) ("it must appear that he will, or may, probably suffer irreparable injury in some way" if injunction is denied); German v. Clark, 71 N.C. 417 (1874) (court "will not enjoin a mere trespass unless irreparable damage is threatened"). In the absence of a claim of title or right to immediate possession by the defendant, however, the normal concern is simply with whether there is another adequate remedy. See Kistler v. Weaver, 135 N.C. 388, 47 S.E. 478 (1904). If the trespass is continuing or repeated and without a claim of right, it is usually assumed that the remedy in damages is not adequate and an injunction is issued. Cobb v. Atlantic Coast Line R.R., 172 N.C. 58, 89 S.E. 807 (1916); Combs v. County Comm'r's, 170 N.C. 87, 86 S.E. 963 (1915); Wood v. Woodley, 160 N.C. 17, 75 S.E. 719 (1912) (defendant's claim of title clearly insubstantial, injunction issued); Roper Lumber Co. v. Richmond Cedar Works, 158 N.C. 162, 73 S.E. 902 (1912).

\textsuperscript{94}When the trespass is repeated or continuous, there is seldom any discussion of adequacy of other remedies. See, e.g., Cobb v. Atlantic Coast Line R.R., 172 N.C. 58, 89 S.E. 807 (1916).

\textsuperscript{95}Absent a title dispute or undue hardship on the defendant, an injunction will
It is important, however, to distinguish the temporary restraining order from the preliminary injunction and to distinguish each of these from the “permanent” injunction. The temporary restraining order is granted, if at all, on ex parte application of the plaintiff, and defendant has no opportunity to be heard. For this reason, courts are properly reluctant to issue temporary restraining orders, and statutes limit the period of time in which they may remain in effect. The preliminary injunction or “interlocutory” injunction issues, if at all, on notice to the defendant, who then has an opportunity to be heard. The hearing, however, is usually incomplete as compared with a full-scale trial, and very often the decision of the trial judge to grant or deny injunctive relief at the preliminary stage is made on affidavits of the various parties. Here again, there is good reason for reluctance in issuing such injunctions, and consequently a pressing need must be shown by the plaintiff in order to obtain such an injunction; this ordinarily means that the plaintiff must show the danger of “irreparable injury” if he wishes to obtain either a temporary restraining order or a preliminary injunction.

Although a jury trial is normally granted in the trial of equity almost always issue to prevent a “continuous” or repeated trespass and in such cases adequacy of legal remedies is seldom even mentioned. See, e.g., United States v. Colvard, 89 F.2d 312 (4th Cir. 1937); Cobb v. Atlantic Coast Line R.R., 172 N.C. 58, 89 S.E. 807 (1916); Combs v. County Comm’rs, 170 N.C. 87, 86 S.E. 963 (1915); Wood v. Woodley, 160 N.C. 17, 75 S.E. 719 (1912) (title dispute, but since defendant’s claim of title was insubstantial, injunction issued); Roper Lumber Co. v. Richmond Cedar Works, 158 N.C. 161, 73 S.E. 902 (1912).

The terminology “temporary restraining order” and “preliminary injunction” appears in Rule 65 of the proposed N.C. RULES OF CIVIL PROCEDURE (which is taken from Rule 65 of the FEDERAL RULES OF CIVIL PROCEDURE). N.C. Laws 1967, ch. 954, §1. The code terminology in North Carolina is parallel, but not identical. N.C. GEN. STAT. §§ 1-485, -489 (1953) refers to “temporary injunctions,” which are roughly equivalent to the temporary restraining orders. The “preliminary injunction” is often referred to in decisions of the Court as an “interlocutory” injunction and often the Court speaks of “continuing the injunction.” This also refers to what is in effect the grant of the preliminary injunction.

E.g., Clinard v. Lambeth, 234 N.C. 410, 67 S.E.2d 452 (1951). The basis for relief on the ex parte temporary restraining order is, of course, almost always affidavit or limited testimony by the plaintiff. See N.C. GEN. STAT. §1-489 (1953). Under the Federal Rules an opportunity to offer evidence must be afforded if demanded, even at the preliminary stage. Fed. R. Civ. P. 65.
cases in North Carolina, it is not granted in cases of temporary restraining orders or preliminary injunctions, and the defendant in an injunction case gets a jury trial only on the final hearing for the "permanent" injunction. Thus, procedurally, the temporary restraining order and preliminary injunction are disadvantageous to the defendant, and the plaintiff's case must be more pressing when he seeks these remedies than when he seeks only a "permanent" injunction granted after a full-scale trial.

Adequacy of legal remedy

Classically an injunction would not issue to prevent trespass to land unless the legal remedy was inadequate. But the mere fact that the plaintiff can recover money in a law action is not ordinarily an adequate legal remedy for trespass if the trespass is repeated or continuous, and a statute so provides. Put a different way, if the defendant commits a single isolated trespass, plaintiff has no need for an injunction unless further trespasses are impliedly or expressly threatened. But if the trespass is either continuous, as where defendant leaves debris on plaintiff's land, or repeated, as where defendant enters the land anew every day, no money judgment will protect plaintiff's right to enjoy exclusive possession of his land, and an injunction will issue to forbid the trespass unless there is some reason to hold otherwise. There are earlier decisions showing a strong reluctance to grant injunctions against trespass, but around 1900 the North Carolina Supreme Court came to recognize that to deny a needed injunction was to reduce valuable property rights and to sanction a kind of private eminent domain.

Stewart, 94 N.C. 484 (1886). The idea is often expressed as a rule that equity "will not enjoin a mere trespass unless irreparable damage is threatened," as in German v. Clark, 71 N.C. 417, 420 (1874). However, it now seems clear that it is not the trespass that evokes such a rule, but the fact that a preliminary injunction or temporary restraining order is sought, and that procedural protection for the defendant's rights is very limited in such cases.

Cf. Fremont v. Baker, 236 N.C. 253, 72 S.E.2d 666 (1952). This is necessarily so, of course, where a temporary restraining order is sought ex parte under N.C. Gen. Stat. § 1-485 and § 1-489. The practice is, however, that the judge rather than the jury decides the preliminary injunction issue also. See A. McIntosh, North Carolina Practice & Procedure § 2216 (2d ed. 1956).

See cases cited note 95 supra. The older view to the contrary, as expressed in such cases as Frink v. Stewart, 94 N.C. 484 (1886), is now clearly overruled.

In an application for an injunction to enjoin a trespass on land it is not necessary to allege the insolvency of the defendant when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees.

The first clear recognition of this point seems to have been Roper Lumber
Apart from cases in which the trespass is continuing or repeated, an injunction is proper in any case where there is a real need for it. If the plaintiff is in possession of realty, he may obtain an injunction preventing defendant from dispossessing him. If defendant threatens by act or word to destroy or damage ornamental trees or shrubs, an injunction is proper, since trees cannot usually be replaced, certainly not with any ease, and since in any event it would be almost impossible to put a suitable money value on such items. This is a classic illustration of inadequacy of a damages claim at law. On this same principle, courts will enjoin a trespass that tends to destroy valuable wildlife and hunting privileges. A similar rule is that an injunction will go to protect against "waste" or against a destruction of the "inheritance" or freehold.

Co. v. Richmond Cedar Works, 158 N.C. 162, 73 S.E. 902 (1912), where the Court said:

It would be a most extraordinary destruction of the rights of property if a private corporation, possessing no power of eminent domain, could seize the lands of another, to which it had no semblance of title, and appropriate them to its own use, simply because it was able to respond in damages.

Id. at 164-65, 73 S.E. at 903.

The liberalizing trend, however, first began with the enactment of present N.C. Gen. Stat. § 1-486 (1953), in 1885, providing that an injunction might issue even though the defendant was not shown to be insolvent.

Banks v. Parker, 80 N.C. 157 (1879). The Court here said that "[a] person in the quiet possession of real estate as owner may obtain an injunction to restrain others from dispossessing him by means of process growing out of litigation to which he was not a party." Id. at 159.

As to the measure of damages, see pp. 338-40 supra. Some courts have now held that where ornamental trees are destroyed by trespass, the landowner may recover the cost of replacement. Samson Constr. Co. v. Brusowankin, 218 Md. 458, 147 A.2d 430 (1958); Huber v. Serpico, 71 N.J. Super. 329, 176 A.2d 805 (App. Div. 1962).

Swan Island Club v. Ansell, 51 F.2d 337 (4th Cir. 1931). Here the plaintiff allegedly owned a large acreage of marshy land suitable chiefly for hunting wild waterfowl. Defendant allegedly trespassed under a claim of right, setting up duck blinds and shooting. This allegedly would destroy gaming rights and render the property substantially valueless. Since the gaming rights were unique and not readily susceptible to measurement, the court considered the injury irreparable and considered that damages would be inadequate. Hence it held that an injunction might issue.

In Council v. Sanderlin, 183 N.C. 253, 111 S.E. 365 (1922), the plaintiff conveyed land, which by mesue conveyances passed to defendant. In the initial conveyance plaintiff reserved "the right to hunt" and the "power to protect the game on said land against the trespass of all persons." Defendants, who leased the land from the then present owner allegedly interfered with the plaintiff's hunting rights. After holding that the reservation of hunting rights was a "profit a prendre," the Court held that an injunction would issue to enjoin interference with it. This is not, of course, strictly a "trespass" case, since the plaintiff has no possessory estate, but it is closely analogous.

Richardson v. Richardson, 152 N.C. 705, 68 S.E. 217 (1910); Latham v.
Timber cutting and other forms of exploiting land resources have presented a special problem. The old view of the Court was that an injunction should not issue to prevent timber-cutting and similar development of natural resources.\(^1\) There were at least three strands of reasoning: (1) when both plaintiff and defendant claim title, there is no ground for a preliminary injunction; title should be decided in an action at law;\(^2\) (2) unless defendant is insolvent, he can pay damages, and if it turns out that he is in fact a trespasser, damages is an adequate remedy;\(^3\) (3) it is good policy to develop natural resources and send “the valuable products of our forests” into the “tide of trade.”\(^4\) All of these views have undergone some change.

First, by statute, insolvency is no longer relevant, at least in most injunction cases, and injunction may issue to prevent a trespass even where the defendant is solvent.\(^5\)

Second, there has been a statutory change in policy concerning the exploitation of natural resources.\(^6\) Where at one time it was widely regarded as desirable to cut timber and clear arable land,\(^7\) conservation of resources rather than immediate and hurried exploitation of them is regarded as more important today.\(^8\) Thus, a statute appears to provide that where both parties assert a bona fide claim of title to timber,

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\(^1\) Lumber Co., 139 N.C. 9, 51 S.E. 780 (1905) (contingent remainderman cannot recover damages for waste but may obtain injunction); Jones, Lee & Co. v. Britton, 102 N.C. 166, 9 S.E. 554 (1889) (injunction issued against “an injury in the nature of waste” to protect judgment creditor who had lien outstanding against the land).

In Lyerly v. Wheeler, 45 N.C. 267 (1853), the Court said that an injunction against trespass would issue only if title is proved or undisputed and if the trespass “is attended with permanent results.” Later cases make it clear, however, that, although permanent damage is one ground in favor of granting an injunction, it is no longer a required ground.

\(^2\) See pp. 359-61 infra.

\(^3\) Frink v. Stewart, 94 N.C. 484 (1886); Dunkart v. Rinehart, 87 N.C. 224 (1882); Thompson v. McNair, 62 N.C. 121 (1867).

\(^4\) To issue an injunction against timber cutting or production of turpentine would cause not only much private loss, but great detriment to the public. Fields already cleared would lie idle, woodland that, in a country like ours, ought to be cut down and cultivated, would stand wild and unproductive, and the valuable products of our forests would no longer swell in the tide of trade. Gause v. Perkins, 56 N.C. 177, 179 (1857).

\(^5\) See, e.g., note 114 supra.

\(^6\) Some states reached this position through judicial change. See Pardee v. Camden Lumber Co., 70 W. Va. 68, 73 S.E. 82 (1911).
an injunction may issue to prevent either from cutting it. The statute is peculiarly worded and perhaps subject to some other interpretation, for it provides only that the trial judge, when there is a bona fide title dispute, shall make "no order . . . permitting either party to cut said timber trees . . . ." It appears, however, that the Court has interpreted this to mean that an injunction may issue against either or both parties. A second statute provides that where one claimant has prima facie title and a bona fide claim, and the other does not, the apparently bona fide claimant may be permitted, after giving bond, to proceed to cut the timber. This appears to imply that the other claimant shall be or may be enjoined, and also that if both parties are bona fide claimants, an injunction may issue against both. In effect, these statutes, then, appear to allow an injunction on a preliminary assessment of the title. If a preliminary assessment by the trial judge indicates both parties claim bona fide and make out prima facie titles, both may be enjoined from cutting; if only one makes out a prima facie and bona fide claim, his adversary may be enjoined.

Thus, in the timber-cutting cases there is a statutory reversal of the older policy in favor of fast exploitation of land and a reversal of the policy against determination of title on preliminary injunction.

Where the trespass does not involve timber cutting, however, the statutes will not directly control. Even so, the policy in favor of exploitation of resources is probably now generally overridden by the policy in favor of their orderly development, and it may well be that an injunction against other forms of land-resources development is appropriate in particular cases. This might be true, for example, if defendant's

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120 See Chandler v. Cameron, 227 N.C. 233, 41 S.E.2d 753 (1947); Kelly v. Enterprise Lumber Co., 157 N.C. 175, 72 S.E. 957 (1911); Johnson v. Duvall, 135 N.C. 642, 47 S.E. 611 (1904). In Moore v. Fowls, 139 N.C. 50, 51 S.E. 796 (1905), the Court said:

Section 1 specifies certain conditions when the injunction shall not be dissolved. Section 2 specifies a contingency when the court may permit one of the parties to cut the timber . . . .

... The legislature of 1901 [which enacted §§ 1-487 and 1-488] has thrown greater safeguards around the rights of such litigants, and now, when the plaintiff satisfies the judge that his claim is bona fide and that he can show an apparent title to the timber, the judge should not dissolve the injunction, but continue it until the title can be finally determined.

Id. at 52, 51 S.E. at 797. In Chandler v. Cameron, supra, the Court upheld an order enjoining defendant from cutting timber, but held that absent a finding of a bona fide and prima facie valid claim by plaintiff, he could not be permitted to cut the timber either.

122 See cases cited note 120 supra.
exploitation of the land is at odds with its full development, or threatens to exhaust the resources in an inefficient way, or is not consonant with principles of conservation. Even if defendant is developing the land resources properly, the plaintiff may have a good claim for injunctive relief, since it may be difficult or impossible for him to measure the value of what was taken from the land. In this situation, one solution may be to appoint a receiver who can keep accurate account of what is removed from the land and the price received for it. In all these cases not covered by the timber statutes, there remains the policy against making determinations of title on preliminary injunction hearings. This is a sound policy, though not invariably controlling, and it must be weighed in the balance if both parties claim title.

Except where title is in issue, there is little evidence that the Court is concerned about the relative adequacy of legal remedy; and injunctions issue in cases where a need is shown without great reluctance, again excepting the case where title is in issue. This is the appropriate attitude in North Carolina, certainly on permanent injunction, since there is no denial of jury trial in the equity courts of North Carolina.

Hardships and equities

In any equity action, including those for injunctions, the "equities" of the parties are considered; if the plaintiff has been inequitable in some respect, relief may be denied to him in the court's discretion, even though his conduct has not been illegal or tortious. Prejudicial delay, or misleading conduct, however innocent, or unclean hands are all examples of factors that may lead a court to deny equitable relief in balancing the respective "equities" of the parties.

Courts may also deny relief, not only where the plaintiff has behaved in some "inequitable" way, but also where the grant of relief will impose an undue hardship upon the defendant. This is an especially pertinent consideration on a preliminary injunction. "An injunction of this nature," Justice Ervin said in Huskins v. Yancey Hospital, Inc., "should be granted where the injury which the defendant would suffer from its issuance is slight as compared with the damage which the plaintiff would sustain from its refusal, if the plaintiff should finally prevail." And the injunction should not issue "when its issuance would cause great injury to the defendant and confer little benefit in comparison upon the

123 See pp. 366-68 infra.
124 See pp. 359-61 infra.
125 238 N.C. 357, 78 S.E.2d 116 (1953).
126 Id. at 361, 78 S.E.2d at 120.
plaintiff." These rules apply in any injunction case, but they are especially important where defendant's building encroaches on plaintiff's land.

Thus, where one sues to enjoin a trespass, the injunction issues, not of right, but in the court's discretion, and in exercising that discretion the court will consider and balance the clarity of the plaintiff's right, the plaintiff's need, the defendant's hardship, and the presence or absence of inequitable conduct, and issue or deny the injunction as the balance seems to indicate.

Plaintiff out of possession—transferring possession or trying title

Neither a temporary restraining order nor a preliminary injunction is issued in the usual case to "settle a dispute as to the possession of realty or to dispossess one for the benefit of another." The normal remedy to establish title and recover possession is the civil action analogous to the common law action of ejectment. This action had and has three important characteristics: (a) the plaintiff had the burden of showing that his title was good, and he could not recover merely because defendant's title was weaker; (b) a full-scale trial was held as in other civil actions; (c) a jury determined disputed issues of fact. If the plaintiff who is out of possession is allowed to recover possession of realty by a preliminary injunction, either the preliminary injunction must carry with it these incidents, or the normal rules in title-trying actions will be subverted.

For example, the injunction normally sought is either a temporary restraining order or a preliminary injunction. Though North Carolina affords a jury trial in equity cases, it does not do so on hearings for restraining orders and preliminary injunctions. Nor, in such hearings,  

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127 Id.  
128 See pp. 363-65 infra.  
131 As distinct from the attenuated hearing on preliminary injunction or the entire absence of a hearing on a temporary restraining order. As to these, see pp. 351-54 supra.  
133 Van Hecke, Trial by Jury in Equity Cases, 31 N.C.L. Rev. 157 (1953).  
134 Though the authorities on this are not clear, the practice is well established and entirely proper, especially since, outside of term time, a jury could not readily
is there a full-scale trial; rather the case is heard on affidavits and a preliminary determination is made whether relief is justified. If under these conditions an injunction is issued, then the defendant is ousted from possession without a jury trial or even an opportunity to cross examine witnesses. Furthermore, if the plaintiff is able to gain possession in this manner, he will not need to bring an ejectment suit in which he will have the burden of establishing his title, but rather may leave it to the defendant to do so, with the result that by this maneuver the plaintiff will have shifted the burden of proof to the defendant. Finally, to shift possession before a full-scale trial is to favor the party out of possession for no very obvious reason. Until a trial is held, one does not know which party has the better claim, at least not ordinarily, and absent unusual circumstances there is no justification for favoring the plaintiff any more than defendant.

In exceptional circumstances, however, the Court may transfer possession by injunction. In *Young v. Pittman*, the defendant was interfering with, or threatening to interfere with, plaintiff's claimed rights to mine. Both parties claimed title. Defendants evidently barred "plaintiff's right of ingress for the purpose of mining," but the Court approved a preliminary injunction, which in effect put plaintiff in possession of the mine. Although the Court recognized the usual rule that "a court of equity will not interfere by injunction to determine a disputed question of title to land, nor undertake to dispossess one party for the benefit of another," it held that the injunction should issue. Apparently two factors influenced the Court's decision. First, the defendant's claim of title appeared to be relatively weak, being based as it was on adverse possession, while plaintiff's title was apparently a good paper title. Second, there was strategic need for mica that plaintiffs would mine if in possession, be called, and no jury could be called quickly enough to allow expeditious decision on the emergencies usually asserted in preliminary injunction cases. Cf. Fremont v. Baker, 236 N.C. 253, 72 S.E.2d 666 (1952).


Under the statutes affecting timber cutting, an injunction is sometimes permitted and it operates very substantially like one shifting possession. This involves a preliminary determination that the party seeking injunction has "prima facie" title and the other does not. See pp. 354-58 supra. Some similar standard may well be appropriate in cases not involving timber, provided the ultimate burden of proof on final hearing remains with the plaintiff, and is not shifted when the plaintiff regains possession.

This is very similar to the standard prescribed by statute in the timber-cutting situation. See pp. 356-57 supra.
and the Court evidently believed that the mining would be slowed down or halted if plaintiffs were kept out of possession.\textsuperscript{139}

In \textit{Horton v. White},\textsuperscript{140} the Court apparently also sanctioned at least a partial transfer of possession under unusual circumstances. In that case Sarah Horton brought an ejectment action to recover possession of land occupied by White. Both parties claimed title. While the suit was pending and before it was decided, Sarah Horton gained possession of a portion of the disputed land in suit. White responded by obtaining a temporary restraining order and, on hearing, a preliminary injunction and appointment of a receiver to secure the rents and profits of the parcel on which Sarah had entered. The Supreme Court held this was proper. The opinion does not make it entirely clear, but apparently this involved a transfer of possession to White under the temporary restraining order and a transfer of possession to the receiver on the preliminary injunction. All this seems proper enough because in this case the transfer of possession back to White had the effect of preserving the burden of proof, which lay upon Sarah at the beginning of the ejectment action. So long as there is a clear possession in one party immediately before an injunction is sought, perhaps it is appropriate to transfer possession back to him by preliminary injunction (assuming he shows a need for so drastic a remedy).

Thus, though ordinarily possession of land will not be transferred by injunction, there are occasionally appropriate cases for the exercise of such power. Whether the courts will transfer possession by a preliminary injunction apparently depends on several factors: (1) Can the plaintiff show a relatively clear right and the absence of one by defendant? (2) Can the plaintiff show a genuine need for immediate possession as against the need of defendant? (3) Can the possession be transferred without allowing the plaintiff to evade the burden of proof as to title laid upon him by the common law? If all these questions are answered "yes," then a good case for transfer of possession by injunction is presented. At the same time, the first two questions are matters of degree, and the decision to grant the preliminary injunction is necessarily one of discretion rather than a certain rule of law, even when all the questions are answered affirmatively.

\textsuperscript{139} This is very similar to consideration of relative hardship. \textit{See} text accompanying notes 125-128 \textit{supra}. It emphasizes, however, public interests more than private ones.

\textsuperscript{140} 84 N.C. 297 (1881).
Transfer of possession by permanent injunction

Most of the cases involving transfer of possession of land by injunction turn on the fact that a temporary restraining order or a preliminary injunction is in issue. As indicated previously, to issue a preliminary injunction to put one into possession is to deny a jury trial and to allow plaintiff to avoid his usual burden of proof. However, a permanent injunction in North Carolina is now treated like other civil actions, and a jury trial is afforded as of right in equity cases just as in law cases. The permanent injunction is issued after full scale trial, and the plaintiff retains the burden of proof in such a trial. Thus, there seems no present objection in North Carolina to the grant of a permanent injunction transferring possession or trying title, as distinguished from a preliminary injunction. Indeed, ignoring the labels on the papers in the case, the suit for a permanent injunction seems indistinguishable from the suit in ejectment, except that an injunction may be enforced expeditiously by proceedings for contempt if necessary. Although there is no clear authority, it would seem that a permanent injunction might properly issue to transfer possession or settle title issues.

Continuing trespass and possession

Courts everywhere have tried to distinguish between a trespass that is "continuous" and an entry upon land that actually ousts the occupier and secures possession to the trespasser. A continuous trespass will be, under proper circumstances, enjoined by preliminary injunction. Ordinarily if the trespasser goes beyond a "continuous trespass" and secures possession, the remedy, if title is in dispute, is not preliminary injunction but a suit in ejectment. Thus if an injunction is issued before final hearing on a full-scale trial, courts are apt to stress that the trespass is continuous. If the preliminary injunction is denied, the courts are apt to stress that the trespass is not merely a continuous or repeated one, but is possession by defendant against which no preliminary injunction will ordinarily issue.141

An observer on the land would find it difficult to distinguish by observation some cases of "possession" by defendant from some cases of "continuous trespass" by him. Perhaps the distinction is less a description of the parties' conduct than an expression of the conclusion that a preliminary injunction ought to issue. At any rate, the difficulty in distinguishing the two, whether the distinction is a factual or a conceptual one, has appeared in several cases.

141 See pp. 359-61 supra.
In *Huskins v. Yancey Hospital, Inc.*,\(^{142}\) the defendant hospital had built a driveway, used by its ambulances, on a strip of land claimed by both the plaintiff and the defendant. The plaintiff sought to obtain an interlocutory or preliminary injunction against the hospital's use of the drive, contending that plaintiff was in possession of the disputed strip and that the hospital's use was a "trespass of a continuous nature," so that injunction would be justified. The Court held, however, that the defendant hospital was not merely trespassing continuously, but was instead "in possession," and, partly on the principle that "possession" is not transferred by injunction, the preliminary injunction was denied. As a matter of factual description, it is entirely possible to describe defendant's conduct as a repeated trespass by its ambulances, or a continuous trespass by the paving on the drive rather than as "possession." The conclusion to be drawn seems to be that the supposed dichotomy between "continuing trespass" on the one hand and "possession" on the other is not very helpful, and the Court probably is moved, as it properly should be, by other factors altogether. This is borne out by the emphasis in *Huskins* on the relative hardships of the parties—the need of the hospital to use the disputed land, and the plaintiff's apparent lack of need for it. Very probably the distinction between continuous trespass and possession merely serves as a not very clear way of expressing a conclusion already reached on other grounds. The supposed distinction, however, probably does serve to remind us of the policies against significantly altering the parties' relationship to the land on preliminary hearing.\(^{143}\)

*Mandatory injunctions to remove trespassing chattels*

Ordinarily the injunction orders defendant to cease trespassing. If defendant deposits debris on the land, however, it may be proper for the court to order him to remove it by a mandatory injunction.\(^{144}\) The man-

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\(^{142}\) 238 N.C. 357, 78 S.E.2d 116 (1953).

\(^{143}\) See pp. 354-58 supra.

\(^{144}\) In Academy of Dance Arts, Inc. v. Bates, 1 N.C. App. 333, 161 S.E.2d 762 (1968), defendant dumped debris on plaintiff's land. A mandatory injunction was held proper to require removal, with a sixty day time period afforded defendant to accomplish removal. It was not clear why the court regarded damages as an inadequate remedy. However, a mandatory injunction seems more efficient than damages, since plaintiff is not subjected to the risks and uncertainties of recovering damages. A similar, well-known case is Wheelock v. Noonan, 108 N.Y. 179, 15 N.E. 67 (1888), where defendant deposited a "few stones" by permission. These turned out to be boulders 15 feet long. A mandatory injunction issued here because removal by the landowner was not feasible. This case was cited with approval in Leasville Woolen Mills v. Spray Water Power & Land Co., 183 N.C. 511, 515, 112 S.E. 24, 26 (1924).
A mandatory injunction might properly also require defendant to replace ornamental trees he has removed in the course of a trespass.\textsuperscript{146}

Historically there has been a reluctance to issue mandatory injunctions, at least in the preliminary stage before final hearing. As the Court recognized in \textit{Clinard v. Lambeth},\textsuperscript{146} a mandatory injunction may require the defendant to destroy something he has a right to have, and courts must exercise restraint in granting such injunctions where the defendant may be irreparably injured by compliance. This policy is usually expressed by saying that the plaintiff must show a threatened injury that is immediate, irreparable, and clearly established.\textsuperscript{147}

The mandatory injunction is less often associated with orthodox trespass cases than it is with protection of easements and other interests falling short of ownership in fee. The Court in \textit{Carolina Power & Light Co. v. Bowman},\textsuperscript{148} implied that a power company was entitled to an injunction to force removal of a building erected upon its easement and under its power lines upon a finding that the building interfered with the easement. In \textit{Leaksville Woolen Mills v. Spray Water Power & Land Co.},\textsuperscript{140} a mandatory injunction was issued commanding defendant to remove an embankment blocking a roadway, which plaintiff claimed the right to use. Although the defendant claimed title to the roadway, the Court thought plaintiff had shown a clear right and palpable violation, or at least a prima facie case, and hence the mandatory injunction issued without the show of reluctance usually encountered when the title dispute covers more than a right-of-way.\textsuperscript{160} A similar result was reached where defendant interfered with use of a road in violation of an injunction, and was ordered by a mandatory injunction to restore the road to its former condition.\textsuperscript{161} Likewise a mandatory injunction has been issued to require defendant to remove a structure that violates a restrictive covenant.\textsuperscript{162}

\textsuperscript{146} The damages alternative may or may not be adequate. If replacement cost is allowed as damages, perhaps the injunction would not be necessary. See pp. 338-40 supra. On the other hand, a mandatory injunction here would put the risks of finding replacements and making them succeed in the soil on the defendant, where, if he is at fault, it ought to be.

\textsuperscript{147} "As a rule such an order will not be made as a preliminary injunction, except where the injury is immediate, pressing, irreparable and clearly established, or the party has done a particular act in order to evade an injunction which he knew had been or would be issued." \textit{Id.} at 418, 67 S.E.2d at 458, quoting A. McIntosh, \textit{North Carolina Practice & Procedure} § 851 (1st ed. 1929).

\textsuperscript{148} 229 N.C. 682, 51 S.E.2d 191 (1949).

\textsuperscript{149} 234 N.C. 410, 67 S.E.2d 452 (1951).

\textsuperscript{150} See pp. 354-58 supra.

\textsuperscript{151} Keys v. Alligood, 178 N.C. 16, 100 S.E. 113 (1919).

\textsuperscript{152} Ingle v. Stubbins, 240 N.C. 382, 82 S.E.2d 388 (1954).
Although these cases appear to protect one's interest in the use rather than in the possession of land, there seems to be no reason to doubt that a mandatory injunction will also issue in a "pure" trespassory situation as well to protect one's right of possession. There must be, of course, a genuine need for the injunctive relief, and where a mandatory injunction is sought preliminary to a full-scale trial, the plaintiff's right must be clear and its violation palpable. But if these normal prerequisites are met, a mandatory injunction presumably would issue.

There are several situations where injunctive relief, mandatory or prohibitory, is ordinarily denied. Where anyone who has the power of condemnation makes a "permanent" entry upon the land—as by constructing a structure—the plaintiff's remedy is usually an action of "inverse condemnation" for permanent damages for the taking of his land. Thus if a railroad or a public utility with condemnation powers encroaches upon plaintiff's land without completing formal condemnation procedures, an injunction does not issue to force removal. The same is true when one obtains permission of the State Highway Commission to locate a structure upon a highway easement, the fee in which belongs to the adjacent landowner. This is, or may be, an additional burden upon the fee; the plaintiff may be entitled to compensation, but he is not entitled to force removal of the structure permitted by the Commission. Quite possibly an injunction will be granted even against one who has the power of condemnation if he acts in bad faith and deliberately enters plaintiff's land without following the statutory procedures for condemnation. Short of this, however, the normal remedy must be for damages for the "taking" if the injury is permanent, or for normal trespass damages if there is only a temporary injury.

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154 See pp. 345-48 supra.
155 See, e.g., Rhodes v. City of Durham, 165 N.C. 679, 81 S.E. 938 (1914) ("the right of abatement at the instance of an individual is of necessity denied"). See generally pp. 345-48 supra.
156 N.C. GEN. STAT. §§ 136-18(10), -93 (1964) (Highway Commission to authorize various installations, such as pipes or utility wires, on the highway easement).

The State Highway Commission had the right to grant the permit to the defendant to lay its sewer line within the Commission's easement across the property of the plaintiffs, but it did not and does not have the power to relieve the defendant from liability to compensate the plaintiffs for the added burden the State Highway Commission permitted the defendant to put upon the pre-existing easement.
Mandatory injunctions to relieve encroaching permanent structures

In a number of cases the Supreme Court of North Carolina has approved a mandatory injunction to force removal of a structure that interferes with use of plaintiff's land or his easement.\(^\text{168}\) A classic problem in equity jurisprudence is slightly different and does not appear to have been dealt with explicitly by the Court. This is the problem of the building that encroaches very slightly upon the plaintiff's land, or overhangs it slightly, or projects into it underground. In such cases the defendant is a trespasser and plaintiff can recover damages. It is also clear that in many such cases, the plaintiff can obtain a mandatory injunction to force removal by the defendant.\(^\text{169}\) In many cases, however, it will work an unconscionable hardship upon the defendant if he is forced to remove the building. He may occupy only the smallest portion of plaintiff's land at no real harm to the plaintiff; but the cost of removing the building may be enormous. Furthermore, if an injunction issues to compel defendant to remove the building, the plaintiff may be tempted to engage in extortion by offering to sell the land to the defendant at an exhorbitant price. If the cost of removing the encroaching structure is very high, defendant may well be forced to buy plaintiff's land, or part of it, at a price many times its worth, rather than destroy the building that encroaches an inch or two. Thus, to grant an injunction compelling removal of the building may be a prelude to extortion by the plaintiff.\(^\text{169}\) For these reasons, courts usually balance hardships and grant or refuse an injunction on these facts as seems indicated.\(^\text{161}\)

On the other hand, if injunctions are not granted to force removal

\(^\text{168}\) Id. at 544, 135 S.E.2d at 643. See also Van Leuven v. Akers Motor Lines, Inc., 256 N.C. 610, 124 S.E.2d 560 (1962) (evenly divided court affirmed refusal to grant a mandatory injunction).

\(^\text{169}\) If the Commission condemns land for a highway and takes and pays for a fee, of course the adjacent landowner has no complaint when structures are placed upon the land taken by the Commission. Neither does he have any complaint if the Commission takes less than a fee, but takes (and pays for) an easement authorizing not only use for highways but also use by "assigns" for utility poles, etc. In such a case the plaintiff still owns the fee subject to the easement, but the Commission has taken an easement "large" enough to cover the right to put utility poles on it and there is thus no additional burden upon the fee at all. See Hildebrand v. Southern Bell Tel. & Tel. Co., 221 N.C. 10, 18 S.E.2d 827 (1942).\(^\text{168}\) Carolina Power & Light Co. v. Bowman, 229 N.C. 682, 51 S.E.2d 191 (1949); Leaksville Woollen Mills v. Spray Water Power & Land Co., 183 N.C. 511, 112 S.E. 24 (1922); Keys v. Alligood, 178 N.C. 16, 100 S.E. 113 (1919).\(^\text{169}\) Beaty v. Gordon, 236 Ark. 50, 364 S.W.2d 311 (1963); Tauscher v. Andruess, 240 Ore. 304, 401 P.2d 40 (1965).

\(^\text{161}\) RESTATEMENT OF TORTS § 941, comment c (1939).

of encroachments, builders may be allowed to engage in a kind of private eminent domain; they may feel free to “take” whatever land they need by building on it intentionally or perhaps negligently, knowing that they will not be forced to remove the structure. To prevent this, an injunction to force removal of the structure should be granted in any case in which the defendant intentionally builds a portion of his building upon the plaintiff’s land. And it should operate as a strong factor against the defendant if he negligently builds across the line.

The North Carolina Supreme Court has not dealt directly with this particular problem, although mandatory injunctions have been granted to compel removal of a building that offended a deed restriction, and to compel removal of structures that interfered with use of land or with easements. In *Huskins v. Yancey Hospital, Inc.*, the encroaching structure was a driveway used by ambulances at a hospital. Although the Court did not specifically consider the high cost of removing the paving, it did indicate that it would balance the hardships to the defendant and refuse to force removal when the plaintiff’s need was small compared to the extreme hardship on the defendant.

If a court refuses to force removal of a building that encroaches slightly upon plaintiff’s land, the effect is that the trespass by the building becomes permanent, unless the structure itself is of the kind not likely to last. This entitles either plaintiff or defendant to measure damages by the “permanent damages” standard, that is, by the value of the land taken. This normally means that plaintiff will be compensated for the land “taken” by the encroaching building and defendant will acquire title to the land involved; the court’s decree to this effect can, under statute, be recorded as a deed. However, there seems no reason to insist that the land involved pass in fee simple to the defendant if the plaintiff wishes to convey a lesser interest. For example, if plaintiff genuinely wishes the land back, a decree might afford defendant the right to keep his building on it, but with provision for the land’s reverting to plaintiff should the building be destroyed. Of course, if such a provision (or some variation of it) is inserted in the decree, the defendant’s liability in permanent damages would not be liability for a fee simple; it would be liability only for what he received, whatever it was. This obviously is not a serious problem, since the amounts of land involved in encroachment cases are

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163 Cases cited note 157 supra.
164 238 N.C. 357, 78 S.E.2d 116 (1953).
165 See pp. 345-51 supra.
usually small; but in a commercial area, such considerations may have much weight. In any event, if injunction is denied, the parties should provide a decree that makes title clear and should record it pursuant to the statutory provisions.

RESTITUTIONARY MEASURES OF DAMAGES—
"WAIVER OF TORT AND SUIT IN ASSUMPSIT"

Defendant’s gain as measure of recovery

Most commonly, the plaintiff in a trespass action seeks payment for his losses, if he has any; if he has no pecuniary losses, he seeks to vindicate his right to exclusive possession\(^6\) by recovery of nominal or punitive damages.\(^7\) Sometimes, however, the plaintiff’s losses are quite small while the trespasser has made either a real or a theoretical gain through his trespass. Suppose, for example, the defendant occupies the plaintiff’s land for a year, and that the rental value of the land is 500 dollars for that period of time. By his use of the land, however, defendant either saves himself the expense of 1,000 dollars he would otherwise be required to pay for similar land elsewhere, or he makes a profit of 1,000 dollars. If plaintiff is limited to a recovery of his “loss” he will recover (at most) 500 dollars. If, however, he can recover what defendant has gained through his wrongdoing, he will double his recovery. The recovery of defendant’s gain when there is no corresponding loss on the plaintiff’s part may be justified as preventing “unjust enrichment,” and such a recovery may be called, a little misleadingly, a restitutionary one.

Whether and under what circumstances such a recovery would be allowed is not well settled, but a number of cases are important for both comparison and distinction. At least two North Carolina decisions allow a landowner to recover rents on his land *actually collected* from tenants by the trespasser or his assignee.\(^8\) These decisions, like most related cases, might traditionally be discussed as cases in which the plaintiff “waives the tort and sues in assumpsit.” Such a quaint expression is not especially meaningful today, but it does serve to point up the fact that the recovery of rent is presumably what the plaintiff would have recovered had the trespasser contracted to lease the premises. In both cases, however, the recovery of the gain to the defendant is apparently also equal to the loss of the plaintiff. Thus, the cases are easily explicable in terms

\(^{6}\) See Dobbs, *Part I* 36-46 (interest in possession as a dignitary interest).

\(^{7}\) See pp. 334-44 *supra.*

\(^{8}\) Womack v. Carter, 160 N.C. 286, 75 S.E. 1102 (1912); London v. Bear, 84 N.C. 226 (1881).
of the normal tort damages aimed at compensating the plaintiff for his loss.

There is at least one decision, however, that allows the landowner to recover the reasonable rental value of the land used by the defendant.\(^{170}\) In *Leigh v. Garysburg Manufacturing Co.*,\(^{171}\) the defendant took a timber deed from the plaintiff covering the right to cut timber from plaintiff's land for five years. The covenants between the parties also allowed the defendant to construct a railroad on the land and to haul out timber both from plaintiff's land and that of others. The defendant hauled out timber from other lands after the five year period was over and thus trespassed upon the plaintiff's land. The plaintiff was allowed to recover the reasonable rental value of the land occupied by defendant in hauling timber. This decision seems entirely proper\(^{172}\) and indeed is entirely in accord with the recovery of *mesne* profits following an ejectment suit at common law. However, it should be noticed that this is not necessarily the same as the more common tort recovery based on plaintiff's losses, for the plaintiff has lost the rental value of his land only if he has been prevented from renting it by the trespass. It seems quite apparent that he was *not* prevented from renting his land and his losses were not in fact pecuniary at all. He lost the exclusive right to possession only, for which he was entitled, clearly, to something; but his actual losses were not the rent. Thus such a recovery is essentially a recovery of the defendant-trespasser's gains, not the plaintiff's actual losses; such recoveries are often associated with quasi-contract or restitution.

The profits made by the defendant in using the plaintiff's land are not necessarily equivalent to rental value and may or may not be recoverable. If the landowner wishes to use the land himself and, in using it, would have made profits, he has losses of that amount when the trespasser deprives him of the land. If he can in fact prove these profits, he can recover them on the usual bases that one recovers his losses.\(^{173}\) Even if

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\(^{170}\) Where tangible items are removed from the land, the value of these items may be recovered, and on this score there is not the problem that exists where the defendant uses the land without diminishing its value. *See generally* pp. 334-44 *supra.*

\(^{171}\) 132 N.C. 167, 43 S.E. 632 (1903).

\(^{172}\) *Accord,* Raven Red Ash Coal Co. v. Ball, 185 Va. 534, 39 S.E.2d 231 (1946) (discussing the assumpsit theory at length).

\(^{173}\) In *C.B. Coles & Sons v. Standard Lumber Co.*, 159 N.C. 183, 63 S.E. 736 (1909), the landowner contracted with *B* that *B* would purchase and remove 100,000 feet of lumber from the landowner's lumber yards. *B* did not remove the lumber and the yard was blocked. The landowner alleged a loss of profits resulting because the blocked yards shut his mill down. But the Court held that on the facts the claim of lost profits was "too speculative and remote." On the
he cannot prove them conclusively, he may argue that the profits made by the trespasser in using the land constitute some evidence of his losses.\textsuperscript{174} In either case he is seeking to recover normal tort-damages compensation for his loss. However, the landowner may argue differently; he may argue that even if he, the landowner, has no losses, the trespasser should not be allowed to profit by his trespass but instead should be required to disgorge his unjust gain, including any profits he made. A similar argument can be made by the landowner when the trespasser does not make tangible profits by his use of the land, but does save himself expenses he otherwise would have had. Cases like \textit{Leigh},\textsuperscript{176} where reasonable rental value of the land used by the defendant is awarded, do not necessarily authorize recovery of profits made by defendant's use of the land where the plaintiff has no losses. It is one thing to require a trespasser to pay the market value of what he takes even though the landowner has lost nothing; it is entirely another to require a trespasser to pay more than the market value of what he takes as well as more than the landowner has lost.

Recovery of the trespasser's profits—or his savings of expense—in excess of rental value is probably warranted only when the trespasser acts in bad faith, that is, when he intentionally trespasses knowing he has no honest claim of right to the land.\textsuperscript{178} In this situation, some courts have allowed recovery of profits. One of the leading cases is \textit{Edwards v. Lee's Administrator},\textsuperscript{177} where defendants owned an underground cave under their own land, which connected with a cave under the plaintiff's land. The cave under plaintiff's land was 360 feet below the surface and had no entrance except the entrance through defendant's property. Defendants operated their cave as a commercial attraction and included in the operation the portion of the cave under plaintiff's land. The Kentucky court specifically found the trespasses were willful, not innocent, and allowed a proportionate recovery of the profits from the defendant's business. The court recognized that the usual recovery was reasonable value—which of course did not exist here, since there could be no access to the portion of the cave under plaintiff's land. However, the court reasoned

other hand, the Court recognized that \textit{B} who failed to remove according to his contract, was liable “for the use and occupation—that is, a fair rental value of the yard.” \textit{See also} note 174 \textit{infra}.

For cases where profits were unrecoverable, \textit{see pp. 343-44 supra}.

\textsuperscript{174} \textit{See} Capitol Garage Co. v. Powell, 98 Vt. 303, 127 A. 375 (1925).

\textsuperscript{176} \textit{Leigh v. Garysburg Mfg. Co.}, 132 N.C. 167, 43 S.E. 632 (1903).

\textsuperscript{178} As to liability for unintended trespass, \textit{see Dobbs, Part I} 32-36.

\textsuperscript{177} 265 Ky. 418, 96 S.W.2d 1028 (1936).
that rental value was really intended as a "convenient yardstick by which to measure the proportion of profit derived by the trespasser directly from the use of the land itself." Hence, when the yardstick was unavailable, the court thought it appropriate to turn directly to profits of the defendant as the appropriate measure. Whatever the theory, it is apparent that the plaintiff was awarded something in this famous case that he had not lost. Although such an award may be justified in many cases of willful trespass, it seems arguable on these facts that the defendant's gain was not necessarily unjust. While restitutionary recoveries to prevent unjust enrichment are desirable, some care may be required to avoid simply enforcing a harsh forfeiture against a trespasser in the name of justice. There should be satisfactory evidence that the trespasser acted in bad faith and there should be an absence of any exculpating or mitigating factors before the landowner is given a windfall to prevent the defendant's enrichment. For example, in a Connecticut case, a sheriff attached property of certain debtors in a building owned by the plaintiff by wrongfully padlocking the building. Unless the plaintiff lost opportunities to rent his premises because of the padlock or the sheriff was acting in bad faith, there seems no reason to hold the sheriff liable for the theoretical rental value of the building. The landlord's actual losses, such as rent he was prevented from obtaining, would surely furnish a more just recovery. Since the issue is only one of damages or remedy and not one of primary right, there is no reason why courts cannot take such matters into account on a case-by-case basis and award the higher restitutionary recovery only where it is clearly justified.

Presumably North Carolina will allow recovery of profits made from use of the land by a deliberate tortfeasor, and would likewise allow recovery of any savings made by such a tortfeasor's use of the land, although there seem to be no decisions precisely on point. For this reason some attention must be given to the historical reluctance of many courts to allow "assumpsit" for use and occupation of land by a trespasser.

"Waiver of tort and suit in assumpsit"

In the case of certain torts, notably conversion of personal property, common law courts allowed the plaintiff at his option either a suit in tort (trover) or a suit in contract (assumpsit). If the plaintiff chose the tort action, his damages would be the value of the property at the time of


conversion; if he chose to "waive the tort and sue in assumpsit," his damages might be the value of the property when it was resold by the defendant at a higher price. The assumpsit was the "implied assumpsit" or quasi-contract in which the courts fictionally implied a promise by the defendant to pay the gain he derived from the property (the resale price). Once the common law fictions are laid aside, this amounts to saying only that either of two measures of damages may be appropriate in certain cases, one of which is the plaintiff's loss and the other of which is the defendant's (unjust) gain.

In many cases, however, lawyers of earlier times took their fictions seriously. When they spoke of waiving the tort and suing in assumpsit they thought of the case as having acquired all the characteristics of a contract suit; it was more than a quaint way of saying that the plaintiff had some options about damages. This meant that the case was now a contract case, not only in the sense that damages would be based upon gain to the defendant, but that it was also a contract case for purposes of venue, or jurisdiction of courts, or the statute of limitations, or survival of actions. Such procedural matters were not significant

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180 Cf. Brady v. Brady, 161 N.C. 324, 77 S.E. 235 (1913) (trespass on land in Virginia and removal of trees; though trespass is local action only, plaintiff may treat the claim as one for conversion or may waive the tort and sue in assumpsit, in which case the action is transitory and may be brought in North Carolina). See also Richmond Cedar Works v. Roper Lumber Co., 161 N.C. 604, 77 S.E. 770 (1913), where the Court stated: "When the trespasser has sold the severed property and received money for it, plaintiff's cause, as a cause of assumpsit for money had and received, is admittedly transitory at common law." Id. at 607, 77 S.E. at 772.

181 Stroud v. Life Ins. Co., 148 N.C. 54, 61 S.E. 626 (1908) (action based upon alleged fraud for an amount in excess of the jurisdictional limits of the old justice court in tort cases; held, since plaintiff had waived the tort and sued in assumpsit, the jurisdictional limits were those in contract, not those in tort, and the claim was within the jurisdiction).

182 Robertson v. Dunn, 87 N.C. 191 (1882). Here T executed a note payable to A; B converted the note. A's estate sued B's estate, but after the statute of limitations for conversion had run. "When there has been a tortious taking of his property, the injured party may bring trespass or trover, or he may waive both and bring assumpsit for the proceeds, when it shall have been converted into money ...." Id. at 193. Hence the Court held that money received by B on the note within the appropriate period was recoverable.

183 Phillips v. Homfray, 23 Ch. D 439 (C.A. 1883), is a leading case. There, on facts somewhat similar to those in Leigh v. Garsburg Mfg. Co., 132 N.C. 167, 43 S.E. 632 (1903), X had used the plaintiff's real property as a roadway and carried coal and ironstone across it. X died and the action was revived against his executrix, who opposed the action on the ground that a personal action dies with the person, except where something tangible has been removed from the soil. The Court held that the decedent's estate had not been enriched, except by saving money otherwise needed to buy a right-of-way, and that the action would not lie. The Court also held that the plaintiff could not "waive the tort and
in, say, conversion cases. If defendant in a conversion case were subjected to the "contract" statute of limitations or the "contract" jurisdiction of an inferior court, it would hardly disarrange the jurisprudence of the country. Land cases, however, were different. Venue, at least, and probably about everything else, has been considered of special importance in land cases, and certainly statutes of limitations or survival of actions (before modern statutes) were important in land cases. If common law courts had thought of the problem in land cases as simply a question of what damages might be recovered against the trespasser, the restitutionary or "assumpsit" damages might have been allowed. But this was not the way they thought; they thought that if "assumpsit" damages were allowed, the case was one in assumpsit, and that assumpsit venue, assumpsit limitations of actions and all the rest went with it. And that was too much. Apparently in consequence of such a view—now outmoded by the abolition of the forms of action—courts refused to allow the restitutionary recovery in land cases, except where something tangible was taken from the land.

At least they refused to allow "waiver of tort and suit in assumpsit" in such cases for purposes of changing procedural rules normally applied to land actions.

There was, seemingly, a second reason why courts were reluctant to grant a restitutionary recovery for trespass to land. There was an English statute allowing recovery for the reasonable value of the land when it was occupied by agreement with the owner but the agreement was not itself enforceable. This may have implied that a recovery of reasonable value for the use of land was available only when there had been an agreement and that such a recovery was not available when the use was purely tortious. At any rate some commentators thought something like this. There is a quite similar statute in North Carolina, providing that when one occupied land by permission under a "parol lease which is

sue in assumpsit" where circumstances negatived the implication of a contract to pay for the use of the land. Phillips v. Homfray, supra.

One early North Carolina case expressed the view that assumpsit would not lie for trespass to land. Long v. Bonner, 33 N.C. 27 (1850). But this case apparently is a dead letter today, for two reasons: (1) the Court (per Ruffin, C.J.) appears to have held only that assumpsit was wrong as a matter of form; it expressly recognized that there was a remedy for mesne profits; and (2) subsequent decisions, notably Leigh v. Garysburg Mfg. Co., 132 N.C. 167, 43 S.E. 632 (1903), have allowed a recovery for rental value, which is essentially the same as a recovery in assumpsit as far as damages go.

See F. Woodward, The Law of Quasi-Contract § 283 (1913). A number of cases in which timber or other goods are removed from the land are discussed at pp. 334-44 supra.

The statute was discussed in Long v. Bonner, 33 N.C. 27 (1850).
void," the landowner may nevertheless recover the reasonable value for the use.187 But this statute does not seem to preclude recovery of the reasonable rental value in tort for purely trespassory use; it seems to be aimed at a narrow situation only and does not seem to exclude a similar recovery in tort. At any rate, such a recovery of rental value has been allowed in North Carolina for purely tortious use of land, so that such a statute does not appear to affect the issue today, whatever was the case in England.188

Finally, courts may have been reluctant to allow restitutionary recoveries in cases where the "use" of land was so minimal that it furnished no workable measure of damages. If defendant takes a single short cut across plaintiff's lawn, he has not in any workable sense "used" the land and the gain to him is not an appropriate measure of recovery. If the defendant daily parks his car on the plaintiff's property to save himself the expense of parking in a commercial lot, however, the matter is different, and the landowner should recover the expense saved to the defendant by this deliberate trespass, and this is so even if the plaintiff is not "ousted."189

None of these reasons seems to have any weight today in cases where defendant makes some substantial use of the land. The statute allowing recovery of rental value where there is agreement had not precluded rental value recovery where there was no agreement. And the common law fiction that rental value was a suit on contract and the resulting assumption that all procedures for contracts must be followed if the tort were "waived," are of no effect since the forms of action have been abolished. Today it is plain enough that the issue is damages—and that to allow restitutionary damages does not require a contract venue. Presumably the common law reluctance to allow "assumpsit" for use and occupation should have little influence in preventing recovery of appropriate damages. This view is bolstered by the fact that mesne profits were always recoverable following an ejectment suit, even in the days when forms of action rode roughshod, so that it is apparent that there is no substantial objection to the damages as such. Finally, it may be noticed that North Carolina long ago indicated an absence of sympathy with the common law attitude and has allowed recovery of rental value of land occupied by tortfeasors.

This being done, there seems no reason, when an appropriate case arises, not to allow recovery of profits gained by the deliberate bad faith trespasser as well, at least where such profits are fairly attributable to use of the land, rather than to labor or capital investment.

**Measurement of the gain or benefit to defendant**

In some cases the benefit or gain to the defendant resulting from his tort is clear. For example, he may use land with a rental value of 1,000 dollars for its best and most productive use, in which case he clearly has received a value of 1,000 dollars in his use of the land. Likewise, if he saves an expense of 1,000 dollars, he has benefited to that extent.

In some cases, however, the defendant may not use the land in the most productive way, and in a sense does not get its full value. Since the plaintiff's recovery in the cases under discussion is the "benefit" to the defendant rather than the loss to the plaintiff, it might seem appropriate to measure the defendant's net benefit, that is, the advantage he actually gained, and to allow the plaintiff to recover that. This seems a fair recovery when it is remembered that if the plaintiff's losses exceed such an amount, the plaintiff will base his claim on the losses rather than on the defendant's gains. However, it seems clear, at least where the defendant-trespasser acts deliberately and in bad faith, that he is liable, not merely for the benefit he actually derived but rather for the reasonable rental value of the land—"the actual rental value of the land, and not what the defendant actually gathered from the land." This measure seems unwarranted and uselessly punitive when the trespasser is not willful and where it seems unlikely that the plaintiff would have been able to rent the premises and thus has no actual losses.

In any event the rule that the plaintiff recovers the "actual rental value of the land, and not what the defendant actually gathered" is a

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100 Credle v. Ayers, 126 N.C. 11, 35 S.E. 128 (1900). The Court added language suggesting that the plaintiff may have really lost such an amount—"The object is to put the plaintiff . . . in *status quo*, by giving as compensation the rental value that could have been had . . . ." *Id* at 13, 35 S.E. at 129. But there is no proof indicating that the plaintiffs could in fact have rented the land out and such proof is never in fact required.

101 A similar method of measuring benefit is used in cases where the defendant makes an oral promise unenforceable under the statute of frauds, and plaintiff is allowed a quasi-contract recovery. In many such cases, the plaintiff gets the market value of the services rendered or goods leased whether the defendant used them or not. *E.g.*, Clinkinbeard v. Poole, 266 S.W.2d 796 (Ky. Ct. App. 1954); Bennett Leasing Co. v. Ellison, 15 Utah 2d 72, 387 P.2d 246 (1963). But such cases furnish no very suitable analogy in the trespass cases, absent a deliberate trespass, for in the statute of frauds cases the defendant has bargained for what he got, even if his bargain is not enforceable.
minimum, not a maximum. If the defendant actually gathers rents, those rents may be recovered by the plaintiff.\textsuperscript{192} And there may be cases in which there is no rental value for the peculiar use to which defendant puts the land. In such cases, recovery should be measured by the benefit to the defendant,\textsuperscript{193} in savings or otherwise, unless an inverse condemnation proceeding for the "taking" is used.\textsuperscript{194}

**Defendant’s gain as substantive ground for recovery**

In the preceding materials, discussion turned on whether the landowner might recover from the trespasser on the basis of the benefit accruing to the trespasser from his tort, rather than on the basis of loss to the landowner. A further possibility is worth attention: may benefit accruing to a defendant, perhaps only indirectly from a trespass, justify recovery when no recovery at all would otherwise be allowed? Are there cases in which benefit to the defendant is not merely a measure of damages, but furnishes the basis of liability in the first place?

Perhaps this possibility was overlooked in *Williams v. Cape Fear Lumber Co.*\textsuperscript{195} The plaintiff there owned the fee and conveyed a limited timber right to defendant. Defendant did not himself enter the land, but instead conveyed the timber rights he owned to $T$, who entered and cut timber, but cut in excess of that granted. The question was whether the defendant—who had not entered on the land—was liable. Since defendant had not gone on the land physically, he was not a trespasser. On the other hand, the defendant was paid by $T$ by the board foot. Thus, defendant must have been paid not only for the timber that could be rightfully cut, but also for the timber $T$ wrongfully cut. At least the defendant had a right to such payment under his contract with $T$. Thus, though it was $T$ who trespassed, the benefit of the trespass went to defendant and the loss to the landowner-plaintiff. It seems clear that if this is so, the plaintiff should be allowed to recover against defendant, on grounds partly analogous to those used in "tracing" in the law of constructive trusts. The point was not, however, raised.

In a similar case, *London v. Bear,*\textsuperscript{196} recovery was allowed. There one Hall went into possession of lands of the plaintiff and leased them. He then assigned the rent from some of the premises to the defendant.

\footnotesize{\textsuperscript{192} Womack v. Carter, 160 N.C. 286, 75 S.E. 1102 (1912); London v. Bear, 84 N.C. 266 (1881).}
\footnotesize{\textsuperscript{193} See Note, 48 Harv. L. Rev. 485 (1935).}
\footnotesize{\textsuperscript{194} See pp. 344-51 supra.}
\footnotesize{\textsuperscript{195} 172 N.C. 299, 90 S.E. 254 (1916).}
\footnotesize{\textsuperscript{196} 84 N.C. 266 (1881).}
Partly because of "his acceptance of full rent," the defendant was held liable, and presumably this result would obtain even if defendant never entered the premises at all.

The conclusion seems to be that one benefiting from a trespass may, in proper cases, be required to disgorge the benefit to the landowner, even though he is not himself physically a trespasser.

**Defendant's gain as limit of liability**

Ordinarily, if the plaintiff can recover the gain to the defendant at all (rather than his own losses) it is entirely optional; he selects the measure of damages that will afford him the greatest recovery.

As already indicated, however, there are some cases in which the gain to the defendant should not be allowed as an alternative measure of recovery and in which the plaintiff should be allowed to recover his losses and no more. There may well be cases in which the converse is also true—in which the plaintiff should be allowed to recover on the basis of the defendant's gain, but on no other basis.

Where there has been no tangible loss—where there is neither physical detriment to the land nor loss in a pecuniary sense—the plaintiff still has a right to exclusive possession and may recover at least nominal damages to vindicate that right, and sometimes punitive damages as well. The value of the right to be left alone on one's own land is not capable of objective measurement and juries may be permitted considerable leeway in granting damages, even when punitive damages as such are not justified. However, where the trespass is minor and innocent, and where neither physical harm to the land nor economic harm to the plaintiff results, an award of substantial damages would be hard to justify unless on the ground that such damages represented gain to the defendant.

*Shell Petroleum Corp. v. Scully* is illustrative. Defendant, an oil company, trespassed on plaintiff's land in exploratory work in which dynamite was exploded and vibrations recorded to indicate the presence or absence of minerals. The dynamiting did not damage the land, which was marsh without value except for trapping purposes and oil exploration. On the contrary, the plaintiff clearly had no loss at all, since the trespass revealed the presence of valuable minerals and since the oil company advised the landowner of this fact, so that he would have opportunities for leasing the land to oil drillers. The jury awarded the plaintiff one dollar an acre

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197 See note 178 *supra* & accompanying text.
198 71 F.2d 772 (5th Cir. 1934).
for his total holdings, a sum of 26,795 dollars, but the appellate court reversed, indicating that the value to the defendant was the appropriate measure of damages, rather than loss to the plaintiff, in these circumstances. "In attempting to apply a measure of damages sounding in loss, the court was thus driven to submitting this impossible, and under the evidence, meaningless measure of damage."189 Had the dynamiting physically damaged the land, of course, the plaintiff would have had losses; and had the dynamiting revealed not the presence but the absence of mineral deposits, the plaintiff would have had losses; for he would at least have lost the lease-for-speculation value of his land. But absent any losses, and absent a bad faith trespass or even any serious dignitary invasion, it seems clearly right to limit substantial damage to the gain to the defendant.

Summary

(1) Where tangible items are removed from the land, the owner may recover their value, or the diminution of land value whichever is appropriate to the case.200

(2) Where defendant uses the land and does not remove any item, the plaintiff has the option of recovering for any damage done, or nominal damages, plus punitive damages if they are warranted;201 the plaintiff may, however, recover any actual gain to the defendant, such as rents he takes from the plaintiff's tenants, or may recover rental value even if the plaintiff would not have leased the premises and thus has no actual losses.202

(3) In appropriate cases it seems probable that the plaintiff may recover, at his option and in lieu of any of the above items, the profits made by the defendant from use of the land; this is probably to be permitted only when the defendant is an intentional wrongdoer,203 and where he is not, the plaintiff is probably limited to rental value of the land.204

(4) The trespasser's benefit or gain—to be recovered by the plaintiff—may be measured either by the actual benefit received by the defendant (including savings to him),205 or by the reasonable value of the land, disregarding the fact that defendant may not have taken full advantage

189 Id. at 775.
200 See pp. 334-44 supra.
201 Id.
203 Edwards v. Lee's Adm'r, 265 Ky. 418, 96 S.W.2d 1028 (1936).
205 A good discussion of this is found in a conversion of chattels case, Olwell v. Nye & Nissen Co., 26 Wash. 2d 282, 173 P.2d 652 (1946).
of it. Which measure of benefit is used depends upon the plaintiff's option, and probably upon whether the defendant is a deliberate wrong-doer.

(5) In addition to recoveries for trespass, in which benefit to defendant is an alternative measure of damages, some persons may be held for the amount of benefit received from a trespass even though they did not themselves enter the land.

DAMAGES—AVOIDABLE CONSEQUENCES

Contributory negligence is no defense to an intentional tort, and thus is ordinarily no defense to trespass to land. If the landowner or occupier takes affirmative action that increases damages to his land, however, he may be denied recovery for such damages as he himself has caused, at least if his acts are unreasonable or intended to increase the damages caused by the trespass.

Beyond this, a landowner may in some cases be required to take action, even to expend money, to minimize the damages caused by the trespass. "The general principle is fully recognized with us that, in case of contract broken or tort committed, the injured party should do what reasonable care and business prudence requires to minimize the loss." What acts one must take to minimize his losses will, of course, vary with circumstances. He is not required to incur substantial expense to protect his property, at least where the protection would be experimental and where it might result in liability to others.

Nor is he required to go upon defendant's land and repair the fence to prevent defendant's cattle from escaping, since "[t]his would have been protecting the defendants' land at the plaintiff's expense..." and ordinarily this would not be a reasonable requirement. On the same principle, the landowner need not

207 See London v. Bear, 84 N.C. 266 (1881).
208 Where liability for entrance upon land is based upon negligence rather than upon intent, however, contributory negligence is presumably a bar. As to negligence liability, see Schloss v. Hallman, 255 N.C. 685, 122 S.E.2d 513 (1961); Smith v. Pate, 246 N.C. 63, 97 S.E.2d 457 (1957).
209 Henley v. Wilson, 81 N.C. 405 (1879). Defendant's evidence was that plaintiff had dammed sluices on his land, contributing to the total damage. Presumably if the landowner's acts are reasonable, even though they result in additional damage, the trespasser will not be relieved of liability for the additional damages, just as one is not relieved in negligence cases when the plaintiff makes an emergency response that increases his injury.
210 Yowmans v. City of Hendersonville, 175 N.C. 574, 579, 96 S.E. 45, 47 (1918).
211 Id.
invest additional capital in a business damaged by a trespasser in order to minimize the trespasser's damage.\textsuperscript{213} In some cases the Court has said that a landowner, flooded by defendant's wrongful act, is not required to reduce his damages by cutting drainage ditches, because the landowner "is not required to incur such expense."\textsuperscript{214} One of these cases indicates that the plaintiff need not act to avoid losses or minimize his damage in cases of tort, but only in cases of contract.\textsuperscript{215} This is plainly wrong, however, and the Court clearly recognizes the duty to take reasonable care to minimize damages in tort cases.\textsuperscript{216} The real explanation for not requiring the landowner to ditch his own land seems to be that, under the circumstances at least, it would be an unreasonable burden upon him.

In \textit{Waters v. Kear},\textsuperscript{217} the defendant diverted waters onto the plaintiff's land. At the trial there was evidence to the effect that he offered to ditch plaintiff's land to drain the waters. The Court held that this evidence was irrelevant and that a verdict should be entered for the plaintiff, because "the defendant had no legal right to require this, and the plaintiff was not required to assent to the defendant cutting a ditch through her land. . . ."\textsuperscript{218} Though it is not clear, the diversion of waters was apparently intentional rather than accidental. Where that is the case, and where a ditch would be permanently required to drain the lands, the Court's ruling is surely correct, for any other ruling would allow the defendant a kind of private eminent domain, under which he could use the plaintiff's land so long as he did the physical labor. This apparently is what the Court had in mind, for it suggested condemnation under the Drainage Act.\textsuperscript{219} Where the trespass is accidental and not permanent, and where ditches could be temporary, very probably a different result could be justified.

\textsuperscript{213} Johnston v. Rudesill, 46 N.C. 510 (1854) (sawmill).
\textsuperscript{214} Borden v. Carolina Power & Light Co., 174 N.C. 72, 75, 93 S.E. 442, 443 (1917); See Cardwell v. Norfolk & W. Ry., 171 N.C. 365, 88 S.E. 495 (1916). In Barcliff v. Norfolk & S.R.R., 168 N.C. 268, 84 S.E. 290 (1915), the Court stated flatly that he "is not required to avoid damages to his land . . . by digging ditches . . . ." \textit{Id.} at 270, 84 S.E. at 292. See also Waters v. Kear, 168 N.C. 246, 84 S.E. 292 (1915), where the Court also said that the landowner was not even required to allow defendant to cut drainage ditches on plaintiff's land.
\textsuperscript{216} Yowmans v. City of Hendersonville, 175 N.C. 574, 96 S.E. 45 (1918).
\textsuperscript{217} 168 N.C. 246, 84 S.E. 292 (1915).
\textsuperscript{218} Id. at 247, 84 S.E. at 292.
\textsuperscript{219} See N.C. GEN. STAT. §§ 156-1 to -25 (1964). A similar point was suggested in Roberts v. Baldwin, 155 N.C. 276, 71 S.E. 319 (1911), where on similar facts the Court held that the plaintiff was not required to drain the land to minimize his losses, since to hold otherwise would make it "unnecessary for the upper proprietor to institute legal proceedings to drain through the lands of the lower proprietor." \textit{Id.} at 282, 71 S.E. at 322.