In the general course of a surveyor's duties, it it often required that entry onto and across adjoiners or other properties be made to locate and tie in required control corners for a particular survey. To enter upon private property a surveyor will require a "right of entry".

Right of entry means the right to enter upon another's land without being subject to trespass. It does not mean right to enter and destroy property. Arizona has a surveyor's right of entry law which allows for a registered Professional Land Surveyor or employee of the United States Government to enter upon private lands for the purposes of conducting a survey. The statute is shown next:

§ 33-104. Right of person making land survey to enter lands; damages for injury to lands

A. Any person who is registered as a land surveyor under title 32, chapter 1 or who is an employee of the United States government may enter upon lands within this state to perform necessary work relating to land surveys, and may establish permanent monuments and erect the necessary signals and temporary observatories without committing unnecessary injury. The person making a survey under this section shall make every reasonable effort to give oral or written notice of the survey to the owner of the land before entering the land.

B. If the parties interested cannot agree upon the amount of damages caused thereby, either may petition the superior court to assess the damages.

C. The person entering lands for a land survey as provided by this section may tender to the injured party damages therefor, and if the damages finally assessed do not exceed the amount tendered, he shall recover costs. Otherwise the injured party shall recover costs.

D. Notwithstanding this section, the owner or owner's agent may deny entry to normally restricted or hazardous areas.

The statute states that the "person making a survey under this section shall make every reasonable effort to give oral or written notice of the survey to the owner of the land before entering the land." It is not clear whether simply knocking on someone's door the day of the survey, at the surveyor's convenience would satisfy the criteria for making every reasonable effort, especially if the landowner is not home. Usually someone is home and permission is seldom denied, but in certain instances irate landowners will not allow access. Even though there is a right of entry it is advised not to argue with the wrong end of a shotgun! The best approach is to send a letter to the landowner advising them of the need to do a survey in the area. In the letter you ask them if they have any information of land boundaries in the area and ask them for convenient times to enter upon their land. People want to feel important and be involved in the survey. Make them feel like a part of the survey by asking them for help. An example of a letter asking for entry permission is shown next:

Dear Landowner;

Our firm, Ace Number One Surveyors, has been hired to perform a survey of the NW1/4 of Section 20, T4S, R14E. In order to perform this survey we need to recover the S1/4 corner of section 20, which happens to be on your property. We have found that landowners often have a great deal of knowledge of land boundaries in and around their property. We would like to contact you for any information or assistance you can offer us in locating the S1/4 corner.

We will be calling you in the next two weeks to schedule a time when we may enter your property with the least inconvenience on your part. At that time we can discuss any information you may have concerning land boudaries in that area.

If you have any questions please call us at 555-1212 during regular business hours.

Sincerely,

John Doe, PLS

The statute also states that the person making the survey shall be responsible for any damages to the landowner's property. It may seem that the surveyor can only be held to actual damages. This statute has not been tested in Arizona so the outcome of the award of damages is not known. Other states have had cases whereby not only have actual damages been awarded, but due to the negligence of the surveyor, the court awarded punitive damages far exceeding the actual damages. Two court cases are included with this chapter from other states that show the liability associated with entry onto someone else's land.

The one case of Indiana & Michigan Electric Company v. Stevenson, 363 N.E. 2d 1254 (1977), the utility company's survey crew apparently had the right of entry for this particular type of survey. They negligently caused damages on two properties. The actual damages were only $120 and $300 for each property. The punitive damages awarded were $60,000 and $50,000 respectively!

It cannot be emphasized enough that even though surveyor's have a right of entry in Arizona, neligent damage to the land may result in tremendous costs. It is advised to check around for an insurance policy that would cover punitive damages of this type.

One last item to consider. This right of entry law applies to surveyors registered "under title 32, chapter 1 or who is an employee of the United States government". If a registrant's certificate is expired, they are in violation of A.R.S. 32-145 (see chapter on Professions and Occupations) and may not be registered in the eyes of the law. Just another reason to keep your certificate up to date.

Robert B. RAGLAND, Appellant,

v.

Richard P. CLARSON, t/d/b/ as Richard P. Clarson and Associates, Appellee.

No. 0-321.

District Court of Appeal of Florida, First District.

March 30, 1972.

Action against surveyor for damage from cutting growth on plaintiff's land. The Circuit Court, Duval County, Henry F. Martin, Jr., J., rendered judgment for defendant and plaintiff appealed. The District Court of Appeal, Rawls, J., held that under statute providing that surveyors should not have right to destroy, injure, damage, or move anything on land without written permission of owner, surveyors were liable for cutting growth, without owner's written permission, even though cutting was necessary to survey.

Reversed and remanded.

1. Trespass ⇐13

Under statute giving surveyors right to enter land but providing that they should not have right to destroy, injure, damage, or move anything on land without written permission of owner, surveyors were liable for cutting growth, without owner's written permission, even though cutting was necessary to survey. F.S.A. § 472.14.

2. Trespass ⇐52

Landowner who had attempted to preserve land in its natural state and improve it with plantings was not entitled to recover replacement value of each plant, tree, or shrub damaged by surveyors but could recover for loss of convenience and comfort in use of his land although destruction might not generally diminish market value. F.S.A. § 472.14.

3. Trespass ⇐68(1)

Instruction on damages, in action against surveyor for unauthorized cutting on plaintiff's land, that jury might consider whether plaintiff was deprived of convenience and comfort in use and enjoyment of land, was erroneous where it was undisputed that surveyor had deprived plaintiff of convenience and comfort.

4. Trespass ⇐67

Evidence in action against surveyor for cutting growth on plaintiff's land was sufficient to take question of punitive damages to jury.

5. Appeal and Error ⇐1178(6)

On reversal of judgment for defendant and determination that plaintiff was entitled to directed verdict on liability, new trial on all issues would be granted since question of damages was intricately interwoven with question of liability.

William H. Maness, Jacksonville, for appellant.

Raymond Ehrlich, and Herbert R. Kanning, of Mathews, Osborne & Ehrlich, Jacksonville, for appellee.

RAWLS, Judge.

Plaintiff (appellant) Ragland sued defendant (appellee) Clarson, a surveyor, for damages resulting from the cutting of plants and trees in the course of his employment in surveying Ragland's land. Upon trial of the issues a jury verdict was returned for the defendant-surveyor, final judgment was entered in favor of defendant, and motion for new trial was denied; hence, this appeal.

The two salient points on appeal posed by appellant concern the measurement of damages, and denial of his motion for directed verdict as to liability.

The resolution of this controversy depends upon a construction of Section 472.14, Florida Statutes, F.S.A. viz.:

> "472.14 Registered engineers and surveyors authorized to enter lands of third parties under certain conditions.—Registered engineers and registered land surveyors be and they are hereby granted permission and authority to go on, over and upon the lands of others when necessary so to do to make land surveys, and in so doing to carry with them their agents, servants and employees necessary for that purpose, and that such entry under the right hereby granted shall not constitute trespass, and that such registered engineers and registered land surveyors shall not nor shall their agents, servants or employees so entering under the right hereby granted be liable to arrest or a civil action by reason of such entry; provided, however, that nothing in this section shall be construed as giving the said registered engineers, registered land surveyors, their agents, servants or employees any right to destroy, injure, damage or move anything on said lands of another without the written permission of the landowner."

We find no reported case construing this statute.

This record discloses that Ragland has been "snake bit" in his strenuous efforts, spanning more than 20 years, to preserve a 52-acre parcel of land known as "Grandma's Farm" in its natural state and improve the land with plantings. Ragland's interest in this parcel of land is reflected by a record he kept of various shrubs and trees which were planted by him from 1965 through June 1969. His diary in a number of instances reflects the source of the seeds and cuttings. Among the plants that he placed on the land are: dogwood, various types of azaleas, maidenhair fern, unknown wild flowers, atamasco lilies, columbine, phlox, wygelia, nandina, brown-eyed susans, rhododendron, mountain laurel, white fringed orchid, magnolia, cherry laurel, redbud, myrtle, cedar, crab apple, peaches, plums, persimmons, cherokee roses, red bay, silver bell, and innumerable other varieties. In addition, from 1954 to 1969 Ragland planted 19,500 slash pines, 2,500 longleaf pines, 750 cedars, 1,000 spruce pines, and 500 Arizona cypress on the land. The foregoing plantings alone detail the intense interest that Ragland has in this parcel of land.

In 1966 the State Road Department located a segment of the interstate system through Ragland's property. He exhausted every effort available to halt that project.[1] The next blow to Grandma's Farm was the designation by the Duval County School Board of a portion of same for a senior high school site.[2] The instant controversy arose out of this action.

On January 15, 1969, the School Board, by letter to Clarson, advised: "You are authorized to proceed with the architectural survey on the subject site . . . It is our desire that you furnish us with boundary information at your earliest convenience." On January 20, 1969, Ragland's attorney wrote to Clarson stating, inter alia:

> ". . . I call your attention to the further proviso of that statute which reads as follows, to-wit:
>
> '* * * Nothing in this section shall be construed as giving said registered engineers, registered land surveyors, their agents, servants or employees any right to destroy, injure, damage or move anything on said lands of another without the written permission of the landowner.'

1. Ragland v. State Department of Transportation, 242 So.2d 475 (1 Fla.App. 1971). The facts in this case further detail Ragland's care, concern and attachment for this property.

2. The School Board had not instituted eminent domain proceedings. The "designation" of the subject parcel by the School Board as a potential school site did not confer upon it any property rights in the parcel.

"As you know, access to the land was gained by removing a post and a valuable tree was cut down. This is to again repeat the warning previously given you and caution you that Dr. Ragland will insist that you respect the above quoted law, as well as the law that gives you the right to enter upon Dr. Ragland's land."

Subsequently, Clarson and his crew proceeded upon Ragland's land and performed the architectural survey, which included a topographical of the 19.68-acre proposed school site utilizing 300 feet contour lines. Ragland complained to Clarson's survey crew about their cutting trees and asked them not to cut any plants, but the crew continued surveying. Excerpts of Clarson's testimony as to cutting of growth on the land read as follows:

"To take an accurate survey, namely, on the base line we cut everything. If I remember, on the base line, there were less than twenty-four inches that we cut. We know that they needed that for accuracy of their work, and also for saving time and because they were going to clear out a bigger area anyway to build the school and so forth, so normally we cut everything, sir."

". . . I told them to be real careful and not to cut anything of any value and not to cut anything large or anything but what they absolutely had to be able to accomplish the work."

[1] The subject statute is clear and unequivocal. It grants a license to a surveyor or his agents to enter upon a landowner's property without his permission and without fear of criminal prosecution for trespass. It does not permit him to "break and enter," that is, to remove barricades for the convenience of driving vehicles on the landowner's property; it does not permit him to "destroy, injure, damage, or move anything without the written permission of the landowner". But, the surveyor says: I have to cut in order to run a line. The simple answer is if he has to cut, he must procure the written permission of the landowner, or in the alternative be prepared to respond in damages. To construe the statute otherwise might well activate the constitutional guarantee that a citizen shall not be deprived of his property without due process of law. The facts are not in dispute that this surveyor destroyed, injured and damaged this property without the written permission of the landowner. The trial judge should have directed a verdict for plaintiff on the question of liability.

[2, 3] We next consider the question of damages. Ragland strenuously contends that he was entitled to introduce evidence as to "replacement" value of each plant, tree or shrub damaged. We do not agree. Ragland's damages were clearly sought for deprivation of his convenience, comfort and enjoyment of the subject parcel. This is illustrated by Ragland's own testimony: "I have been trying to preserve it as open space which I feel is vitally needed in a community like this." The trial judge instructed the jury as follows:

"The Court instructs you that the owner of property has the right to enjoy it according to the owner's [taste] . . . and wishes so that the taking or injuring or damaging trees or shrubs may deprive the owner of convenience and comfort in the use of his land for which he is entitled to be compensated though the damages or destruction of trees and shrubs might not generally diminish the market value of the property."

The above portion of the instruction is a correct enunciation upon the law as to this plaintiff's damages. It is the next part of his instruction that constitutes reversible error. There, the trial judge advised the jury that if it found from "the greater weight of the evidence that the trees and shrubs alleged to have been damaged . . . under such circumstances as to entitle the plaintiff to recover . . . you may consider whether or not the plaintiff was deprived of the convenience and comfort in the use and enjoyment of his property . . . ." The evidence was not in dispute that defendant-surveyor deprived

plaintiff of his convenience and comfort in the use and enjoyment of his property. This segment of the instruction was erroneous.

[4] In view of the evidence in this record we hold that the question of punitive damages was properly submitted to the jury and upon a new trial being granted the jury should again be instructed on the question of punitive damages.

[5] The judgment appealed is reversed with directions to grant a new trial on all issues since the question of damages is intricately interwoven with the question of liability.

Reversed and remanded.

SPECTOR, C. J., and CARROLL, DONALD K., J., concur.

INDIANA & MICHIGAN ELECTRIC COMPANY, Appellant (Defendant below),

v.

Jack STEVENSON, Joe Collins, and Lloyd Collins, Appellees (Plaintiffs below).

No. 1-776A121.

Court of Appeals of Indiana, First District.

June 15, 1977.

Rehearing Denied July 25, 1977.

Property owners brought actions against public utility to recover for crops

and timber cut by utility while surveying land in preparation for condemnation of property. The Circuit Court, Clay County, Robert W. Neal, J., entered judgments awarding property owners compensatory and punitive damages, and utility appealed. The Court of Appeals, Lowdermilk, J., held that: (1) evidence sustained finding that utility's cutting of crops and timber on plaintiffs' land substantially interfered with plaintiffs' free use and enjoyment of such crops and timber, and therefore, constituted a taking of such crops for which plaintiffs were entitled to compensation; (2) evidence was sufficient to merit award of punitive damages; (3) trial court did not abuse its discretion in admitting evidence of utility's course of conduct in dealing with landowners along its proposed survey route; (4) trial court did not err in denying utility's motion for change of venue; (5) jury was adequately instructed on the law, and (6) awards of $50,000 and $60,000 respectively to property owners who suffered actual damages of $300 and $120 respectively were not excessive, in view of fact that defendant utility company had consolidated assets totaling over 1.5 billion dollars, and a year end income totaling more than 43 million dollars.

Affirmed.

1. Appeal and Error ⇐761

On appeal from judgment awarding property owners compensatory and punitive damages arising out of action of public utility in cutting crops and timber while surveying land preparatory to condemning property, public utility did not waive its specifications of error by failing to set out each assignment of error individually in argument section of its brief, in view of fact that utility grouped its specific assignments of error under several general headings and numerically directed court to where in its motion to correct errors the specific error could be located and where in the record the alleged error was committed and preserved for appellate review. Rule AP. 8.3(A)(7).

2. Eminent Domain ⇐8

Legislature, by vesting right of eminent domain in specific entities, has recognized that desires of individual landowners to undisturbed enjoyment of property must succumb to practical needs of society as a whole.

3. Eminent Domain ⇐74

Generally, public utility's mere entry upon land for purpose of examination and survey pursuant to statutory grant of authority does not ipso facto amount to a taking of property in the constitutional sense for which compensation must be assessed and tendered before entry and survey are made. IC 32–11–1–1 (1976 Ed.); Const. art. 1, § 21.

4. Trespass ⇐13

Public utility's right to enter private property for purpose of examination and survey confers no license to engage in course of destruction of crops, timber, etc. IC 32–11–1–1 (1976 Ed.); Const. art. 1, § 21.

5. Eminent Domain ⇐2(1), 307(2)

Before private property is "taken" in a constitutional sense, there must be substantial interference with owners' use and enjoyment of specific property allegedly taken; whether interference is substantial is a factual question which must be resolved in each case by trier of fact. Const. art. 1, § 21.

6. Eminent Domain ⇐2(1)

A taking in the constitutional sense is a relative term and not all damage to property amounts to a taking of that property. Const. art. 1, § 21.

7. Eminent Domain ⇐300

Evidence in actions brought by property owners against public utility to recover for crops and timber cut by utility while surveying land in preparation for condemnation of property sustained finding that utility's cutting of crops and timber on plaintiffs' land substantially interfered with plaintiffs' free use and enjoyment of such crops and timber, and therefore, constituted a taking of such property for which plaintiffs were entitled to compensation. IC 32–11–1–1 (1976 Ed.); Const. art. 1, § 21.

8. Trespass ⇐13

Public utility's unconstitutional taking of property owners' crops and timber revoked its statutory grant of authority to enter private property for purposes of examination and survey prior to condemnation, and thereby relegated public utility to status of a trespasser. IC 32-11-1-1 (1976 Ed.); Const. art. 1, § 21.

9. Trespass ⇐56

Award of punitive damages is proper in a trespass action upon showing of fraud, malice or oppressive conduct.

10. Eminent Domain ⇐300

Evidence in actions brought by property owners against public utility to recover for crops and timber cut by utility while surveying land in preparation for condemnation of property sustained finding that utility had knowledge of alternative means of surveying which would have resulted in slight, if any, damage to crops or timber, and such evidence was sufficient to warrant award of punitive damages to property owners.

11. Eminent Domain ⇐304

Property owners' right to recover punitive damages arising out of action of public utility in cutting crops and timber while surveying land in preparation for condemnation of property was conditioned upon their ability to prove that utility perpetrated and established tort in performance of its surveying activities, or conduct which could properly be characterized as tortious in nature or malicious. IC 32-11-1-1 (1976 Ed.).

12. Eminent Domain ⇐298

In actions brought by property owners against public utility to recover for crops and timber cut by utility while surveying land in preparation for condemnation of property, trial court did not abuse its discretion in permitting certain nonparty witnesses to testify about utility's surveying activities upon their property, in view of fact that such evidence was relevant as tending to prove whether utility's conduct upon plaintiffs' lands was malicious in nature and thereby deserving of assessment of punitive damages.

13. Appeal and Error ⇐1170.7

In actions brought by property owners against public utility to recover for crops and timber cut by utility while surveying land in preparation for condemnation of property, any error in trial court's admission of evidence of utility's acquisition of easements in nonrelated cases, and certain pleadings filed in cases between parties, was harmless, in view of fact that there was other evidence properly admitted which would have justified award of punitive damages. Rule TR. 61.

14. Venue ⇐42

In action brought by property owner against public utility to recover for crops and timber cut by utility while surveying land in preparation for condemnation of property, trial court did not abuse its discretion in denying utility's motion for change of venue, which motion was based upon newspaper article which reported award of punitive damages to property owner in similar case, and which included author's speculation that such similar case would serve as a precedent for instant case, in absence of showing of prejudice to such a degree that it was unlikely that utility could obtain a fair trial in county. Rule TR. 76.

15. Eminent Domain ⇐307(3)

In actions brought by property owners against public utility to recover for crops and timber cut by utility while surveying land in preparation for condemnation of property, jury was adequately instructed on the law.

16. Appeal and Error ⇐1004.1(4)

Court of Appeals will not reverse award of damages as being excessive unless damages appear so unreasonable as to convince the court that jury was motivated by passion or prejudice.

17. Damages ⇐87(1)

Purpose of award of punitive damages is to punish wrongdoer and thereby deter others from engaging in similar conduct in the future.

18. Appeal and Error ⇐1004.1(10)

There are two primary factors which should properly be considered in reviewing an award of punitive damages: first, nature of tort and extent of natural damages sustained should be considered; second, economic wealth of defendant should be considered.

19. Eminent Domain ⇐305

Punitive damage awards of $50,000 and $60,000 respectively to property owners whose crops and timber were cut by public utility during survey of land in preparation for condemnation of property, and who suffered actual damages of $300 and $120 respectively, were not excessive, in view of fact that defendant utility had consolidated assets totaling more than 1.5 billion dollars, and a year end income of more than 43 million dollars.

Thomas W. Yoder and Lawrence A. Levy, of Livingston, Dildine, Haynie & Yoder, Fort Wayne, John M. Baumunk, Brazil, for appellant.

Hansford C. Mann, of Mann, Mann, Chaney, Johnson & Hicks, Terre Haute, George N. Craig, Craig & Craig, Brazil, for appellees.

LOWDERMILK, Judge.

NATURE OF THE CASE

Defendant-appellant, Indiana & Michigan Electric Company (IMEC), appeals from the adverse judgments of the trial court entered upon jury verdicts which awarded plaintiffs-appellees, Joe and Lloyd Collins (Collins), compensatory damages of $120 and punitive damages of $60,000, and which awarded plaintiff-appellee, Jack Stevenson (Stevenson), compensatory damages of $300 and punitive damages of $50,000. These two cases were consolidated for purposes of this appeal.

FACTS

The facts necessary for our disposition of this appeal are as follows: IMEC is a public utility engaged in the generation and transmission of electric energy. IMEC has the power of eminent domain.[1]

In October, 1974, IMEC was examining and surveying land in Clay County, Indiana, in preparation for the construction of its proposed Breed-Tipton-Pipe-Creek 765,000 volt electrical transmission facility.

The Collins and Stevenson were residents and landowners in Clay County whose property IMEC wished to survey.

When IMEC's survey crew reached the Collins' land they found corn 10 to 12 feet high in the line of sight of their survey routes. IMEC ran what are known as centerlines from a tripod when conducting its surveys. Inasmuch as the Collins' corn was in its line of sight for approximately 1800 feet of the survey route, IMEC cut the corn without first obtaining the Collins' permission.

On Stevenson's land there was a woods consisting of brush, saplings, trees and dense foliage along approximately 1100 feet of IMEC's survey route. In order to obtain what it believed to be an accurate line of sight and tower elevations IMEC cut approximately 23 saplings and trees without Stevenson's permission.

CENTRAL ISSUES

1. Whether a public utility when examining and surveying property preparatory to condemning the property has the right to cut the corn or trees of a landowner, without his permission, when thought necessary to conduct an accurate survey.
2. Whether there was sufficient evidence to merit an award of punitive damages, and whether the trial court erred in overruling IMEC's motions for judgments on the evidence at the close of the *Collins* and *Stevenson* cases.
3. Whether the trial court erred in permitting certain irrelevant evidence to be introduced over IMEC's objection in both cases.

1. IC 1971, 32-11-3-1 (Burns Code Ed.).

4. Whether the trial court erred in denying IMEC's motion for a change of venue in the *Stevenson* case.
5. Whether the trial court erred in giving, and in refusing to give, certain instructions to the jury.
6. Whether the verdicts awarding punitive damages in both cases are arbitrary and capricious.

DISCUSSION AND DECISION

ISSUE ONE

[1] Before reaching the merits of this appeal we first will address the appellees' argument that IMEC has waived all specifications of error by not setting out each assignment of error individually in the argument section of its brief.

IMEC elected to group its numerous specific assignments of error under several general headings, supported by a single argument, as permitted by Ind.Rules of Procedure, Appellate Rule 8.3(A)(7). Under each general assignment of error IMEC numerically directed this court to where in its motion to correct errors the specific error could be located, and by the use of footnotes, where in the record the alleged error was committed and preserved for appellate review.

It is the opinion of this court that AP 8.3(A)(7) has been substantially complied with. As stated in the recent case of *Indiana State Board of Tax Commissioners v. Lyon and Greenleaf Co., Inc.* (1977), Ind. App., 359 N.E.2d 931, at p. 933:

> "Before turning to a discussion of the merits, it is necessary to dispose of a contention by appellee that the issues to be discussed have been waived by the Board. Appellee contends that appellant has waived all asserted errors by failing to specifically set forth in its brief with the respective arguments the applicable errors assigned in its motion to correct errors. However, several specifications of error are grouped and the issues raised by such errors are sufficiently articulated. Moreover, each section of appellant's argument is prefaced with a statement making numerical reference to which specifications of error from the motion to correct errors relate to each section of argument. Where there has been substantial compliance with the rules, a failure to include all that is technically required will not result in a waiver. *Yerkes v. Washington Manufacturing Co., Inc.* (1975), Ind.App., 326 N.E.2d 629."

IC 1971, 32-11-1-1 (Burns 1976 Supp.) provides in pertinent part as follows:

> "Entry, survey, effort to purchase, title.—Any person, corporation or other body having the right to exercise the power of eminent domain for any public use, under any statute, existing or hereafter passed, and desiring to exercise such power, shall do so only in the manner provided in this chapter [32-11-1-1—32-11-1-13] except as otherwise provided herein. *Before proceeding to condemn, such person, corporation or other body may enter upon any land for the purpose of examining and surveying the property sought to be appropriated or right sought to be acquired*; and shall make an effort to purchase for the use intended such lands, right-of-way, easement or other interest therein or other property or right. . . ." (Our emphasis)

IMEC contends that as an incident to its right to enter and survey property prior to it being condemned it has the right to cut minimal quantities of crops or timber in order to produce an accurate survey. The Collins and Stevenson contend that such conduct on the part of IMEC would allow an unconstitutional "taking" of their property in violation of Art. I, § 21 of the Indiana Constitution, impliedly revoking IMEC's statutory license to enter private property, and thereby making it a trespasser.

Art. I, § 21 of the Indiana Constitution provides:

> "Compensation for services or property. —No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except

in case of the State, without such compensation first assessed and tendered."

We are thus faced with the unenviable task of reconciling two important and oftentimes competing interests. On the one hand we have the interest of the landowner to be secure in the ownership and possession of his property; on the other hand, we have the interest of society as a whole who in our technologically advanced civilization have become accustomed at the mere flick of a switch to be provided with a valuable source of energy—*electricity*.

We must now proceed with the difficult task of balancing these two important interests.

[2, 3] In the first instance our legislature by vesting the right of eminent domain in specific entities has recognized that the desires of the individual landowner(s) to the undisturbed enjoyment of his property must succumb to the practical needs of society as a whole. *State v. Flamme* (1940), 217 Ind. 149, 26 N.E.2d 917. Further, our legislature has provided that any entity preparing to exercise its statutory right of eminent domain has the further right to enter, examine and survey the property about to be condemned. IC 32–11–1–1, *supra*. It is the generally accepted rule that a public utility's mere entry upon land for the purposes of examination and survey pursuant to a statutory grant of authority does not *ipso facto* amount to a *taking* of property in the constitutional sense for which compensation must be assessed and tendered before the entry and survey are made. 29 A.L.R.3d 1104 (1970). We fully adhere to this rule. Properly exercised the pre-condemnation survey can serve the interests of both landowner and public utility. The landowner will have only so much of his land condemned as is needed for the particular utility purpose involved; and, the utility will not be forced to engage in the wasteful expenditure of the ratepayer's money by blindly purchasing a "pig in a poke."

[4] However, a public utility's right to enter private property for the purpose of examination and survey confers no license to engage in a course of destruction of crops, timber, etc.

Having recognized the competing interests involved and the two extremes of the spectrum our focal point becomes narrowed to this question, "When do acts by a public utility when conducting an examination and survey of property prior to condemning that property amount to a *taking* of private property in violation of Art. I, § 21 of the Indiana Constitution, thereby revoking a public utility's statutory license to enter private property?

Our Supreme Court has not had occasion to address this specific question. However, in the case of *School Town of Andrews v. Heiney* (1912), 178 Ind. 1, 7, 98 N.E. 628 at p. 630, a "taking" of property was defined as follows:

> "What is a 'taking' of property within the constitutional provision is not always clear; but, so far as general rules are permissible of declaration on the subject, it may be said that there is a taking where the act involves an actual interference with, or disturbance of, property rights, *which are not merely consequential, or incidental injuries to property, or property rights*, as distinguished from prohibition of use, or enjoyment, or destruction of interests in property . . ." (Our emphasis)

See also, *Schuh v. State* (1968), 251 Ind. 403, 241 N.E.2d 362.

[5] Therefore, before private property is "taken" in a constitutional sense there must be a *substantial interference* with the owners use and enjoyment of the specific property allegedly taken. Whether the interference is substantial is a factual question which must be resolved in each case by the trier of fact.

IMEC contends that by not allowing utilities to cut a minimum number of trees, crops, etc., needed to effectuate accurate surveys, it will become in essence impossible to conduct surveys, and without surveys, there can be no eminent domain. It is argued that any entry upon a person's property will result in some damage. IMEC posits the extreme example of blades of

grass being trampled under the feet of the survey crew.

We do not accept the total picture of oblivion which IMEC paints for utilities in such broad strokes for two reasons. First, there was expert testimony presented at trial from which reasonable men could find that methods of surveying through cornfields and timber were available which would not result in the destruction of corn and trees. For example, the experts posited offset surveying and surveying from platformed elevations as practical alternatives to cutting. The costs in money and time in adopting these techniques must yield at this point to the paramount interests of the landowner. Secondly, the law does not concern itself with trifling injuries. Such an injury as posited by IMEC could not properly be considered a substantial interference with the owners use and enjoyment of his property. In the same vein would be the case of a utility driving survey stakes into land. The land could not properly be considered substantially interfered with and thereby taken.

[6] We think it important to emphasize that a taking in the constitutional sense is a relative term and that not all *damage* to property amounts to a *taking* of that property. For example, to cut a tree down at its base would be a taking of that tree; however, reasonable men might well find that to cut a limb or branch from a tree does not amount to a taking of the tree. The reason being that the owners use and enjoyment of the tree would not be substantially interfered with.

[7] In the case at bar reasonable men could have found that IMEC's cutting of a strip of corn 1800 feet long, 4 to 8 feet wide, substantially interfered with the Collins' free use and enjoyment of their corn. *Indiana & Michigan Electric Co. v. Stevenson* (1975), Ind.App., 337 N.E.2d 150. Likewise, IMEC's cutting of approximately 23 saplings and trees on Stevenson's property was a substantial interference with his free use and enjoyment of his saplings and trees. *Indiana & Michigan Electric Co. v. Stevenson, supra.*

ISSUE TWO

IMEC contends that the trial court erred in overruling its motions for judgments on the evidence at the close of the *Collins* and *Stevenson* cases, and that the evidence was insufficient to merit an award of punitive damages in either case.

The Collins and Stevenson contend that the evidence and reasonable inferences therefrom establish that IMEC exceeded the lawful scope of its statutory authority to conduct examinations and surveys by cutting trees and crops and thereby became trespassers; hence, if the actions of IMEC as trespassers could have been considered malicious an award of punitive damages was proper.

[8, 9] As this court has stated, *supra*, reasonable men could have found that IMEC's conduct in cutting the Collins' corn and Stevenson's trees amounted to a taking of that property for which compensation should have been first assessed and tendered. IMEC's unconstitutional taking of private property revoked its statutory grant of authority to enter private property for the purposes of examination and survey and thereby relegated IMEC to the status of a trespasser, *Burton v. Calaway* (1863), 20 Ind. 469; *Spades v. Murray* (1891), 2 Ind. App. 401, 28 N.E. 709. It is settled that an award of punitive damages is proper in a trespass action upon a showing of fraud, malice or oppressive conduct. *Moore v. Crose* (1873), 43 Ind. 30; *Nicholson's Mobile Home Sales, Inc. v. Schramm* (1975), Ind. App., 330 N.E.2d 785. As noted above, there was evidence that there were alternative means of surveying available which would have resulted in slight, if any, damage to corn or trees. The jury could have reasonably inferred that IMEC had knowledge of these alternative methods of surveying property, but elected not to use them because of the additional time and expense involved, hence, IMEC's actions exhibited a heedless disregard for the property rights of landowners.

[10] Therefore, it is the opinion of this court that the trial court did not err in denying IMEC's motions for a judgment on the evidence in the *Collins* and *Stevenson* cases, and there was sufficient evidence to merit an award of punitive damages in both cases. *Mamula v. Ford Motor Co.* (1971), 150 Ind.App. 179, 275 N.E.2d 849; *Hidden Valley Lake Inc. v. Kersey* (1976), Ind.App., 348 N.E.2d 674.

ISSUE THREE

IMEC contends that the trial court erred in permitting nonparties to testify concerning the activities of IMEC upon their land, in permitting evidence into the record concerning IMEC's negotiations with landowners looking forward to the acquisition of voluntary easements, and in allowing certain pleadings to be read to the jury. It is contended that this evidence was not relevant or material to the issues before the trial court.

It is the opinion of this court that the trial court did not abuse its discretion in permitting certain non-party witnesses to testify about IMEC's surveying activities upon their property.

[11] The Collins and Stevenson sought to recover punitive damages in their complaint. Their right to recover such damages was conditioned upon their ability to prove IMEC perpetrated an established tort in the performance of its surveying activities, or conduct which could properly be characterized as tortious in nature or malicious. *Vernon Fire & Casualty Insurance Co. v. Sharp* (1976), Ind., 349 N.E.2d 173.

[12] Evidence of IMEC's course of conduct in dealing with landowners along its proposed survey route would have some relevance as tending to prove whether IMEC's conduct upon the Collins' and Stevenson's lands was malicious in nature and thereby deserving of an assessment of punitive damages. 12 I.L.E. *Evidence* § 55, pps. 491–492.

We are not unmindful that the Collins' and Stevenson's proof of these collateral matters was time-consuming and arguably prejudicial to IMEC.

Nevertheless, it was the function of the trial court to weigh the relevancy of this evidence against its possible prejudice to IMEC and its risk of confusing the jury, and its determination favoring admissibility will not be overturned absent a clear showing of abuse of discretion.

[13] IMEC contends that evidence of its acquisition of easements in non-related cases, as well as certain pleadings filed in cases between the parties herein, were improperly admitted into evidence.

This evidence was admitted for the purpose of informing the jury, under the theory of the Collins' and Stevenson's complaints, that the conduct of IMEC was malicious and oppressive and thus entitled them to an award of punitive damages. Further, we hold that if this were error that it was harmless error as there was other evidence properly admitted which would have justified an award of punitive damages. Ind. Rules of Procedure, Trial Rule 61.

ISSUE FOUR

[14] IMEC argues that the trial court erred in the *Stevenson* case by not granting its motion for a change of venue from the county.

The *Stevenson* case commenced on February 12, 1976. In the evening edition of the "Brazil, Indiana Times", on February 12, 1976, there appeared an article outlining the Collins' verdict of $60,000 punitive damages which concluded:

". . . The *Collins* decision is expected to serve as the precedent in the remaining cases."

IMEC filed its petition for a change of venue from the county on February 16, 1976, which was denied on February 19, 1976.

TR. 76 provides in pertinent part as follows:

"CHANGE OF VENUE

(1) In all cases where the venue of a civil action may now be changed from the judge or the county, such change shall be

granted upon the filing of an unverified application or motion without specifically stating the ground therefor by a party or his attorney. Provided, however, a party shall be entitled to only one [1] change from the county and only one [1] change from the judge.

(2) In any action except criminal no change of judge or change of venue from the county shall be granted except within the time herein provided. Any such application for a change of judge or change of venue shall be filed not later than ten [10] days after the issues are first closed on the merits.

* * * * * *

(8) Provided, however, if the moving party first obtains knowledge of the cause for change of venue from the county or judge after the time above limited, he may file said application, which must be verified personally by the party himself, specifically alleging when the cause was first discovered, how discovered, the facts showing the grounds for a change, and why such cause could not have been discovered before by the exercise of due diligence. Any opposing party shall have the right to file counter-affidavits on such issue within ten [ten] days, *and the ruling of the court may be reviewed only for abuse of discretion.*

* * *" (Our emphasis)

The newspaper article complained of was located on page eight of the "Brazil, Indiana Times", and consisted of six sentences. The article related certain factual matter about the *Collins* case to the reader, and concluded with the author's speculation that the *Collins* case would serve as a precedent for the *Stevenson* case.

There being no showing of prejudice to such a degree that it became unlikely that IMEC could obtain a fair trial in Clay County, the trial court did not abuse its discretion in denying IMEC's motion for a change of venue from the county.

ISSUE FIVE

[15] IMEC makes numerous assignments of error in the trial courts giving, and in its refusal to give, certain instructions to the jury. We will not belabor this opinion by setting each of these instructions out in full followed by a separate discussion. We have examined each of the complained of instructions individually, and in relation to each other, and are of the opinion that the jury was adequately instructed on the law.

ISSUE SIX

IMEC contends that the verdict in the *Collins* case awarding $60,000 punitive damages, and in the *Stevenson* case awarding $50,000 punitive damages is clearly excessive.

[16] On appeal, this court will not reverse an award of damages as being excessive unless the damages appear so unreasonable as to convince this court that the jury was motivated by passion or prejudice. *City of Evansville v. Cook* (1974), Ind.App., 319 N.E.2d 874.

IMEC, in more than one place in its brief, argues that a verdict awarding punitive damages must bear some reasonable relationship to the compensatory damages suffered. IMEC tendered an instruction to this effect which was refused by the trial court.

We agree with IMEC's argument as far as it goes, but we are of the opinion that IMEC's statement of the law is incomplete.

[17] It has been often stated that a high ratio of punitive damages to compensatory damages alone will not be grounds to reverse an award of punitive damages. *Joseph Schlitz Brewing Co. v. Central Beverage Co.* (1977), Ind.App., 359 N.E.2d 566; *Lou Leventhal Auto Co. v. Munns* (1975), Ind.App., 328 N.E.2d 734. The purpose of an award of punitive damages is to punish the wrongdoer and thereby deter others from engaging in similar conduct in the future. *Joseph Schlitz Brewing Co., supra.*

[18] Therefore, from what has been said thus far, it appears to this court that there are two primary factors which should properly be considered in reviewing an award of

punitive damages. First, the nature of the tort and the extent of the actual damages sustained should be considered. Second, the economic wealth of the defendant should be considered.

[19] In the *Collins* case actual damages were $120, and in the *Stevenson* case actual damages were $300. In both cases the tort being complained of was a trespass. Actual compensatory damages being small, and the tort being complained of resulting in direct injury to property rather than injury to the person, are both factors which would mitigate in favor of a punitive damage award smaller than arrived at by the juries in the cases at bar. However, on the other hand, we have the economic wealth and income of IMEC to consider.

The record reveals that IMEC at the close of 1974 had consolidated assets totaling $1,544,638,000; it paid $40,320,000 dividends on its common stock, and its year end income totaled $43,924,000. These factors, properly considered, would tend to favor a large punitive damage award.

Therefore, upon balancing the actual damages sustained by the Collins and Stevenson with the nature of the tort which they suffered on the one hand, against the economic wealth of IMEC on the other, this court is unable to say that the verdicts in the *Collins* and *Stevenson* cases were the result of passion or prejudice.

Judgments affirmed.

ROBERTSON, C. J., and LYBROOK, J., concur.