July 1925

Value of the Use in Non-Renting Localities

Samuel C. Weil

Follow this and additional works at: https://scholarship.law.berkeley.edu/californialawreview

Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z386B9M

This Article is brought to you for free and open access by the California Law Review at Berkeley Law Scholarship Repository. It has been accepted for inclusion in California Law Review by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
"Value of the Use" in Non-Renting Localities

Where one is temporarily deprived of his property, the "value of the use" for the period is recoverable; and, in localities where there is sufficient renting to afford a basis of comparison, this value is determined from what the property would have rented for during the period. Rental value is the market value of a temporary use, where there is a rent market.

But often there is no rent market—localities without renting are common, particularly in the irrigated regions of the West. The owners live upon their places and cultivate them. Leased land for comparison is hard to find, and then, as in all instances of valuation where there is no market standard for comparison, resort must be had to substitutes.

Two such substitutes compete in the authorities. Opinion evidence of what the property might have rented for if there had been a rent market, competes with loss of production, the net value of the crops that might have been produced.

The competition between them is strongly pressed. Each attacks the other as speculative. But since neither of them makes itself perfect by pointing out this defect in the other, the one which is the less imperfect should prevail, and it is our object to present loss of production as entitled to this preference.

1. An instance that reminds us of the newspaper accounts of the Owens Valley situation is furnished by an extended New York litigation.

As in the Owens Valley matter, the New York illustration arose from the expansion of urban requirements crowding out the agricultural. There was a well-watered Long Island valley long devoted to vegetable gardening. Drawn by the presence of the water supply, the city of New York entered and drilled wells to transport the

\[1\] In addition to this "general damage" there may be recovered any "special damage" such as harm to houses or the like.
water to city use, drying out the agricultural neighborhood to a considerable extent, and the vegetable gardens deteriorated. The city refused to make compensation, and numerous suits by the neighboring landowners followed for their damages.

Beside the depreciation of permanent market value of the land, there was a loss of use for the season by destruction of crops then growing. The value of the crops, if they had not been impaired, necessarily depended upon a variety of contingencies—their market price at assumed maturity, cost of maturing them if cultivation had continued to maturity, chances that they might have matured in a poor condition, and chances that they might not have matured at all.

The trial court considered crop-value as therefore a request for lost profits, and barred it as speculative. The plaintiff was directed to prove loss of rental value (and this, the court said, should be not over five per cent of the value of the land), and as it was a locality where there was no renting plaintiff had no renting proof to offer, and he was allowed no recovery. The Appellate Division affirmed the ruling.

The atmosphere of these opinions is quite unfriendly to the landowner's claim for crop loss, as attempting to blackmail the city. How far this atmosphere was influenced by the political atmosphere one cannot say. The city was proceeding with a pretty high hand. To an outsider reading the opinion now, the idea that there was some influence brought to bear on the case in the beginning by the city's political interests is not out of the question in view of all that the rest of the country has so long heard about New York's political condition in that period (1901).

The case was taken from the Appellate Division to the Court of Appeals. The Appellate Division's approval of rental as the measure of damages bound the Court of Appeals on the law. The Court of Appeals had only a jurisdiction to examine the admission of evidence. One may judge that if it had been free it might have held that rental value was not the test because it was not a renting locality, but on that question it had no power to rule. Confining itself to a question of evidence, it held that—rental value being the test—crop loss must be admitted in evidence at least as a guide to what the loss in rental value would be.

The opinion comments that the city was not taking a very high moral position in electing to stand as a naked trespasser harming people in the locality into which it had intruded, and refusing to go to eminent domain to have the damages assessed on its own initiative.

A new trial was ordered, and resulted in an opinion by Mr.
Justice O'Gorman therein, repeating the original result. He said he could not understand what the Court of Appeals meant. Plaintiff was sent away practically without recovery a second time. Appeal was again taken to the Appellate Division.

This time the latter notes, on the authority of the ruling of the Court of Appeals, that rental value as an exclusive test was not a very satisfying one. The owner having occupied the land himself unrented, proof of what it would have rented for if renting had not been impossible was difficult to apply, and crop values must be resorted to at least as a guide from which experts might estimate a probable rental. Therefore the trial court was reversed again, and this time without going to the Court of Appeals. A referee was appointed to determine what the damages were, in addition to an injunction against the city if the loss of permanent value of the land in addition to the other loss be not paid.

2. The comment which this suggests is that speculation, which was the target of the lower rulings, is not reduced by speculating on rental value where there is no rent market.

In the New York case the owners in the locality farmed for themselves, and had been so doing for fifty years, and there was no renting to be guided by, and to force a renting estimate was compelling an estimate upon a fanciful premise; comparable to the remark made by one court (in a somewhat different connection, it is true) that such inquiries "bear a close affinity to Lord Dundreary's famous question, 'If you had a brother would he like cheese?'"

If rental were a matter of percentage of return on capital value, this might not apply, because rent would be a matter of arithmetic; but other things influence rent. Differences of location in the same neighborhood, soil variations, and especially personal considerations cause two adjoining properties to rent differently; so that an assumption on capital data, with no actual renting for comparison, is a capital estimate rather than a rental basis in fact.

While that process may be adopted in default of better alterna-

---


3 Oakland v. Pacific Coast Lumber, etc. Co. (1915) 171 Cal. 392, 400, 153 Pac. 750.
tives, it is not rental value that results, and it leaves to speculation, moreover, what is a proper rate of return for the particular locality.

3. No one will contend that loss of production as an alternative is free from speculation. "The realization of the benefits of property must always depend in a large degree on the ability and sagacity of those who employ it." The revenue always involves some unavoidable degree of industry, skill and wisdom, of the person cultivating the land, also the state of the market, the demand and supply for the products and the like. The question is which of two competing tests, both of which have to be speculative, is the less so—whether it is less speculative to assume a rent market which is known not to exist, or a crop maturity which has the probability of experience behind it.

That it has such probability is evident. Crops usually do mature. The chances are greater of success than of failure. Speculation on their success is in a probable direction, and particularly in the irrigation states of the West because irrigation stabilizes the water supply and is a source of insurance.

Refusal to recognize this is not an avoidance of speculation, but prefers to speculate in the more improbable direction of failure. It brings up drought, pest, bankruptcy or sudden death. A flight of locusts might come and eat up the young shoots or the landowner might fall down a well. This foreboding of calamity is much the greater speculation. It will not allow the elements of its foreboding to be inspected or questioned.

Its speculation is furthermore indulged to shield the wrongdoer, obscuring the fact that defendant is the one responsible for the need of speculating. There must be speculation whenever the future is involved, and where the court must throw the effect of this upon one side or the other, he who is responsible for causing the need of speculation should bear the burden of it. Defendant ought not be allowed to cover his trail of wrongdoing by denouncing as speculative the position in which he has been the cause of placing the plaintiff.

Some opposition to accepting the loss-of-production test has been

---

4 N. 24, infra.
6 De Freitas v. Suisun (1915) 170 Cal. 263, 149 Pac. 553.
7 Smith v. Hicks (1908) 14 N. Mex. 560, 98 Pac. 138, 142-144, 19 L. R. A. (N. S.) 938.
8 Shoemaker v. Acker (1897) 116 Cal. 239, 244, 48 Pac. 62. See 17 C. J. 756-761.
due to a changing use of words. In the earlier stages of the law the damages recoverable were called by the term *mesne profits*, and in this term the word "profits" historically means *products*. It refers to the issues of the land as in the phrase "rents, issues and profits"—natural products such as stone or wood, or industrial products such as cultivated crop, but in either event *products*.9 This is understood when the right to take things from the land is by consent; it is then called a "profit a prendre"; whether it be taken by consent, however, or by trespass it is the same subject-matter. By forgetting this special use of the word "profit" in *mesne profits* in the sense of "products," because it is now elsewhere obsolete, the allowance of *mesne profits* often comes to be confused with the question of mercantile or competitive profits, where the main element is the personal equation of the individual business man. The discussion is thence led into the question of speculativeness further than it properly involves.

It is not legitimately a question of "profits" in the commercial sense. It is a question of *production*, which deals with a probability, whereas figuring on a rental value where there is no rent market starts from a foundation that is necessarily fictitious.

4. The law in California has had a history of variation. In an early case damage for loss of crops was favored.10 The allowance of such recovery was later again strongly set out.11 Then followed a couple of rulings that such element of damage is speculative, and these restricted recovery to the basis of rental value.12 The latter of these contains some recognition that this is only for renting localities, but it was not as clearly expressed as might have been, and an ambiguous situation was produced. The previous cases were not cited. Subsequently a forceful opinion returns to crop-value, this time without referring to the rental-value cases.13 The Chief Justice dissented on the ground that the decision was in conflict with rental-value cases; and the failure in each line of cases to face the status of the other line leaves the ambiguity not

---

9 32 Cyc. 591. Similarly in the Standard Dictionary, under the word "profits"—"Law. The rents, products, or other emoluments arising from land; also the right to a part of the soil or produce of land." (Italics added.)
10 Ellis v. Tone (1881) 58 Cal. 289.
11 Shoemaker v. Acker, 116 Cal. 239, 244-248.
12 Pallett v. Murphy (1900) 131 Cal. 192, 63 Pac. 366; Crow v. San Joaquin, etc. Co. (1900) 130 Cal. 309, 62 Pac. 562, 62 Pac. 1058.
wholly removed, especially as the rental-value cases have been reiterated.\textsuperscript{14}

So far as one can balance the conflicting rulings, the weight of California authority for non-renting localities appears to be against the rental-value cases and for those allowing the loss of production. The view taken by the Supreme Court of another state, in which the California cases are reviewed, is that rental-value cases for non-renting localities have been overruled.\textsuperscript{15}

5. The plaintiff in one California case resisted overcharge by an irrigation company, and sued for damage to his crops through subsequent non-delivery of water. It was ruled for him that there was an overcharge, but against him that he should have avoided the consequences by paying it and suing to recover the overpayment.\textsuperscript{16}

\textsuperscript{14} Fresno, etc. Co. v. Perrin (1915) 170 Cal. 411, 416, 149 Pac. 805; Auchmoody v. Manhattan Beach (1921) 53 Cal. App. 726, 730, 200 Pac. 803.


\textsuperscript{16} Henrici v. South Feather, etc. Co. (1918) 177 Cal. 442, 450, 170 Pac. 1135. "The court referred to a passage from Sutherland on Damages, and went on to say that 'under this rule the measure of damages in this case was the amount that it would have been necessary for her to pay to obtain sufficient water to replace that of which she was deprived.'" (Italics added.) The following expression, by the same court but shortly before, is not referred to: "We do not see how such expenditures made in an effort to procure another water supply are proper elements of damage." In re City of Eureka (1914) 4 Cal. R. R. Com. 466, 477. (Italics added.)
USE-VALUE OF NON-RENTING LAND

As the overcharge was so small as to be trifling ("only a few dollars"), there was in effect no overcharge because the rule *de minimis* applies, as a subsequent case holds. But the opinions in both cases intimate that the decision would be the same if the illegal exaction, although small, were substantial.

The rule of avoidable consequences, here concerned, requires plaintiff to do what is *reasonable* to keep his damage down; but whether it is *reasonable* to require submission merely because the cost of submission is small from a money point of view, is not an uncontroverted question.

In these cases where the amount in dispute is small at the outset, the controversy usually has an additional personal interest. The party who has taken or withheld the water, even courteously, which seldom happens, is an ever-present reminder that the other, if he does not fight, is, as Justice Holmes somewhere puts it, in a class with the dog who will not defend his bone, and if plaintiff does not feel that at the outset, he is made to feel it by the comment that soon goes about among the farms, in the village, and along the country roads. It has always been so in rural water cases. The words "rival" and "rivalry" come from this source.

The personal motive to stand for what one believes to be his rights is thus involved, and this motive, notwithstanding the money cost of submission may be small, has been declared to be essential to the life of the law. Otherwise there would have been no Boston Tea Party and no revolution; and the reasonableness of submission is not improved by the suggestion to sue to get the illegal exaction back—a permission the more burdensome because of the smallness of the possible recovery. In the case of John Horn, tried before Lord Mansfield on a charge of expressing sympathy with the American colonists killed at Lexington and Concord for standing on their rights, the Chief Justice, on making one of his rulings against Horn, told Horn that he had a remedy by appeal if it was wrong; to which

17 "If it should be thought that plaintiff was entitled to a judgment for the said sum of $1.53 it is sufficient to say that the rule of *de minimis* applies." Severini v. Sutter-Butte Canal Co. (1922) 59 Cal. App. 154, 157, 210 Pac. 49.

18 "The use of running waters gives rise to very frequent disputes. The antagonisms of the diverse interests involved has been at all times so strong and so keen that the words 'rivals,' 'rivalry' are derived from the word 'rive' or rather from the term 'rivales,' by which the Romans designated the riparian owners." 1 Picard, Traite des Eaux (2d ed.) p. 473.

19 Of submission because it may be the cheapest way, it has been said in a well-known place: "I hold this view, which is to be met with not infrequently in life, to be reprehensible in the highest degree, and in conflict with the very essence of law." Von Jhering, The Struggle for Law (Callaghan & Co. Translation, 2d ed.) p. 30.
Horn replied that this was giving a man a wound and pointing him to a place where he might get it plastered.20

6. If loss of production is to be the test, it would seem that there is no distinction between instances where crops are growing and instances where no crops have been planted, if the defendant's act prevented the planting.

Ability to grow them is of course essential; no damages can be had for something that could not have been done. Inability may result from excessive expense, for example.

But if the ability existed, a farmer put out of business just before planting is as much harmed as if it happened just after planting, except only the cost of planting. In both cases a loss of productivity for the season is enforced by the defendant. The two situations differ only in extent of proof. Planting demonstrates plaintiff's ability to use the land that season, as also his intention to do so. Such ability and intention do not prove themselves where plaintiff has not yet begun the operation. But to prove them by other means is an ordinary matter of evidence.

Furthermore, if we once grant plaintiff's right to recover the value of crops that were growing, it may happen that the interference continues over several seasons and prevents his planting in the seasons following; is his recovery to be confined to the first season only?

There seems no reason why ability and intention should be other than a matter of proof where they become material, or why, if proved, the damages for defeating that intention should not be the full loss of the production which plaintiff was able and intended to make and was not allowed to carry out.

7. A further variation of the situation may arise where the intention, though formed, is unspecific. The case here in mind is where a man purchases a piece of land with a water right attached, but another diverts the water so soon after plaintiff's entry that plaintiff has not yet had opportunity to plan the uses that he intends to make. He proves that his land is capable of producing several kinds of crops under irrigation, and that he bought the land with the intention of cultivating it, but he had not yet decided the particular kind.

The opponent of speculation becomes additionally disturbed at the thought of permitting a question of probable crop values to go on, when even the kind of crop to be figured upon is undetermined.

20 20 Howell's State Trials, 667.
Still, the recriminations of the wrongdoer ought not to obscure the fact that he is responsible for the situation. It is his own doing. Moral justice, and the law as well, seem to require that defendant bear the burden of the uncertainty of the choice of crop, upon the same principle as other uncertainties of defendant's creation. Is not the instance within the case where one pried an emerald out of another's ring and converted the emerald, and as there was no record from which to ascertain the emerald's value, the wrongdoer was made to pay for the most valuable emerald that could be put in that setting? When the nature of a wrongful act takes away the means of proving the nature and extent of the loss, the law will make every reasonable intendment to reach a recovery. It is for the defendant to respond in damages for the most valuable use of which the land was capable.\(^\text{21}\)

Analogy for this can be had where the question is of sale-value instead of use-value. Evidence is allowed to designate all possible uses for their influence upon the market value. If agricultural land is condemned which has particular availability for a reservoir site it is not valued merely as agricultural land.\(^\text{22}\)

True, it is not valued merely as a reservoir site either, since, there being a market, all uses are allowed for in the market value. But where there is no market to resolve the doubts between possible uses, defendant who did the wrong should hardly expect to be the one to get the benefit of the doubt which, since it cannot be cleared up, must fall upon one or the other.

8. Another variation of the situation may arise where plaintiff had no intention to use the land—a trespasser, let us say, blocking up a road to a piece of unused land, in a non-renting locality.

The difficulty, even here, of refusing an allowance on the basis of loss of production lies in condensing a continuing interference into a single moment of time.

Unquestionably plaintiff has suffered neither rental nor productive loss at the moment of invasion in such case. By hypothesis he could not have rented the land because it is not a renting locality,

and he had no intention of using it himself. That is, however, but the *status quo* of the moment. How long is it to be assumed that this state of things would have lasted?

Certainly not indefinitely. Otherwise the wrongdoer, who could not take the *fee* without substantial compensation, could prevent its use for any number of years and escape payment by restoring the property at his convenience.

Can a stranger select any time he desires and say "You are not using your property now, and therefore you shall not use it hereafter so long as I want it"? The argument is bolshevistic. The owner's title to the property includes the right to form new plans. The stranger's assertion, by imposing the *status quo* at the time of invasion, which the trespasser selects for himself, takes the owner's control of his own property from him and substitutes the arbitrary will of the trespasser.23

There may properly be assumed that the *status quo* as it was at the time of the invasion would have continued for a "reasonable time," leaving to the discretion of the jury to say what is reasonable from all the circumstances that can be tendered upon it. Doubtless if the invasion were close to the beginning of the season and plaintiff had no intention yet formed to cultivate, this condition would reasonably be taken to continue throughout that season. But would it not take more factors than that to indicate that this would be true the next season also—and still more to carry it to the remote end of the fourth or fifth or still later seasons over which the interference continues?

Some limit of time, a question of degree in the discretion of the jury, must come at which the owner's absence of intention to cultivate at the moment of invasion, ceases of importance; and beyond that limit the principle returns that when the invasion is clear and only the damage is in doubt, the party who brought the situation should bear its burden. If there is chance of erring it should hardly be on the side of letting defendant benefit his defense by his own wrong.

What would have been done but for his wilful trespass should be a hazard of the invader because the creation of that hazard was

23 "Though he never had up to that time obtained one farthing for the use of the streams, and might never have made any use of them, nevertheless, the damage or loss which he sustained was, that he was deprived of the power of using the property which was his." Trent-Stoughton v. Barbados, etc. Co. [1893] App. Cas. 502, 504, 62 L. J., P. C. 123, 69 L. T. 164. (Italics added.)
his own doing, and the inability of anyone to answer the question is his own fault.\textsuperscript{24}

9. There are other variations into which this question of valuing the temporary use of property leads, with much variety of decision upon most of them. The conclusion here suggested, however, is that rental value is applicable only to renting localities, and that, in others, earning capacity or productivity of the property is the proper test. Where productive capacity is also unavailable, some other resort than either of these two has to be found, and has been variously suggested.\textsuperscript{25}

San Francisco, California.

\textit{Samuel C. Wiel.}


\textsuperscript{25} In the location of government training camps during the war, sites were often \textit{on idle lands}. The government condemned a temporary use in such an instance, and the ruling was that in the absence of any rental value of the land the government should nevertheless pay damages at \textquoteleft{}the prevailing rate of interest on its fair value.\textquoteright{} In re Condemnation of Lands for Military Camps (1918) 250 Fed. 314, 315.

The damage has alternatively, in such an instance, been figured also on benefit to defendant. Where, for example, wires are strung along the roof of a building by a telephone company without permission of the owner of the building, the effect upon the rental value of the building is trifling. Equally trivial is ordinarily any interference with use of the roof. The telephone company was held liable to pay to the owner of the building the value which the use of the privilege was \textit{to the telephone company}. Bunke v. New York Tel. Co. (1905) 110 App. Div. 241, 97 N. Y. Supp. 66, 71, affirmed (1907) 188 N. Y. 600, 81 N. E. 1161. See also Whitwam v. Westminster Brymbo Coal Co. [1896] 2 Ch. 538, 65 L. J., Ch. 741, 74 L. T. 804.