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## Damages - Growing Crops - Measure of Damages for Injury to Growing Crops

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to good husbandry in an agricultural state and much land can be made more productive as a result of proper drainage.

Because the application of the reasonable use doctrine depends on the facts of each case that comes before the court it can be effectively used in all parts of the state, thus the North Dakota Supreme Court has followed the best suited doctrine for North Dakota.

DAVID L. PETERSON

**DAMAGES—GROWING CROPS—MEASURE OF DAMAGES FOR INJURY TO GROWING CROPS**—The appellant appealed a judgment in favor of the respondent based on claims for damages for the county's negligent spraying of weed killer onto their tomato crops. The appellant contends that the trial court did not use the proper measure of damages in measuring the respondent's loss, claiming that the proper measure of damages for partial destruction of growing crops is "the difference between the market value of the crop destroyed and the cost of producing the crop." The California court *held*, in rejecting this measure and based upon the rule in *Rystrom v. Sutter Butte Canal Co.*,<sup>1</sup> that the estimated costs of production must first be deducted from expected gross receipts to arrive at the expected net profit. Next, actual costs of production must be deducted from actual receipts to arrive at actual net profit. Finally, deducting actual net profit from expected net profit fixes the actual damage.<sup>2</sup> *Solis v. County of Contra Costa*, 60 Cal. Rptr. 99 (Ct. App. 1967).

The *Rystrom* case,<sup>3</sup> an action for damages in contract, relies on *Treller v. Bay River Dredging Co.*,<sup>4</sup> where the court approved a measure similar to that in *Rystrom*.

The court stated:

In cases of destruction of growing crops it is proper and important to introduce and admit evidence showing the kind of crops the land is capable of producing, the kind of crops destroyed, the average yield per acre of each kind on land not destroyed, and on similar lands in the immediate neighborhood, cultivated in like manner, the stage of growth of the crops at the time of injury or destruction, the expenses

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1. 72 Cal.App. 518, 249 P. 53 (1925). Action by plaintiff to recover damages for loss of crops due to the alleged failure of defendant to furnish water for irrigation purposes during the years 1921 and 1922 as provided by contract.

2. *Id.* at 55.

3. *Supra* note 1.

4. *Teller v. Bay & River Dredging Co.*, 151 Cal.App. 209, 90 P. 942 (1907).

of cultivating, harvesting and marketing the crops, and the market value at the time of maturity, or within a reasonable time after the injury or destruction of the crops.<sup>5</sup>

But the court proceeds to state:

[W]hile all such evidence may be considered by the jury in determining the amount of damages, if any, still the true measure of compensation is the value of the crops in the condition they were in at the time of their injury or destruction.<sup>6</sup>

From these three cases, one can observe that the court has applied precedent from a contract case<sup>7</sup> to a tort case,<sup>8</sup> and as a result thereof it appears that what was originally a guideline in proving the measure of damages has become the measure itself.

The general measure of damages arising out of obligations other than contractual is found in Section 3333 of the CALIFORNIA CIVIL CODE (West 1954):

For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not.

Formerly the courts have followed the majority rule,<sup>9</sup> stating that the true measure of damages, not arising from contract, for the total destruction of a growing crop is the value of the crop in the condition it was in at the time and place of destruction.<sup>10</sup> As a method of determining these damages, the court used the market value of the estimated product at the time of destruction, less the costs of producing and marketing the crops.<sup>11</sup>

California has expressly rejected the "rental value of the land for the current year" measure, used by some states, stating that such a test was not a determination of value at all, but a determination of cost, which ignored the owner's chances of making a profit on the crop.<sup>12</sup>

California also has a statute dealing with the measure of dam-

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5. *Id.* at 944.

6. *Id.*

7. *Supra* note 1.

8. *Solis v. County of Contra Costa*, 60 Cal.Rptr. 99 (Ct.App. 1967).

9. *E.g.*, *Commonwealth v. Masden*, 295 Ky. 861, 174 S.W.2d 1004 (1943); *Grip v. Hatmaker*, 189 Okla. 317, 116 P.2d 973 (1941); *Austin v. Howard*, 158 S.W.2d 556 (Tex. Civ. App. 1942).

10. *E.g.*, *Wolfson v. Hathaway*, 32 Cal.App.2d 632, 198 P.2d 1 (1948); *Teller v. Bay & River Dredging Co.*, 151 Cal.App. 209, 90 P. 942 (1907).

11. *Wolfson v. Hathaway*, *supra* note 10.

12. *Teller v. Bay & River Dredging Co.*, *supra* note 4.

ages arising from a breach of an obligation arising out of a contract which states that the measure is:

. . . the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which in the ordinary course of things would be likely to result therefrom.<sup>13</sup>

In cases involving growing crops, the courts have expressed this rule as the probable yield and market value of a destroyed crop, less the cost of producing and marketing it,<sup>14</sup> and in the case of partial destruction, less the net value of the crop actually produced.<sup>15</sup> This is in substance the rule used in the instant case, which is an action in tort.

It is difficult to tell whether the court intended to adopt a "prospective net proceeds" rule, such as that used in the contract cases,<sup>16</sup> or whether it was just discussing this as a means of proving damages, as was done under the "value of the crops in the condition they were in at the time of injury" rule.<sup>17</sup>

North Dakota has two statutes, one dealing with damages in tort<sup>18</sup> and one with damages in contract,<sup>19</sup> substantially the same as those in California. There is a North Dakota case dealing with damages to a growing crop allegedly caused by a breach of contract, but it doesn't discuss the measure of damages, since damages were not allowed.<sup>20</sup> There are also several tort cases,<sup>21</sup> but they involve perennial grass, and not annual crops as discussed here. Thus, it is difficult to tell what method the North Dakota courts would use to determine what the measure of damages would be under these two statutes.

The California legislature's preserving the tort-contract<sup>22</sup> distinction in regard to damage measures, indicates that their intention was that there should not be indiscriminate mingling of tort-contract

13. CAL. CIV. CODE § 3300 (West 1954).

14. *Hayman v. Shoemaker*, 203 Cal.App.2d 140, 21 Cal.Rptr. 519 (1962); *Chrisman v. Southern Calif. Edison Co.*, 83 Cal.App. 249, 256 P. 618 (1927); *Telander v. Tujung W. & P. Co.*, 43 Cal.App. 492, 185 P. 504 (1919); *Allen v. Los Molinos Land Co.*, 25 Cal.App. 206, 143 P. 253 (1914).

15. *Rystrom v. Sutter Butte Canal Co.*, 72 Cal.App. 518, 249 P. 53 (1925).

16. *Supra* note 14.

17. *Supra* note 10.

18. N.D. CENT. CODE § 32-03-20 (1960).

19. N.D. CENT. CODE § 32-03-09 (1960).

20. *Hayes v. Cooley*, 13 N.D. 204, 100 N.W. 250 (1904). In an action for damages for the breach of a contract to thresh grain, which was not entered into under such special circumstances that it may be reasonably inferred that other than the ordinary liability was contemplated by the parties, the court held that the loss of grain by exposure to storms is a remote, and not a proximate, consequence of the breach, and will not sustain a recovery.

21. *E.g.*, *Schmeel v. Schumacher*, 137 N.W.2d 789 (N.D. 1965); *McGillivra v. Minneapolis, St. P. & S.S. M. Ry. Co.*, 135 N.D. 275, 159 N.W. 854 (1916).

22. CAL. CIV. CODE § 3300 (West 1954); CAL. CIV. CODE § 3333 (West 1954).

principles. However, the direct doctrine, allowing as damages the prospective net proceeds is perhaps preferable because it is less likely to invite difficulties over the question of whether there is a market value, or disputes over the kind of evidence which will be admitted to show value.<sup>23</sup>

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23. MCCORMICK, DAMAGES 561 (1935).