Eminent Domain -- Agriculture -- Evidence -- Just Compensation for Allotment Bearing Land

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the statute are not met the defendant's liability is the same as at common law, with general damage to reputation presumed. The practical result of this statute is similar to the result under the per quod rule, i.e., it is only in the exceptional cases that money damages will be recovered. The major difference is that with the statute the plaintiff's name would be cleared and the vindicatory function of the action served.

REED JOHNSTON, JR.

Eminent Domain—Agriculture—Evidence—Just Compensation for Allotment Bearing Land

The Agricultural Adjustment Act of 1938 and its subsequent amendments provide a complex scheme for the regulation of the production of certain agricultural commodities. Under the act, the Secretary of Agriculture determines what acreage requirements of each commodity will be required by the nation. This overall requirement is then apportioned by states, counties, and farms. Local committees at the county level apportion the allotment among the farms on which the commodity has been produced. The basis for the apportionment is the commodity production history of each farm, taking into consideration past production of the commodity, suitability of the land, available equipment for production, crop rotation practices, and other physical factors that affect the production of the commodity.

It is through this generally outlined statutory scheme that a farm's eligibility and attainment of an acreage allotment for a specific commodity is determined.

The receipt of an allotment is noticeably self-perpetuating for the basis for award is heavily weighed on the commodity productive history and the suitability of the individual farm. The allotment is made to the farm itself and not to the person who operates or owns the farm and, therefore, runs with the land.

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3 Ibid.

4 See Chandler v. Davis, 350 F.2d 669 (5th Cir. 1965), cert. denied, 382
not, as a general rule, sanction the sale or transfer\(^5\) of commodity allotments apart from the land to which they are attached.\(^6\) The notable exception\(^7\) is the condemnation of allotment bearing land by any federal, state, or other agency having the power of eminent domain.\(^8\) The importance of this exception in the subsequent evaluation of this condemned allotment bearing land merits closer examination.

Under section 1378 of the act,\(^9\) the farmer is allowed to transfer an agricultural commodity allotment which has been lost as a result of the condemnation of the allotment bearing land. When allotment bearing land is taken by the power of eminent domain, the allotment is placed in an allotment pool and reserved for transfer to other land presently owned or to be subsequently purchased by the displaced farmer.\(^10\) The statute provides that:

Upon application to the county committee, within three years after the date of such displacement, . . . any owner so displaced shall be entitled to have established for other farms owned by him allotments which are comparable with allotments determined for other farms in the same area which are similar . . .\(^{11}\) Provided, that the acreage used to establish or increase the allotments for such farms shall be transferred from the pool and shall not exceed the allotment most recently established for the farm acquired from the applicant and placed in the pool.\(^{12}\)

Thus, depending on the suitability\(^{13}\) and location of the substitute

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\(^{11}\) Ibid.

\(^{12}\) Where the condemned land represents less than 15 per cent of the total crop land on the farm, the allotment attributable to that portion of the farm condemned is transferred to the part of the farm not so taken. See Act of 1938, § 378(c), added by 72 Stat. 995 (1958), as amended, 7 U.S.C. § 1378(c) (1964).

\(^{15}\) Ibid.

\(^{16}\) Suitability in this context means land that has productive qualities
land that is available, a displaced farmer may have his pooled allotment transferred in its entirety or in a lesser amount. The condemnee also stands to lose the allotment and its section 1378 right if he fails to apply for transfer within the three year period. In addition, a regulation imposed by the Administrator of the Commodity Stabilization Service conditions the right of a displaced farmer to transfer his allotment on a showing that the acquisition of the substitute land was solely for the purpose of reestablishing farming operations and is not a scheme to sell or transfer the allotment for the benefit of someone other than the condemnee. It also requires a certification by the farmer that no agreements have been made with any person for the purpose of obtaining an allotment for that person. In United States v. Citrus Valley Farms, Inc. the United States acquired farm land needed for the construction of a dam and reservoir. The farm possessed a 550 acre cotton allotment which was placed in the county allotment pool in accordance with the act and was subsequently transferred to other land prior to trial.

The dispossessed owners were awarded compensation for the land on the basis of the fair market value of Citrus Valley Farms with the allotment included less the "monetary value, if any, established by a preponderance of the evidence, of the section 1378 right retained by the defendant." The jury fixed the value of the land including the allotment at 1,025,000 dollars and the deductible value of the separated section 1378 right to the owner at zero.

The Government, on appeal, contended that the court was awarding compensation for more than had been taken because under the act the owner retains the allotment and it should follow that the measure of compensation should be the value of the land without the allotment. It was also contended by the Government that by valu-

suitable for the commodity in question and no existing allotment or a present allotment small enough to be increased without exceeding the allotments allowed for comparable farms in the locality. Ibid.

13 See note 11 supra and accompanying text.
16 350 F.2d 683 (9th Cir. 1965).
18 350 F.2d at 685 n.2.
19 This formula for evaluation was used in a condemnation proceeding involving North Carolina allotment bearing land. See Austin v. Jackson, 353 F.2d 910 (4th Cir. 1965).
ing the section 1378 right at zero they failed "to give any considera-
tion at all to an item of obvious value." Nevertheless, in affirming,
the United States Court of Appeals for the Ninth Circuit held that
the enhancement of the condemned land resulting from the presence
of an allotment, reduced by the value of the section 1378 right to
the condemnee, must be included in the determination of just com-
pensation.

The court's rejection of the Government's formula for deter-
miming the measure of compensation is soundly based in its recogni-
tion that the term "allotment" has a multiple meaning; the allotment
attached to the original land and the section 1378 right to transfer
it elsewhere are not the same. The court said that an allotment is
not only a "license to produce," but is also a "measure of the land's
proven productive value." From this court's interpretation it is
clear that when allotment bearing land is condemned the loss to the
condemnee is the value of his land with the allotment included
(measure of the land's proven productive quality); while all that
remains is the conditional section 1378 right to transfer the allot-
ment to some substitute land (license-to-produce).

The Government also contended that the allotment will auto-
matically increase the value of any lands to which it might be
transferred in amount precisely equal to its enhancement of the
lands from which it was severed. This position clearly overlooks
the multiple character of the allotment. The Government's formula
for evaluation would attribute to the retained section 1378 right
"enhancement values earned by the land from which it was severed—
characteristics which the land retains and which cannot be severed
by the owner and transferred to other land."24

The difficulty of applying this court's formula for the measure
of compensation is in the determination of the deductible value of
the retained section 1378 right to transfer.

The court in the principal case failed to establish any recog-
nizable criteria for evaluating this section 1378 right, but by recon-
sidering the nature of the right certain applicable considerations
become apparent. First, it must be recognized that there is always

20 350 F.2d at 686.
21 Id. at 687.
22 Id. at 686.
23 Id. at 686.
24 Id. at 686.
the possibility that the displaced farmer will choose to relinquish his section 1378 right in order to retire from farming. In this event nothing should be deducted and the reserved allotment should become immediately available to the local committee to be reapportioned to other farms.\textsuperscript{26} Nothing in the act makes the exercise of a section 1378 right mandatory upon the displaced farmer; a court should allow the voluntary renouncement of this optional right without prejudice.\textsuperscript{26}

If the displaced farmer chooses to exercise his section 1378 right, and does so prior to trial, its deductible value can be conveniently calculated by reference to the identifiable substitute land as was done in the principal case.\textsuperscript{27} In this situation the court should consider the productive capacity of the substitute land, conversion costs, conversion time, availability of labor, access to market, availability of water, and other characteristics of the substitute land.\textsuperscript{28} Furthermore, the presence of an existing allotment on the substitute land may prevent the total section 1378 right from being exercised.\textsuperscript{29}

Difficulty arises when the displaced farmer has neither relinquished nor exercised his section 1378 right prior to trial. Here, since the court has no concrete reference it must look at the availability of other non-allotment bearing land, the location of this land, as well as the applicable considerations discussed in relation to specific substitute land. Moreover, the basis of the evaluation should include the possibility that the 1378 right will not be exercised within the three years and therefore lost,\textsuperscript{30} the inability of the farm-

\textsuperscript{26} "Since pooled allotments are part of the National, State, and county allotments, the release and reapportionment of such allotments would not add any acreage that was not contemplated when the national allotment was established." S. \textsc{Rep.} No. 172, 87th Cong., 1st Sess. 1727, 1728 (1961) (letter of Orville L. Freeman, Secretary of Agriculture).

\textsuperscript{27} Judge Foley, concurring, argued that the requirement for just compensation prohibits the deduction of the value of the section 1378 right in any situation. 350 F.2d at 687.

\textsuperscript{28} One commentary suggests delaying all condemnation proceedings until the three year transfer period has run or until the farmer has exercised his section 1378 right as a possible solution to the difficulty in determining the deductible value. See 41 \textsc{Wash. L. Rev.} 615 (1966).

\textsuperscript{29} The court in the principal case considered the availability of similar non-allotment bearing land, availability of convertible non-allotment bearing land, cost of conversion, and the time required for conversion. 350 F.2d at 687.

\textsuperscript{30} 7 C.F.R. § 719.11(f)(5) (1965). This regulation prevents the use of the section 1378 right by a farmer who buys a farm with an existing allotment-acreage ratio equal to or in excess of the county average.

\textsuperscript{30} "Where allotments remain in the pool for one or more crop years ...
er to sell his 1378 right,\textsuperscript{31} the strict regulations restricting its use and benefit solely to the condemnee,\textsuperscript{32} and the possible loss of all or a portion of the right due to a present allotment on the available substitute land.\textsuperscript{33}

The result of these contingencies is to make the deductible value of the retained section 1378 right highly speculative.\textsuperscript{34} Given this uncertainty, it is not surprising that the jury in the principal case found that the section 1378 right to transfer was unprofitable and of no value to the displaced farmer.

The possible application and import of the \textit{Citrus Valley Farms} case in North Carolina should not be overlooked. North Carolina enjoys allotments of every type provided for under the act. The increasing use of condemnation proceedings by federal, state, and other agencies for parks, highways, forest reserves, military reservations, water conservation and utilities will undoubtedly affect much North Carolina allotment bearing land.

The North Carolina courts, in the evaluation of property taken by the power of eminent domain\textsuperscript{35} have generally measured just compensation by the fair market value of the property taken, computed at the time of the taking.\textsuperscript{36} Fair market value has been determined by the consideration of all elements and capabilities of the land and all uses to which it is reasonably adapted in accordance with the land's best and highest capabilities.\textsuperscript{37}

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\item It is generally due to inability of the former owner to locate immediately and purchase other suitable farms to which the pooled allotments could be transferred for continuation of farming: S. \textit{Rep.} No. 172, 87th Cong., 1st Sess. 1727, 1728 (1961) (letter of Orville L. Freeman, Secretary of Agriculture).
\item See note 6 \textit{supra} and accompanying text.
\item See note 14 \textit{supra} and accompanying text.
\item See note 29 \textit{supra} and accompanying text.
\item There is also a “windfall” possibility where the section 1378 right could be more valuable than the allotment to the taken land resulting from a transfer of the allotment upon condemnation from an area of poor productivity to one of greater productivity. This possibility is enhanced since the act does not prohibit the transfer to other areas or even states. See, in connection with the principal case, Westfall, \textit{Agricultural Allotments as Property}, 79 \textit{Harv. L. Rev.} 1180, 1194 (1966).
\item North Carolina has no eminent domain provision in its constitution. However, just compensation by the state has been held required by Art. I, § 17 of the North Carolina Constitution. See Sale v. Highway Comm'n, 242 N.C. 612, 89 S.E.2d 290 (1955); Eller v. Board of Educ., 242 N.C. 584, 89 S.E.2d 144 (1955).
\item See Highway Comm'n v. Conrad, 263 N.C. 394, 139 S.E.2d 553 (1965);
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A comparison of the North Carolina court's measure of just compensation with the Government's requested measure of compensation for condemned allotment bearing land either in the principal case (the value of the land without the allotment) or as requested in the pretrial memorandum (value of similar non-allotment bearing land) will find the two at odds. The North Carolina courts in considering all elements, capabilities and uses of condemned allotment bearing land could hardly justify the exclusion of evidence pertaining to the presence of an allotment as a measure of the productivity and capability of the land.\textsuperscript{39}

The North Carolina court also adheres to the doctrine that fair market value is to be ascertained by assuming the existence of a buyer who is ready, willing, and able to buy but is under no compulsion to do so.\textsuperscript{40} It is evident that a buyer would place a higher value on land which was or had possessed a commodity allotment than he would place on similar non-allotment bearing land. The allotment would reflect the productive history of the land, prove the land immediately productive of the commodity, and prove that the land had been, for retention of the allotment, rotated and tilled toward continued and improved production of the commodity.\textsuperscript{41}

The North Carolina court has also admitted as evidence of an element of market value the consequences of a general governmental policy, such as the enhanced value resulting from zoning restrictions applicable to the land as they reflect the land's highest and best use\textsuperscript{42} and the enhanced value resulting from roads, highways, parks or other public uses on or adjacent to the condemned land which were established through the governmental power of eminent domain. Since an agricultural allotment is also considered a general

\textsuperscript{39}United States v. 3296.82 Acres of Land, 222 F. Supp. 173, 175 (D. Ariz. 1963).
\textsuperscript{40}The bearing of the productive character of the land on the market value in condemnation proceedings was considered in Creighton v. Water Comm'rs, 143 N.C. 171, 172, 55 S.E. 511, 511 (1906).
governmental policy, it follows that the North Carolina court would consider the presence of an allotment equally admissible as evidence in the determination of just compensation.

From the foregoing it would seem that there is no reason why the North Carolina courts would refuse to allow evidence of the presence of a commodity allotment to be presented and considered in the evaluation of condemned land.\textsuperscript{44}

\textsc{Algernon L. Butler, Jr.}

Evidence—Executive Privilege For Aircraft Accident Report

The crash of an Air Force bomber has again brought before the court a claim of executive privilege for the Air Force Aircraft Accident Report. The Supreme Court of the United States sustained the privilege in a now famous case, \textit{United States v. Reynolds},\textsuperscript{1} on the ground that military secrets were contained in the accident report. In the instant case, \textit{O'Keefe v. Boeing Co.},\textsuperscript{2} the privilege was asserted on other grounds.

Plaintiffs, the surviving member of the crew and personal representatives of six crew members killed in the accident, instituted an action for wrongful death and personal injuries against the aircraft manufacturer in the federal district court on the ground of diversity of citizenship.\textsuperscript{3} The complaint in \textit{O'Keefe} alleged negligence and breach of warranty by Boeing Company. In pretrial proceedings, plaintiffs moved for discovery and inspection\textsuperscript{4} of Air Force

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  \item \textsuperscript{1} [A]n increment added to the value of land by a governmental policy is not to be deducted from the fair market value of land condemned in order to arrive at the amount of the just compensation which must be paid therefor . . . . For instance it would obviously be impossible as a practical matter to deduct from the fair market value of agricultural land all elements of its value due to the Government's agricultural policy. \textit{Iriarte v. United States}, 157 F.2d 105, 111 (1st Cir. 1946).
  \item \textsuperscript{2} The principal case is the only case this writer has found that directly confronts and considers the problem.
  \item \textsuperscript{3} 345 U.S. 1 (1953). Executive privilege was asserted by the Secretary of Air Force for the accident report of a B-29 crash. Sustaining the privilege, the Court held that an examination \textit{in camera} of the report was unnecessary where the court is satisfied that military secrets are involved.
  \item \textsuperscript{4} 38 F.R.D. 329 (S.D.N.Y. 1965).
  \item \textsuperscript{5} 28 U.S.C. § 1332(a)(1) (1964).
  \item \textsuperscript{6} \textit{Fed. R. Civ. P. 34}. This rule provides in part:
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