

1951

Wasatch Chemical Co. v. L. G. Leon : Brief of Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Samuel J. Nicholas; Attorney for Appellant;

Recommended Citation

Brief of Appellant, *Wasatch Chemical Co. v. Leon*, No. 7662 (Utah Supreme Court, 1951).
https://digitalcommons.law.byu.edu/uofu_sc1/1452

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

WASATCH CHEMICAL CO.,

a corporation,

Plaintiff and Appellant,

vs.

L. G. LEON,

Defendant and Respondent

Civil
No. 7662

BRIEF OF APPELLANT

FILED

AMUEL J. NICHOLAS,
Attorney for Appellant.

MAY 10 1931

Clerk, Supreme Court, Utah

TABLE OF CONTENTS

STATEMENT OF FACTS	1
STATEMENT OF POINTS	5
ARGUMENT	6

POINT NO. I. THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT OF THE JURY	6
--	---

- A. All the onions had emerged from the ground on the day the weedicide oil was applied.
- B. Uniformity of the germination and growth of the crop of onions.
- C. Condition of seed-bed, temperature.
- D. Time of planting: required time to emerge.
- E. Onion patch infested with weeds.
- F. Reduced amount of oil applied failed to destroy the weeds or onions.
- G. A substantial crop of onions produced and abandoned.

POINT II. THE COURT ERRED IN HOLDING THAT APPELLANT IS LIABLE ON THE THEORY OF A BREACH OF EXPRESSED AND IMPLIED WARRANTIES AS TO THE METHOD OF APPLICATION, AS DISTINGUISHED PER SE FROM THE GENERAL OIL	37
---	----

- A. The Uniform Sales act is applicable to chattels only.
- B. Time element in application cause of trouble and not the chattle.

POINT III. THERE WAS NO EXPRESS AUTHORITY TO MAKE ANY STATMENT AS TO WARRANTIES	41
---	----

- A. Dr. Arvil L. Stark, Director of Agriculture Research.
- B. Scope of employment, not to sell.

POINT IV. THE EVIDENCE IN THIS CASE IS
INSUFFICIENT TO JUSTIFY THE INFER-
ENCE THAT THE RESPONDENT'S LOSS, IF
HE HAD ANY, WAS THE PROXIMATE RE-
SULT OF THE USE OF WASCO GENERAL
OIL WEEDICIDE 46

POINT V. THE EVIDENCE IS INSUFFICIENT
TO SUPPORT THE JURY'S VERDICT OF
EXCESSIVE DAMAGES, APPEARING TO
HAVE BEEN GIVEN UNDER THE INFLU-
ENCE OF PASSION OR PREJUDICE 53

TABLE OF CASES CITED

Anderson v Nixon, 104 Utah 262; 139 Pac. (2d) 216	51
B. T. Moran v. First Security Corp., 82 Utah 316	29
Coruch v. Nat'l. Livestock Remedy Co. (1928) 205 Iowa 51; 217 N. W. 557	50
De Zeeuw v. Fox Chemical Company (1920), 189 Iowa 1195 179 N. W. 605	38
Edwards v. Clark, 83 Pac. (2d) 1021	49
Friedman & Sons v. Kelley, 102 S. W. 1066, 126 Mo. App. 279	45
Jankele v. Texas Co., 88 Utah 325; 54 Pac. (2d) 425	57
Parker v. Pettitt, 138 Pac. (2d) 592	29
Peterson v. Richards, 73 Utah 69; 272 Pac. 229	53
Reid v. San Pedro, L. A. & S. L. R. R., 39 Utah 617, 118 Pac. 1009	53
Spackman v. Benefit Ass'n. of Ry. Employees (1939), 97 Utah 91; 89 Pac. (2d) 490	49
Smith v. Ind. Comm. (1943) 104 Utah 318; 140 Pac. (2d) 314	51
Stimber & Co. v. Keene, 152 S. W. 661	43
Sumsion v. Streater Smith, Inc. (1943), 103 Utah 44; 132 Pac. (2d) 680	51
Tremelling v. Southern Pac. Co., 51 Utah 189; 170 Pac. 80....	53
Upton v. Suffolk Co. Mills, 11 Cush (Mass.) 586; 59 Am. Dec. 163	45

TEXT BOOKS

6 Am. & Eng. Encyl. of Law (2d Ed) 224	45
15 Am. Jur. Damages, p. 410	29
15 Am. Jur. Crops Sec. 73	56
15 Am. Jur. Damages, Sec. 27	56
46 Am. Jur. Sales, Sec. 300	43
Benjamin on Sales (6th Ed.), Sec. 624	45
Clark & Skyles, on Agency, Sec. 244	45
13 L. R. A. 678	43
Mechem on Agency, Sec. 350-362	45
Story on Agency (2d Ed.), Sec. 60	45
Tiffany on Agency, Secs. 45-47	45
Wharton on Agency, Sec. 189	45

IN THE
SUPREME COURT
OF THE
STATE OF UTAH

WASATCH CHEMICAL CO.,
a corporation,

Plaintiff and Appellant,

vs.

L. G. LEON,

Defendant and Respondent

Civil
No. 7662

BRIEF OF APPELLANT

STATEMENT OF FACTS

The respondent, a share-crop farmer, on or about the ¹²⁷last of April, 1949 (R 178: L 20) planted a tract of leased land to onions. The land is situated (R 112: L 14-19) approximately one and one fourth miles west

of the intersection of 9000 South and Redwood road in Salt Lake County, Utah.

On April 23rd, 1949, on account of an advanced growth of weeds (R 370: L 10-13 covering the land where the respondent had planted his onion seed, (R 101: L 2-3) the respondent contacted the appellant, (R 126: L 23 etc.), a Utah corporation engaged, among other things, with supplying the agriculture industry with various kinds of weedicides (R 353: L 26-29.)

At the plant of the appellant, the respondent approached Dr. Arvill L. Stark, a trained and experienced horticulturist and plant physiologist (R 352-53 et seq.), who was retained by the appellant for the specific purpose of agriculture research and the dissemination of information pertaining to the agricultural industry (R 352: (L 16), and the respondent stated to Dr. Stark at that time a situation that he termed "a problem of weeds in his onions" (R 362:19-20). The advisability of using one certain weedicide, Synox was discussed and rejected (R 362-63). Thereupon, the feasibility of using another type of weedicide, Wasco General Oil was discussed. During the discussion of using the General Oil, Dr. Stark questioned the respondent, in particular, as to whether the onions had appeared out of the ground, and the respondent told Dr. Stark that they had not. (R 364-66). Having been assured by the respondent, that the onions had not emerged from the ground, Dr. Stark suggested that the respondent use General Oil; and, to

totally destroy the weeds, recommended that it be applied at the rate of 50 gallons per acre (R 380:L 17). Dr. Stark read through the instructions for the use of the general oil weedicide from a "Weed Control Bulletin" (Plaintiff's exhibit "B") (R 364:L 5 et seq).

Following the discussion with Dr. Stark, the respondent proceeded to the appellant's sales department and purchased a lesser amount of the general oil than Dr. Stark had recommended to use according to the facts that the respondent had stated to Dr. Stark. The quantity of the oil the respondent purchased was approximately sufficient to cover his onion crop at the rate of 25 gallons per acre (R 130:L 19-22). Three days after the oil was purchased from the appellant, the respondent applied it to the crop of onions. On the day that the oil was applied to the onion crop, onions had emerged from the ground to a height of one and one half inches high (R 101:L 15). To apply the oil after the onions had emerged, or began to emerge within two days was against the instructions the respondent had received (Plaintiff's Exhibit "B," page 11) (R 364: L 5 et seq). However, the reduced amount of the oil that was sprayed on the onion crop did not destroy either the weeds or the onions (R 302: L 20-30). The onions, not being destroyed by the light application of the oil, were cared for (R 245:L 18 et seq) and matured until about July 10, 1949, at which time they were abandoned (R 149: L 11). At the date of abandonment there were approximately a 50%

crop of the onions (R 246: L 10) that had reached a height of (R 262: L 8) approximately six inches high. Following the purchase and application of the oil weedicide on April 26th, 1949, the defendant continued to call at the place of business of the appellant and make other purchases, even more of the weedicide oil (Plaintiff's Exhibit "J": p. 16: L 24-26). During May, 1949, he made purchases on the 16th, 19th, 23rd and 28th; during August, 1949, he made purchases on the 4th and 8th (Exhibit "A", attached to complaint: R 9-C), and during approximately three months of time while his onions were growing he made no complaint to the appellant (R 266: L 28-30), although at regular intervals he had made payments on his accounts and other purchases (Plaintiff's Exhibit "D," "E," "F" and "G," and had ample opportunity to do so. On January 4th, 1950, appellant's attorney, wrote the respondent and made demand for the balance of his account, and invited him to consult with either himself or the appellant (Plaintiff's Exhibit "H"). Again on April 17th, 1950, appellant's attorney wrote the respondent and made demand for the balance due on his account, and threatened legal action for collection, but, still, the respondent made no complaint against the appellant. On June 19th, 1950, the appellant filed suit (R 9-"B") against the respondent for the balance due on his account, and the same time made garnishment, on the wages of the respondent, on Salt Lake County Auditor (R 8), where the respondent was working for a very substantial wage

as an electrician (R 265: L 5-26). For free advice (R 273: L 8-12) the respondent went to the Salt Lake County Attorney's office, where Ralph McBroom, RESPONDENT'S counsel, was employed (R 272:L 13 et seq). Then, the appellant heard from the respondent for the first time concerning the account by way of a Counter-Claim in damages (R 4) filed in answer to the complaint, admitted owing the balance due, but alleged an express and implied warranty that the general weedicide oil would kill the weeds in the respondent's onion patch and leave the onions unharmed. The appellant's reply (R 13) to the counter-claim denied the allegations therein, and further alleged the proximate cause of his damage, if any, was failure to use due care. The issues were tried to a jury and a verdict returned in damages in favor of the respondent and against the appellant (R 23). The appellant made its motion to set aside the verdict (R 69), which was denied (R 70), and the appellant filed notice of appeal to this court (R 71).

STATEMENT OF POINTS RELIED UPON

POINT NO. I, THE EVIDENCE IN THIS CASE IS INSUFFICIENT TO SUPPORT THE VERDICT OF THE JURY ON THE GROUNDS THAT AT THE TIME WEEDICIDE GENERAL OIL WAS APPLIED TO RESPONDANT'S ONION CROP, ~~PLIED TO RESPONDENT'S ONION CROP,~~ *that there was no harm beneath the* SURFACE OF THE GROUND NOT EMERGED.

POINT NO. II, THE COURT ERRED IN HOLDING THAT APPELLANT IS LIABLE ON THE THEORY OF BREACH OF EXPRESS AND IMPLIED WARRANTY AS TO THE METHOD OF APPLICATIONS AS DISTINGUISHED FROM THE GENERAL OIL ITSELF.

POINT III, THE COURT ERRED IN HOLDING THAT AUTHORITY HAD BEEN GIVEN TO MAKE ANY STATEMENTS AS TO WARRANTIES: THAT SUCH STATEMENTS AS ARE RELIED ON BY THE RESPONDENT ARE UNUSUAL AND NOT CUSTOMARY.

POINT IV, THE EVIDENCE IS INSUFFICIENT TO JUSTIFY THE INFERENCE THAT RESPONDENT'S LOSS, IF ANY, WAS THE PROXIMATE RESULT OF THE USE OF WASCO GENERAL OIL WEEDICIDE.

POINT V, THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JURY'S VERDICT, OF EXCESSIVE DAMAGES APPEARING TO HAVE BEEN GIVEN UNDER THE INFLUENCE OF PASSION AND PREJUDICE.

ARGUMENT

POINT I.

THE EVIDENCE IN THIS CASE IS INSUFFICIENT TO SUPPORT THE VERDICT OF THE JURY.

In the Court's Instructions Nos. 10 and 12-B (R 56 and 58) that for the jury to bring a verdict in favor of the respondent, they must be satisfied by a preponderance of the evidence that the Wasco General Oil, which the appellant sold to the respondent, destroyed onions *that were beneath the surface of the ground or had not emerged*. For the jury to comply with this instruction, it must rely upon evidence that when the Wasco General Oil was applied to the onion crop there were onions beneath the surface of the soil not yet emerged which the oil destroyed. This they could not do; for reason, all the testimony in the case is to the effect that the onions had emerged or were emerging on the day the oil was applied.

On April 23, 1949, the day the respondent contacted the appellant (R 125:L 12), he was asked the question: "Are your onions up yet?" To which he replied, "No, they aren't. THEY WON'T BE UP FOR TWO OR THREE DAYS." The exact time the respondent applied the oil to the onion crop he was vague and indefinite about (R 131:L 6, 7). However, another witness definitely fixed the day as April 26, 1949 (R 369:L 11 et seq). By the respondent's own calculated estimation, he stated his onions would be emerged from the ground on the 25th or 26th of April. That they emerged as he estimated they would be, we quote (Plf's Exhibit J; L 20):

Q. At the time you were spraying, were there any onions out of the ground?

A. There were one here and there, yes.

Further testimony of another witness that the onions were out of the ground we quote (R 373:L 21, 29) :

Q. When you saw that the onions had already emerged from the ground, at the time he was spraying them, when you were out there on the 25th or 26th, which ever it was, of April, 1949, did you tell him that the onion crop, or that portion of the onion crop, at least, that had emerged from the soil would be killed by the oil he was putting on?

A. Yes, I also said that he was spraying plenty late.

Q. 'Plenty late,' what did you mean by that?

A. The onions had come up further than they should.

Further evidence proving the fact the onions were up on the day they were sprayed, we quote a witness of the respondent, Henry Schmidt (R 90:L 12) :

Q. * * * you state that you observed and pointed out to Dr. Stark, that there were some onions sticking up, is that right?

A. Right.

Q. Will you state approximately how many, as you observed, there were sticking up as you went across the field?

A. It couldn't have been many then. It can't, it wouldn't have averaged any more than one per foot.

Q. How far were they sticking up, would you say relatively?

A. Well, they just straightened out.

Q. And after they straightened out, how high were they in terms of inches? (R 101:L 13-15)

A. I would say an inch and a fourth, an inch and a half.

The Wasco general oil the respondent was using to spray his onion crop with, was a general weed killer, very commonly used among farmers throughout the States of Utah and California (R 329:L 18 et seq). The respondent had received verbal instructions and directions as to its proper use (R 373:L 11-18); also, he was given a "Weed Control With Chemicals" pamphlet (Plf's Exhibit "B"), which instructions and pamphlet the respondent admitted having received (Plf's Exhibit J; p 11:L 11). The Weed Control pamphlet (Plf's Exhibit "B": p 11) states specifically that two days before emergence of the seedlings from the ground is the very latest one can wait before applying the general oil weedicide, and even then some damage can be expected.

Regardless of this instruction the respondent had allowed his days of grace to expire before applying the oil to his onions—on the day he purchased the oil, he yet had time assuming his statement true that the onions would not be up for two or three days; he stated four hours was all the time needed to put it on (Plf's Exhibit J:L 20-21). Nevertheless, he applied the oil seeing the onions had emerged, and knowing that the oil would kill them, we quote (Plf's Exhibit J:18, 19):

Q. Were you aware this type of oil would kill the tops of plant life?

A. Of all tops, yes.

Further with reference to the emergence of his onion seedlings at the time he sprayed them with General Oil Weedicide, the respondent testified (R 142:L 3 et seq):

Q. Will you describe the condition of your crop relative to its maturity at the time you sprayed * * *?

A. The onions come up to about three inches high. They were yellow and burned.

Q. That isn't what I am asking you. Will you strike that part? At the time when you sprayed these onions, will you state what you observed in reference to the emergence of the onions at the time of spraying?

A. At the time of spraying there was one onion here and there that just barely protruded at the top of the soil.

A. And approximately how many would you say over the area?

A. I would say there was maybe one out of ten, or one out of twenty.

Q. And those onions were barely protruding?

A. That is correct.

Q. Will you state how far above the ground you observed them protruding?

A. They were barely sticking through. It couldn't be over 1/16th of an inch at most.

The foregoing evidence is conclusive that the onions were emerged and the respondent knew his onions were

emerged at the very time he sprayed them.

Having the positive, uncontradicted evidence that the respondent's onions were actually emerged and up to a height of one-half inch, on the day that he sprayed them, immediately poses the question of how much of the crop had emerged, or was within two days of emerging on the date of spraying. This question can be answered with definite certainty by knowing the uniformity of their growth to the time of their emergence. From the testimony of the respondent we quote (R 142; 1 25 et seq):

Q. And prior to the time you sprayed these onions, had you checked the germination of your seed?

A. That is right.

Q. And will you state in what condition you found the plants?

A. The plants were in perfect condition. They were healthy.

Q. Had you occasion to go over the field and check the germination through the field?

A. That is right.

Q. And will you describe the condition of the germination relative to its uniformity?

A. It couldn't have been more uniform, as far as I was concerned.

Q. And by that you mean that the plants that you had had germinated uniformly throughout?

A. That is right.

The respondent and his witnesses testified there was a "uniform germination of seeds" (R 143:L 7-9), "mild, mellow and moist soil" (R 90:L 10-11), "without crust" (R 90:L 11). The mean temperature for the month of April, 1949, was 53.6 degrees; plus 5.7 degrees above normal (Plf's Exhibit "C"). With onion seed existing in such a perfect state for growing, can there be any question in the mind of anyone that the respondent's onion seedlings were developing rapidly and excellently, and under such ideal growing conditions as was said to exist by the witnesses. Could there have possibly been but slight variation in their emergence from the soil. If some of the onions had emerged from the soil and had reached a height of one and a quarter to one and a half inches high (R 101:L 13-15), then all the rest of the respondent's onion crop, with reference to emerging from the soil, ranged all the way from an inch and a half high back to onions within the prohibited grace limit of applying the oil at two days before emerging. The very fact that the respondent deliberately destroyed his entire onion crop, with but a few exceptions, as he claims, bears out the fact that the onions all had emerged, or were within the prohibited two days period of emerging when he applied the oil (R 367:L 5-7).

There is other uncontradicted evidence in the record that conclusively proves the respondent's onions were emerged on April 26th, the day he applied the oil (R 369:L 11-12).

The respondent testified (R 114:L 20-21) that he

planted his onion seed the first of April. He said the seed-bed was in perfect condition (R 120:L 9). The soil was light, sandy loam (R 120:L 19), with plenty of moisture, good mulch and very fine (R 120:L 20). Respondent's partner in the undertaking said he prepared the land, and it was in perfect condition for planting (R 83: L 25-27). He described it as fine, mellow and perfect moisture (R 90:L 8-11), and that it was the best piece of land on the farm, especially reserved for growing onions (R 97:L 24-25), and that it did not crust (R 99: L 17-23). The weather during April, 1949, was settled and it did not storm (R 180:L 10, 11); nevertheless, there was plenty of moisture in the soil (R 302:L 4). The weather mean of the month of April, 1949 was 53.6 degrees, 5.7 degrees above normal (Plf's Exhibit "C"). A witness for the respondent had occasion to pass over the respondent's onion field during the month of April, 1949 "every four to seven or eight days" (R 306:L 12 et seq), and out of curiosity he checked the germination of the seedlings in the field (R 301:L 28), and they were *just beneath the surface of the ground*, there was no crust, they had plenty of moisture, and the respondent testified that the germination couldn't have been more uniform (R 143:L 1, 9). From the foregoing evidence, it surely can be inferred that the onion seedlings emerged from the soil with the same uniformity with which they were growing just beneath the surface of the soil.

Further testimony shows the respondent planted his onion seed, on or about the first of April, 1949 (R

178:L 20), and the evidence shows that he sprayed them on the 26th day of April, 1949. The onions had been in the ground, on the day he sprayed them, just two days short of four weeks. In support of the appellant's contention that they were up on the day the respondent sprayed them, we quote the testimony of a farmer with years of practical experience (R 337:L 27 et seq):

Q. How many days after planting before the onion seedlings start emerging from the ground?

A. Well, that depends again upon weather conditions. If it is cold it takes that much longer, and if it is warm that much sooner. Anywhere from three to four weeks, depending on whether the weather is warm or cold.

As to the time it takes to emerge onion seedlings from the soil, we quote the respondent on the subject (R 180:L 22-26):

Q. How long does it take onions to come through after you plant them?

A. * * * I have seen them come up in two weeks, and come up in five weeks. That depends upon the warmth of the soil. * * *

The month of April, 1949, was above average 5.7 degrees, and according to the respondent's own stated experience the onion crop of 1949 should have emerged at an early date, rather than a later one.

All the evidence in this case tends to point up one fact: the soil, moisture, weather and seed germination

surrounding the respondent's onion growing operation were in a state of perfection. All the respondent's witnesses, as well as the respondent, himself, testified enthusiastically and were well satisfied with the state of perfection in which the respondent was farming his onion crop during April, 1949. Thus, it can be correctly concluded that the respondent's onion seedlings would have emerged from the soil in at least average, which would have been according to the foregoing testimony approximately three weeks. Whereas, the respondent's onion seed had been in the ground, under perfect conditions, on the date of applying the weedicide oil approximately twenty-six days, or just two days short of four weeks, without question, they were up, which is shown by other circumstances.

On April 23, 1949, the date the respondent purchased the weedicide oil from the appellant (R 126:L 23-30), his words and actions significantly indicate, like a barometer, the true circumstance and happenings of his onion crop. The respondent was an experienced onion grower (R 110:L 18), with a pre-knowledge of weedicide chemicals (Plf's Exhibit "J" p 11:L 12), yet, he was troubled. He did not, immediately upon his arrival at the appellant's place of business, contact the selling personnel; to the contrary, he sought out Dr. Arvil L. Stark (R 127:L 4), an experienced and qualified horticulturist and plant physiologist (R 353:L 4 et seq), whose specific employment with the appellant was research and dissemination of agriculture information

(R 353:L 13).

Upon approach to Dr. Stark, the respondent's opening statement was: "I have a weed problem in my onions (R 127:L 7 et seq) (R 362:L 19 et seq). The problem was discussed. A weedicide, by name Synox, was recommended, but the respondent declined to use it, because, he said: the weeds in his onion patch were too dense and advanced too far that he could not wait until his onions had reached a maturity in growth of two or three leaves before applying the Synox (R 363:L 29 et seq). The use of Synox considered not possible, the discussion, then, turned to the use of general oil weedicide (R 364: L 5-9). Still, the respondent hesitated and was undecided about using the general oil weedicide. Before deciding he held a telephone conversation with his partner, Henry Schmidt (R 87:L 17). Both the respondent (R 127:L 14, 15), and Henry Schmidt (R 101:L 25, 26) were told by Dr. Stark that the general oil weedicide would kill the plant life above the soil, but was harmless to anything that had not emerged from the soil. It was not until the respondent had discussed the use of the general oil weedicide at length with Dr. Stark and Henry Schmidt that the respondent decided to use the general oil on his onions. This point we wish to emphasize: *when the respondent finally did purchase the oil, he only purchased one-half the amount that Dr. Stark had recommended*, and applied it at the rate of 25 gallons per acre (R 130:L 13 et seq), instead of the recommended 50 gallons per acre (R 380: L 17), and by the

testimony of a reliable witness testifying for the respondent, Mr. Horace Palmer (R 302: L 20-30), did not destroy either the weeds, or the onions.

Perhaps the truth can be arrived at by discovering what the problem really was that the respondent declared to Dr. Stark existed with reference to his onion crop. His words and actions clearly indicate he was wrestling with a problem at the time he purchased the general weedicide oil.

Webster defines a problem as a perplexing question proposed for solution. Perhaps the quickest and simplest manner to discover what the respondent's problem in his onion crop was, is by using a process of elimination of what it wasn't.

- (1) We can dismiss hand weeding as not being his problem, as the respondent dismissed that himself when he decided to use chemical weedicide.
- (2) We can eliminate the use of Synox as a weedicide for the weeds had too far a start on the onions and threatened to choke out the onions before the onions were mature enough that the Synox would have no effect on them.
- (3) We can eliminate the use of Wasco General Oil, because it would not create a problem if applied to the onions a few days before the onions emerged from the soil.

Eliminating the foregoing conditions, we would not

have a perplexing situation amounting to a problem at all, if the onion seedlings were not yet emerged. But if we add a condition where the onion seedlings have emerged from the ground with too perfect a uniformity that Wasco General Oil cannot be applied without destroying all or a substantial part of them, and Synox cannot be applied because the weeds are too dense and have advanced too far ahead of the onions, and we either do not have the money it takes to hand weed them, or do not want to expend such a sum, then, we submit, there is a problem, indeed. Just as the respondent stated he had at the time he purchased the oil.

To have a problem, one must have previous knowledge to recognize it as such. Without critical knowledge, no one can realize a problem exists in a condition or circumstance. The first words the respondent said to Dr. Arvil L. Stark, when he approached him on the day he purchased the Wasco General Oil was: he had a problem of weeds in his onions (R 127:L 7, 8). Without the previous knowledge that the *time of application* is the all-important factor in using chemical weedicides (R 329:L 18 et seq), how did the respondent recognize the fact that he had a problem.

We submit to the court: could it be possible or probable that two persons with the experience and background of Dr. Stark and the respondent could discuss intelligently the subject matter of the application of weed-killers without ever once mentioning the time of application, especially when they both understood the

properties of the oil weedicide were lethal and destructive to all plant life it contacted. As an example of the evasiveness and hedging of the respondent when asked concerning the time of application, we quote (Plf's Exhibit "J" p 11:L 30 et seq) :

Q. Now, when were you to apply that spray to your onion crop?

A. These onions were about to come up, there was quite a few weeds emerged from the ground on account of the perfect seed germination, there was quite a lot of weeds come up—not a lot of them—there was quite a few. I went in to see Dr. Stark about it, I suggested using Synox, or Shell oil No. 10, what they call No. 10. He said: "Have your onions come out of the ground yet?" I said, "No." He said, "We have got a general petroleum, use it on ditch banks, it worked perfect out there and up in Bountiful," about a week or so before I talked to him, it had done a beautiful job. He said, "Go ahead and use it."

And thus the question of the time element was evaded and never answered.

The fact is the respondent knew his onions were emerged, or were emerging, and he was too late to use General Wasco Oil weedicide, and too early to use the Synox and the onion crop was being smothered out with the weeds, for he had a thick growth (R 101:L 2-3) of weeds. The respondent is a farmer with lifelong experience (R 160:L 30) and had grown crops of onions

every year since 1943 (R 110: L 23), and that he was well fortified with a knowledge of the use of weedicides, we quote (Plf's Exhibit "J":p 11: L 11):

Q. Where did you obtain your knowledge to use it?

A. More or less, the information I got was from Mr. Thatcher here, *from their pamphlets I received there*; from getting fertilizer, one thing and another from farms; some from California farms, some from Utah farms; Utah farm magazine.

In addition to the foregoing knowledge the respondent had previously obtained on the use of chemical weedicides. Dr. Stark read to the respondent from a pamphlet (R 364:L 5, 9) about the rate and method of application of the use of Wasco General Oil, and gave him a pamphlet containing the information (R 363:L 11, 14) which the respondent took away with him. The very fact that the respondent did not follow out Dr. Stark's recommendation shows unmistakably and clearly that he was using his own judgment and drawing upon his own knowledge and experience to solve his problem. That he also knew facts existed that made Dr. Stark's recommendation inapplicable, and having weighed the risk involved of applying Wasco General Oil weedicide to his onion while they were emerging from the soil, or after they had emerged, the respondent, nevertheless, decided to take it. Not, however, with the full amount of the application recommended to destroy the weeds, but with only half that amount. Concluding that the

reduced amount would not harm the onions, while at the same time it would destroy or retard the growth of the weeds. If this does not answer the respondent's solution to his problem, then what other reason can be given for him acting so cautiously, deliberating at length, before deciding to use the weedicide oil, and then cutting the amount by half when purchasing and applying it.

Another point to be considered is how any of the weedicide oil got to the soil—let alone penetrate the soil far enough to destroy onion seedlings that were underneath the surface of the soil far enough that they would not emerge within the course of two days. A witness for the respondent, Henry Schmidt, testified (R 100:L 23 et seq), as follows:

Q. Did you notice the ground with respect to the weed condition on it at that time?

A. Yes.

Q. What was the condition?

A. Lots of weeds.

From the (R 101:L 2, 3):

Q. The ground was well covered with weeds?

A. Yes, there was plenty of weeds.

The first words the respondent said to Dr. Stark when he contacted him were, "I have a weed problem in my onions (R 127:L 7, 8). In the respondent's deposition (Plf's Exhibit "J": p 12: L 1, 5) he stated there

were a lot of weeds. Dr. Stark testified that there was a bad infestation of weeds grown over the respondent's onion crop (R 370:L 12).

As to the application of the weedicide oil to the weeds, the respondent testified, as follows (Plf's Exhibit "J": p 13 L 12 et seq):

Q. You were spraying all over the onions?

A. That is right, over the tops of the onions.

Q. Over the tops of the onions, in fact spraying all around?

A. That is right.

Q. What pressure in spraying did you use?

A. I was using about 35 or 40 pound pressure.

Q. What was the size of the nozzle-head you had used?

A. I can't exactly say the size of the nozzle-head. After I sprayed the ground it tallied up 25 gallons.

* * *

From the foregoing testimony that the oil weedicide is sprayed from nozzles under pressure from a boom rig approximately 15 inches above the ground (Plf's Exhibit "J"; p 15:L 18, 19). At the rate of 25 gallons per acre, it figures out that a little over a pint of oil is applied per square rod (R 359:28, 30). The weedicide oil is very volatile "on a hot day, it dispels quite rapidly" (R 332:L 11). At temperature of 50 to 60 degrees the oil will dispel quite rapidly (R 332: L 19).

From the testimony of a witness for the respondent, we quote (R 332: L 1 et seq) :

Q. Mr. Wallace, you said the temperature on the particular day the spray was used would be quite a determining factor in how long it would take the oil to dissipate, evaporate?

A. That is right.

Q. Now, assuming that the temperature on the day this oil was applied was variable, from 57 degrees at one o'clock a.m., up to a high of 68 degrees, from three to four; 67 to 68 up to 5 o'clock, then down to 53 degrees. On such a day as that, with that range of temperature (Plf's Exhibit "C"), how long do you think it would take the oil, sprayed on the crop, to dissipate? (R 332: L 30).

A. On those kind of conditions, its dissipation on the soil surface would take at least two or three days for a complete dissipation (R 332:L 5).

Q. Now, it is true that if there is any residue there that would kill onions, it would kill weeds too, wouldn't it?

A. That is right.

Q. In fact, that is the purpose of using this oil spray, is to kill the weeds before the onions get up, isn't it?

A. That is absolutely right.

The temperature on the 25th of April, 1949, varied from 57 degrees at 1:00 a.m., to 68 degrees at 6:00 o'clock p.m., and on the 26th of April, 1949, it varied

from 50 degrees at 1:00 o'clock a.m., to 73 degrees at 6:00 o'clock p.m. (Plf's Exhibit "C"). Thus, the weather at the time the onions were sprayed with the oil was hot, and the volatile oil would dissipate according to the undisputed testimony of the witness rapidly. In fact, too rapidly to do a good job of killing the weeds.

The foregoing facts are uncontradicted and conclusive that the weedicide oil sprayed in such a light, reduced amount—approximately a pint per square rod of ground—on a hot spring day, when there had been no rain (R 232: L 13), from a boom 15 inches from the ground, under pressure through spraying nozzles to vaporize it would never penetrate through the thick carpet of weeds that covered the onion crop and touch the ground. The actual proof of this fact was the condition of the onion patch, after the spray had been applied. Instead of destroying onion seedlings that were beneath the ground surface, it didn't even kill the weeds and onions that were above the surface of the ground (R 302:L 20). We quote from the testimony of a witness who testified for the respondent:

Q. And will you describe what you observed in reference to the onions that were protruding out?

A. * * * I noticed that the tips of the onions that were protruding out were sort of a, there was a discolor to them, sort of a shrimp. That is what I noticed as I went through the patch, practically all over the patch, in other words.

Q. Was there anything else that you observed in reference to the color of those onions that showed?

A. No, only the *weeds were obstructed very much from growth.*

The foregoing witness saw the onion field immediately after the weedicide oil had been applied for he said he could smell the oil (R 225:L 12) that had been applied.

We have already pointed out to the court that the respondent's partner, testified that on the day the respondent sprayed the onion field, onions were emerged to a height of 1½ inches (R 101: L 13-15). The respondent testified (R 231: L 1) "For the first two or three days they will come up here, one here and one there. When you first see the onions sticking through you know the rest are right beneath the surface. That has been my experience for years.". When you first see the onions sticking through, you know the rest are just beneath the surface. If this statement made by the respondent is correct then all of his onions certainly had emerged at least to the folded over stage on the day he sprayed, if on that day as the witness stated some of the onions were emerged to a height of 1½ inches high. For he admitted that when the onions first emerged they are folded over (R 230:L 23, 24), and at that time when he first observed the first ones sticking through the soil the others were just beneath the surface—it takes time for the first onions emerging from the soil doubled over

(R 228:L 2, 3) to straighten out and reach a height of ($1\frac{1}{2}$) one and one-half inches high. While the first to emerge are making such strides in growth, the others are not standing still; they already have emerged to the point of the first in the meantime.

That this was exactly the situation on the day the respondent sprayed the onion, we quote him (R 227:L 12 et seq):

Q. What do you mean the tips were dead?

A. The onions were just barely protruding through the soil, and where the oil would hit them, it would burn them.

Q. How high were they?

A. Just barely protruding through the soil.

Q. The onions were barely protruding through?

A. That is right, yes sir.

Q. How was the tip of the onion exposed?

A. How was the tip of the onion exposed?

Q. Yes.

A. Well, it was just barely sticking through the soil, and that is all.

Q. Well, but now, Mr. Leon, when onions come through the soil, they don't spring up like that, straight up, do they (indicating), they come up folded?

A. They come up folded and push right on straight through.

Q. Yes, How were these when you put the oil on? Were they still folded, or straightened out?

A. They were still folded.

Continued (R 228:L 1)

Q. Still folded?

A. Yes sir. Before they will flip up like that, they have to be out of the ground a good half inch. I would judge.

Q. How far do you think they were out of the ground?

A. I do not think they were over an eighth of an inch. They were just barely sticking through, what I could see.

The respondent, also, testified the onions were emerged 1/16 of an inch on the day he sprayed them (R 152:L 23, 24):

Q. Will you state how far above the ground you observed.

A. They were barely sticking through. It couldn't have been over 1/16 of an inch at the most.

Thus, the foregoing, respondent's own testimony proves, on the day he sprayed his onion, he had onions that tips, or according to other testimony in the record (R 101:L 13, 15) they were an inch and one half high; he had onions that were an inch high and folded; he had onions out of the ground an eighth of an inch, and he had onions out of the ground 1/16 of an inch.

All the testimony in the record points to the one conclusion, all the onion seedlings were emerged from the

soil on the day they were sprayed, and to assume otherwise is mere speculation as there is no proof in the record of any of the seedlings being beneath the surface of the soil on the date of spraying. The most convincing fact in the record that there were no onions destroyed beneath the surface of the ground is the fact that the onions emerged above the surface of the soil were not destroyed.

After the crop was sprayed with the weedicide oil the respondent admits a crop of onions continued to grow (R 246:L 8). Exactly what was the correct stand to expect we are not informed. The land to which the onions had been planted had previously been a dry-farm, and never grown a row crop before (R 94:L 29, 30) the seed which was planted was 3 years old, (R 85:L 15, 16), and the land was seriously infested with weeds (R 101:L 2, 3) that had a too far advance growth on the the onions. Again it might be asked under such conditions, just what stand could be expected to be sufficient. The respondent said he had 50% of what he considered a stand. Just what he considered a stand, is not said.

The respondent admitted the tops of the emerged onion were burned only (R 145:L 11). Also, respondent's witness Palmer testified that only the tops of the onions were effected with the oil (R 225:L 22). The respondent also stated the onions continued to grow after he sprayed, even though they had emerged (R 246:L 6 et seq) and been sprayed with the reduced application of the oil. We submit, there is no evidence in the record

of any of the onions being beneath the surface of the soil, within two days of emerging, on the date of spraying, and for the jury to bring a verdict that must be based upon that fact alone is to indulge in speculation, which by law the jury is not permitted to do.

The court in *Parker v. Pettitt*, 138 Pac. 2nd 592, said: "Damages which are uncertain, or speculative are not recoverable either in actions ex contractu or ex delicto, 15 Am. Jur. Damages p. 410. Supporting the rule is the Utah case of *B. T. Moran v. First Security Corp.*, 82 Utah 316.

We invite the court's attention to the respondent's testimony in his Deposition taken prior to the trial of the case; his direct testimony and cross examination is a prime example of evasion and contradiction, upon which the jury has had to draw to bring its verdict. The record definitely shows:

- I. That the perfection of the growing conditions shown by the testimony could not help but produce an onion crop in average time, or even shorter than average.
 - (a) The seed-bed was fine and in perfect condition for planting (R 120:L 20) (R 83:L 25-27).
 - (b) The soil was fine moist and mellow, and did not crust (R 90:L 10-11).
 - (c) The seed germination had perfect uniformity (R 142:L 25 et seq).

- (d) There was no storms during the month of April, 1949, during the time of germination of the seeds—the weather was warm with an average temperature of 53.6 degrees for the month, which was 5.7 degrees above normal (Plf's. Exhibit "C").

II. The respondent proved by visual observation that the onions were emerged within the time the foregoing facts in (I) above shows they should have emerged (R 227:L 12 et seq).

- (a) Some were emerged from the ground to a height of one and one half inches (R 101:L 13-15).
- (b) Others were emerged to a height of 1 inch: 1/8 inch and 1/16 of an inch (R 142:L 3 et seq).

With the foregoing facts established with uncontradicted proof. The respondent then proves two conflicting propositions:

- A. The reduced application of the weedicide oil that he applied burned only the tips of the onions that had emerged from the soil, and did not kill them, which it should have done.
- B. But the reduced application of the weedicide oil that he applied penetrated through the covering of weeds that had grown over the onions and destroyed the onions that were beneath the surface of the soil, which it should not have done.

The proof made by the respondent in propositions "A" and "B" above is just the reverse of all the other

evidence in the record as to the lethal effect resulting from application of the weedicide oil to onions (1) that have emerged, and (2) onions that have not emerged.

All the following witnesses testified that the oil weedicide was destructive to all emerged plant life:

Mr. Wallace, respondent's witness (R 238:L 9, 10)

The respondent (Plf's Exhibit J: p 16:L 18-20)

Henry Schmidt, respondent's witness and partner (R 190:L 1)

Mr. Lewis Call, a witness for the appellant (R 345:L 11-13)

Dr. Arvil L. Stark, witness for the appellant, (R 359:L 4 et seq)

The following witnesses testified the weedicide oil is harmless to onion seedlings underneath the surface of the soil:

Mr. Wallace, respondent's expert witness (R 329:L 16-17)

Dr. Arvil L. Stark, appellant's witness (R 127:L 14-16)

Lewis Call (R 345:L 2-13)

The respondent admitted in his direct testimony that he was warned by Dr. Stark (R 127:L 14, 15) that: "It will kill the onions that are sticking up, but won't hurt those beneath the soil". The only possible reason the oil did not destroy the onions that were sticking out of the

ground is because of the reduced amount with which it was applied, and the fact the onions were comparatively sheltered by density of the weeds. The record in this case is void of any evidence that any onion seedlings were beneath the surface of the ground on the date of spraying, and had they been under the surface of the ground they would have been unharmed, for the very practical experiment demonstrated by the respondent was that the oil did not destroy the exposed onions, then, how could it destroy the unexposed ones. And, again had there been unemerged seedlings in the ground and they did not emerge within the course of two or three days, they would emerge totally unharmed (R 333:L 1) even in cases where the full quantity recommended had been used.

The only evidence in the record to the effect that there were any onions beneath the surface of the ground at the time the weedicide oil was applied is that of the respondent, and to show its worthlessness, we quote (R 146:L 21 et seq.):

- Q. (Direct Examination) Following the spraying of the 10-acre tract of yellow onions, will you describe what occurred, and to the one acre tract of white onions?
- A. After the spraying had been put on, it just set those onions back. THEY WOULD NOT PROTRUDE THROUGH THE SOIL. IT JUST DELAYED THEM FOR ABOUT TWO WEEKS THERE. When they finally did come through there wasn't enough for a crop.

- Q. (R 148: Line 6) At this time * * * will you describe what the condition of the onions were on the 10-acre tract at that time?
- A. At that time?
- Q. Yes, that was about three weeks after.
- A. THEY WERE ABOUT 2-1/2 inches to 3 inches high, for height * * *
- Q. (R 147:L 19-20) Will you just answer what you did to straighten the thing out?
- A. Well, I weeded them, weeded them once, and fertilized, and gave them a shot of water.

In the foregoing testimony the respondent has stated, almost in the same breath, that his onions, after spraying, were delayed for two weeks from protruding through the soil, and in three weeks time they had reached a height of 2-1/2 to 3 inches high, which contradicts all the other testimony in the record on the possible rate of growth of onions under the most favorable conditions. However, we will show a contrary statement of the respondent by quoting the testimony of the respondent in the cross-examination (R 244:L 7 et seq) :

- Q. * * * after you sprayed the 11-acres with oil, what did you do?
- A. (Line 13) Well, there was nothing I could do but wait for these seeds to come through, and there finally was a percentage of a stand come through, AFTER ABOUT THREE WEEKS.
- Q. So you didn't do anything then. What was the first thing that you did do after they came

through?

A. After they came through, I cultivated them with a tractor.

Q. How high were they?

A. Oh, they had gotten up around an inch and a half to two inches high, by that time I guess * * *

Q. And that was how long after you sprayed them?

A. About three weeks, I would say.

Q. About three weeks, after you sprayed them?

A. I cultivated actually with the tractor. It was a little sooner than that, because I could barely see an onion here and there so I could get in and loosen the soil, I would say it was about ten days after I put the oil on.

As to the maturity of growth of the onions on the day that the respondent sprayed the oil weedicide on them, we quote his own testimony (R 227:L 12 et seq) :

Q. What do you mean the tips were dead?

A. The onions were just barely protruding through the soil, and where the oil would hit them it would burn them.

Q. How high were they?

A. Just barely protruding through the soil.

Q. The onions were barely protruding through the soil?

A. That is right, yes, sir.

Q. How was the tip of the onions exposed?

- A. Well, it was just barely sticking through the soil, and that is all.
- Q. Well, but now, Mr. Leon, when onions come through the soil, they don't spring up like that, straight up, do they? They come up folded.
- A. They come up folded and push right on straight through.
- Q. How were these when you put the oil on? Were they still folded, or straightened out?
- A. They were still folded.

We submit the respondent in the foregoing testimony has made absolutely contradictory statements, but actually summing up all the statements he made, the truth is actually revealed. In a part of his testimony, he says; for instance, that his onions were delayed and would not protrude for about two weeks. In another part he says that there was a percentage of a stand come through after about three weeks. Then in contradiction of these statements he says; he cultivated his onions about ten days after he sprayed them with the oil weedicide, and at the time he cultivated his onions were protruded and up to a height of about an inch and a half to two inches high. And further contradicting his statement in his direct examination that his onions were not protruded from the soil and were delayed in protruding for about two weeks he says: that at the time of spraying the onions they were protruded from the soil and in the folded stage.

Now, from the foregoing testimony, if we will accept

as truth his statement that at the time he sprayed his onions they were protruded from the soil to the folded over stage (there is other testimony in the record that they were even advanced further) on the day he sprayed them with the oil weedicide, then the respondent's other statements in the foregoing testimony, also, become truth i.e., on the day he cultivated the onions, ten days after they were sprayed with the weedicide oil, the onions were up to a height of 1-1/2 to 2 inches high, and three weeks after he sprayed the weedicide oil on them, the onions were up 2-1/2 to 3 inches high. Thus by the simple statement that the onions were up on the day that they were sprayed all the rest of the testimony of the respondent and his witnesses fall into line and support and fortify each other. Whereas, not to do so, all the testimony on this point falls into a contradictory confusion.

Because the respondent failed in his proof to show by a preponderance of the evidence that the Wasco General Oil weedicide killed onion seedlings, not as yet emerged from the soil, at the time the respondent applied the oil to his onion crop, he cannot recover in this action, and there is no evidence in the record on which the jury's verdict can be correctly based, and therefore the lower court erred in refusing to grant the appellant's motion (R 70) to set the verdict of the jury aside on the grounds of insufficiency of the evidence to support it.

POINT II.

THE COURT ERRED IN HOLDING THAT PLAINTIFF IS LIABLE ON THE THEORY OF EXPRESS AND IMPLIED WARRANTIES AS TO THE METHOD OF APPLICATION AS DISTINGUISHED FROM THE GENERAL OIL WEEDICIDE ITSELF.

In Instruction No. 9, the Court states in effect that liability on the warranty idea exists whether the General Oil Weedicide or the method of application was the cause of respondent's failure with his onion crop. The court refused to distinguish between the oil per se and the method of application.

We direct the attention of the Court to the fact that the nature of Dr. Arvil L. Stark's employment with the appellant was the dissemination of agriculture (R 353:L 13), the respondent, himself, testified that Dr. Stark was the person from whom he got his information and advice from (R 125:L 13 et seq), and that he even got advice on items (R 126:L 20, 21), even though he did not purchase them from the appellant company for whom Dr. Stark was employed. The evidence is clear and uncontradicted that in his conduct and relationship with the respondent, Dr. Stark acted in an advisory capacity only.

When a method of procedure or application is advised, suggested or recommended, the speaker is liable, if at all, on a different theory than that which arises from the sale of a chattel.

The matter of warranty with reference to this case

involves personal property; in fact, the Uniform Sales Act is applicable only to goods and chattels, and Section 76 of the Act defines the classes of goods subject to its provisions. An idea, a recommended procedure, a suggested application, a method is not subject to its provisions. These are simply intangibles, having reality only in their relationship to physical things. If a Supersonic physicist advises, explains, recommends a formula, a method, or a procedure by which I can get to the moon, and I meticulously follow his advice or recommendations, or methods and do not arrive, I am not entitled to recover at least not on the theory of warranty. How much less so, as in this case, can I recover where I do not follow the advice and recommendations given, and the method fails, there can be no breach of warranty.

We invite the attention of the Court to the decision in *De Zeeuw v. Fox Chemical Company*, (1920), 189 Iowa 1195, 179 N.W. 605, where the Court said:

“If on this it may go to the jury whether there has been a warranty, then the same is true if a physician expressed an opinion that a certain prescription which he was willing to give to benefit one who was then ill and it proved that the medicine did not improve his condition, or if a lawyer expressed the opinion that he could win a suit, and that he thought certain defenses or tactics would bring about that result, and if despite the use of these tactics the suit failed, it would be for a jury to say whether, the suit not having been won, there was or was not a breach of warranty.”

Certainly the advice of a man engaged in the profession of Horticulture, as is Dr. Stark, could not possibly

precipitate in warranty for giving advice as to the method and procedure of application.

A well informed, enlightened society, and the law in a free society follows in its wake, encourages the expression of opinion and the dissemination of ideas to such a degree that a person bringing an action based upon a recommendation following a discussion of a problem, as was the fact in this case, cannot recover—certainly not on a warranty theory—even if it is proved that the idea or method or procedure recommended is basically unsound, because of the assumed facts not being the actual facts as they existed, at the time of discussion.

If, therefore, the respondent's trouble was caused by the time and method, or procedure suggested by Dr. Stark, as distinguished from the General Oil Weedicide, there can be no recovery for breach of warranty. The difference in the theories of liability as to chattels and ideas as to time and method is of particular interest and importance in this case, because the respondent's own witness testified (R 329:L 18 et seq) that the time factor in the procedure was the cause of respondent's difficulties. Both Mr. Wallace (R 329:L 22), expert witness for the respondent, and Dr. Stark (R 373:L 27) testified that the time element of application in the procedure was the all important thing in the use of General Oil as a weedicide, which element the respondent either intentionally, carelessly, or improvidentially ignored, and that is the theory of this lawsuit, and decidedly not warranty

as the respondent alleged in his counter-claim (R 4-5). There is no evidence in the record of this case that the Wasco General Oil is not just what it was recommended to be—destructive to plant life by direct contact. The respondent testified that the General Oil had destroyed the weeds and onions “as if you had used a blow torch on them” (R 145:L 7, 8), thus the properties and purposes were as represented. Then the only possibility remaining, on which the respondent can depend on recovery is the method and procedure of application of the General Oil. Since the method and procedure was the proximate cause of the respondent’s damage, and since there is no such thing as an express or implied warranty as methods or other intangibles, the respondent cannot recover on the theory of warranty as alleged in his counter-claim (R 4-5).

The Court submitted the cause to the jury on the theory (Instruction No. 9) that there could be a breach of an express warranty as to the method. The Sales act admittedly implies certain warranties as to the sale of goods under certain circumstances, but the warranties could not possibly be implied or made in the sale of ideas—an intangible that has no substance, and can be too easily deviated and altered, as was done in this case by the recipient. The appellant requested an instruction on this theory, but the request was refused (R 27).

It is submitted that the court committed error in permitting the case to go to the jury on this theory.

POINT III.

THERE WAS NO EXPRESS AUTHORITY TO MAKE ANY STATEMENT AS TO WARRANTIES; THERE WAS NO IMPLIED AUTHORITY TO MAKE ANY SUCH STATEMENTS IN AS MUCH AS THE PROOF BY BOTH THE APPELLANT AND RESPONDENT IS UNEQUIVOCAL AND CLEAR THAT SUCH STATEMENTS AS ARE RELIED ON BY THE RESPONDENT ARE UNUSUAL AND NOT CUSTOMARY.

Under the court's instruction No. 9 (R 55), the court found as matter of law that Dr. Arvil L. Stark had express or implied authority to warrant appellant's Wasco General Oil Weedicide, and particularly *if sprayed on the onion crop as the respondent sprayed it*, would kill the weeds and not harm the onions not emerged from the soil, and the respondent relied thereon and applied the oil substantially as directed. We submit there was no such express or implied authority to make such warranties.

Warranties, in trade and industry, are primarily associated with chattels and personnel who sell them. Dr. Arvil L. Stark was distinctly not employed as a salesman or in the selling department of the appellant company. We call the attention of the court to his training, education and background (R 352-53). His scope of employment with the appellant company is Director of Agriculture Research (R 352:L 16). The nature of his work is the dissemination of agricultural information (R 353:L 13), which work requires that he have knowledge of chemicals with reference to the industry of agriculture (R 353:L 15-16. There is not an iota of

evidence in the record that Dr. Arvil L. Stark ever sold, and to the respondent in particular, any of the appellant's products. He acted specifically in an advisory capacity. The respondent testified that he got a lot of information from Dr. Stark (R 125:L 2); he said he felt like Dr. Stark was someone he could "get my knowledge from" (R 125:L 17); Dr. Stark advised the respondent with respect to fertilizers (R 125:L 27-29); up until 1949, he had called for Dr. Stark's advice a lot of time (R 126:L 7); in fact, he obtained information on products from Dr. Stark that he did not purchase from the appellant company at all (R 126:L 17-22). The foregoing evidence is unmistakably clear that Dr. Stark acted only as a source of information for the respondent, never in a selling capacity. This was strictly the scope of his employment to give the farming trade dealing with the appellant company technical information in solution of their farming problems. To act otherwise would be outside the scope of his employment. There is no evidence in the record that the respondent did purchase anything from Dr. Stark, or that Dr. Stark was employed by the appellant company to sell. As a matter of fact, all the evidence is to the contrary, and to the effect that Dr. Stark is employed by the appellant company not to sell but, solely, to give information pertaining to the industry of agriculture to those seeking it (R 126:L 10 et seq).

The rule is axiomatic that in order to warrant one must first have the authority to sell, or make the sale.

A fact that was never proven Dr. Stark had. In fact, the respondent testified Dr. Stark was one from whom he got knowledge (R 125:L 17-18), not chattels.

The law is settled that a principal is not bound by the acts or statements of the agent when the agreement to sell is upon unusual terms or conditions, or when the statements made are unusual terms or conditions, or when the statements made are unusual and not customary in the trade (*John Stimber & Co. v. Keene*, 152 S.W. 661). How much less then is a principal liable in warranty for the acts of his employee, whom he has never authorized to sell his chattels, and who did not sell his principal's chattels, but only gave requested information concerning them, that was not followed by him who requested the information. Antecedent representations, forming no part of the contract as concluded, cannot be regarded as a warranty, and evidence of representations made some time before the sale, offered to establish a warranty, has been rejected as too remote, 13 L.R.A. 678. A warranty is ordinarily made at the time of the sale, in which case it is supported by the price paid, 46 Am. Jur., Sec. 300. It then follows, that if a person did not make the sale or receive the money, or the promise to pay the money, he certainly could not be held liable in warranty, simply because he had given requested technical information on an article someone intended to purchase at a later time from someone else, either in the employment of the principal, or otherwise, and not using exactly the assumed facts upon

which the proffered technical information was based to make the purchase but substituting therefor an entirely new set of facts. To hold one in warranty for such a state of affairs would always result in the same dilemma revealed by the testimony in this case—the giver of the information stands defenseless, while the receiver of the information, at whose request the information was given, is armed with a double-edged sword that might be wielded in either direction.

The assumed facts assumed in this case on which Dr. Stark based his recommendation (R 380:L 17) to apply 50 gallons of general weedicide oil are the following: (a) the onion crop was densely infested with a growth of weeds (R 94:L 28-30); (b) that the onions had not, as yet, emerged from the ground (Plf's Exhibit "J":p 12:L 6, 7). An amount less than the amount recommended would not destroy the weeds is shown by testimony of respondent's witnesses (R 302:L 18 et seq). However, the actual facts were: the onions had emerged (R 101:L 4 et seq); the weeds were dense (R 94:L 28-30). Instead of following the recommendation, the respondent reduced the amount recommended by half (R 277:L 5), with result: the weeds were not destroyed (R 302:L 30), as was the intent and purpose of using the oil weedicide. From the foregoing it is clear that the respondent applied a half portion of the oil weedicide to the weeds, which was useless insofar as destroying either the weeds or the onions that had already emerged from the ground when he applied it.

It is the contention of the appellant, that one employed as was Dr. Stark, solely for the purpose of research and dissemination of information (R 353:L 12), and not having made the sale, or connected with the selling of chattels for the appellant could not warrant, and further the information he gave was too remote from the sale at the time it was given, and for him to have made any warranty in the capacity in which he was employed would have been unusual and not customary in the trade, and therefore in law without effect.

In the case of *Friedman & Sons v. Kelly*, 102 S.W. 1066, 126 Mo. App. 279, the court said:

“This responsibility of the principal for the acts of his agent, not expressly authorized, is limited, however, to such acts as are within the apparent scope of the authority conferred: * * * Or, to state the proposition in other language, the law presumes, and those dealing with the agent have the right to act upon the presumption of law, that the agent is authorized to sell the goods in the usual manner, and only in the usual manner and make such contracts thereabout as are reasonable of comport with the usage and custom of the trade in like undertakings, and it is to this extent, and this extent only, that an agent may be said as a matter of law to be acting within the scope of his apparent authority. Story on Agency (2d Ed.) Sec. 60; Tiffany on Agency, Secs. 45-47; Benjamin on Sales (6th Ed.) Sec. 624; 6 Am. & Eng. Ency. Law (2d Ed.) 224; Wharton on Agency, Sec. 189; Mecham on Agency, Secs. 350-362; Clark & Skyles on Agency, Sec. 244; Upton v. Suffolk County Mills, 11 Cush.

(Mass.) 586, 59 Am. Dec. 163.

The respondent admitted that Dr. Stark was a source from which he obtained knowledge (R 125:L 17) before making up his mind about the purchases he intended to make, either with the appellant or otherwise.

The court submitted the case to the jury in its Instructions Nos. 8 and 9, on the theory that Dr. Arvil L. Stark, at all times pertinent was acting in the course of his employment, and that he warranted the Wasco General Oil, "as the respondent sprayed it." It is submitted that the court committed error in permitting the case to go to the jury on these theories.

POINT IV.

THE EVIDENCE IN THIS CASE IS INSUFFICIENT TO JUSTIFY THE INFERENCE THAT THE RESPONDENT'S LOSS, IF HE HAD ANY, WAS THE PROXIMATE RESULT OF THE USE OF WASCO GENERAL OIL WEEDICIDE.

It is elementary in law that the plaintiff must establish by competent and substantial evidence that his loss, if any, was proximately caused by a violation of a duty owed to him by the plaintiff. In this case, the respondent has contended that any loss of what he considered a "good stand of onions" was caused by his spraying on his onions a reduced application of Wasco General Oil weedicide. Therefore, the question of proximate cause assumes vital importance in the case. All the witnesses testified to numerous causes that might interfere with

the growing of a good stand of onions. Many of which were present in the respondent's onion growing operation. For instance: testimony was given and not disputed that the seed the respondent planted was three years old (R 85: L 15-16) and only 56 per cent viable (R 85:L 25), and planted at the rate of 3 pounds per acre (Plf's Exhibit "J":p 7 L 9). The respondent testified to having lost five acres of his onions next adjoining on account of poor seed (Plf's Exhibit "J":p 6 L 28-29). The land where the onions were planted had previously been a dry-farm (R 94:L 29-30), badly infested with weeds; had been summer-fallowed for weed control (R 94:L 22-24); it had never been planted to row crops before (R 107:L 6-11); the onion seed bed had been harrowed with a tooth harrow ten days after it was planted with the teeth set an angle of 10 degrees (R 144:L 21-26). After planting the land had not been cultivated (Plf's Exhibit "J":p 8 L 29 et seq); the weeds had been allowed to grow until they threatened to crowd out the onions. The soil where the onions were planted had a per cent of clay in it (R 318:L 6 et seq). Clay soil is given to crust and where a crust forms on the surface over the onion seedlings they cannot break through (R 338:L 23-28).

Previously, we pointed out that respondent did not establish the fact by competent satisfactory proof that the general weedicide oil destroyed the onions either above or beneath the ground. For by his own testimony he admitted having 50% of some arbitrary amount he

had in mind as what should be a full crop. As to what that arbitrary amount of the ideal crop should be, we cite the wide variation existing between testimony of farmers in the record. The respondent said he produced 500 fifty-pound bags per acre on five acres of land adjoining (R 150:L 6). Another farmer in the vicinity testified he grew 1800 fifty-pound bags of onions per acre (R 403:L 27). Could this larger rate of production be the amount the respondent had in mind, when he said he only had fifty per cent of crop before he abandoned it. If that is the case 50% of 1800 bags is 900 bags, and is still 400 bags more than the respondent testified to raising on his own acreage (R 150:L 6) per acre. The burden was on the respondent to establish proximate causation by a preponderance of competent evidence. This he did not do, but left the jury in a position to speculate on the proximate cause of loss, or whether or not he suffered a loss under the existing circumstances at all. Inasmuch as he had 50% of some imaginary crop that he thought he should have had, it is just possible that by comparative values such an amount is a substantial crop of onions. How was the jury to know this except by assumption and speculation, as there is no proof in the record concerning it. The respondent attempted to make proof of the imaginary crop he should have had by introducing the testimony of several farmers as to the yields of onions they produced. The fallacy and unreliability of this kind of evidence is stated by one of respondent's own witnesses, we quote (R 317: L 20): "Well, I don't know. My farm probably is a

high-fertility farm. Now, we use a lot of commercial fertilizers, and we use a lot of barn-yard manures. Now, to be able to answer your question, I would have to know the fertility particularly of that particular plat of ground in previous years, what has gone before in the fertility end of it, to give you a clear picture of it, to be comparative to my ground * * *." In other words, to use the production of another farmer's ability and land as proof for a measure to gauge any other particular farmer's ability and land, there is much more to be known than just how many bushels of this or that each one produced on his acreage.

The law is clear on this point that mere possibilities leave the solution of an issue of fact in the field of conjecture. The following Utah cases stand for the proposition that a jury's verdict may not be based on testimony showing only possibility, nor on speculation, conjecture, or suspicion:

Edwards v. Clark, 83 P. (2d) 1021;

Spackman v. Benefit Ass'n of Ry. Employees (1939), 97 Utah 91; 89 Pac. (2d) 490.

The only similarity of conditions existing between the respondent's acreage and farming methods and that of his neighbor's shown, was the fact that they had purchased seed from the same source. And even in this testimony there is a discrepancy in the testimony. The respondent testified that he planted at the rate of 3 pounds of seed per acre (Plf's Exhibit "J" p 7 L 9).

The witnesses testified they planted 6 pounds of seed per acre (R 314:L 21), because they knew it was old poor seed and only 56 per cent viable (R 314:L 10).

The law, with reference to showing a possible yield of onions from farmers who had obtained seed from a common source, is stated in the case of *Crouch v. National Livestock Remedy Co. et al.* (1928), 205 Iowa 51, 217 N.W. 557. The defendant was a seller of hog remedy. The plaintiff buyer sued the defendant on the theories of implied and express warranty, as was done in the case at bar. He introduced evidence, over objection, that other farmers had used defendant's hog powder, with varying results as to the death of their hogs. The court held this testimony to be inadmissible, saying: there was not sufficient showing of identical conditions, even though all of the witnesses testified that the directions were followed in feeding the powder. Also, the case *supra* is identical with the case at bar in that there is an element of remoteness. In the Iowa case, the hogs were said to have died some six weeks to three months after the hog powder was fed; in the case at bar, the respondent claimed to have abandoned a substantial crop of onions some six to eight weeks after an application of weedicide oil. The Iowa Supreme Court said concerning a situation of this kind:

“* * * It is also apparent that the evidence as to the death of the hogs is remote from the claimed cause. To say that hogs fed at a certain time died six or seven months after the feeding, or from six weeks to three months thereafter is

to open a door for speculation and conjecture as to whether there is any causal connection between the feeding and the subsequent death at such a remote period."

Under the heading of Point I, we pointed out to the court with competent, undisputed evidence, that the reduced quantity of the appellant's weedicide oil that the respondent applied to his onion crop neither destroyed the emerged onions nor onions that were submerged beneath the soil, and the stand of onions that he did grow on the land and abandoned because it was only 50% of what he considered—by some measure, he did not make known—a bumper crop. To make claim for more than what he actually did produce, with his farming ability under the prevailing conditions, his proof must do more than raise a conjecture, or show a possibility. *Sumsion v. Streater Smith, Inc.* (1943), 103 Utah 44, 132 Pac. (2d) 680; *Anderson v. Nixon*, 104 Utah 262, 139 Pac. (2d) 216; *Smith v. Ind. Com.* (1943), 104 Utah 318, 140 Pac. (2d) 314.

We will concede to the respondent that he knew what to expect as a normal crop yield of onions, where tested and certified 100% viable seed had been planted, and this was the measure against which he compared his crop yield in July 1949 and came to the conclusion that it was only 50% of a stand (R 246:L 10). It is axiomatic that the crop yield cannot ever exceed the seeds planted, and if the respondent planted seeds that were old and only 50% viable, he could only get 50% of the amount of the crop he would have got had he

planted seeds that were 100% viable. With reference to amount and kind of seed the respondent planted we quote his own testimony (Plf's Exhibit "J" p 7 L 9).

Q. What rate of seeding was your seeding per acre?

A. Three pounds per acre at 20-inch rows.

Respondent's partner, Henry Schmidt, furnished the seed to the respondent (R 108:L 26, 27) (R 113:L 11-13), and he testified the germination tests on the seed showed 56% viability (R 85:L 25, 26). The normal rate of seeding onions is 3 pounds per acre (R 337:L 10 et seq) (R 85:L 20-22). Now, here is unmistakable evidence in the record that is undoubtedly the truth because it was given long before the respondent attempted to change it because of its revealing effect as the cause for his 50% crop yield. What can be more expetive of the fact that the respondent had a half a crop, by comparison, than his own words that he planted 56% viable seed at the normal rate of 3 pounds per acre. What more than a half a crop could he expect. We submit to the court that the evidence points to the respondent's production yield of onions being only 50% of what it should have been was the result of 56% viable seed planted at the rate of 3 pounds per acre, rather than the result of the application of the reduced amount of appellant's weedicide oil.

The respondent has proven in this case (R 146:L 24-30) that his crop of onions were destroyed as a result of the application of the general oil weedicide, and, also,

that he produced what he determined was a 50% crop, and abandoned it because it would not pay on a share crop basis (R 246:L 10).

Where plaintiff's undisputed evidence from which essential fact is sought to be inferred points with equal force to two things, only one of which points to defendant's liability, plaintiff must fail, or in this case respondent must fail. *Reid v. San Pedro, L. A. & S. L. R. R.*, 39 Utah 617, 118 Pac. 1009; *Tremelling v. Southern Pacific Co.*, 51 Utah 189, 170 Pac. 80; *Peterson v. Richards*, 73 Utah 69, 272 P. 229.

Thus, there was insufficient proof, as a matter of law, from which the jury could infer that the appellant's oil weedicide was the proximate cause of any damage to respondent's onion crop, if any.

POINT V.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE JURY'S VERDICT OF EXCESSIVE DAMAGES, APPEARING TO HAVE BEEN GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE.

The evidence in this case is undisputed that the respondent is not a farmer in the full sense of the term; that he is by profession an electrician (R 265:L 12, 13); that what farming he ever did was of an itinerant, share crop basis (R 161:L 6 et seq). The farming operation he was engaged in that resulted in this action was on a share crop basis—his partner, Henry Schmidt, furnishing the land (R 5:L 11), the equipment, water and seed.

The respondent does not own any farming acreage, neither has he ever owned any (R 265:L 29 et seq). His statements as to the acreage he had planted were flagrantly contradictory; however, it was shown after considerable cross-examination (R 169:L 12 et seq) that he had planted 20 acres of the leased land to onions. The testimony without dispute shows that of the 20 acres he planted, he admitted losing five acres on account of bad seed (Plf's Exhibit "J" p 6 L 28); on another four-acre patch, he admitted harvesting 500 (R 195:L 8) 50-pound bags of onions per acre; on the remaining 11 acres involved in this case he could have actually harvested 50 per cent of what he considered a good stand of onions had he continued on until harvest, we quote (R 246:L 6-13):

Q. At the time you weeded them, then, how many onions were up?

A. There never was a stand came up. It was approximately, as close as I could judge, it was about a 40% stand, 40 or 50% stand. Maybe it wasn't that much. It was just barely enough, if they would have gotten in and started growing, maybe I would have made it worth while to hang on to the crop and break even. That is about all in a percentage crop.

In support of this testimony of the respondent that there was actually a substantial crop of onions growing on the land that could have been harvested at a considerable profit, we quote further from the record (R 384:L 1 et seq):

Q. Well, did you know that they hadn't been sprayed then?

A. I had no idea what the acreage was. Leon showed me onions which he claimed he had sprayed, and he showed me onions which he claimed he had not sprayed, and that is the extent of my knowledge.

Q. I see. And it is your testimony today the onions he claimed he had sprayed and those he had not sprayed looked practically the same?

A. Practically the same, I could see no difference, any significant difference, between them. You couldn't tell where the lot of sprayed and the lot of unsprayed divided.

Q. Is it true that the entire 5-acre tract of onions was about three inches high. Is that what your testimony is?

A. That is my recollection, sir.

A. * * * And is it also true that the whole 5-acre tract was yellow and crippled and twisted?

A. No sir, they were green.

Q. They were good; the whole tract looked good?

A. Yes, sir.

Q. Looked like it would make a good stand of onions?

A. It wasn't as thick as I would like it if I were an onion grower.

Q. * * * but it looked to you like it would make a good crop of onions?

A. It would make a crop of onions.

Q. * * * And that is the whole field?

A. Yes.

Q. And that is the one he claimed he sprayed and the ones he didn't?

A. Yes, sir.

Q. And you are sure the portion he claimed he did not spray did not have any kind of crippled or burned or yellow appearance?

A. I couldn't see any difference.

The attention of the court is called to the fact that the date the foregoing observation of the respondent's 5-acre patch of onions—1 acre sprayed and 4 acres not sprayed—was on May 5, 1949 (R 383:L 9 et seq).

Assuming, which appellant does not admit, that the weedicide oil applied to the respondent's onions interfered with, or destroyed one half of the anticipated crop the respondent expected, and that he had the other one half of the crop remaining. It was his duty to preserve and mature the half crop to minimize his damages. 15 Am. Jur. Crops, Sec. 73, states the law clearly that: "It is a rule of law, founded on principles of natural justice, that one who has been injured in his person or property is charged with the duty of minimizing the resulting damage—that is, he must exercise reasonable care to obviate the consequences likely to follow from the injury." Also, the law of the respondent's duty to minimize his damages is stated in 15 Am. Jur. Damages, Sec. 27, thus: "One who is injured by the wrongful or negligent acts of another, whether as the result of a tort

or of a breach of contract, is bound to exercise reasonable care and diligence to avoid loss or to minimize or lessen the resulting damage, and to the extent that his damages are the result of his active and unreasonable enhancement thereof or are due to his failure to exercise such care and diligence, he cannot recover; or, as the rule is sometimes stated, he is bound to protect himself if he can do so with reasonable exertion or at trifling expense, and can recover from the delinquent party only such damages as he could not, with reasonable effort, have avoided. *Jankele v. Texas Co.*, 88 Utah 325, 54 Pac. (2d) 425, citing R.C.L.

Because of the foregoing rule of law, it was the duty of the respondent to minimize his loss by carrying on with the farming of 50% crop of onions that he stated had survived the oil, which would have been very easily possible; for he farmed the four acres of onions right adjacent on through until he harvested them. The very fact that he failed to continued to farm a fifty per cent crop is evidence enough to prove that he did not exercise the due diligence and care the law required of him, and he can only recover from the respondent the damages he could not have avoided. And in this case, it is not questioned—the respondent admits (R 246:L 6-13) he could have produced a 50% crop had he continued on with the farming.

We pointed out to the court in Point IV, *supra*, that the evidence offered in this case, as to what other farmers with varied skills of farming and other ground,

conditions and circumstances is inadmissible, and therefore cannot be used as a measure to award the respondent damages. The only competent evidence in the record that can be used as a measure on which to estimate damages sustained by the respondent is onions he raised on the four acres of adjacent property. Which he admitted was 500 50-pound bags per acre (R 150:L 6).

Therefore, he had planted 11 acres on which he claimed a loss on account of the weedicide. Eleven acres times 500 50-pound bags of onions is 5500 50-pound bags of onions. Had the respondent used reasonable care and diligence to minimize his loss, he could have harvested 50% of the 5500 50-pound bags of onions, which would leave his actual loss chargeable to the appellant 2750 50-pound bags of onions. The evidence produced to show the price of the onions at harvest time of 1949, was \$1.20 a 50-pound bag. 2750 50-pound bags of yellow onions at \$1.20 per bag amounts to \$3300.00. From this sum the law allows the production costs and marketing cost that would have been expended had the crop matured to be deducted, which in this case were estimated approximately as \$1442.25 (Def's Exhibit "4"), this sum being one half the amount the respondent estimated for maturing the full crop. Thus, the greatest possible amount in law that could be assessed against the appellant for damages, assuming it is liable, is \$1857.75.

We submit that the lower court committed error, as a matter of law, in denying respondent's motion to

vacate and set aside the jury's verdict (R 69) on the grounds of excessive damages, appearing to have been given under the influence of passion and prejudice.

That the respondent was entitled to a verdict in his favor against the appellant for \$5069.50 (R 23) is contrary to and against the evidence. In other words, had the jury returned a verdict with respect to material facts as shown by the evidence, its verdict would have been for the appellant. And now appellant does complain of and assign as error the verdict as aforesaid by the jury. For the reasons herein given, and because of the law in such matters provided. We submit to this court that the verdict of the jury in the court below should be set aside, and the case be remanded with instructions to dismiss the counter-claim of the respondent with prejudice, and the prayer of appellant's complaint granted.

Respectfully submitted,

SAMUEL J. NICHOLLES, Esq.,
Attorney for the Appellant.