

1951

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

Utah Supreme Court

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Civil No. 7662

IN THE SUPREME COURT
of the
STATE OF UTAH

WASATCH CHEMICAL COMPANY,
a corporation,

Plaintiff and Appellant,

VS.

L. G. LEON,

Defendant and Respondent.

BRIEF OF RESPONDENT

FILED

McBROOM & HANNI,
JUL 19 1951 *Attorneys for Respondent.*

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT
of the
STATE OF UTAH

WASATCH CHEMICAL COMPANY,
a corporation,

Plaintiff and Appellant,

vs.

L. G. LEON,

Defendant and Respondent.

Civil
No. 7662

BRIEF OF RESPONDENT

STATEMENT OF FACTS

The Wasatch Chemical Company, plaintiff and appellant, commenced this action against L. G. Leon, defendant and respondent, by suing respondent on an open account in the amount of \$162.82 for goods, wares and merchandise (R. 9 "B", 9 "C"). Respondent admitted the account and counterclaimed for the loss of profits that respondent would have realized from eleven acres of respondent's 1949 onion crop, which eleven acres of

onions were destroyed by the application of an oil called Wasco General Oil that appellant had sold to respondent. Appellant, by and through its agent, Dr. Arvil L. Stark, at the time of the sale expressly warranted that the oil would kill the weeds and any of the onions that had emerged from the ground at the time respondent applied it but that it would not hurt those onions that were beneath the surface of the ground (R. 4, 5, 127, 379, 380, 382). At the time the oil was sprayed, substantially all of the onions were beneath the surface of the ground (R. 142-145). Then entire crop of onions that had not emerged was destroyed by the application of the oil. The trial resulted in a verdict for the respondent in the amount of \$5,069.50 representing the value of the crop (R. 23), to which amount interest at the rate of six per cent per annum from January 1, 1950, was added pursuant to stipulation of the parties at pre-trial (R. 21). The sum of \$162.82 claimed in appellant's complaint with interest thereon from August 4, 1949, was, pursuant to stipulation at pre-trial (R. 20), deducted from the amount of the verdict resulting in a judgment in favor of respondent in the amount of \$5,206.67 (R. 65, 66). From this judgment appellant, Wasatch Chemical Company, appeals.

POINTS ARGUED BY RESPONDENT

1. Under the admitted facts respondent sprayed the crop with the oil as contemplated by the terms of the warranty.

2. There was sufficient evidence that there were

onions beneath the surface of the ground at the time respondent sprayed the crop to support the verdict of the jury.

3. Dr. Arvil L. Stark acted within the scope of his employment and had authority to make the warranty.

4. The trial court did not subject appellant to liability for a representation as to a method of application. It did subject appellant to liability for an affirmation of fact relating to the goods sold.

5. The evidence was sufficient to support the verdict of the jury on the issue of whether or not the application of the oil caused respondent's loss of crop.

6. The evidence was sufficient to support the verdict of the jury as to the amount of respondent's damage.

STATEMENT OF EVIDENCE

We do not agree with appellant's statement of facts.

1. WARRANTY.

In 1949 respondent planted ten acres of Utah Yellow Sweet Spanish onions and five acres of Utah White Sweet Spanish onions on a farm owned by Henry Schmidt (R. 112, 113) near Ninetieth South and Redwood Road in Salt Lake County, Utah, (R. 112) under an agreement whereby Schmidt prepared the ground for planting, leased it to respondent, and furnished the seed for the yellow onions, certain equipment and materials and respondent was to plant the seed, mature, harvest and market the crop, pay all expenses subsequent to planting and pay Schmidt as rent one-half of the gross pro-

ceeds of the sale of the crop (R. 82, 91, 113). Respondent was to have complete control of planting, maturing, harvesting and marketing the crop (R. 113). Schmidt was to have no part in any matters subsequent to preparation of the ground (R.109).

Respondent planted the onions in the middle of March and during the first week of April, 1949, (R. 113, 114). After planting (R. 123, 124) and prior to emergence of the onions (R. 127) some broad leaf and red root weeds appeared on the five acre tract of white onions and the ten acre tract of yellow onions (R. 123, 124).

At noon on Saturday, April 23, 1949, respondent went to the Wasatch Chemical Company (R. 125, 363). There he saw Dr. Arvil L. Stark (R. 125, 363), who was the Director of Agricultural Research and Information of the company and an officer of the company (R. 353). At this point it should be noted that respondent had dealt with the Wasatch Chemical Company for several years (R. 126) and, specifically, that Dr. Stark had as an employee of the company on those occasions advised respondent of the materials to use in his farming operations, and respondent had purchased the materials from the company pursuant to that advice (R. 125, 126). It should also be noted that at the commencement of trial appellant stipulated, “* * * that Dr. Arvil L. Stark, at all times material in this cause was the employee of the Wasatch Chemical Company, and was acting in the course and scope of his employment,” (R. 80, 81); and, that appellant took no exception to, and requested no instruction in conflict with, the trial court’s Instruction

No. 8 that, “* * * as a matter of law, Dr. Arvil L. Stark, at all times herein pertinent was the employee and agent of plaintiff and was acting in the course and scope of his employment, and that plaintiff, Wasatch Chemical Company, is *liable for damage caused defendant, if any, by virtue of Dr. Stark’s acts, representations or promises, if any.*” (R. 55, 406, 26-43.) (Italics ours.)

On the instant occasion, Saturday afternoon, April 23, 1949, respondent went to the Wasatch Chemical Company and talked to Dr. Stark about the weed problem in his onion crop (R. 127, 363). There is a conflict in the testimony as to what was said in the course of this conversation. However, both the respondent and Dr. Stark testified that in the course of the conversation Dr. Stark recommended that the respondent use Wasco General Oil, a product sold by the Wasatch Chemical Company, to eliminate the weeds from the respondent’s onion crop, see testimony of respondent (R. 127) and testimony of Dr. Stark (R. 365, 379); and, both respondent and Dr. Stark testified that Dr. Stark told respondent, relative to the effect of Wasco General Oil on the onions, *that the oil would kill any of the onions that had emerged from the ground at the time he applied it, but that it would not hurt those onions that were beneath the surface of the ground.* See testimony of respondent (R. 127) and testimony of Dr. Stark (R. 379, 380, 382.)

With reference to this conversation the respondent testified as follows. He told Dr. Stark that he had a weed problem in his onion crop, and that he was thinking of using Sinox to eliminate the weeds. Dr. Stark told

the respondent not to use Sinox because it would have too much residual effect on the onions. Dr. Stark asked the respondent whether or not his onions were up. Respondent stated that the onions were not up, and that they would not be up for two or three days. Dr. Stark recommended that respondent use Wasco General Oil and told respondent that *it would kill the onions that were protruding from the surface of the ground, but that it would not hurt those onions that were beneath the soil.* (R. 127.) Dr. Stark told respondent to apply the oil at the rate of fifty gallons per acre (R. 221, 222). Respondent further testified that pursuant to Dr. Stark's representation he purchased six fifty-four gallon drums of Wasco General Oil (R. 127-129.) (Def. Ex. 3.); and, that since the respondent was short of cash, Dr. Stark directed that the sale be made to respondent on credit (R. 219). Respondent also testified that he had not heard of Wasco General Oil prior to this conversation (R. 130).

With reference to this conversation Dr. Stark testified as follows. Respondent came to Dr. Stark's office at the Wasatch Chemical Company on April 23, 1949, with reference to a weed problem in respondent's onion crop (R. 363). Dr. Stark suggested the use of Sinox, but respondent stated that he could not wait that long. (R. 363-365.) Dr. Stark asked respondent if his onions were up, and respondent replied that they had not come up. Dr. Stark then suggested that respondent use Wasco General Oil to eliminate the weeds (R. 365) and told respondent to apply it at the rate of fifty gallons per acre (R. 380). Dr. Stark then showed respondent Plaintiff's

Exhibit B, which exhibit is a pamphlet published by Wasatch Chemical Company entitled "Weed Control With Chemicals," and particularly directed respondent's attention to page 11 of that pamphlet. (R. 365-368). The pamphlet, *which was written by Dr. Stark* (Pl. Ex. B, p. 2), contains the following statement (R. 367-368) (Pl. Ex. B, p. 11) relative to pre-emergence spraying:

"There is considerable experimental evidence that spraying the soil after planting but before the crop comes through, or emerges, is successful in annual weed control, but not perennials. Less damage to the crop has resulted when applications are made about 2 days before the crop seedlings come through the soil.

"Oils alone and oil fortified with dinitros, and pentachlorophenol, and 2,4-D are used for pre-emergence spraying.

"Detailed information on pre-emergence spraying will be sent upon request." (Italics ours.)

Dr. Stark also testified that nothing was said in the conversation relative to the fact that the onions would be up in two or three days (R. 379). He did, however, testify that in the course of this conversation he told the respondent, relative to the effect of Wasco General Oil on the onions, *that it would kill the onions that were up at the time he applied it, but that it would not hurt those onions that were beneath the surface of the ground* (R. 379, 380), and see (R. 380-382).

Respondent denied that Dr. Stark in this conversa-

tion or in any other conversation showed respondent Plaintiff's Exhibit B, which is the pamphlet on "Weed Control With Chemicals" (R. 221-224), and that he ever saw the pamphlet prior to commencement of this action (R. 224). Dr. Stark admitted on cross examination that he did not know whether or not respondent read the pamphlet (R. 378, 379).

While respondent and Dr. Stark were carrying on the above conversation, Henry Schmidt called respondent on the telephone at the Wasatch Chemical Company in reference to a matter not related to this case. In the course of the telephone conversation respondent informed Henry Schmidt that Dr. Stark had recommended that respondent use the Wasco General Oil on the onion crop. Henry Schmidt talked to Dr. Stark about the matter. With reference to the ensuing telephone conversation with Dr. Stark, Henry Schmidt testified as follows. He told Dr. Stark that he was under the impression that respondent was going to use Sinox to eliminate the weeds. Dr. Stark then recommended use of the Wasco General Oil. Henry Schmidt then asked Dr. Stark what the effect of the Wasco General Oil would be on the onions. Dr. Stark replied *that it would kill the onions that were up, but that it would not hurt those onions that were under the ground.* (R. 87-88.)

2. APPLICATION OF OIL.

On the following Monday, April 25, 1949, according to the testimony of respondent (R. 131) and Henry Schmidt (R. 89) or on April 26, 1949, according to the

testimony of Dr. Stark (R. 370), respondent sprayed the Wasco General Oil on the ten acre tract of yellow onions and on the south one acre of the five acre tract of white onions at a rate of 25 gallons per acre (R. 130, 131) or at the rate of 35.7 gallons per acre directly over the onion rows. (R. 133-140.) (Def. Ex. 2.) When respondent had sprayed approximately one-third of the ten acre tract of yellow onions, Dr. Stark came out on the field in the company of Paul Schmidt, a brother of Henry Schmidt (R. 145, 276). There is a conflict in the evidence as to certain aspects of what transpired at that time. However, both respondent and Dr. Stark testified that at that time there was only one onion protruding from the surface of the ground per foot. See testimony of respondent (R. 143) and testimony of Dr. Stark (R. 380). Both respondent and Dr. Stark testified that at that time Dr. Stark told respondent *that the oil would not hurt the onions that were beneath the surface of the ground*. See testimony of respondent (R. 146) and testimony of Dr. Stark (R. 382). Both respondent and Dr. Stark testified that at that time Dr. Stark told respondent that respondent should increase his rate of application to 50 gallons per acre. See testimony of respondent (R. 146) and testimony of Dr. Stark (R. 381). Paul Schmidt and Henry Schmidt corroborated respondent and Dr. Stark on each of the above matters. See testimony of Paul Schmidt (R. 277, 278) and testimony of Henry Schmidt (R. 89, 90).

Relative to the state of emergence of the onions at the time of spraying, there is a conflict in the evidence

as to the height at that time of the few onions that had emerged; however, there is no conflict in the evidence as to the quantity of onions that had emerged and as to the quantity of onions that were at that time beneath the surface of the ground. Dr. Stark, Henry Schmidt, Paul Schmidt and respondent all testified that there was approximately one onion protruding per linear foot (R. 380, 90, 278, 143). The few onions that had emerged had reached a height according to Dr. Stark of one and one-half to two inches (R. 370) and according to Henry Schmidt of one and one-fourth to one and one-half inches (R. 101). According to respondent they were barely protruding from the surface of the ground and had reached a height of one-sixteenth of an inch (R. 142) to, at most, one-eighth of an inch (R. 228), and according to Paul Schmidt they were just protruding through the surface (R. 278) and were still bent over (R. 280). Relative to the quantity of onions that were beneath the surface of the ground at the time of spraying, the testimony was as follows. Respondent testified that approximately one out of ten or twenty of the onions were barely protruding from the surface of the ground, that he had checked the germination of the crop at that time, that approximately eighteen to twenty plants had germinated per linear foot, that the crop was planted heavier than usual and that only one onion was protruding per linear foot (R. 142-145). Paul Schmidt testified that he observed the germination at the time, that there was a good germination of seed and a good stand of onions underneath the surface (R. 277, 278). Honor S. Palmer

testified that he checked the germination of the seed sometime before the application of the oil and observed that sufficient plants had germinated beneath the surface of the ground to make a crop of onions, and that he observed the field sometime after the application of the oil and at that time some onions were protruding but they were very scattered (R. 301, 302). Dr. Stark testified that he did not examine the ground to see if there were any seedlings beneath the surface (R. 371). Respondent, Henry Schmidt and Paul Schmidt all testified that, in response to a question at the time as to the effect of the oil on the onions, Dr Stark stated that there were plenty of onions beneath the surface of the ground to make a good crop (R. 146, 90, 277).

The following should be noted with reference to the condition of the crop at this time. Respondent had planted the seed on the ten acre tract of yellow onions at the rate of six pounds per acre using the No. 13 hole on a Planet Junior drill (R. 115, 175, 215) and the seed on the five acre tract of white onions at the rate of three pounds per acre using the No. 8 hole on the same drill (R. 114, 215). See corroborating testimony of Henry Schmidt (R. 85). The seed beds of the ten acre tract of yellow onions and the five acre tract of white onions were both mellow, moist, fine, sandy loams with a good mulch on top, and they were in substantially the same condition at the time of planting and at the time of spraying. See testimony of Henry Schmidt (R. 83, 86, 90), respondent (R. 118, 120, 121, 143), Paul Schmidt (R. 277), Joe Serre (R. 281) and Honor S. Palmer (R. 300, 301). The

soil of the five acre tract of white onions was substantially the same but slightly heavier than that of the ten acre tract of yellow onions. See testimony of Henry Schmidt (R. 87), respondent (R. 120, 121, 143), Joe Serre (R. 282) and Wilford E. Egbert (R. 290). The ten acre tract had been planted to tomatoes in 1947 (R. 106, 107) and summer fallowed and fertilized in 1948 (R. 83). At the time of spraying there was a good and uniform germination throughout the seed beds. See testimony of respondent (R. 143, 144), Paul Schmidt (R. 277) and Honor S. Palmer (R. 301). The presence of broad leaf and red root weeds indicated that the ground was in good condition to produce onions (R. 124). The quantity of weeds was not so large that they could not have been hand weeded (R. 225). The application of the oil to the ten acre tract of yellow onions and the south one acre of the five acre tract of white onions killed the weeds immediately. See testimony of respondent (R. 145, 225, 226) and testimony of Dr. Stark (R. 371). It also burned the tips of the few onions that were protruding at the time. The crop had been planted heavier than usual (R. 145). Respondent, Henry Schmidt and Paul Schmidt all testified that at the time of spraying Dr. Stark said that the oil would burn the tips of the onions that were protruding, but that it would not kill them. (R. 90, 145, 227, 277.)

3. FAILURE OF CROP.

Following application of the oil to the ten acre tract of yellow onions and south one acre of the five acre

tract of white onions the onions remained under the ground for from ten days (R. 244) to two weeks (R. 146) and turned dark yellow and brown (R. 183, 229). At about that time a few of the onions came through, and respondent cultivated the crop to relieve the condition (R. 229, 244). Two weeks later, or about the middle of May, approximately a forty or fifty per cent stand of onions had emerged from the ground (R. 246). They were two and one-half to three inches high, had a burnt, yellow, twisted appearance and were in a crippled, sickly condition. See testimony of respondent (R. 148), Joe Serre (R. 282, 283) and Honor S. Palmer (R. 303). At that time the north four acres that had not been sprayed of the five acre tract of white onions had reached a height of from ten to twelve inches, were green in color and in good condition. See testimony of respondent (R. 148, 263) and testimony of Joe Serre (R. 283). Respondent tried to carry the eleven acres that had been sprayed through and make a partial crop (R. 147, 182). He had heard Dr. Stark say that the oil would set the crop back but would not destroy it (R. 255). See corroborating testimony of Paul Schmidt (R. 277). Toward the latter part of May he spent about a week weeding the eleven acres (R. 246) to eliminate the weeds that had germinated subsequent to application of the oil (R. 247, 248). About the first of June he recultivated them (R. 246). About the middle of June he irrigated and fertilized them (R. 247). The onions continued not to grow and remained yellow, twisted and bent (R. 247). About the 15th of June he irrigated and fertilized them with sul-

phate of ammonia (R. 247, 248). After that he recultivated them (R. 248). In the early part of July the onions on the eleven acres that had been sprayed with the oil were in a stunted, injured condition (R. 255) and had attained an ununiform height of from three to, at the most, six inches (R. 262). At that time respondent determined that the onions on the eleven acres that had been sprayed would not make a marketable crop and abandoned them (R. 148, 182, 255). Joe Serre was of the opinion that at the time of his last examination in the latter part of May the onions on the eleven acres that had been sprayed would have headed out, but that they would have been of no commercial use because they would have been too small to market (R. 283). Respondent notified Dr. Stark of the damage to his crop in May or June, 1949 (R. 147, 148, 266).

4. CAUSATION AND COMPARATIVE YIELDS.

The four unsprayed acres of the five acre tract of white onions developed well and yielded 500 fifty pound bags of U. S. No. 1 grade onions per acre (R. 150). Respondent and Earl Toone both testified, with reference to the comparative yields of yellow and white onions, that yellow onions will produce an average of from one-third to one-half more tonnage per acre than will white onions (R. 150, 323, 324).

M. D. Wallace, manager and agricultural supervisor of the E. C. Olsen Company at Provo, Utah, a graduate of the Utah State Agricultural College, head of the Department of Horticulture at the Brigham Young

University for four years and an expert on use of oils for weed control on crops, was called as a witness on behalf of the respondent (R. 234, 235) with reference to the causal connection between application of the oil and destruction of the ten acres of yellow onions and the one acre of the five acre tract of white onions. He testified that if it were assumed that an oil having the same formula and qualities (R. 236) as the Wasco General Oil sold by appellant to respondent (R. 327, 328) (Pre-trial Order, Para. 6, R. 20), were applied to a crop of onions in the same condition (R. 235, 236) as respondent's eleven acres were at the time of spraying (R. 142, 143), at the same rate of application and in the same manner (R. 236) as respondent sprayed the ten acre tract of yellow onions and the one acre of the five acre tract of white onions (R. 131-141), that in his opinion such an application of oil would completely destroy the onions beneath the surface of the ground (R. 328, 329). He further testified that an application of such oils is not recommended within less than ten days prior to emergence (R. 330) or within more than ten days after planting (R. 334).

The testimony of Wilford E. Egbert (R. 287-292) and Dale Sugiyama (R. 324-327) was offered by the respondent for the purpose of showing the viability of the seed used by the respondent on the ten acre tract of yellow onions and the probable yield of the ten acre tract of yellow onions. This testimony was admitted in evidence without objection of the appellant. Wilford E. Egbert and Dale Sugiyama testified as follows. Eleven

acres of Utah Yellow Sweet Spanish onions were planted and raised on the Egbert farm in 1949 (R. 288, 289). The eleven acres were located approximately one and one-fourth miles east of the ten acre tract of yellow onions planted by the respondent and one-half mile south of the five acre tract of white onions planted by the respondent (R. 289, 325). The ground was prepared for planting by Wilford E. Egbert (R. 290, 291). The seed was planted, and the crop was raised and harvested by Dale Sugiyama (R. 324-326). Wilford E. Egbert purchased the seed from Henry Schmidt in 1949 (R. 288). He planted no acreage to yellow onions from seed obtained from any other source in 1949 (R. 288). (Henry Schmidt testified that this seed was taken from the same lot of seed as that which he delivered to the respondent and which the respondent used in planting the ten acre tract of Yellow Sweet Spanish onions concerned in the case before this court.) See testimony of Henry Schmidt (R. 85, 86). The preparation of the Egbert acreage for planting was substantially the same as the preparation of the acreage planted by the respondent. See testimony of Henry Schmidt with reference to fall ploughing in 1948, fertilizing, harrowing three times and levelling with an Everson leveler (R. 83, 84, 90); and, see testimony of Wilford E. Egbert with reference to fall ploughing in 1948, fertilizing, harrowing three times and levelling with an Everson leveler (R. 291). The Egbert acreage was planted at approximately the same time and at the same rate and depth

of seeding as was respondent's acreage. See testimony of respondent with reference to planting about the 1st of April at a rate of six pounds per acre to a depth of one inch (R. 114, 115, 118, 175, 215) and testimony of Wilford E. Egbert and Dale Sugiyama with reference to planting about the 20th of March at a rate of six pounds per acre to a depth of one inch (R. 215, 325). The same steps in cultivation were used and taken as were used and taken by the respondent on the ten acre tract of yellow onions down to the time when the respondent applied the oil. See testimony of respondent (R. 122) and testimony of Dale Sugiyama (R. 324-326) with reference to harrowing after planting to eliminate the weed seeds. The Egbert acreage yielded from 600 to 700 fifty pound bags per acre of U. S. No. 1 grade Utah Yellow Sweet Spanish onions (R. 327). The Egbert crop matured about October 1, 1949, and was harvested about November 1, 1949 (R. 326).

The testimony of Earl Toone was admitted in evidence on the question of viability of the seed used on the ten acre tract of yellow onions. In 1949 he raised Utah Yellow Sweet Spanish onions from seed that he obtained from Henry Schmidt that year (R. 313, 314). (Henry Schmidt testified that the Utah Yellow Sweet Spanish onion seed that he sold to Earl Toone in 1949 was taken from the same lot of seed that he delivered to the respondent and that the respondent used in planting the ten acre tract of yellow onions.) See testimony of Henry Schmidt (R. 85, 86).

The Toone acreage was planted at the same time and at the same rate and depth of seeding as was respondent's acreage. See testimony of respondent with reference to planting about the 1st of April at a rate of six pounds per acre to a depth of one inch (R. 114, 115, 118, 175, 215) and testimony of Earl Toone with reference to planting about the 1st of April at a rate of six pounds per acre to a depth of one inch (R. 314-315). The Toone acreage yielded 800 fifty pound bags per acre of U. S. No. 1 grade Utah Yellow Sweet Spanish onions (R. 322).

5. MARKET VALUE, ESTIMATED YIELD
AND ESTIMATED COSTS SUBSEQUENT
TO ABANDONMENT.

Morris Vance, produce manager of the Sterling Nelson Company, who as a part of his duties buys onions from farmers as a wholesaler and in the course of his work has occasion to observe the harvest of onions in Salt Lake County, was called as a witness on behalf of respondent with reference to the market value of onions in Salt Lake County in 1949 (R. 292, 293). He testified as follows relative to the time of harvesting onions and the steps after harvesting necessary to prepare onions for the market (R. 296). Onions are usually harvested during the month of October although some harvest carries over into November (R. 296). After they are harvested in October or November (R. 297), they have to be left lying in the fields to dry and cure from ten days to three weeks, according to weather conditions (R. 296). There-

after they must be placed under cover and graded and sorted according to size. The process of grading and sorting is usually done by hand, and the time that it takes depends on the yield (R. 297). He further testified that in 1949 the wholesale market price to farmers in Salt Lake County for U.S. No. 1 grade onions was as follows: in October, \$1.10 to \$1.20 per fifty pound bag of yellow or white onions, and in November and December, \$1.60 per fifty pound bag of yellow onions and \$1.85 per fifty pound bag of white onions (R. 294, 298).

Respondent estimated that the yield of the one acre that was ~~not~~ sprayed with the oil of the five M. & J. acre tract of white onions would have been the same as that of the four unsprayed acres, or 500 fifty pound bags of U. S. No. 1 grade onions per acre (R. 150, 152), and that the yield of the ten acres of yellow onions would have been from 600 to 800 bags per acre (R. 150). He further testified that the market value in Salt Lake County in 1949 per fifty pound bag of U. S. No. 1 grade onions was as follows: in October, \$1.65 to \$1.80 for yellow onions and \$2.50 for white onions; in November, \$2.00 to \$2.20 for yellow onions and \$3.20 for white onions; and, in December, \$2.00 for yellow onions (R. 151, 152).

Defendant's Exhibit 4, which is an account prepared by the respondent of the estimated costs of maturing, harvesting and marketing the ten acres of yellow onions and the one acre of white onions subsequent to the time of their abandonment in July, 1949

(R. 152-159), was offered and received in evidence without objection by appellant (R. 160). The account is based on an estimated yield of 500 fifty pound bags of white onions for the one acre of white onions and estimated yields of 500, 600, 700 and 800 fifty pound bags per acre of yellow onions for the ten acre tract of yellow onions. The account shows that the estimated costs subsequent to abandonment, which costs include personal labor, would have varied from \$2,565.50 to \$3,435.50 dependent on the amount of the yield. (R. 157-159.)

ARGUMENT

Point 1.

UNDER THE ADMITTED FACTS RESPONDENT SPRAYED THE CROP WITH THE OIL AS CONTEMPLATED BY THE TERMS OF THE WARRANTY.

Henry Schmidt and respondent testified, and Dr. Stark admitted, that at the time of the sale of the Wasco General Oil Dr. Stark told respondent that, "the oil would kill those onions that were up at the time that he applied it, but that it would not hurt those onions that were beneath the surface of the ground," *supra* pp. 5-8, (R. 87-88, 127, 379-382). Dr. Stark also told respondent that he should apply the oil at the rate of fifty gallons per acre, *supra* p. 6, (R. 221, 222, 380). That this warranty is subject to no other construction than that the oil would not hurt those onions that were beneath the surface of the ground at the time of its application regardless of when

they might emerge is borne out by the fact that Dr. Stark, by his own testimony, was present at the time of spraying, saw that one onion was up per foot and at that time told respondent that the oil would not hurt those onions beneath the surface of the ground, *supra* p. 9, (R. 380, 382), and on cross-examination admitted that he made no qualification as to how near the surface the submerged onions were so long as they were not protruding from the soil (R. 382). Respondent sprayed the crop at the rate of 25 gallons per acre or 35.7 gallons per acre directly over the onion rows, *supra* p. 9, (R. 130-140)). Based on the above and other evidence, *supra* pp. 3-9, the court instructed the jury that, “* * * as a matter of law * * * the plaintiff, through Dr. Stark, warranted that Wasco General Oil, if sprayed on defendant’s onion crop, as defendant sprayed it, * * * would not harm the onions that had not emerged from the soil, and that the defendant relied thereon and applied said spray substantially as directed.” (Instruction No. 9, R. 55.)

Appellant offered in evidence Exhibit B, which is the pamphlet on “Weed Control With Chemicals” written by Dr. Arvil L. Stark, (Exhibit B p. 2). Dr. Stark testified that he particularly directed respondent to page eleven of the pamphlet, which contains the following language relative to pre-emergence spraying:

“There is considerable experimental evidence that spraying the soil after planting but before the crop comes through, or emerges, is successful in annual weed control, but not perennials.

Less damage to the crop has resulted when applications are made about 2 days before the crop seedlings come through the soil.

“Oils alone and oil fortified with dinitros, and pentachlorophenol, and 2,4-D are used for pre-emergence spraying.

“*Detailed information on pre-emergence spraying will be sent upon request.*” (Italics ours.)

Respondent denied ever having seen the pamphlet prior to commencement of this action. *Supra* pp. 7-8. From the above words contained in the pamphlet appellant argues that respondent’s application of the oil after a few of the onions had emerged and at a time when the rest of the onions may have been within two days of emerging was a violation of appellant’s express instructions given at the time of sale of the oil and that application of the oil within two days of emergence of the onions was prohibited. (Appellant’s brief pp. 3, 9, 11, 12.)

The words contained in the pamphlet are neither in form or in substance an instruction or prohibition against use of the oil within two days prior to emergence. The words “ * * * considerable experimental evidence that spraying * * * before the crop comes through * * * is successful * * * ” and “less damage to the crop has resulted when applications are made about two days before the crop seedlings come through the soil,” are in the nature of general information concerning pre-emergence spraying. They are merely statements to the effect that in the past cer-

tain experiments had shown that under certain circumstances there would be little or no damage to a crop. They do not militate against or purport to prohibit the making of an express warranty without qualification to the effect that if part of the onions are up, the oil will not hurt the onions beneath the surface of the ground. The language of the pamphlet itself expressly contemplates that such a warranty may be made by words to the effect that detailed information on pre-emergence spraying will be given to those seeking it. Pursuant to those words the warranty was made by Dr. Arvil L. Stark, the man who wrote the pamphlet. Dr. Stark admitted that he made no qualification as to how near the surface of the ground the submerged onions were so long as they were not protruding from the soil, *supra* p. 21. The conclusion is inescapable, therefore, that whether or not respondent had knowledge of the wording of the pamphlet, his reliance on the express warranty was as a matter of law reasonable for the following reasons. 1. The wording of the pamphlet itself did not purport to prohibit or militate against the making of such a warranty. 2. The pamphlet itself contemplated that such a warranty might be made. 3. The warranty was made by the man who wrote the pamphlet. 4. The warranty was made without qualification as to how near the submerged onions were to the surface of the soil. 5. The man who wrote the pamphlet and made the warranty, by his own testimony, was present at the time of spraying and at that time told respondent that the oil would not hurt the onions beneath the

surface of the ground.

Appellant attacks the verdict of the jury on the ground that since there was no evidence that there were any onions beneath the surface of the ground that were not within two days of emergence and there was considerable evidence that the onions beneath the surface were within two days of emergence at the time of spraying, appellant's brief pp. 7-13, the verdict must be based on speculation as to the onions that were beneath the surface of the ground and not within two days of emergence, appellant's brief p. 29. This argument is a corollary of the argument set forth above to the effect that application of the oil by respondent within two days of emergence of the onions was a violation of appellant's instructions and prohibited. It is submitted that the scope of the warranty was that if part of the onions were up and the rest were beneath the surface of the ground, the oil would not hurt those onions beneath the surface, that that warranty was without qualification as to when the onions beneath the ground might emerge (R. 382), and that the language of the pamphlet did not prohibit the making of the warranty, *supra* pp. 20-23. Evidence that there were onions beneath the surface of the ground that would not emerge within two days after respondent sprayed the crop with the oil was not, therefore, necessary under the warranty. The decisions in *Parker v. Pettit*, 171 Or. 481, 138 P.2d 592, and *B. T. Moran v. First Security Corp.*, 82 U. 316, 24 P.2d 384, relative to conjectural damages, are not, therefore, applicable.

Point 2.

THERE WAS SUFFICIENT EVIDENCE THAT THERE WERE ONIONS BENEATH THE SURFACE OF THE GROUND AT THE TIME RESPONDENT SPRAYED THE CROP TO SUPPORT THE VERDICT OF THE JURY.

The court instructed the jury that for it to find for the respondent it must be satisfied by a preponderance of the evidence that the Wasco General Oil destroyed onions of the respondent that were beneath the surface of the ground or had not yet emerged. (Instructions No. 10 and 12-B, R. 56, 58.) Appellant attacks the verdict of the jury on the ground that the evidence shows that there were no onions beneath the surface of the ground at the time respondent sprayed the crop since all of the onions must, under the conditions existing, have already emerged. (Appellant's brief pp. 5, 15, 27, 28, 32, 36.) Appellant reaches this result through a process of reasoning to the effect that since respondent told Dr. Stark that the onions would not be up for two or three days at the time of their conversation on April 23, 1949, and the oil was not applied until April 26, 1949, according to Dr. Stark, appellant's brief p. 7, and since onions ordinarily emerge within two to five weeks after planting and respondent planted his onions during the first week in April, *ibid.* pp. 13-15, and since the witnesses testified that the few onions that were protruding had reached a height of from one-sixteenth of an inch to one and one-half inches, *ibid.* pp. 25-28, 34, 35, and since the soil, moisture, weather and seed germination

were perfect, *ibid.* pp. 14-15; therefore, all of the onions must have emerged at the time respondent sprayed the crop and, therefore, there could have been no onions beneath the surface of the ground at that time, *ibid.* pp. 5, 15, 27, 28, 32, 36. Dr. Stark, Henry Schmidt, Paul Schmidt and respondent all testified that there was approximately one onion protruding per linear foot at the time of spraying (R. 380, 90, 278, 143). Relative to the quantity of onions that were beneath the surface of the ground at the time of spraying, the testimony was as follows. Respondent testified that approximately one out of ten or twenty of the onions were barely protruding from the surface of the ground, that he checked the germination of the crop at that time, that approximately eighteen to twenty plants had germinated per linear foot, that the crop was planted heavier than usual and that only one onion was protruding per linear foot (R. 142-145). Paul Schmidt testified that he observed the germination at the time, that there was a good germination of seed and a good stand of onions beneath the surface of the ground (R. 277, 278). Respondent, Henry Schmidt and Paul Schmidt all testified that, in response to a question at the time as to the effect of the oil on the onions, Dr. Stark stated that there were plenty of onions beneath the surface of the ground to make a good crop (R. 146, 90, 277). *Supra* pp. 9-11. It is submitted that all of the evidence in the record is to the effect that there was a good crop of onions beneath the surface of the ground at the time respondent applied the oil.

Point 3.

DR. STARK ACTED WITHIN THE SCOPE OF HIS EMPLOYMENT AND HAD AUTHORITY TO MAKE THE WARRANTY.

The trial court instructed the jury that as a matter of law Dr. Stark at all times pertinent to the case was the agent and employee of appellant and was acting in the course and scope of his employment and that appellant was liable for damage caused respondent, if any, by virtue of Dr. Stark's acts, representations or promises, if any, Instruction No. 8 (R. 55), *supra* p. 5; and, that as a matter of law appellant, through Dr. Stark, warranted that Wasco General Oil, if sprayed on respondent's onion crop, as respondent sprayed it, would not harm the onions that had not emerged from the soil, Instruction No. 9 (R. 55), *supra* p. 21. Appellant attacks these instructions on the ground that the scope of Dr. Stark's employment was strictly limited to agricultural research and the giving of technical advice to farmers, did not include the sale or any connection with the sale of appellant's goods; and, that, therefore, the making of the warranty was not within his express or apparent authority. (Appellant's brief pp. 41-46.)

The question of the scope of Dr. Stark's employment and his authority to warrant is raised for the first time on this appeal. At the commencement of trial appellant stipulated that “* * * Dr. Arvil L. Stark, at all times material in this cause was the employee of the Wasatch Chemical Company, and was acting in the

course and scope of his employment." Appellant took no exception to the trial court's Instructions No. 8 and 9 (R. 406) and it did not request an instruction on either the scope of Dr. Stark's employment or his authority to warrant (R. 27-43). Since the only "actions" of Dr. Stark material to this cause were his statements at the time of sale of the oil in question and his statements and observations at the time of its application, it is submitted that the words of the stipulation, "acting in the course and scope of his employment" were intended to cover and did cover his statements and, therefore, the matter of his authority to make the warranty. Appellant can not, therefore, question either the scope of his employment or his authority to warrant at this time. Furthermore, the failure to except to the court's instructions as given or to request a conflicting instruction on the specific issue and take exception to its refusal precludes raising the question on appeal. *Hadra v. Utah National Bank*, 9 U. 412, 35 P. 508; *Morgan v. Child, Cole & Company*, 61 U. 448, 213 P. 177; *Straka v. Voyles*, 69 U. 123, 252 P. 677; *Kirchgestner v. Denver & R. G. W. R. Co.*, 225 P.2d 754; U. R. C. P., Rule 51.

If it were assumed that appellant is not bound by the stipulation and that he had preserved error in the instructions, it is submitted that the record amply supports the conclusion that as a matter of law the warranty was within Dr. Stark's express and apparent authority. Appellant reaches a contrary result by the following process. Since Dr. Stark's employment

was limited strictly to agricultural research and the giving of scientific information to farmers, appellant's brief p. 42, and since the evidence does not show that Dr. Stark ever sold or was connected with the selling of appellant's goods, *ibid.* pp. 42, 45, and in particular since the evidence does not show that Dr. Stark ever sold any goods to the respondent, *ibid.* pp. 42-43; the making of a statement by Dr. Stark in the nature of a warranty, would be unusual, *ibid.* p. 43, and, therefore, not within his apparent authority, *ibid.* p. 45. Without admitting the accuracy of this conclusion we submit that the only evidence in the record is to the contrary of the premises on which it is based. Dr. Stark is the Director of Agricultural Research and Information and an officer of the company (R. 353). That he is connected with the sale of the goods of the company, see testimony of Dr. Stark (R. 354, 359, 363), wherein in response to a series of questions about sales made by the company, he on each occasion testified that, "we sell them." On the occasion of purchase of the oil respondent went to the Wasatch Chemical Company on April 23, 1949 (R. 125), talked to Dr. Stark (R. 127), bought the oil pursuant to Dr. Stark's recommendation (R. 127) (Def. Ex. 3); and, since respondent was short of cash, Dr. Stark directed that the sale be made to him on credit (R. 219). Thus, Dr. Stark was connected with the actual sale of the oil in question to respondent. Appellant offered no affirmative evidence that the making of sales was outside of the scope of Dr. Stark's employment or that the making of warran-

ties was not within his authority. It was not an issue in the case.

Appellant attacks Instruction No. 9 on the ground that since the warranty was made prior to the sale by one who did not consummate the sale or receive the promise to pay, it was, therefore, too remote to form a part of the contract of sale of the oil, appellant's brief pp. 43, 45, and was, therefore, without effect. The evidence detailed in the preceding paragraph disposes of the question.

m.x. Appellant further attacks Instruction No. 9 on the ground that the assumed facts on which the warranty was based were that the onions had not emerged; while the actual facts at the time of spraying were that the onions had emerged. The warranty was to the effect that if part of the onions had emerged and the rest were beneath the surface of the ground at the time of spraying, the oil would not hurt those onions beneath the surface of the ground, *supra* pp. 20-23. The actual facts were that there was only one onion up per foot and there was a good crop of onions beneath the surface of the ground at the time of spraying, *supra* pp. 9-11.

Point 4.

THE TRIAL COURT DID NOT SUBJECT APPELLANT TO LIABILITY FOR A REPRESENTATION AS TO A METHOD OF APPLICATION. IT DID SUBJECT APPELLANT TO LIABILITY FOR AN AFFIRMATION OF FACT RELATING TO THE GOODS SOLD.

From the wording of Instruction No. 9 appellant argues that the court erred in imposing liability on

appellant for a representation as to the method of application of the oil by respondent rather than for a warranty as to the effect of the oil on the crop. (Appellants' brief pp. 37-40.) Appellant apparently reaches this result by the following process: that the words, " * * * if sprayed on defendant's onion crop, as defendant sprayed it, * * * " in the sentence, " * * * as a matter of law * * * plaintiff * * * warranted that Wasco General Oil, if sprayed on defendant's onion crop, as defendant sprayed it, * * * would not harm the onions that had not emerged from the soil, * * * " mean that appellant warranted the effect on the onions of the method of application of the oil by respondent rather than the effect on the onions of the oil itself; and that this instruction, therefore, imposed liability on appellant for a statement with reference to the effect of a suggested method or process of application and not for a statement with reference to the effect of the oil on onions that had not emerged from the surface of the ground; and, that since the law with reference to warranties in the sale of goods is not applicable to statements relative to a suggested method or process, respondent cannot recover under this instruction. We submit that: (1) the conclusion reached by appellant from the wording of the instruction is not correct; and (2) if it is assumed for the purpose of argument that appellant's conclusion is correct, the instruction did not prejudice appellant; and (3) appellant has not preserved error in the instruction on this issue.

1. The conclusion reached by appellant is not correct. Section 12 of the Uniform Sales Act defines an express warranty as, "any affirmation of fact or any promise by the seller relating to the goods * * *." Section 81-1-12, U.C.A., 1943. The words, "plaintiff * * * warranted that Wasco General Oil if sprayed on defendant's onion crop, as defendant sprayed it, * * *" in the sentence " * * * as a matter of law * * * plaintiff * * * warranted that Wasco General Oil, if sprayed on defendant's onion crop, as defendant sprayed it * * * would not harm the onions that had not emerged from the soil, * * * " are merely an instruction by the court to the effect that as a matter of law appellant did warrant what the effect of the oil would be under certain circumstances and that respondent did apply the oil within the scope of appellant's warranty as to *what the effect of the oil would be* under those circumstances. The words of the sentence, "plaintiff * * * warranted that Wasco General Oil * * * would not harm the onions that had not emerged from the soil, * * *" are an instruction that appellant made an express affirmation of fact relative to the effect of the oil, to-wit, that the oil, " * * * would not harm the onions that had not emerged from the soil * * *."

2. If it is assumed for purpose of argument that appellant's interpretation of the instruction is correct, the instruction, nevertheless, did not prejudice appellant. The admitted facts of the case are that Dr. Stark told respondent that Wasco General Oil would not

hurt the onions that were beneath the surface of the ground if applied at a rate of fifty gallons per acre, *supra* pp. 5-6, 9. All of the evidence in the case is to the effect that respondent did apply the oil at less than the rate of fifty gallons per acre, *supra* p. 9. It was, therefore, within the province of the court to instruct the jury that as a matter of law appellant warranted that Wasco General Oil would not hurt the onions that were beneath the surface of the ground, and that respondent applied the oil within the scope of that warranty. The language that the court used in so instructing the jury could not possibly prejudice the appellant. The issue before the jury was whether or not Wasco General Oil did destroy onions beneath the surface of the ground and not the theory on which appellant would be liable if it did.

3. If it is assumed for the purpose of argument that the instruction as given was erroneous, appellant has not preserved error on this issue. The question of whether or not the statement made by appellant was in fact a warranty is raised for the first time on this appeal. Appellant did not except to the court's Instruction No. 9 as given and did not request an instruction on the issue of whether or not the statement made was a warranty with reference to the effect of the oil. Appellant claims to have preserved error in the instruction by having made a request for a directed verdict of no cause of action on respondent's counterclaim. (Appellant's brief p. 40.) To preserve error in an instruction an appellant must point out

to the trial court specifically in what respect the instruction as given is erroneous either by requesting a conflicting instruction on the specific issue and excepting to the trial court's refusal or by excepting to the instruction as given and specifying wherein it is erroneous. *Hadra v. Utah National Bank, Morgan v. Child, Cole & Co., Straka v. Voyles, Kirchgastner v. Denver & R. G. W. R. Co., U. R. C. P., Rule 51, supra* p. 28. This appellant did not do.

Point 5.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT OF THE JURY ON THE ISSUE OF WHETHER OR NOT THE APPLICATION OF THE OIL CAUSED RESPONDENT'S LOSS OF CROP.

The court instructed the jury that for it to find for the respondent it must be satisfied by a preponderance of the evidence that the Wasco General Oil destroyed onions of the respondent that were beneath the surface of the ground or had not yet emerged. (Instructions No. 10 and 12-B, R. 56, 58.) Appellant attacks the verdict of the jury on the question of causation because of insufficiency of the evidence. He does so on the following grounds, (Appellant's brief pp. 46-53.) 1. Any one of many causes might have interfered with the crop, *ibid.* pp. 46-47. 2. One-half of the crop was lost through poor seed and the other half through abandonment, *ibid.* pp. 47-48, 51-57. 3. The evidence shows that the oil did not destroy the weeds or the onions that had emerged at the time of its application. Therefore, it is apparent that the

oil did not destroy the onions that were beneath the surface of the ground, *ibid*, pp. 21-25, 28-29, 51. 4. The evidence as to probable yield, based on neighboring crops as to which there was no similarity of conditions, was conjectural, and therefore, there was not sufficient evidence to support the verdict on the question of cause of loss, *ibid*. pp. 48-51; and, further, that since the evidence was incompetent on the question of probable yield of respondent's crop, there was not sufficient evidence to support the verdict of the jury on that question, *ibid*. pp. 57-58.

1. Appellant apparently claims that since any one of the many causes, to-wit: that the land had been a dry farm and had never been planted to row crops, that the land was badly infested with weeds, that the seed bed had been harrowed ten days after planting with the teeth of the harrow set at a ten degree angle, that the land had not been cultivated after planting, that the land was given to crusting, and that the seed was planted at the normal rate of three pounds per acre and was only 56% viable, might have interfered with development of the crop, therefore, the evidence was insufficient to support the verdict, *ibid*. pp. 46-47.

Without admitting the soundness of the conclusion we submit that the evidence does not support the premises on which the conclusion is based, and that in any event the question was for the jury. The record shows the following. The land was planted to row crops, to-wit, tomatoes in 1947 (R. 106, 107) and summer fallowed and fertilized in 1948 (R. 83). The

quantity of weeds was not so great that they could not have been hand weeded (R. 225). A neighboring farmer had harrowed his crop ten days after planting with the teeth of the harrow set at a ten degree angle, and his crop yielded 600 to 700 bags of onions per acre. The harrowing did not disturb respondent's onions. The one acre that was sprayed with the oil of the five acre tract of white onions was not harrowed after planting, and the one acre failed. (R. 122-123, 325-327.) The land was cultivated three times after planting (R. 244, 246, 248). The testimony of five witnesses was to the effect that the soil was not crusted at the time of planting or at the time of spraying (R. 83, 86, 90, 118-121, 143, 277, 381, 300, 301). The yellow onion seed was planted at the rate of six pounds instead of three pounds per acre because it was fifty-six per cent viable (R. 115, 175, 215, 85).

2. Appellant claims that since respondent's evidence shows that his yellow onion seed was only fifty-six per cent viable and since respondent stated in his deposition that he planted his onion seed at the rate of three pounds per acre, which is the normal rate of seeding for seed that is one hundred per cent viable; it is apparent that only one-half of a normal crop of yellow onions would be produced; and, since respondent admitted that he produced one-half of a normal crop and abandoned it, respondent's evidence points with as much force to the fact that his total crop was lost through bad seed and abandonment as it does to the fact that it was lost as a result of application

of the oil; and, therefore, ^{respondent}~~appellant~~ can not recover m-21
under the doctrine of *Reid v. San Pedro, L. A. & S. L. R. R. Co.*, 39 U. 617, 118 P. 1009; *Tremelling v. Southern Pacific Co.*, 51 U. 189, 170 P. 80; and, *Peterson v. Richards*, 73 U. 69, 272 P. 229. (Appellant's brief pp. 47-48, 51-57.)

To reach the conclusion that the seed was the cause of loss of one-half of respondent's yellow onions appellant must take the position that respondent's statement in his deposition that he planted his onion seed at the rate of three pounds per acre (Pl. Ex. J pp. 6-7), is conclusive evidence that respondent planted his yellow onions at the rate of three pounds per acre. Respondent testified as follows at trial. He planted the seed on the five acre tract of white onions at the rate of three pounds per acre using the No. 8 hole on a Planet Junior drill (R. 114, 215) and he planted the seed on the ten acre tract of yellow onions at the rate of six pounds per acre using the No. 13 hole on the same drill (R. 115, 175, 215). He planted the yellow onions at the rate of six pounds per acre because he knew the seed was only fifty to fifty-six per cent viable (R. 215) as a result of previous tests made by both him and Henry Schmidt (R. 175). On cross-examination he was confronted with the statement in his disposition to the effect that he had planted onion seed at the rate of three pounds per acre (R. 174). He then explained what appeared to be a variation between his testimony in his deposition and his testimony at trial. His explanation was as follows.

The ten acre tract of yellow onions was in fact drilled at the rate of six pounds per acre, but only three pounds of good seed was actually planted because the seed was only fifty per cent viable (R. 175). Respondent's testimony that the yellow onions were in fact drilled at the rate of six pounds per acre is corroborated by the testimony of Henry Schmidt to the effect that because the yellow onion seed tested fifty-six per cent viable he recommended that respondent drill it at the rate of six pounds per acre instead of the normal rate of three pounds per acre (R. 85). Respondent's testimony is further corroborated by the fact that Earl Toone in drilling the same seed at the rate of six pounds per acre used the same hole as did respondent, to wit, the No. 13 hole on a Planet Junior drill (R. 85-86, 313-314). Furthermore, a close reading of respondent's deposition (P. Ex. J, pp. 6-7) reveals that in stating that he planted his seed at the rate of three pounds per acre, he was probably referring to the rate at which he planted his five acre tract of white onions and not to the rate at which he planted his yellow onions because the question concerning the rate of seeding was immediately preceded by a question concerning the 500 bag per acre yield on the tract of white onions. There is no express statement in the deposition as to the rate of seeding on the ten acre tract of yellow onions. In any event it is submitted that the rate of seeding of the yellow onions, the viability of the seed and the credibility of the witness were questions for the jury; and, that it was within the province of the

jury to determine that the seed did not cause the loss of one-half of the crop of yellow onions.

In reaching the conclusion that the other one-half of the crop was produced and lost because respondent abandoned it, appellant states that respondent admitted that he produced one-half of a normal crop and abandoned it. (Appellant's brief, pp. 47-48, 51-57.) We submit that the record is to the contrary. Appellant's claim that respondent admitted that he produced one-half of a normal crop is based on a partial quotation of respondent's testimony in which respondent stated that a forty to fifty per cent *stand* of onions came up, *ibid.* p. 54. The statement (R. 246) was as follows:

“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.*”

The word “stand” with reference to crops usually refers to the relative number of plants growing on a particular area and not to the quality of the plants. That respondent was using the word in that sense is evident from the quotation itself. Immediately following the words, “40 or 50% stand” are the words, “Maybe it wasn't that much. It was just barely enough, if they would have gotten in and started growing * * *.” It is further evident that respondent was referring

to the quantity of onions that came up and not to their quality from the fact that the quotation was with reference to the status of the crop about the middle of May (R. 246). At that time the "50% stand" of sprayed onions were two and one-half to three inches high, had a burnt, yellow, twisted appearance and were in a crippled, sickly condition (R. 148, 282, 283, 303). At that time the four unsprayed acres of the five acre tract of white onions had reached a height of from ten to twelve inches, were green in color and in good condition (R. 148, 263, 283). *Supra* p. 13. The word "stand" was used with reference to the quantity of onions throughout the case. See testimony of Paul Schmidt (R. 277) in which he quoted Dr. Stark as saying, "Even if it does kill them, there is *enough* underneath the surface of the ground to make a good *stand* for you," and testimony of Joe Serre (R. 282) in which in response to a question with reference to the stand or quantity, he replied, "it was a poor stand." Respondent further testified that by July the sprayed onions had reached an ununiform height of from three to, at the most, six inches (R. 262) and were in a stunted, injured condition (R. 255), and that at that time he could see that the onions would not make a marketable crop and that there was no hope for a crop so he had to abandon them (R. 148, 255). Joe Serre testified that the onions on the eleven acres that had been sprayed would have been of no commercial use because they would have been too small to market (R. 283). We submit that the

overwhelming weight of the evidence is that the eleven acres of sprayed onions were destroyed and that respondent's testimony was to that effect.

Appellant quotes at length from Dr. Stark's testimony to the effect that he examined the five acre tract of white onions in May and could see no difference between the four unsprayed acres and the one acre that was sprayed with the oil, appellant's brief pp. 54-56. At most this merely creates a conflict in the evidence as to the condition of the onions in May. But, it also raises a question as to why Dr. Stark was out there examining the five acres of white onions if there was not something wrong. He admitted on cross-examination that at that time he told respondent, "Sometimes it is necessary to try these things out before you really know what their effect will be." (R. 387-388.) Dr. Stark's testimony is the only evidence in the record from which even an inference can be drawn that the ten acres of yellow onions and the one sprayed acre of the five acre tract of white onions were not destroyed. It was within the province of the jury to determine the question.

At this point it should be noted that appellant claims under Point V, appellant's brief pp. 54-57, with reference to damages, that it is not questioned and respondent admits that he could have produced a fifty per cent crop and that since he failed to exercise diligence to minimize the loss by carrying the fifty per cent crop through to completion, respondent's recovery must be limited to fifty per cent of the probable yield of the crop that he might have produced. The evidence

detailed in the preceding paragraphs disposes of this question. The overwhelming weight of the evidence is that the total crop failed. Furthermore it should be noted that respondent did exercise every effort to save the crop prior to abandonment. See Statement of Evidence, 3. Failure of Crop, *supra* pp. 12-14.

3. Appellant claims that since such a reduced quantity of oil was applied and the oil was so volatile, and particularly since respondent testified that the oil only burned the tips of the onions that were protruding and that onions continued to grow after application of the oil and since one of respondent's witnesses testified that on his examination after the spraying, the tips of the onions that were protruding were discolored and the weeds were very much obstructed in growth; it is apparent that the oil did not kill either the weeds or the onions that had emerged at the time of its application; and, therefore, it is apparent that the oil could not have destroyed the onions beneath the surface of the ground. (Appellant's brief pp. 21-25, 28-29, 51.)

Without admitting the accuracy of this conclusion we submit that the record is to the contrary. With reference to the quantity of oil that was applied, Dr. Stark himself testified that at the time of application the weeds were oil soaked (R. 371). With reference to the rate of application and volatility of the oil, M. D. Wallace, an expert witness called on behalf of respondent, testified that in his opinion the oil would destroy the onions beneath the surface of the ground

(R. 328, 329). With reference to the conclusion that the oil did not kill the weeds and the onions that had emerged at the time of its application, both respondent and Dr. Stark himself testified that the oil did kill the weeds that had emerged at that time (R. 145, 225, 226, 370, 371). Dr. Stark also testified that the oil killed the few onions that had emerged (R. 370), but that he told respondent that the oil would not kill those onions beneath the surface of the ground. Neither the testimony of respondent's witness, Honor S. Palmer, to the effect that at the time of his examination after the spraying, the tips of the onions that had emerged were discolored and the weeds were very much obstructed in growth (R. 302) nor the testimony of respondent to the effect that the oil did burn the tips of the few onions that had emerged at the time of its application and that thereafter some onions did grow on the ground (R. 246) in a burnt, yellow, twisted condition (R. 148, 282, 303) constitute admissions that the oil did not destroy the onions that had emerged at the time of its application. See Statement of Evidence, 2. Application of Oil and 3. Failure of Crop, *supra* p. 8 *et seq.* It is submitted that the admitted facts are that the oil did destroy the weeds and the onions that had emerged on the date of its application, and whether or not the oil destroyed the onions beneath the surface of the ground was a question for the jury.

4. Appellant apparently claims that since the evidence as to probable yield was based on neighbor-

ing crops as to which there was no similarity of conditions or farming methods, respondent's evidence as to the amount of his loss was conjectural; and, therefore, there was not sufficient evidence to support the verdict of the jury on the question of cause of loss, appellant's brief pp 48-51; and, further, that since the evidence was incompetent on the question of probable yield of respondent's crop, there was not sufficient evidence to support the verdict of the jury on that issue, *ibid.* pp. 57-58.

Without admitting the accuracy of either conclusion, we submit that the evidence is to the contrary of the premises on which these conclusions are based. The testimony of Wilford E. Egbert and Dale Sugiyama was offered by respondent to show the viability of the seed used on respondent's ten acre tract of yellow onions and the probable yield of the ten acre tract of yellow onions. The testimony was admitted in evidence without objection by appellant. The evidence showed the following. Eleven acres of Utah Yellow Sweet Spanish Onions were planted on the Egbert farm in 1949. The Egbert acreage was located in close proximity to that of respondent. The soil was prepared for planting and fertilized in substantially the same manner and by substantially the same methods as was that of respondent. The seed was obtained from the same lot of seed and was drilled at the same rate, to the same depth and at approximately the same time as was that of respondent. The same steps in cultivation were taken after planting down to the time of

application of the oil ^{was were taken} by respondent. The Egbert acre- Mr. H.
age yielded from 600 to 700 fifty pound bags per acre
of U. S. No. 1 grade Utah Yellow Sweet Spanish onions.
The Egbert crop was harvested about November 1,
1949. The testimony of Earl Toone was admitted in
evidence solely on the question of viability of the yel-
low onion seed used by respondent (R. 321). The evi-
dence showed the following. The Toone acreage was
planted at the same time as was that of respondent.
The seed was obtained from the same lot of seed
and drilled at the same rate and to the same depth
as was that of respondent. The Toone acreage yielded
800 fifty pound bags per acre of U. S. No. 1 grade
Utah Yellow Sweet Spanish onions. See Statement of
Evidence, 4. Causation and Comparative Yields, *supra*
p. 15 *et seq.*

We submit that the similarity of conditions and
farming methods with reference to the Egbert acreage
was sufficient to admit the evidence as to the Egbert
yield on the issue of probable yield of respondent's
crop, that the credibility of this evidence was a ques-
tion for the jury and that this evidence alone would
have been sufficient to support the verdict on the ques-
tion of probable yield of respondent's crop. See *Lester*
v. Highland Boy Gold Mng. Co., 27 U. 470, 76 P. 341;
Hopper v. Elkhorn Valley Drainage District, 108 Nebr.
550, 188 N. W. 239, to the effect that yields on similar
lands in the neighborhood cultivated in a similar man-
ner is admissable on the question of probable yield of
the crop in issue. Appellant cites *Crouch v. National*

Livestock Remedy Co., et al, 205 Iowa 51, 217 N. W. 557, to the contrary. In that case a purchaser of a hog remedy, in an action for breach of warranty against the seller, sought to prove that the remedy killed his hogs by evidence that the remedy also killed hogs of other farmers without showing that the remedy sold to him had the same content as the remedy sold to the other farmers. The plaintiff's own evidence showed that the chemical content of the remedy varied at different times. The case would be applicable to the instant case if respondent had sought to prove that the Wasco General Oil sold to him killed his onions by evidence that a Wasco General Oil having a different chemical content killed the crops of other farmers. Appellant also claims that the *Crouch* case is similar to the instant case in that respondent did not abandon the onions for from six to eight weeks after application of the oil and in the *Crouch* case the hogs did not die for from six weeks to three months after being fed the remedy. In the instant case the effect of the oil was observed shortly after its application, and respondent tried to carry the crop through to minimize the loss, *supra* p. 12 *et seq.* It is submitted that the *Crouch* case is distinguishable on the facts and in principle from the case before this court. That the casual connection between the application of a substance to a crop and the effect of the substance on the crop may be proven either by evidence of the effect of use of the same substance on different crops or by visual observation of the effect of the substance on the

crop that is damaged, see *Carter v. McGill*, 168 N. C. 507, 84 S. E. 802, *aff'd on rehrg.*, 171 N. C. 775, 89 S. E. 28; *Swift & Co. v. Aydelt*, 192 N. C. 330, 135 S. E. 141.

Furthermore if it were assumed for the purpose of argument that the evidence with reference to the Egbert acreage was incompetent on the question of probable yield, it is submitted that other evidence in the record amply supports the verdict of the jury. The four unsprayed acres of the five acre tract of white onions yielded 500 fifty pound bags per acre. Both the respondent and Earl Toone testified that the comparative yield of yellow onions is one-third to one-half more per acre than white onions. (R. 150, 323, 324.) That the yield of the four unsprayed acres of respondent's own crop was admissible to show the probable yield of the eleven sprayed acres is without question, *Naylor v. Floor*, 51 U. 382, 170 P. 971. Appellant concedes this point, appellant's brief page 58. Since all of the evidence in the record is to the effect that the yield of yellow onions is from one-third to one-half more per acre than that of white onions, and the yield of the four unsprayed acres of white onions was 500 fifty pound bags per acre of U. S. No. 1 grade White Sweet Spanish onions, it is apparent that the probable yield of the ten acres of yellow onions would have been from 666 to 750 fifty pound bags of U. S. No. 1 grade Yellow Sweet Spanish onions per acre and that the jury would have been justified in so finding. Further, the testimony of respondent was received in evidence

without objection by appellant as to the estimated yield of the one sprayed acre of white onions and the ten sprayed acres of the yellow onions. Respondent testified that the probable yield of the one acre of white onions would have been the same as that of the four unsprayed acres, to-wit, 500 fifty pound bags of U. S. No. 1 grade White Sweet Spanish onions and that the probable yield of the ten acre tract of yellow onions would have been from 600 to 800 fifty pound bags of U. S. No. 1 grade Yellow Sweet Spanish onions per acre (R. 150, 152). We submit that the evidence of probable yield was sufficient to support the verdict of the jury.

In the light of the testimony of the expert witness, Mr. M. D. Wallace, *supra* pp. 14-15, and in the light of the condition of the one sprayed acre of the five acre tract of white onions as compared with the condition of the four unsprayed acres following the application of the oil, *supra* p. 12 *et seq.*, and in the light of the evidence as to the favorable conditions existing with reference to the sprayed acreage at the time of application of the oil, *supra* p. 11 *et seq.*, and the subsequent degeneration of the sprayed acreage, *supra* p. 12 *et seq.*, it is submitted that there was sufficient evidence to support the verdict of the jury on the issue of whether or not the oil destroyed the crop.

Point 6.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT THE VERDICT OF THE JURY AS TO THE AMOUNT OF RESPONDENT'S DAMAGE.

Appellant attacks the verdict of the jury on the

ground that the damages awarded were excessive and concludes that under the evidence the verdict could not have exceeded \$1,857.75. Appellant bases this conclusion on three erroneous premises. They are as follows. 1. Respondent produced and abandoned fifty per cent of a normal crop. 2. The maximum probable yield of respondent's ten acre tract of yellow onions was 500 fifty pound bags per acre. 3. The evidence would not support a verdict based on a market value in excess of \$1.20 per fifty pound bag. (Appellant's brief pp. 57-58.)

We submit that the record is to the contrary.

1. As heretofore noted relative to the contention that respondent produced and abandoned fifty per cent of a normal crop, the evidence is that the ^{total} crop failed, that the onions that did emerge from the ground would have been of no commercial use because they would have been too small to market and that respondent made every effort to save the crop prior to abandonment. Point 5 (2) *supra* p. ³⁹~~38~~ *et seq.* m. & d.

2. Relative to the contention that the maximum probable yield of respondent's ten acre tract of yellow onions was 500 fifty pound bags per acre, the evidence was sufficient to support a verdict of the jury based on a probable yield of 600 to 800 fifty pound bags per acre for the ten acres of yellow onions and 500 fifty pound bags for the one acre of white onions. Point 5 (4) *supra* p. 43 *et seq.*, and p. 47 *et seq.* m. & d.

3. In arriving at the conclusion that the evidence would not support a verdict based on a market value

in excess of \$1.20 per fifty pound bag appellant assumes, first, that the only evidence in the record as to the market value of onions in October, 1949, was \$1.20 per fifty pound bag and, second, that the only time of harvesting of onions in Salt Lake County was October. As to the first proposition, the evidence shows market values for onions in Salt Lake County in October, 1949, ranging from \$1.20 (R. 294) to \$1.65 (R. 151) per fifty pound bag. As to the second proposition, the evidence shows that the time of harvest of onions in Salt Lake County included both the months of October and November (R. 296, 326), that the market value in November was \$1.60 per fifty pound bag of yellow onions and \$1.85 per fifty pound bag of white onions and that the price was the same in December. (R. 294, 298.) *Supra* p. ⁴⁵44 and p. 18 *et seq.*

n. & d.

Assuming the jury found a yield of 625 fifty pound bags per acre for the ten acres of yellow oinos and 500 fifty pound bags for the one acre of white onions or a total yield of 6,750 bags on respondent's eleven acres and assuming a market value of \$1.20 per fifty pound bag, the gross value of the onions would be \$8,100.00 and the estimated costs subsequent to abandonment would be \$2,928.00 (Defs. Ex. No. 4). Deduction of the estimated costs subsequent to abandonment from the \$8,100.00 would leave a net return of \$5,172.00. Assuming that the jury found a yield of 500 fifty pound bags per acre for the eleven acres of the onions and assuming that the jury found a market value of \$1.40 per fifty pound bag, the gross value of the onions would be

\$7,700.00 and the estimated costs subsequent to abandonment would be \$2,565.50 (Def. Ex. No. 4). Deduction of the estimated costs subsequent to abandonment from the \$7,700.00 would leave a net return of \$5,134.50. The verdict in this case was \$5,069.50 (R. 23). We submit that taking the numerous variables open to the jury in calculating the amount of damage, the evidence is sufficient to support a much larger verdict than that rendered.

Respectfully submitted,

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Attorneys for Respondent.