

1953

Hyrum Jenkins and Belle Moyle Jenkins v. John B. Morgan et al : Brief of Appellants

Utah Supreme Court

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W. D. Beatie; Attorney for Plaintiffs and Appellants;

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IN THE SUPREME COURT OF THE STATE OF UTAH

HYRUM JENKINS and BELLE
MOYLE JENKINS, his wife,
Plaintiffs and Appellants,

— vs. —

JOHN B. MORGAN, WILLIS MOR-
GAN, ALBERT MORGAN, BERT
MORGAN, ETHEL G. MORGAN,
M. L. BUXTON and MILO BUR-
RASTON,
Defendants and Respondents.

Appellants' Brief
FILED

W. D. BEATIE
Clerk, Supreme Court, Utah *Attorney for Plaintiffs
and Appellants.*

433 Judge Building
Salt Lake City, Utah

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Defendants and Respondents.

Case No.
7826

Appellants' Brief

THE FACTS

This is an appeal by the plaintiffs, Hyrum Jenkins and Belle Moyle Jenkins, his wife, from a judgment in favor of the plaintiffs and against the defendants in the sum of \$24.00, together with interest thereon at 6% per annum from and after September 2, 1947 and their costs in the sum of \$....., which judgment is dated January 10, 1952.

This action was commenced by the plaintiffs filing an action against John B. Morgan, Willis Morgan, Al-

bert Morgan, Bert Morgan, Ethel G. Morgan, M. L. Buxton and Milo Burretson, the latter two being bondsmen on a supersedeas bond on appeal in the sum of \$1,000, bearing date of September 2, 1947, which was in case No. 14026 of the Fourth Judicial District Court, or Supreme Court, Case No. 7108. Judgment in that cause was entered in favor of the plaintiffs and against defendants for quiet title to certain properties and the defendants, except these bondsmen aforesaid, filed a notice of appeal and said defendants, including the two bondsmen, did on the 3rd day of June, 1947, file a \$300 cost bond and the defendants did on the 5th day of June, 1947, including the bondsmen, did file \$100 supersedeas bond based on an order fixing the amount of undertaking the bond on appeal in an ex parti matter before the court on the 10th day of June, 1947. Motions were duly filed by the plaintiffs for exception to sureties and reconsideration of the amount of bond. The Hon. Joseph E. Nelson did on the 27th day of August, 1947, call up for reconsideration on motion of plaintiffs the determination of the amount of undertaking of bond on appeal based upon the affidavit of plaintiffs that it was their desire to have the ground made available to them for breaking of the ground and the planting to grain which would mature and be harvested in 1948, and that the value of said ground was the sum of \$20.00 per acre. Further that plaintiff had made arrangements for the drilling for water on said ground, and that the plaintiffs during the period of appeal desired the property for agricultural purposes. At this hearing plaintiffs adduced evidence of the availability of the ground for agricul-

tural purposes and the matter was continued to September 2, 1947, at which time plaintiffs adduced further evidence showing the availability for breaking the 160 acres of ground under question and the drilling for water, and on said date the Hon. Joseph E. Nelson did order the increase of bond to \$1,000; that the defendants, including the bondsmen, did then file a new supersedeas bond in the sum of \$1,000 on the 2nd day of September, 1947.

The costs incident to the appeal in case No. 7108 were paid by the defendants, but no money was paid by reason of the withholding of the ground from the plaintiffs between September 2, 1947 and August 16, 1948 when this court did render its decision in case No. 7108, affirming the decision rendered by the Hon. Joseph E. Nelson. This action was then brought upon the bond of the defendants for the value of the use of the withholding on the part of the defendants, between September 2, 1947 and the 9th day of September, 1948, upon which date the remittitur in case No. 7108 was docketed in the Fourth District Court.

Trial in this matter was had on November 26, 1951 and December 3, 1951 and the judgment of this court in the sum of \$24.00 in favor of plaintiff was entered on January 10, 1952, from which this appeal is taken.

The issue involved is whether or not the measure of damage of the value for use for the withholding of the property by the defendants from the plaintiffs is to

be based upon the value of use as grazing ground, which is the position which the trial judge took in this matter or the value of the use as agricultural ground.

David S. Powelson, called as a witness for the plaintiff, testified that he knew this particular property during his lifetime and that his business was that of a farmer all his life in and about the Goshen area; that he had been on this particular ground involved in the years 1946 and 1947 with the intent of purchasing the ground from the plaintiffs, and that he did enter into a contract with the plaintiffs for the purchase of the same on May 17, 1947. (R. 27-28). That this witness did receive the 160 acres of ground in question on December 6, 1948, in accordance with the agreement entered into with the plaintiffs (R. 33); that after receiving the property he broke the ground in August of 1949 (R. 34); that he likewise drilled for water and obtained the same and that a crop was planted in the spring of 1950 (R. 36) and that a harvest was made in 1950 (R. 36); that of said harvest approximately 75 or 80 acres was in dry land wheat and 30 acres was in irrigated wheat; that the 80 acres of dry farm wheat yielded 15 bushels per acre and the 30 acres of irrigated grain yielded 40 bushels per acre. (R. 37). That during the year 1946, or 1947, this witness went onto the property in question with Mr. Marcellus Palmer, a land specialist, to determine the depth and quality of the soil (R. 38-39). That the reasonable rental value of this 160 acres of ground for farming purposes was worth \$30.00 per acre on the irrigable ground (R. 42) and on the non-irrigable ground

the reasonable rental value per acre was \$10.00 per acre. (R. 42-43). That there was 25 acres of irrigated potatoes. (R. 44).

Hyrum Jenkins called as a witness and identified the agreement with David S. Powelson (Ex. B) (R. 60) and then identified a photostatic copy of deed to David S. Powelson and Arnold Dewitt Trotter deeding the property in question (Ex. C.R. 60).

Marcellus Palmer called as witness for plaintiff stated his qualifications as an expert and that in August of 1947, he made a detailed examination of the property in question. (R. 76). On this examination he made six soil tests to a depth of four feet and described the forage and vegetation then growing on the land (R. 77). He testified that for dry land agriculture a yearly rental value per acre would be about \$10 per acre and if it were used for irrigated agriculture about \$30.00 per acre. (R. 82). On cross examination he testified that rentals are based upon about 50% for the type of crops, wheat, alfalfa, barley or oats. (R. 83).

David S. Powelson recalled to the stand identified Ex. "E" an assignment of his interest to the plaintiff. (R. 91). On cross examination witness testified that he rented comparable land in 1948 and 1949 for \$30 per acre which land was under irrigation. (R. 93). That the ground under question approximately 30 years ago had been planted to corn. (R. 95). That the dry farm ground was broken up in August of 1949 and drilled for water

which was obtained in the spring of 1949. (R. 97). That grain was planted in the ground dry farm in 1949 and the irrigable land planted in the spring of 1950. (R. 98). That the cost of producing water per acre is about \$2 per acre. (R. 103).

John B. Morgan, one of the defendants, called as witness for plaintiffs, was present in Court on September 2, 1947 in Judge Nelson's Court Room when the Judge ordered the bond in this case raised to \$1000. (R. 106-107). And he was present in Court when Mr. Jenkins testified that he desired possession of the ground for the purpose of having the same broken and drilled for water. (R. 113). That he did not remember Mr. Monsen testifying as to his agreement to break the ground. (R. 114). And that he did recall Mr. Jenkins testifying that he desired the use of the ground for agricultural purposes. (R. 114-115).

Willis Morgan, called as witness for plaintiffs, was present in Court on August 27, 1947 when Mr. Richard Trotter testified that he was ready, willing and able under an agreement at that time to break this 160 acres of ground. (R. 117-118) and he likewise had a recollection of hearing Mr. Jenkins testify at the trial on the bond matter. (R. 118).

Albert Morgan, a defendant called as a witness for the plaintiffs, testified that he had been experimenting with dry farm wheat on adjacent property planted in the fall of 1950 and harvested in 1951 and the ground

yielded right near 9 bushel per acre. (R. 122). That he likewise has filed an application for drilling for water on said ground and hoped to get 3 or 4 feet of water. (R. 123).

Bert Morgan, a defendant, called on behalf of plaintiffs, remembered being in Court on August 27, 1947 when Mr. Trotter testified to his ability and willingness under an agreement to break the ground then known as the Jenkins property and was likewise present on September 2, 1947 when Hyrum Jenkins testified that he desired the ground for agricultural purposes. (R. 137).

Dewitt Trotter, a witness called for plaintiffs, testified that the ground was first broken in 1949 and that it would take approximately 30 days to break and prepare the ground. (R. 150). That Mr. Monsen broke the ground with a wheat land plow and the first crop was planted in the early spring of 1950. That he planted dry land wheat to 80 acres, 47 acres of irrigated wheat and 20 acres of potatoes. (R. 154). That from the dry farm wheat they received a little over 1200 bushels and irrigated wheat 1885 bushels. (R. 155).

Raymond E. Monson, testifying for plaintiff, stated that on September 2, 1947 he was ready, willing and able to go on the land in question and break the same. (R. 161). That between September 9, 1948 and January 1, 1949 he was tied up on another contract and was not available with his heavy type of equipment to break this ground. That in the months of October, November and

December, 1948, the snow came early and hindered him in the breaking of ground and that had he been on the ground on October 1, 1948, with a snow fall on the same he could not have completed the breaking of the ground. (R. 163). That 80 acres of the ground broken was of tall sage brush, higher than his head and that from his experience as a farmer the ground broken was adaptable and very fine for wheat. (R. 165).

A certified copy of the application for drilling for water on this ground (Ex. "G") was received. (R. 174).

David S. Powelson, recalled to the stand, stated that he had agreed to lease the property in question from October 1, 1947 to September 1, 1948 to one Ken Tachiki for \$30 per acre with water on and \$10 per acre for the dry farm ground. (R. 246).

The defendants called 10 witnesses including the defendants as to the value of grazing ground in the area.

At the conclusion of the testimony the defendants moved to strike all the testimony of the plaintiffs as to:

1. Any intended use of the land other than the established use to which it was deemed put at the time the supersedeas bond was filed.

2. All testimony of plaintiffs and his witnesses touching the question of what had been done with this property since the deed was made from Jenkins to Powelson and Trotter on December 6, 1948.

3. All testimony of plaintiffs and his witnesses that had to do with special damages.

4. All testimony pertaining to an oral contract or conversation between Powelson and the Jap which was received as bearing on the rental value or value of the use of the property.

The Court ruling on said motion overruled the same on grounds 1 and 3 as stated and granted the motion to strike as to grounds 2 and 4.

The Court at this time gave his oral decision in which he stated:

“The affidavit in support of the motion for an increase of bond specifically drew the defendants’ attention to the fact that the plaintiff had on the 26th day of February, 1947, made arrangements for the breaking of the land concerning which the judgment was entered.

The Court finds that by the filing of the affidavit the defendant had full knowledge of that arrangement. The Court finds that because of the supersedeas the plaintiff was deprived of the possession of the land.

The Court finds that at that time the land was unbroken, uncultivated and undeveloped native pasture land and finds that the reasonable rental value of that ground was 15c per acre per year and that there were 160 acres of ground.

For the use and occupancy of the ground within the contemplation of the parties and based upon the ordinary basis of recovery the plaintiff is entitled to judgment against the defendants and each thereof for the sum of \$24.00.

The Court further finds that there is insufficient evidence in this record by which the Court could determine any damages to the plaintiff specially by reason of the arrangement that had been made by the plaintiff prior to the placing of the supersedeas bond for the breaking, development and cultivation of that ground; and that because there is no evidence upon which the Court could measure such damages, special damages are denied.”

STATEMENT OF POINTS RELIED UPON

POINT I.

THAT THE COURT ERRED IN DETERMINING THE MEASURE OF DAMAGE ON THE BASIS OF GRAZING GROUND INSTEAD OF AGRICULTURAL GROUND.

POINT II.

THAT THE COURT ERRED IN STRIKING TESTIMONY WHICH WAS PERTINENT TO DETERMINE THE VALUE OF THE USE OF THE GROUND.

ARGUMENT

POINT I.

THAT THE COURT ERRED IN DETERMINING THE MEASURE OF DAMAGE ON THE BASIS OF GRAZING GROUND INSTEAD OF AGRICULTURAL GROUND.

In *Park vs. Moorman Mfg. Co., et al.*, 241 Pac. 2d, 914, Utah, Justice McDonough at page 920 said:

“The fundamental principle of damages is to restore the injured party to the position he would have been in had it not been for the wrong of the other party.”

In *Moorhead vs. Minneapolis Seed Co.*, 165 N. W. 484, L. R. A. 1918C, 391. The Court at page 394, said:

“The object of the law is to furnish a measure which will give, as near as may be, actual compensation for the breach, and which is free of uncertain, contingent, conjectural or speculative elements. When damages are based upon the value of the use of the land the uncertainty of amount because of uncertainty of crop results is eliminated, and they may be assessed forthwith. We are of the opinion that when the failure of crop is entire, because of failure of germination, the damages should be based on the value of the use, with additions and deductions suiting the conditions of the particular case. The objection suggested by the plaintiffs that there was no fixed rental value in North Dakota is without substantial merit. There need be no market rental value. It is enough if the use value is determined, and that may be found without the aid of a market value. Farmers and others qualified to testify may furnish proof of value.”

In the case of *Pritchard Petroleum Co. vs. Farmers Co-op Oil & Supply Co.*, 190 P. 2d 55, 121 Mont. 1, Justice Gibson at page 58 said:

“The action afforded by the statute is to recover the value of the use of the property for the period of its wrongful detention, not exceeding the time fixed by the statute. The value of the use is the value to the owner of the property, not

its value to the wrongdoer. Compensation is the purpose and basis of the action.”

We cite *Sedwick on Damages*, 8th Ed., Volume 1, Sec. 252, page 376 as follows:

VALUE FOR A PARTICULAR USE

“The value of property is to be estimated with reference to the most remunerative use for which it is adapted. So in *N. J.*, where the value of a horse was in question, Whelpley, C. J. said in *Farrell vs. Colville*, 30 *N. J.*, L. 123, 127, ‘They were entitled to have the value of the horse as a horse to be used in their business, and fitted for that use. Perhaps he would not have been worth anything as a fast trotter or as a gentleman’s carriage horse, because not adapted to the work; but that would not depreciate his value as a cart horse, for which purpose he was to be used’.”

Sedwick on Damages, Vol. 1, 8th Ed., Sec. 253, page 377:

POSSIBLE FUTURE USE

“The present value of property may be enhanced by the possibility of making a more remunerative use of the property than the present use. Such possible use is to be considered. In *Montana Ry. Co. vs. Warren*, 6 *Mont.* 275, 284 per *Bach J.*, the Supreme Court of Montana said: ‘The respondent was allowed to prove the value of land for town lot purposes. He had the right to do so, whether he had built upon it or not. As we have seen, the question is not to what use the land had been put. The owner has a right to obtain the market value of the land, based upon its availability for the most valuable purposes for which it can be used, whether or not he so

used it.' In *Mississippi & R. R. Boom Co. vs. Paterson*, 98 U. S. 403, 407, the plaintiff in error had taken land of the defendant in error by the right of eminent domain, and compensation was sought in this action. The jury found that the land was worth but \$300 for any other than boom purposes, but a very much larger sum for such purposes, and the Supreme Court of the U. S. held that the larger sum should be awarded. Field J., said: "*In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties.* The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is plainly adaptable: that is to say, what is it worth from its availability for valuable uses? Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. (Italics ours)

Newark Coal Co. vs. Upson, 40 Ohio St. Rep. 17.

In this case Upson acquired 23 acres of ground and was developing the property for coal when the Newark Coal Company obtained an injunction on the premises. This injunctive proceeding was later voluntarily dismissed and Upson brought this action. The question arose as to what rule should damages be awarded by. C. J. Granger at page 25 said:

"There being no market value of the rights taken from Upson and his associates the only practical rule for setting its value is to follow the

ordinary common-sense practice of business men. Made known to the body charged with the assessments, as fully as legal evidence can do it, all the facts that naturally and materially affect the value of the use of the rights of which the plaintiffs below were wrongfully deprived. These facts necessarily include the location, thickness, quantity and value of the coal that was mineable then, and then, the facilities for transporting that coal to a market; the nature and extent of the demand for that coal, the total expense of placing it in the market (this included also all preliminary expenditures); the competition with which they must contend; the contingencies in the demand and supply of labor; the relation of the 23 acres to other mining lands of Upson and his associates, for which they could use part, or all, of the same approaches, the total cost of the coal to them, and the prices for which it was saleable during the period of suspension; all these facts naturally affecting the value of the right to prosecute that business with that coal, at and from that place, during that time. No one of them is by itself a measure of value. Considered together, some of them add to, others subtract from the value; and then, after such a view, a common sense judgment again subtracts a percentage for the contingencies that are ever presenting themselves in the affairs of men.

Within these facts thus stated is the element of "profit" on possible sales of coal, i.e., the difference between the cost of it and its market price. But it is there not as a measure of values; not in order to be allowed by the jury 'as profits', but to be treated as one of a mass of facts that throws light upon the value of the use of the rights taken from Upson, all of which the jurors ought to have known and considered when computing the damages."

In *Anderson vs. Columbia Contract Co.*, 184 Pac. 240, 94 Oregon 171.

This is a case where the plaintiff sued to recover damages for breaking the fish trap of plaintiff by defendant's tow boat and barges. The question arose as to whether or not evidence was proper as to the catch of the fish in the trap at the time of the damage and whether evidence of the catch of similar traps during the period at which the trap was damaged could be adduced, and also was it proper to allow testimony as to the amount of the catch after the repair of the trap. J. Harris, at page 248 said:

“While the past success of the trap is not controlling, it is nevertheless one of the factors which may be taken into consideration, not as the measure of damages, but to aid the jury in estimating damages. *Post v. Munn*, 4 N. J. Law, 61, 63, 7 Am. Dec. 570; *Wood Transfer Co. v. Shelton*, 180 Ind. 273, 101 N.E. 718. See, also, *Jacobs v. Cromwell*, 216 Mass. 182, 103 N.E. 383.

That there was a good run of fish during the two weeks is evidenced, the plaintiff says, by the fact that the weather conditions were good, by the significant circumstances that other traps in the same locality, but less favorably situated than the Anderson trap, caught each day ‘up to a couple of tons a day,’ and by the important fact that, when the Anderson trap was repaired, it caught each day from 1600 to 1700 pounds of fish. Does not this evidence of the catches made during the two weeks, as well as the catches made immediately afterwards, serve to make more certain any inference of usable value that may be drawn from prior results? Obviously the testimony

about the run and catch of fish during the two weeks when the trap was out of repair and the catches made by the Anderson trap when again put in repair constituted data which would be very helpful in fixing the usable value of the trap for those two weeks. The fishing season is of comparatively short duration, and consequently the usable value of the trap might be negligible at one time of the year and considerable at another. In brief, the evidence under discussion was competent, not for the purpose of measuring the compensation to be paid to the plaintiff, but for the purpose of aiding the jury in estimating the usable or rental value of the trap.”

ARGUMENT

Plaintiffs contend that the Court in rendering its oral decision on December 4, 1951 recognized the fact that the defendants were apprised of the use of the ground which plaintiffs desired the same for during the period of appeal. This point is recognized by the statement made by the Court as follows:

“The Affidavit in support of the motion for an increase of bond specifically drew the defendants attention to the fact that the plaintiff had, on the 26th day of February, 1947, made arrangements for the breaking of the land concerning which the judgment was entered.

The Court finds that by the filing of the affidavit that the defendants had full knowledge of that arrangement.”

If the defendants had full knowledge by reason of the two hearings before Judge Nelson of the contem-

plated use of the land by the plaintiffs as agricultural ground then clearly the defendants appreciated that by ordering a supersedeas bond in the sum of \$1000.00 they had knowledge that Judge Nelson appreciated the contemplated use as was testified to by plaintiffs' witnesses.

If the defendants did not contemplate the use by the plaintiff of the land for agricultural purposes they had a perfect right at the time Judge Nelson ordered the increase on the supersedeas bond to allow the plaintiffs to occupy the ground for whatever purpose they desired. Otherwise the hearing on the question on the increase in the amount of bond was nothing but a futile gesture.

It is difficult to realize how the plaintiffs during the appeal could have made it more clear that they desired to break and cultivate the ground unless they forcibly took possession from the defendants. It was entirely within the discretion of the defendants to either post a supersedeas bond and withhold possession during the period of appeal from the plaintiffs or to surrender the property to the plaintiffs and not hazard any question of damage between September 2, 1947 and September 9, 1948 which is the date the remittitur from this Court was docketed with the Clerk of Utah County and is the first time that the plaintiffs were legally entitled to enter upon the ground.

It is contended that the damages to the plaintiffs and appellants constituted a loss of the ground for agricultural purposes for a period of two years as it was physically impossible to break the ground until Sep-

tember 9, 1948 at which time it was impossible to break the ground for a 1949 crop.

Why would the plaintiffs have gone to the trouble of filing an application for drilling for water and making arrangements with Mr. Monson for breaking the ground unless this particular tract was to be used for agricultural purposes. It has never been denied by the defendants that the use to which the plaintiffs desired to put the ground was not made known to them at the time the increase in the amount of bond was ordered.

By increasing the bond the defendants knew that their liability would be greater due to the intended use of the ground for agricultural purposes. Otherwise the original bond of \$100.00 would have been sufficient for any damages for the withholding of the ground if it was contemplated only as grazing ground.

POINT II.

THAT THE COURT ERRED IN STRIKING TESTIMONY WHICH WAS PERTINENT TO DETERMINE THE VALUE OF THE USE OF THE GROUND.

In the case of *Anderson vs. Jensen*, 265 Pac. 745, 71 Utah 295. This is a case where the plaintiffs were the owners of 3½ miles of frontage of land on Sheep Creek on the east side of the creek varying from 80 to 160 rods in depth. The defendants were the owners of lands adjoining plaintiff on the east and the elevation of de-

fendant's land was higher and more exposed to storms and winds than that of the plaintiff. That the land of the plaintiffs was particularly desirable for lambing sheep because it is warm, comparatively level and protected from the spring winds and storms and further that it is a distinct advantage to have sheep while lambing, near water.

Late in April 1926 defendants drove their sheep across a part of plaintiffs' land and while so doing a number of lambs were born and the lambs and ewes of defendant's were left upon plaintiff's land. Plaintiff brought his sheep into the vicinity a few days later and were unable to occupy their land by reason of the occupancy of the defendants and this action was brought to recover damages for depriving plaintiffs of the use of their property. J. Hansen, at page 746 said:

“As a general rule, when the owner of property is deprived of the use thereof the measure of damages is the reasonable rental value of the property during the time the owner is wrongfully kept out of possession. Such, evidently, was the view taken by the trial court.

It is also contended on behalf of the defendants that proof affecting any enhanced rental value of the land in question because of its adaptability for lambing sheep is in the nature of special damages and must be specially pleaded to admit proof thereof. We are unable to agree with that contention. General damages, this court has held, ‘are the natural and proximate consequence of, and are traceable to the act complained of and those damages which are probable, traceable to, and necessarily result from the injury, * * * and

may be shown under the general allegation of the complaint. Only those damages, which are not the probable and necessary result of the injury are termed "special" and are required to be stated specially in the complaint.' *Croco v. Railroad*, 18 Utah, 311, 54 P. 9,85 44 L.R.A. 285; *North Point Consol. Irr. Co. v. Canal Co., et al*, 23 Utah, 199, 63 P. 812. Tested by this rule, it follows that if the defendants did in fact deprive the plaintiffs of the use of their land the probable, traceable and necessary result was a damage to the plaintiffs to the extent of the reasonable rental value thereof. In determining such reasonable rental value, the fact that the land may be valuable for lambing purposes is as proper a matter of inquiry as is the fact that the land may be valuable for grazing purposes. The ultimate fact to be determined is the reasonable rental value of the land, and any fact which aids in determining such ultimate fact is proper evidence under the general issue of damages and need not be specially pleaded."

ARGUMENT

Plaintiffs and appellants contend that the trial Judge was in error in striking all of the testimony of the plaintiffs and their witnesses touching the question of what had been done with this property since the deed was made from Jenkins to Powelson and Trotter on December 6, 1948 and further striking all testimony pertaining to an oral contract or conversation between Powelson and the Jap which was received as bearing on the rental value or value of the use of the property.

As was said in the case of Anderson vs. Columbia Contract Company heretofore cited under Point I the Oregon Court stated:

“Obviously the testimony about the run and catch of fish during the two weeks when the trap was out of repair and the catches made by the Anderson trap when again put into repair constituted data which would be very helpful in fixing the usable value of the trap for those two weeks.”

How other than showing what the ground would yield for agricultural purposes could the Court determine the usable value of this ground? The testimony clearly shows that 1200 bushels of wheat were obtained from 80 acres of dry farm land and 1885 bushels of wheat were obtained from 47 acres of irrigated land and that in addition there were 20 acres under irrigation planted in potatoes. Thus, there would be 80 acres of dry farm ground and 67 acres under irrigation and the value of this ground as dry farm land was worth \$10.00 per acre and the irrigated land of 67 acres was worth \$30.00 per acre thus making a loss to the plaintiffs of a sum of \$800.00 for dry farm land and \$2010.00 for irrigated land all in the aggregate sum of \$2810.00 for the period from September 2, 1947 to September 9, 1948. Likewise there was a loss of the ground for the year 1949 which would in effect double the above amount which would be a substantial loss to the plaintiffs.

Just as this Court has stated in the case of Anderson vs. Jensen, the damages in this case are the natural and proximate consequence of, and are traceable to the

act complained of and those damages which are probable, traceable to and necessarily result from the injury.

Under the agreement dated May 17, 1947 between Powelson and the plaintiffs and appellants it did not matter whether Powelson desired to operate the ground personally in 1947 or whether he leased the same to one Ken Tachiki who had agreed with Powelson to pay \$10.00 per acre for dry farm acreage and \$30.00 per acre for the irrigated acreage if available in 1947. In either event the plaintiffs and appellants would have realized a substantial amount as consideration for the deed.

To the date of the writing of this brief the plaintiffs and appellants have been awarded the sum of \$24.00 by the judgment of Judge Dunford as consideration for the deed passing from the plaintiffs and appellants to Powelson and Trotter.

The agreement between Powelson and Tachiki made before the placing of the supersedeas bond distinctly shows as an evidentiary fact what the value per acre was worth to Tachiki if the property had been available in 1947 for lease purposes. Thus the striking by the Court of this testimony eliminates an element which should have been considered by the court as the value per acre as agricultural ground; at least to the extent of \$10.00 per acre as dry farm ground even in the event no water was ever obtained.

It is respectfully contended that the granting of the motion on the part of Judge Dunford eliminated pertinent factors which should have been considered in determining the measure of damage.

CONCLUSION

It is respectfully submitted that the measure of damage in this case should have been upon the basis of the value of the ground for agricultural purposes. It lay entirely within the hands of the defendants and respondents after the hearing before Judge Nelson, when the supersedeas bond was increased to \$1000.00 to either surrender the ground to the plaintiffs and appellants such that their arrangement for the breaking of the ground and the sowing to crop could have been completed for a 1948 harvest, or to respond by filing a supersedeas bond as they did and to then have the question of damage determined by reason of the withholding of said ground by the filing of a supersedeas bond.

Simply because the ground was unbroken as of September 2, 1947 would not control for an intended use which was amply made known to the defendants and respondents.

It is further submitted that the striking of the testimony of plaintiffs and their witnesses concerning the use of the ground after September 9, 1948 and the striking of the testimony of the lease arrangements between

Powelson and Tachiki prior to September 2, 1947 was error upon the part of the Court.

It is respectfully contended that this Court should remand this case to the 4th District Court for the assessment of damages on the basis of value as agricultural ground.

Respectfully submitted,

W. D. BEATIE

*Attorney for Plaintiffs
and Appellants.*