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Alfred D. Pehrson And Rhea B. Pehrson v. Boyd C. Saderup, Madeline Saderup And Bruce Sader Up : Appellants' Brief

In The Supreme Court of the State of Utah

ALFRED D. PEHRSON and
RHEA B. PEHRSON,
Plaintiffs and Appellants,

Vs.

BOYD C. SADERUP, MADEL
SADERUP and BRUCE
SADERUP,
Defendants and Respo

APPELLANTS'

Appeal from the Judgment
Court of Utah County, The
Sorensen, Judge.

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CASES

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Defendants and Respondents.

Case No. 12723

APPELLANTS' BRIEF

STATEMENT OF THE NATURE OF THE CASE

This is an action by plaintiffs against defendants for damages arising from the wrongful cutting of lilac trees on the property of the plaintiffs. The trial court found in favor of the plaintiffs and against the defendants, but found that plaintiffs were entitled only to nominal damages in the sum of $50.00, which damages were trebled under the provisions of Section 78-38-3, Utah Code Annotated, making a total judgment for plaintiffs in the sum of $150.00.

RELIEF SOUGHT ON APPEAL

Plaintiffs-Appellants seek an order remanding the case to the trial court directing the trial court to enter a judgment for the plaintiff based upon a proper measure of damages.

STATEMENT OF FACTS

Plaintiffs and defendant, Boyd C. Saderup, each owned adjoining properties situated between Sixth and Seventh North Streets and University Avenue and First West Streets in Provo, Utah. Plaintiffs' property fronted on University Avenue and defendant, Boyd C. Saderup's, property fronted on First West Street. At the time the plaintiffs purchased their property in 1965, the back yard of the plaintiffs' property was well and gracefully landscaped and there were growing at the rear or westerly most part of the plaintiffs' property French hybrid lilacs. The lilac trees were approximately fifteen feet in height (T-12) and provided a complete screen to the rear of plaintiffs' property. Even after the defendant, Boyd C. Saderup, constructed apartments on his property, the lilac trees were, and acted as, a complete screen between the properties and afforded complete privacy to the plaintiffs (T-13). Not only did the lilacs provide a screen, but they provided beauty to the plaintiffs (T-13). The lilacs were 35 to 36 years old (T-17). On July 4, 1970, the plaintiffs discovered

their lilacs had been cut off at the ground with a saw (T-14) (Plaintiffs' Exhibit 1). Sixteen clumps of the 35 year old lilacs were cut by the defendant, Bruce Saderup, acting as agent of Boyd C. Saderup (T-18). Bruce Saderup, acting as agent of Boyd C. Saderup, admitted cutitng the lilacs without any verification as to the property line or without consulting the deed to look at the description on the deed, or without having a survey (T-51). The plaintiff, Alfred D. Pehrson, stated that in his opinion the lilac trees had a value of $2,000.00 to $2,500.00 (T-18).

Paul Quist of Forest Hills Nursery of Salt Lake City, was called as an expert in the ornamental line of horticulture, which is the placement of trees and shrubs in the landscape. Mr. Quist testified the lilacs were French hybrids, that there would be suckering from the roots and that the trees would eventually replace themselves, but they would be the common lilac or root stock sapling and it would take twenty-five years or more to replace themselves (T-31). Mr. Quist further testified that each lilac clump would cost, excluding the labor of digging and replanting, between $75.00 and $100.00 apiece (T-31). Mr. Quist further testified that it would cost $50.00 each per clump to prepare the soil and plant the tree (T-31).

Prior to the trial, the trial court indicated the case would be tried on the theory of *Brereton v. Dixon,* 20

Utah 2d 64, 433 P.2d 3. Upon the conclusion of the case the court took the matter under advisement and subsequently ruled that *Brereton v. Dixon* applied only to economically productive fruit trees and the trial court was not inclined to expand the rule of that case further. The court further stated that the measure of damages is the difference between fair and reasonable market value of the property as a whole, including improvements, immediately before and immediately after the injury.

The action was brought through the provisions of 78-38-3 Utah Code Annotated, 1953, for treble damages. The evidence presented would sustain a judgment of actual damages of from $2,000.00 to $2,400.00, which judgment should then be trebled.

After the ruling of the trial court the plaintiffs made a motion for a new trial, a motion to make additional Findings of Fact and Conclusions of Law, and a motion to reopen to present further evidence (T-31), and upon denial of the motions (TR-33) plaintiffs appeal.

STATEMENT OF ISSUE ON APPEAL

POINT I

THE COURT ERRED IN ITS APPLICATION OF THE MEASURE OF DAMAGES IN AN

ACTION BROUGHT UNDER 78-38-3 UTAH CODE ANNOTATED.

ARGUMENT

POINT I

THE COURT ERRED IN ITS APPLICATION OF THE MEASURE OF DAMAGES IN AN ACTION BROUGHT UNDER 78-38-3 UTAH CODE ANNOTATED.

This action was brought under the provisions of Utah Code Annotated 78-38-3, which is quoted in full as follows:

> "78-38-3. Right of action for injuries to trees — Damage. — Any person who cuts down or carries off any wood or underwood, tree or timber, or girdles or otherwise injures any tree of timber on the land of another person, or on the street or highway in front of any person's house, town or city lot, or cultivated grounds, or on the commons or public grounds of any city or town, or on the street or highway in front thereof, without lawful authority, is liable to the owner of such land, or to such city or town, for treble the amount of damages which may be assessed therefor in a civil action.

It is hereby pointed out that though there may be some question whether these lilacs were bushes or trees,

in any event the foregoing statute applies to "any wood or underwood, tree or timber." It is clear from the evidence and from Exhibit 4 that in any event the lilacs were wood or underwood, since they were up to four inches in diameter. Also, Mr. Quist testified that they could well be classified as a tree (T-40).

Although this court decided the *Brereton v. Dixon* case (supra), by a divided court, nevertheless it appears to be the law in the State of Utah and should apply with more force in the present case, which was an intentional act rather than in the *Brereton* case, which was a negligent act.

The facts of the *Brereton* case were that the defendant negligently permitted a fire in which he was burning rubbish in connection with a construction project to escape and destroy the usefulness of 111 peach and pear trees. The plaintiff prevailed and the defendant appealed claiming excessive damage and based upon improper evidence and instructions to the jury. The defendant urged that inasmuch as the fruit trees were part of the realty, the only proper measure of damage would be the difference in the value of the land before and after the destruction of the trees. The majority stated in the *Brereton* case as follows:

> "We are aware that in appropriate circumstances this method of assessing damages has

been approved in numerous cases. But we do not agree that it should be the sole and exclusive method of assessing such damages in all circumstances. When property has been damaged or destroyed by a wrongful act, the desired objective is to ascertain as accurately as possible the amount of money that will fairly and adequately compensate the owner for his loss. Reflection will reveal that a rigid adherence in all cases to the rule of the value of the realty before and after the injury would not always serve that objective. In some situations destruction or removal of part of the property might actually enhance the value of the remaining property by conditioning it for some other use; for example, for residential or industrial purposes not desired by the owner. In such a case application of the rule of value of the realty before and after the injury would penalize the owner by giving him less than his true damage and confer an unjustified advantage on the wrongdoer by permitting him to pay less than the actual damage he caused. In addition to the foregoing, there are other, sometimes far greater, difficulties encountered in appraising the before and after value of extensive and varied tracts of land than in determining the value of a comparatively small damage which can be separately ascertained.

In order to obviate the inequity and the difficulties just discussed, and to get more simply

and directly at the valuation of the specific damage caused, in proper cases the courts have applied another rule: if that which is destroyed, even though part of the realty, has a value which can be ascertained separate from the land, recovery is allowed for the value of the thing destroyed or damaged, rather than for the difference in the value of the land before and after the injury. The significant point here is that this latter rule has heretofore been approved by this court."

This court adopted a rule in the *Brereton* case as follows:

"Because of the fact that any attempt at unvarying uniformity in applying either of the foregoing rules results in the inequities above discussed, a third rule, which we believe to be the better considered and more practical one, has been applied. It gives the injured party the benefit of whichever of the two rules will best serve the objective hereinabove stated of giving him reasonable and adequate compensation for his actual loss as related to his use of his property. This more flexible approach avoids a rigid application of either rule where it would result in conferring a favor on the wrongdoer at the expense of the victim; and it allows the owner of property which has been damaged the privilege which should be his of having the decision as to how he desires to use

> his property, by giving him the amount of damage he suffers on the basis of that use. If he wants to maintain a fruit orchard, a wood lot, or even a primitive area, though his property may be of more value if turned to an industrial or residential purpose, that should be his prerogative; and if it is wrongfully destroyed or damaged, the wrongdoer should pay for the actual damage he caused."

This Court cited, in the *Brereton* case, the old Utah case of *Cleary v. Shand,* 48 Utah 640, 161 P. 453. The *Cleary* case was an action brought by the landowner to recover damages for tresspass on plaintiff's land by defendant's sheep. The damage was to growing annual crops as well as to the hay crop, which is a perennial. The court, in the *Cleary* case, stated as follows:

> "If the thing destroyed, although it is a part of the realty, has a value which can be measured and ascertained without reference to the value of the soil in which it stands, or out of which it grows, the recovery must be for the value of the thing destroyed, and not for the difference in the value of the land before and after such destruction."

The Court went on to state:

> "And where grass or meadow has been eaten, injured or destroyed, its value for hay or grazing purposes may be shown, and, if the roots

> have been destroyed, the cost of reseeding and restoring the field or meadow, and the value of the loss of hay or pasture sustained in the meantime."

There have been many cases that have used the cost of restoration as the measure of damages. These cases are collected at 69 ALR 2d 1370 and in 69 ALR Supplemental Service Page 418 and in the pocket part, Page 110. The New Jersey Court, in the case of *Huber v. Serpico,* 71 N.J. Super 329, 179 Atlanta 2d 805, held that an aggrieved landowner should be allowed fair cost of restoring his land to reasonable approximattion of its former condition without necessary limitation to diminution in market value of land where a trespasser has destroyed shade or ornamental trees or shrubbery having peculiar value to the owner. This rule has been followed in many jurisdictions, including Maryland, Ohio, Washington, and others.

In the vast majority of the cases an action brought under Utah Code Annotated 78-38-3 would fail under the rule set forth by the trial court, since the statute applies to trees or wood on a person's house, town or city lot, on cultivated grounds, or on the commons or public grounds of any city or town, or on a street or highway in front thereof. It is readily apparent that a street would have the same value as a street, with or without trees, that cultivated ground would produce the

same amount of crop, with or without trees, and by applying the trial court's rule, an intentional wrongdoer would, at best, be responsible only for nominal damages.

It is clear and uncontradicted that the value, based upon Paul Quist, the expert, of each lilac clump is $75.00 to $100.00, together with $50.00 for planting. It is clear that the actual damages proven for the 16 clumps are at least $2,000.00 and at most $2,400.00. The damages being incurred by reason of a wilful trespass and, as provided in Utah Code Annotated 78-38-3, those actual damages should be trebled.

CONCLUSION

The Court erred in its application of the measure of damages in this case. This Court could properly direct the entry of a judgment using the proper measure of damages in an amount of $2,000.00 to $2,400.00, which amount should then be trebled pursuant to the statute or this court should remand the case to the trial court for the entry of judgment based upon the proper measure of damages.

Respectfully submitted,

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