ALLEN J. CLARK, RESPONDENT, v. THE NEVADA LAND AND MINING COMPANY, LIMITED, APPELLANT.

[6 NEVADA, 203.]

1 CONFLICT OF EVIDENCE.—The rule that a judgment will not be disturbed as being against evidence, where there is a conflict of evidence, has been often enough announced to be considered settled.

PROSPECTIVE DAMAGES.—Prospective damages in actions, such as for overflowing meadow lands and thereby injuring grasses for time to come, are allowed only upon proof that they are reasonably certain to occur.

DAMAGES TO HAY LANDS FOR FUTURE CROPS.—Where in a suit for unlawfully overflowing plaintiff's grass lands, and thereby destroying crops, a judgment was given for damages already sustained, and also damages for loss of crops for the next two cropping seasons: *Held*, that the damage for the loss of future crops was entirely too prospective and conjectural, and that the judgment should be modified by striking it out.

ERRONEOUS INDIVISIBLE PART OF FINDING.—If a finding contains erroneous matter, which cannot be divided from the remainder, the whole must fall.

GOLD COIN JUDGMENTS FOR DAMAGES.—Under section 202 of the practice act (Stat. 1869, 288) a judgment in gold coin for damages is proper.

CLAIMS FOR DAMAGES NOT DEBTS PAYABLE IN CURRENCY.—A claim for damages is not (any more than a tax) a "debt" within the meaning of the act of congress relating to treasury notes, and the legislature might therefore provide that a judgment therefor should be in gold coin, and not to be satisfied by payment in legal tender currency.

APPEAL from the District Court of the Third Judicial District, Washoe County.

The facts are stated in the opinion.

[*204] **Hillyer, Wood & Deal*, for appellant.

Prospective damages cannot be recovered, nor damages to the permanent value of the realty, unless specially claimed in the complaint: *Thayer* v. *Brooks*, 17 Ohio, 489. Where a tort is committed, damages may be given for matters that occur subsequent to the time of bringing the action, but the material and proximate consequences of the act are alone to be taken into consideration. Such matters must be proved with certainty: *Curtis* v. *R & S. R. R. Co.*, 18 N. Y. 548; *Brower* v. *Nerrill*, 3 Chand. (Wis.) 46; *Brannen* v. *Johnson*,

(1) 4 Nev. 156, 304, 393; 5 Id. 281, 415; 6 Id. 215; 8 Id. 41, 126; 9 Id. 70, 10 Id. 49; 11 Id. 96; 12 Id. 423; 13 Id. 107.

19 Me. 361; 6 Cal. 163; *Schooner Lively*, 1 Gallison, 314; *Walrath* v. *Redfield*, 11 Barb. 369; *Finch* v. *Brown*, 13 Wend. 601; *Wilbeck* v. *N. Y. C. R. R. Co.*, 36 Barb. 647; *Nightingale* v. *Scannell*, 18 Cal. 326; *McWhurter* v. *Douglas*, 1 Cold. 591; *Thomas* v. *Shattuck*, 2 Met. 615; *Brown* v. *Smith*, 12 Cush. 366; *Ingledew* v. *Northern Railroad*, 7 Gray, 86.

Haydon & McElvaney, for respondent.

*By the Court, WHITMAN, J.: [*206]

This case was tried by the district court without a jury, and judgment rendered for respondent, for sixteen hundred and twenty dollars in United States gold coin, coupled with an injunction. The judgment was for damages suffered by respondent by reason of the overflowing of his hay fields, and consequent injuries by water from appellant's tail-race, improperly constructed and negligently cared for. The injunction was for the prevention of future injury from the same cause. So far as the appeal is taken from the general judgment, save as hereinafter noticed, not only is there sufficient evidence to warrant the findings and judgment, but it vastly preponderates in favor of respondent; and the rule of decision where there is a conflict of evidence has been often enough announced to be considered settled: *Covington* v. *Becker*, 5 Nev. 281. The injunction was also fully warranted by the pleadings and evidence.

The only point upon which doubt arises is the allowance of three hundred dollars for that, as found by the district judge, among other matters, this overflow spoken of had "killed the grass suitable for hay on his (Clark's) land, leaving it bare and thin in large portions, and bringing up the present season worthless grasses in lieu of good hay-grass growing on the same land last season, and causing *such land to be capable during the season [*207] of 1870 to produce not more than half its usual crop, and thereby injuring plaintiff's land during the present season to the extent of three hundred dollars of its value."

This finding was based upon pleading which averred a