

1949

# M. A. Shaw, Frank Armstrong, et al v. Salt Lake County : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

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

Edward M. Morrissey; Arthur A. Allen, Jr.; William S. Livingston; Attorneys for Appellants;

---

## Recommended Citation

Brief of Appellant, *Shaw v. Salt Lake City*, No. 7380 (Utah Supreme Court, 1949).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/1169](https://digitalcommons.law.byu.edu/uofu_sc1/1169)

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

---

---

# THE SUPREME COURT OF THE STATE OF UTAH

---

M. A. SHAW, FRANK ARM-  
STRONG, et al.,

*Plaintiffs and Respondents,*

vs.

SALT LAKE COUNTY, a  
municipal corporation, et al.,

*Defendants and Appellants.*

CASE NO.  
7380

---

## Appellants' Brief

---

EDWARD M. MORRISSEY,  
*County Attorney*

ARTHUR A. ALLEN, JR.  
*Chief Deputy County Attorney*

WILLIAM S. LIVINGSTON  
*Deputy County Attorney*  
*Attorneys for the Defendants*  
*and the Appellants*

**FILED**

**SEP 15 1949**

CLERK, SUPREME COURT, UTAH

# I N D E X

	Page
I. STATEMENT OF THE FACTS .....	1
II. STATEMENT OF ERRORS .....	3
III. STATEMENT OF PARTICULAR QUESTIONS INVOLVED FOR DETERMINATION .....	3
IV. ARGUMENT	
1. Whether an action of the kind brought by the plaintiffs in this case may be maintained against Salt Lake County or the named defendants as commissioners of Salt Lake County for the creation or maintenance by the defendants of an alleged nuisance.....	4
2. Whether, under the evidence before the court in this action, a nuisance as an inevitable result is established .....	10
3. Whether, even assuming such nuisance to be the result of the defendants' activities all of such activities should be permanently enjoined under the facts and circumstances of this case .....	12
CONSTITUTION AND STATUTES CITED	
Constitution of Utah:	
Article II, Section 1 .....	5
Utah Code Annotated, 1943:	
Title 19-4-3 .....	7
Title 104-3-27 .....	8
Title 104-46-1 .....	9
CASES CITED	
City of Los Angeles vs. County of Los Angeles, 77 Pac. 2nd, 138.....	6
City of Los Angeles vs. County of Los Angeles, 72 Pac. 2nd, 138.....	6
City of Pendelton vs. Umatilla County, 241 Pac. 979 .....	6
Commonwealth vs. Walker, 156 Atl. 340 .....	6
Emery County vs. Burresen, 14 Utah, 330 .....	5
Gayer vs. Whelan District Attorney, 77 Pac. 2nd 138 .....	6
Jones vs. Jefferson County, 89 So. 174 .....	9
Leanny vs. Jefferson County, 32 So. 2nd 542 .....	7
Leibman vs. Richmond, 284 Pac. 731. Cal. App. 354 .....	9
Lund vs. Salt Lake County, 58 Utah 546 .....	6
O'Brien vs. Rockingham County, 120 Atl. 254 .....	7
Odil vs. Maury County, 136 So. West 2nd, 500 .....	9
Roosevelt County vs. State Board of Equalization, 162 Pac. 2nd, 887....	5
Whittaker vs. County of Tuolumne, 30 Pac. 1016 .....	6
TEXTS	
30 Am. Jur. p. 470-418, Sec. 451 .....	11
39 Am. Jur. p. 471, Sec. 195 .....	13
113 A. L. R., p. 370 .....	6
20 C. J. S. p. 1069, Sec. 216 .....	8

# IN THE SUPREME COURT OF THE STATE OF UTAH

M. A. SHAW, FRANK ARM-  
STRONG, et al.,  
*Plaintiffs and Respondents,*

vs.

SALT LAKE COUNTY, a  
municipal corporation, et al.,  
*Defendants and Appellants.*

CASE NO.  
7380

---

## Appellants' Brief

---

### STATEMENT OF THE FACTS

The plaintiffs in this action are all owners or residents of homes situate in a certain area of Salt Lake County which the plaintiffs designated the "Cottonwood District." (Tr. 1.) The plaintiffs assigned certain arbitrary bounds to that district so referred to as follows:

"From Holladay on the north to and including the homes on the south side of 6200 South on the south, and from Wasatch Boulevard on the east, to and including the homes on the west side of Highland Drive on the west." (Tr. 1-2).

At the time of the filing of the complaint, plaintiffs obtained a temporary restraining order, restraining the defendants from operating a gravel pit which was located within that described district. (Tr. 13-16).

Salt Lake County had theretofore entered into a certain agreement of lease with one Edwin B. Harper and his wife, whereby the County obtained a leasehold interest in a tract of ground for the purpose of mining and processing gravel for the use of the County upon the public roads in Salt Lake County maintained by the County. (Tr. 1-2). Prior to the issuance of the temporary restraining order, Salt Lake County had placed machinery and equipment upon the premises and had commenced operations for the extracting of gravel for public road purposes. (Tr. 2). The County had further planned to use a certain hot asphalt plant to further prepare road material for use upon the public roads and had purchased said plant. (Tr. 241).

The defendants filed a demurred to plaintiffs' complaint, which was both general and special in form, and noticed the said demurrer for hearing at the time defendants were ordered to appear in connection with the temporary restraining order. (Tr. 12). Upon the hearing of the order to show cause, the defendants duly moved the court for an order to vacate the temporary restraining order, which was theretofore issued ex parte. (Tr. 12).

The court overruled the demurrer (Tr. 30) and denied the motion to vacate the temporary restraining order. (Tr. 24). The cause was thereupon duly tried and the court found that the proposed operations by the county would constitute a nuisance (Tr. 46-49) and made permanent its restraining order (Tr. 50-51).

## STATEMENT OF ERRORS

1. That the court erred in overruling the defendants' demurrer.
2. That the court erred in denying defendants motion to vacate the temporary restraining order.
3. That the court erred in finding that the operation of defendants' proposed plant would be a nuisance.
4. That the court erred in permanently enjoining the defendants from the operations referred to.

## STATEMENT OF PARTICULAR QUESTIONS INVOLVED FOR DETERMINATION

I. Whether an action of the kind brought by the plaintiffs in this case may be maintained against Salt Lake County or the named defendants as commissioners of Salt Lake County for the creation or maintenance by the defendants of an alleged nuisance. Involved in this general question are three particular questions:

- a. Whether Salt Lake County enjoys a sovereign immunity as a political subdivision of the State of Utah which precludes the maintenance against it of this kind of action.

b. Whether, assuming that such sovereign immunity exists, there is any provision in the statutes of the State of Utah which in any way modifies or effects that sovereign immunity so as to authorize this kind of action to be maintained against the defendants.

c. Whether, assuming that such sovereign immunity exists, it is in any way affected by the fact that the action is equitable in form and asks an injunction against an alleged nuisance.

II. Whether, under the evidence before the court in this action, a nuisance as an inevitable result is established.

III. Whether, even assuming such nuisance to be the result of the defendants' activities, all of such activities should be permanently enjoined under the facts and circumstances of this case.

## ARGUMENT

I. Whether an action of the kind brought by the plaintiffs in this case may be maintained against Salt Lake County or the named defendants as commissioners of Salt Lake County for the creation or maintenance by the defendants of an alleged nuisance.

(a) These questions were the basis of the defendants' general demurrer, which demurrer was overruled by the trial court herein. Considering those questions in order, the first proposition is that the sovereign is immune against any suit that has not been authorized

by that sovereign. We contend that that rule is too well settled to be seriously questioned. The issue is whether the county partakes of the sovereign immunity of the state, or whether the county is a separate entity which does not enjoy that immunity. The constitution of the State of Utah recognizes the several counties as "legal subdivisions of this State," (Constitution of Utah, Article II, Section 1). The nature of the county in Utah was further explained in the case of Emery County vs. Burren, 14 Utah 328. At page 330 of the Utah Report, the court states:

"A county is one of the political divisions of the state signifying the community clothed with such extensive authority and political power as may be deemed necessary by the superior controlling power of the state for the proper government of its people residing within its borders and for a proper administration of its local affairs."

There are many other cases in surrounding jurisdictions holding that the county is an arm or auxiliary of the state. In the case of Roosevelt County vs. State Board of Equalization, a case decided by the Montana Supreme Court, and found reported in 162 Pacific 2nd, at page 887, the court says in part:

"A county is but an agency or arm of the state government, created, organized and existing for civil and political purposes, particularly for the purpose of administering locally the general powers and policies of the state, and as a matter of public convenience in the administration of the government. It is generally a subordinate part of the sovereignty of the state itself, and is not an independent governmental entity."

Further cases in support of this proposition are: Commonwealth vs. Walker, 156 Atlantic 340, a Pennsylvania case; the City of Pendleton vs. Umatilla County, Oregon, 241 Pacific 979; the City of Los Angeles vs. the County of Los Angeles, 77 Pacific 2nd, 138; Gayer vs. Whelan District Attorney, 141 Pacific 2nd 514. In the last mentioned case, which arose in the State of California, the court says at page 516 of the Pacific report in part as follows, "the county enjoys the same immunity from suit and liability as the state," citing the City of Los Angeles vs. Los Angeles County, 72 Pacific 2nd 138, 113 ALR 370, and Whittaker vs. the County of Tuolumne, 30 Pacific 1016. Our Supreme Court has referred to the question of this immunity in the case of Lund vs. Salt Lake County, wherein it is said at page 515 of 200 Pacific, the following:

"In support of the validity of plaintiffs alleged third cause of action, counsel do not contend that the county when acting in a governmental capacity, would be liable for the negligence of its officers or agents for any injury occasioned by their negligence; hence it is not necessary to envoke the doctrine maintained with practical unanimity in nearly every jurisdiction of the country, to the effect that municipal corporations, especially county organizations, are not liable in such cases unless made so by express statute. Brief of respondents counsel filed in the case upon this point is voluminous and conclusive."

(b) The second question involved herein, is whether authority has been given by any statute of the

State of Utah to maintain the action of the sort here before the court. Defendants contend that there is no statute here applicable. Subsection 1, of section 3, Chapter 4, Title 19, Utah Code Annotated, 1943, defines generally the power of a county to "sue and be sued." It appears clear from the authorities that this statute simply constitutes the county as an entity to sue or be sued in those kind of actions in which the county is properly a plaintiff or defendant according to the other statutes of the state. A case so construing a similar statute is *Leanny vs. Jefferson County*, an Alabama case reported in 32 So. 2nd at page 542. At page 543 of the So. Report, the court says in part as follows:

"Notwithstanding the provisions of Title 12, Section 3, Code, that a county is a body corporate with power to sue and be sued in any court of record is nevertheless an arm of the state and is subject to immunity from suit which the state has, so long as it is engaged in governmental functions as to which no statute authorizes suit."

Other Alabama cases to that affect are here cited. In accord is the New Hampshire case of *O'Brien vs. Rockingham County* reported in 120 Atlantic at page 254. In that case the court said in part at page 255 of the Atlantic Report that a statute

"declaring them to be corporate cannot confer upon them other powers or subject them to other duties than those which are conferred and imposed either by express provisions of some statute or are implied from the general character and design of such public corporations." (Citing cases.)

There is no other statute known to the defendants which is in force in this state and which expressly refers to the liability or non-liability of a county to suit. However, section 27, Chapter 3, Title 104, Utah Code Annotated, 1943, gives statutory consent to certain specially designated actions which might under certain conditions be brought against the State of Utah. This section does not of course, authorize an action of the type now before the court against the state or against the county. In the absence of some other provisions specifically referring to the county, defendants contend that this is the consent and the only consent which is given to bring action against the state itself, and the counties as subdivisions of the state.

(c) Referring to the third question herein necessarily involved, defendants propose to discuss the question of whether there is an exception to the sovereign immunity of the state's political subdivision based upon the fact that a nuisance is claimed or that an injunction is the type of relief sought. There would appear from the reading of the text to be some conflict of authority on this question. That apparent conflict of authority is noted in 20 CJS 1069, Section 216, as follows:

“Nuisances. Whether a county may or may not be liable for the creation or maintenance of a nuisance has been decided in accordance with the rule prevailing in the particular jurisdiction as to the liability of counties for torts generally, as discussed in Section 216 Supra; other authorities hold that a county is immune from liability for its torts does not extend to the creation or main-

tenance of a nuisance and have granted injunctive relief in favor of a private individual as against a county for a threatened nuisance.”

The principal cases cited in the footnote, in support of the proposition holding that it is immune from suit for a threatened nuisance are *Leibman vs. Richmond*, 284 Pac. 731, 103 Cal. App. 354, and *Jones vs. Jefferson County*, 89 So. 174, 206 Ala. 13. In the analysis of this question defendants submit that it is perhaps important that the functions, scope and size of counties varies through the United States and that this court should take judicial notice of the fact that the counties in the western states differ in many particulars from counties in other parts of the country. (104-46-1 sub. 8, U.C.A. 1943). The first mentioned case should be especially persuasive since the statutes in the State of California defining the county as a political subdivision are substantially the same as in the State of Utah, and since the counties in the two states are geographically and functionally similar. The cases which are cited in the text at the page last mentioned in support of a contrary view, do not distinguish between a city and a county with regard to this liability. The earlier cases in the State of Tennessee have indicated that injunctive relief as against the county for a threatened nuisance, should be granted. But the later Tennessee case of *Odil vs. Maury County*, 136 So. West 2nd, page 500, seems to abandon this rule, at least in certain circumstances. At page 501 of the report cited, the court refers to the general rule of non-liability on the part of the County, and states:

“this general rule applies to acts constituting nuisances,” and cites in support of that statement many cases which are in accord. It is submitted that there is no valid reason for the distinction adhered to in some courts between tort liability generally and liability for nuisances alleged to be committed. The principal reasons for non-liability on the part of the county generally are illustrated by the following quotations:

“This rule is the logical result of the well settled doctrine that the state may not be sued unless it consents thereto.” — *Larsen v. Yuma County*, 225 P. 1115, 1116, 26 Ariz. 367, 15 CJ page 569 note 63(a).

And the other reason:

“The absolution from liability of a county \* \* \* rests upon the ground that the county \* \* \* is simply a quasi corporation and not clothed with full corporate powers.” — *Shirkey v. Keokuk County, Iowa*, 275 N.W. 706, 712, 225 Iowa 1159, withdrawn except as reaffirmed and modified 281 N.W. 837, 225 Iowa 1159.

It is submitted that upon logic and principle the foregoing reasons apply with equal force whether the wrong complained of is an alleged negligent tort or an alleged nuisance.

II. Whether, under the evidence before the court in this action, a nuisance as an inevitable result is established.

Referring to the second question necessarily involved, the attention of the court is invited to the general

statements of the texts as to the restraining of threatened or apprehended nuisances. 30 Am. Jur. at pages 417-418 section 451 reads in part as follows:

“But the general rule appears to be that an injunction will be granted when, and not unless, the act or thing threatened or apprehended will be a nuisance per se, or a nuisance will inevitably or necessarily result from it. If the complainant’s right is doubtful, or the thing which it is sought to restrain is not a nuisance per se and will not necessarily become a nuisance, but may or may not become such, depending on the use, manner of operation, or other circumstances, equity will not interfere.”

Numerous cases are cited in support of that general proposition. The evidence in this case, appellants believe, establishes clearly that the question of whether the restrained operations would or would not at any particular time become a nuisance as well as the extent of such nuisance depends largely upon the force and direction of wind currents in relation to the plaintiffs’ residences and the proposed site of operations. The evidence as to the probable direction and force of the winds was conflicting. The plaintiffs’ evidence was non-expert and was based on observations of the plaintiffs, all of whom were lay persons as far as physical sciences are concerned and some testimony by the witness Butler. Defendants evidence was based on expert testimony and scientific facts insofar as those facts were available. It is submitted that the question of the effect of the wind is extremely questionable and that in that respect, if in no other,

plaintiffs have failed to show that a nuisance would necessarily follow. The evidence of the plaintiffs with regard to the alleged effect on foliage was based upon certain tests made about December, 1927 in the eastern part of the country. It is submitted that these tests are too remote in time and distance to enable the court to determine as a fact that a nuisance in this regard would necessarily follow from the conditions alleged to arise from defendants proposed operations. The extent to which the nuisances apprehended from proposed operations could be minimized or eliminated by the use of protective devices does not fully appear, but there is evidence that some, at least, of the threatened damage could be eliminated or minimized through proper equipment to collect dust from the planned operations. The permanent injunction issued by the trial court deprives the defendants of any opportunity to determine by experiment what results will follow from the operations, and in effect the trial court is making a decision as to scientific facts without, as appellants believe, any sufficient evidence or information upon which to determine that fact.

III. Whether, even assuming such nuisance to be the result of the defendants' activities, all of such activities should be permanently enjoined under the facts and circumstances of this case.

Another consideration is, of course, the public convenience and necessity resulting from the continuance of the defendants activities as opposed to the nuisance to

the plaintiffs, assuming that that nuisance will result. At 39 Am. Jur. page 471, section 195, appears the following general statement:

“And when the public welfare requires it a nuisance may, for special purposes, be permitted. Public convenience or necessity may also be taken into consideration in some cases in determining whether or not to grant equitable relief.”

It is submitted that Salt Lake County and all of the residents therein, and all persons traveling through Salt Lake County have a direct and immediate interest in proper maintenance and construction of the county roads. It is further submitted that the taxpayers have a direct and immediate interest in the costs of such construction and maintenance and will benefit from efficient preparation of road materials. The proper parties to determine the most efficient and economical manner with which to acquire road building materials are the duly elected commissioners of Salt Lake County. On the other hand, the damage, if any, to the majority of the plaintiffs is extremely remote and speculative. A few of the plaintiffs reside in the immediate vicinity of the proposed operation but the majority live a considerable distance away as will appear from the boundaries of the district in question, as set up by the plaintiffs. Weighing the convenience and necessity of the public as a whole against the inconvenience and possible damage to some of the plaintiffs, it would seem that equitable relief should have been withheld.

It is respectfully submitted that the permanent injunction issued by the trial court herein was improperly granted and that the same should be vacated and the action dismissed with costs to the appellants.

Respectfully submitted,

EDWARD M. MORRISSEY,  
*County Attorney*

ARTHUR A. ALLEN, JR.  
*Chief Deputy County Attorney*

WILLIAM S. LIVINGSTON  
*Deputy County Attorney*  
*Attorneys for the Defendants*  
*and the Appellants*

RECEIVED two copies of the foregoing brief this  
.....day of September, 1949.

CRITCHLOW, WATSON, and  
WARNOCK

By.....  
*Attorneys for Plaintiffs*  
*and Respondents*