

1949

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

Utah Supreme Court

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Critchlow, Watson & Warnock; Attorneys for Plaintiffs and Respondents;

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## Recommended Citation

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# In the Supreme Court of the State of Utah

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M. A. SHAW, FRANK ARMSTRONG,  
et al.,

*Plaintiffs and Respondents,*

vs.

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

*Defendants and Appellants.*

CASE No.  
7380

FILED

OCT 5 1949

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RESPONDENTS' BRIEF

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CLERK, SUPREME COURT, UTAH

CRITCHLOW, WATSON & WARNOCK,  
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*Defendants and Appellants.*

CASE No.  
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## RESPONDENTS' BRIEF

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### STATEMENT OF FACTS

The appellants in their brief have stated the facts disclosed at the trial of this cause very briefly and we do not feel that they inform the court sufficiently as to the location or the nature of the proposed operation. This is especially true in light of the fact that one of appellant's Assignment of Errors is "That the Court

erred in finding that the operation of defendants' proposed plant would be a Nuisance." (Appellant's Brief Page 3).

There are eighty-seven (87) parties plaintiff in this action. They are residents of what has been defined as the Cottonwood District in Salt Lake County. Plaintiffs Exhibit "A," which consists of the present ownership plats filed in the County Recorder's office of Salt Lake County, outlines the general area affected and locates the site of the proposed gravel mining and asphalt plant of Salt Lake County and also the properties of the plaintiffs in this action. The testimony is that the proposed plant as located on the Exhibit is located on a hill or bluff overlooking and to the east of the residences of most of the parties plaintiffs. Plaintiffs Exhibit "B" is a panorama picture of the area and will apprise the Court of the nature of the terrain and identify the locations of the various points testified to at the trial. The other exhibits introduced by the Plaintiffs show the general nature of the homes located in the area.

The testimony is not disputed that the general area in which the Plaintiffs reside is the finest residential area in the State of Utah. (Trans. 15-19, Rec. 76-80) The testimony is also undisputed that the only means of ingress and egress to the plant is by means of a road running east and south from Holladay Boulevard and entering Holladay Boulevard at 5800 South.

This action was commenced by Plaintiffs before the proposed operation had actually commenced. Prep-

arations were at the time under way. The operation as proposed was described by Commissioner Greenwood, the County Commissioner in charge of roads and bridges as follows: (Trans. 185-186-187-188, Rec. 247, 248, 249, 250).

(a) One hot asphalt plant which has been called the Catmul Plant, the operation of which was described by the witnesses Nielsen (Trans. 81 to 85, Rec. 142 to 146) and Higgins (Trans. 76 to 80, Rec. 137 to 142). This plant is powered by a diesel engine and the dryer fired by coal.

(b) One 100 ton per hour jaw gravel crusher powered by a diesel engine.

(c) One diesel powered bulldozer.

(d) One diesel powered dragline.

(e) Diesel or gasoline powered loaders.

(f) 100 truck loads a day moving to and from the plant during the operation.

The testimony of the witnesses Nielsen, Higgins and Butler are to the effect that the operation of this plant and comparable plants are noisy, dusty and that tar residue is emitted.

It should be remembered that the descriptions of the witnesses Higgins and Nielsen covered only the operation of the Catmul asphalt plant and did not include the mining or crushing of gravel. The testimony of the witness Butler covered only the operation of the asphalt plant of Salt Lake City and did not cover these other operations.

The testimony of Commissioner Greenwood is that



the operation of diesel units is noisy. (Trans. 188, Rec. 250)

There is some conflict in the evidence as to the direction of the prevailing winds in the area. We will analyze this testimony in our argument.

## ARGUMENT

We will argue the points of law raised by the appellants in the same order as they are presented in their brief.

1. (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?*

The answer to question (a) of appellants brief also answers (b).

As we understand the points attempted to be made under these headings it is simply that the sovereign cannot be sued unless express statutory consent is given and that the County as a creature of the sovereign is immune. We will concede that a sovereign cannot be sued without its consent. We will further concede that the County is a creature of the sovereign.

We believe the answer to the propositions raised by appellants is definitely answered by the Statutes. In defining the powers of the counties of this State the legislature has provided:

Title 19, Chapter 4, Section 3, Utah Code Annotated 1943.

## GENERAL POWERS

“A county has power:

(1) To sue and be sued.”

The appellants argument loses all of its substance because the State has never relinquished its immunity, except in specific instances. State vs. District Court of Salt Lake County, 102 Utah 290, 128 P2nd 471. There is no statute under the provisions of which the State of Utah can “sue or be sued.” Remedial action against the State is in the main allowed against the officers and commissions of the State, not against the State itself. The legislature has by the enactment of the quoted statute specifically authorized suits against counties. The question as to whether or not the county is liable for the particular wrong alleged is an entirely different question which will be argued later. There is no statutory enumeration of the nature of actions which can be brought against the county. If the reasoning used by appellants were adopted then no action could be maintained against a county except those enumerated in 104-3-27 Utah Code Annotated 1943, which sets forth the actions which may be brought against the State. These actions are of a very limited nature and if this reasoning were sound, the question of the county’s immunity from suit would have been raised many times.

The mechanics for obtaining service against the county are specifically provided for in the statutes. Section 104-5-11 Revised Statutes of Utah 1943 provides  
in part:



“The summons must be served by delivering a copy thereof as follows: \* \* \*

(2) If the defendant is a county, to a county commissioner or to the county clerk of such county.”

There is no comparable section covering service on the State. See *State vs. District Court of Salt Lake County*, *supra*.

(b) *The real question raised under (C) as we view it is not whether or not the county is immune from suit by reason of its sovereignty, but whether the wrong alleged is actionable against the County.*

As has been stated in appellants brief this is an action in equity to enjoin a threatened nuisance. An action to enjoin or abate a nuisance is not predicated on negligence. 9 Am. Juris. 282. No relief is asked, except injunction against the proposed nuisance. 39 Am. Juris. 282 says this among other things relative to the nature of an action based on nuisance.

“\* \* \* and it has been said that an action for a nuisance which violates a property right incident to the ownership of land is in the nature of one for trespass to realty.”

The pleadings, proof and findings of fact in this case support the proposition that unless the operation of the proposed plant be enjoined there would be a violation of a property right incident to the ownership of land by reason of the dust, odors and noise which would inevitably result from the operation of the plant.

This court has held that injunction will lie against

a county for trespass. The case of Aagard vs. Juab County, 75 Utah 6, 281 (P) 728, was an action for damages against the County for land alleged to have been taken by the County for a highway which land belonged to the plaintiff. The plaintiff had not presented a claim to the county as provided by statute and because this had not been done the court rendered judgment for the county on the pleadings. In reversing the District Court this court held that in an action such as the one brought it was not necessary to file a claim. In discussing the sufficiency of the complaint the court said the following:

“In this proceeding a strip of land is the subject matter of dispute. The plaintiff alleges that he is the owner in fee simple of the land. While plaintiff specifically prays for a money judgment for the value of the land, in dispute, he also prays for ‘such further and other relief as may be just.’ The facts alleged in the complaint, if true, are clearly sufficient to entitle plaintiff to a decree quieting title to the land in controversy and to *injunctive relief*.” (Italics ours)

The appellants in their brief have quoted the rule as set forth in Corpus Juris Secundum as to the liability of a county for a nuisance. 14 Am. Juris. 237 says the following:

“Certain specific remedies such as injunction, quo warranto, may be invoked against counties.”

Also at page 218 is the following:

Sec. 52. "There is authority for the view that a county may incur a tort liability in reference to one who stands in the relation of an adjoining proprietor to it. A county, in the construction of a public work, is not privileged to commit a nuisance to the special injury of the citizens. It is liable as a private individual in damage for such act."

The applicable rule is set forth in the case of *Young vs. Juneau County*, 192 Wis. 646, 652, 212 N. W. 295, 297 when the court said:

"The doctrine of liability of a municipal corporation in cases where the relation is that of one proprietor to another is so well entrenched in the jurisprudence of this State that it cannot be disturbed, and by this we do not indicate it should be. \* \* \* In this case the county of Juneau maintained upon adjoining premises a defective engine. Although repeatedly warned of the defect, its officers and agents continued to use the same, with the result that the plaintiff sustained damage, not as a traveler, but as a proprietor. Under such circumstances the case is ruled by *Matson v. Dane County* (172 Wis. 522, 179 N. W. 774), *supra*, and the cases there cited and considered, and the complaint must be held to hold that the defendant maintained a nuisance. If as an adjoining proprietor it violated a legal duty owing by it to the plaintiff, liability follows just as in the case of *Bunker v. Hudson* (122 Wis. 43, 99 N. W. 448), *supra*.

This case was cited with approval in the case of *Necedah Mfg. Corp. v. Juneau County*, 206 Wis. 316, 237 N. W. 227, 240 N. W. 405, 96 A.L.R. 4.

The appellants in their brief have cited the case of Lund vs. Salt Lake County, 58 Utah 546, 200 (P) 515, in support of their theory of sovereign immunity and have quoted a portion of that case. We do not think the case deals in any particular with immunity of the county from suit in tort actions. At most it deals only with the liability of the county for damages for the negligent act of its employees. This was a case for damages caused by the county's employees allowing water from a reservoir to go into the fish ponds of the plaintiff while the reservoir was being cleaned. The action was based on three grounds: (1) for taking and damaging property for public use; (2) Nuisance damaging plaintiffs property; and (3) For negligence. The portion of the opinion quoted by appellant deals with the liability of a county for negligence. The court at page 555 of the Utah Reports discusses the case of Wendell v. Spokane County, 27 Wash. 121, 67 Pac. 576, 91 Am. St. Rep. 528. The court distinguishes the case from the Lund case and in doing so quotes the following from the Washington case:

“This is an action for damages caused by draining the waters of a lake in Spokane County onto the lands of the plaintiffs, *done by the order of the board of County Commissioners* in constructing a road across said lake.

The court found in this case that the County was liable for damages.

In the case now before the court the proposed plant

was to be installed by order of the Board of County Commissioners.

The appellants place some reliance on the case of *Leibman vs. Richmond*, 284 (P) 731, 103 Cal. App. 354. We think that case is clearly distinguishable from the case at bar. This was an action to abate the County Court House of Alameda County as a nuisance. Under the Statutes of California the County under express authority was directed to maintain a court house. There was another law which provided:

“Sec. 3482 of the civil code provides. Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.”

There is no express statute in the case before the court which authorizes or directs Salt Lake County to operate a gravel mining and asphalt plant. Further we do not have a comparable statute governing nuisances such as California.

We submit that a municipal corporation shall not be allowed to construct or maintain any plant which will work an irreparable hardship on the residents of the County.

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

The assignment of error attacking the trial court's findings is so broad that it is impossible for us to determine just wherein the findings of the court were in error and what evidence is lacking to sustain the findings. Certainly under the former rule 26 of this court such

an assignment of error would not be considered by the court. *Johnson et ux vs. Brinkerhoff et al*( 57 (P) 2nd 1132, 89 Utah 530. *Townsend vs. Holbrook*, 56 (P) 2nd 610, 89 Utah 147. Even under the present rule to consider such an assignment would be giving the rule a very liberal interpretation.

The court may, in equity cases, review all of the evidence, but the findings of the trial court will not be disturbed unless the findings are against the evidence. *Anderson v. Anderson*, 104 Utah 104, 138 (P) 2nd 252. We invite the court to read the evidence in this case and we submit that no finding made by the trial court is against the evidence.

We now come to the question of the creation of a nuisance by reason of the proposed installation and operation of the plant. A public nuisance has been defined by the legislature. 103-41-3 Utah Code Anno. 1943.

“A public nuisance is a crime against the order and economy of the state, and consists in unlawfully doing any act, or omitting to perform any duty, which act or omission either: (1) Annoys, injures or endangers the comfort, repose, health or safety of three or more persons;”

The governor may under the statutes direct the attorney general to abate such a nuisance.

104-56-1 Utah Code Annotated 1943 defines a private nuisance as:

“Anything which is injurious to health or indecent, or offensive to the senses, or an obstruc-



tion to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, and damages may also be recovered."

The evidence in this case discloses without contradiction that the operation of the plant would be noisy. The testimony of Mrs. Speyer (Tr. 123, Rec. 185), and Mrs. Mays (Tr. 118-A, Rec. 180), is to the effect that Mt. Olympus acts as a sounding board and that even the noise of the present limited operation by Mr. Harper is apparent. The limited operation conducted by Mr. Harper is described by him (Tr. 163, Rec. 225). He testified that the only equipment used was a gravity loader and screener and at most 4 trucks. This court has held that noises and other disturbances may constitute an actionable nuisance, especially in a residential neighborhood. *Brough v. Ute Stampede Assn.*, 142 (P) 2nd, 670, 105 Utah 446.

The evidence as was stated in our statement of facts is that the operation of the so-called Catmul plant and other comparable plants is dusty and that smoke and odors from hot asphalt and firing of boilers is emitted. This evidence is not seriously controverted. The only claim made by appellants in their brief in this connection is that the prevailing winds during the day time in this area are from the North and West and that the dust and

odors will be carried away from the residences. Indeed, this is the only argument made in the brief attacking the court's findings. The court after hearing all of the evidence found in finding No. 4 (Rec. 48) that the prevailing winds were from the Southeast to the Northwest. This finding was based on the testimony of the witness Butler (Trans. 50, Rec. 111), who testified that he had made actual tests of wind currents at the mouth of Big Cottonwood Canyon. It was further substantiated by the witness Mrs. Mays (Trans. 118, Rec. 179) who had lived in the area all of her life. To controvert this testimony the appellants called Dr. Hawkes who testified that he had written a thesis on wind currents in mountain valleys but who had made no actual tests in this area. We submit that the evidence clearly sustains the court's finding. This court has held that dust and odors or either of them may constitute a nuisance even in areas which are not exclusively residential.

Ludlow vs. Colorado Animal By-Products Co.,  
137 (P) 2nd 347, 104 Utah 221;

Thackery vs. Union Portland Cement Co.,  
231 (P) 813, 64 Utah 437.

The proof is also uncontradicted that there is a definite traffic hazard being created on Holladay Boulevard from the mouth of Big Cottonwood Canyon to Holladay and that this traffic would be increased by 100 truck loads per day during the summer months. See the evidence of Mrs. Speyer (Trans. 126, Rec. 188), and Mrs. Mays (Trans. 1182A, Rec. 180). The case of

Benton vs. Kernan, 13 (A) 2nd 825, New Jersey, discusses excessive use of trucks and their effect on traffic as creating a nuisance in residential neighborhoods and holds that their operation may constitute a nuisance.

It is the contention of these plaintiffs that any one of the activities proved would constitute a nuisance in this particular case. The case of Benton v. Kernan supra has this to say regarding the operation of a rock quarry in a residential neighborhood.

“Considering the high-class residential character of the neighborhood, each of these noises is a nuisance in itself; but the medley of all of them, when the quarry is in full operation, produces such a din in the immediate neighborhood as to render normal conversation difficult.”

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

Salt Lake County has for years maintained and repaired the streets and roads within the County without operating an asphalt plant in this residential area. The present Commissioner Greenwood, testified that there would be a saving of money for the asphalt used and that he favored the gravel at the Harper pit. There is no showing that there are not other available sites. There is a serious question as to whether or not any saving would be made on the asphalt used.

The answer of the defendants did not set up or raise the issue of public good. All of the testimony

relative to costs was objected to at the trial by the plaintiffs. We submit there is no showing that the public as a whole would be benefited.

## CONCLUSION

All of the errors assigned by appellants have been answered.

Counties are created by the legislature and their powers and duties are defined by the legislature. The legislature has relinquished any immunity a county might have from suit by legislative enactment.

The county cannot create a nuisance or deprive its citizens and residents of the quiet, peaceful enjoyment of their homes.

All of the evidence conclusively establishes the fact that any one of the operations contemplated would have created a nuisance, all combined would be intolerable.

No public necessity for such an operation in this particular area was plead or shown.

It is submitted that the rulings and the findings of the trial court were in accord with the law and the facts.

Respectfully submitted,

CRITCHLOW, WATSON & WARNOCK,  
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