

1950

# Maud D. Coon and Joseph Coon v. Utah Construction Company : Brief of Appellants

Utah Supreme Court

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E. Leroy Shields; Attorney for Appellants;

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# In the Supreme Court of the State of Utah

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MAUD D. COON and JOSEPH  
COON, husband and wife,

*Appellants,*

vs.

UTAH CONSTRUCTION COM-  
PANY, a corporation,

*Respondent.*

Case No. 7470

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## BRIEF OF APPELLANTS

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E. LEROY SHIELDS,  
*Attorney for Appellants*

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MAUD D. COON and JOSEPH  
COON, husband and wife,

*Appellants,*

vs.

UTAH CONSTRUCTION COM-  
PANY, a corporation,

*Respondent.*

Case No. 7470

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## BRIEF OF APPELLANTS

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### STATEMENT

This is an action brought by Maud D. Coon and Joseph Coon, husband and wife, against the Utah Constructoin Company, a corporation, to recover damages alleged to have resulted from respondent's use of the highway adjacent to appellants' brick home situate at 80th West and 33rd South Streets, Salt Lake County, Utah (Tr. 3). From July, 1948, and continuing approximately for seven months thereafter, the Utah Construction Company was engaged in the construction and repair of a dike around the tailings pond of the Utah Copper

Company and in the performance of this work, the company used approximately fifteen Euclid trucks whose gross load varies from 81,000 to 84,000 pounds. These trucks are equipped with pneumatic tires. The front wheels of these vehicles were equipped with 1200/24 tires and the rear wheels with 2100/24 tires. Each unit had six tires. Respondent's Exhibit No. 12, which is a part of the record, is a photograph of a Euclid truck such as was used on the project in question (Tr. 122, 123 and 124, inclusive).

In the performance of the contract in question, these large Euclid trucks traversed an area of approximately seven miles from the place where they were loaded to the place where the load was discharged on the dike. Work began usually around 5:00 A.M. and continued throughout the day and into the night hours to approximately 12:00 P.M. (Tr. 8). As stated above, the appellants' home, photographs of which appear as a part of this record, is situated near the highway at 80th West and 33rd South Streets along which these large Euclid trucks conveyed their loads of rock and earth materials to the tailings pond.

The highway immediately in front of appellants' home has a grade which requires the shifting of gears in the operation of the trucks in question when bearing their capacity load (Tr. 7). The natural operation of the trucks caused smoke and fuel fumes and dust in large quantities, particularly when proceeding up the grade adjacent to appellants' home. The fumes, dust and smoke penetrated the air and were blown by air currents over appellants' property and into their home in such quantities and so continuously each day during the opera-



tion of respondent's business aforesaid as to require the appellants to keep all windows and doors of the home shut tight. Notwithstanding the doors and windows were closed tightly, the fumes, smoke and dust from the operation of the trucks seeped through and penetrated into the rooms of the home settling upon and covering the furniture, fixtures, carpets, beds, beddings and household effects and infiltrating into the food and edibles in the appellants' home, thereby interfering with the comfortable enjoyment of said home and creating an unhealthy and unsanitary condition in said home. In addition to these conditions, the operation of said trucks naturally caused loud and disturbing noises to such an extent that appellants and appellants' family were unable to carry on a conversation in their home in a normal way thereby causing appellants great annoyance and constantly disturbing their peace and quiet and the night-time operation of the said trucks made it impossible for appellants to sleep or to obtain proper rest.

In addition to the foregoing conditions created by the operation of the trucks of the respondent, appellants sought damages in the court below for large cracks that have developed and appeared in the outside walls of the home, around the doors and windows and for plaster falling from the ceiling in some of the rooms, contending that vibrations were caused by the heavy weight of the trucks and the heavy loads carried therein as they traversed the ground adjacent to appellants' home of such intensity as to shake the ground upon which appellants' home is built thereby causing said cracks. A series of photographs of both the inside and the outside of appellants' home were caused to be taken by the respondent and



were introduced at the trial as exhibits and are made a part of this record (Tr. pages 114 to 125). (Tr. page 156).

## STATEMENT OF ERRORS

Appellants rely upon the following errors:

### Error No. 1

The court erred in making and entering Conclusion of Law No. 1 to the effect that:

“The operations of the defendant, Utah Construction Company, in hauling material along and upon 80th West Street in Salt Lake County, Utah, from the 1st day of August, 1948, and until the 1st day of March, 1949, did not create or constitute a nuisance.”

### Error No. 2

The court erred in making and entering Conclusion of Law No. 2 to the effect that:

“The operations of the defendant, Utah Construction Company, identified above, did not cause any physical damage to the real or personal property of the plaintiffs.”

### Error No. 3

The court erred in making and entering Conclusion of Law No. 3 to the effect that the operations of the defendant, Utah Construction Company, as revealed by the evidence and identified in the Findings

"... did not cause the plaintiffs any legal damage by reason of the annoyance and disturbance to the plaintiffs and the noise and dust incident upon the operation of said trucks, and the defendant had a lawful right to drive and operate said trucks upon and over the public highway known as 80th West Street in the manner and to the extent that said trucks were operated."

#### Error No. 4

The court erred in making and entering its judgment herein, and the whole thereof, to the effect that:

"The operations of the defendant alleged in plaintiffs' complaint have not caused the plaintiffs to suffer any damage to their property and have not caused any legal damage to the plaintiffs by reason of the noise, vibration and dust incident to the operation of said trucks and the operation thereof by the defendant was a legal and proper use of said public highway by said defendant and did not create or constitute a nuisance."

#### Error No. 5

The court erred in not entering its Findings, Conclusions and Judgment to the effect that the operations of respondent, Utah Construction Company, as shown by the evidence, created a nuisance to appellants injurious to their health, indecent and offensive to their senses, creating an obstruction to the full use of their property so as to interfere with the comfortable enjoyment of life and property and awarding plaintiffs damages within the scope and meaning of Section 104-56-1, Utah Code Annotated 1943.

## ARGUMENT

Errors of Law Nos 1, 2, 3, 4 and 5.

These errors are directed to Conclusions of Law Nos. 1, 2, 3 and to the Judgment, as entered, all of which are to the effect that even though respondent, Utah Construction Company, in its operations and use of 80th West Street in Salt Lake County adjacent to the home and property of plaintiffs from August 1, 1948, continuously daily to March 1, 1949, commencing at 5:00 o'clock A.M., and operating about fifteen large Euclid trucks at intervals of 2½ minutes at a speed of 20 miles per hour with a gross load of 42 tons, continuously through the day and into the night hours to 11:00 o'clock P.M., except for one-half hour off at lunch, emitted strong and offensive fuel fumes, created clouds of dust scattered by air currents over premises of plaintiffs and infiltrating into the inside of plaintiffs' home covering furniture, clothing and settling over carpets, rugs and other household effects, and even entering the food and food supplies of plaintiffs, created loud and disturbing noises and shook through vibrations of speed and the heavy loads the ground surrounding and underneath plaintiffs' home, still as a matter of law no nuisance was created to plaintiffs and no actionable nuisance thereby existed or arose and respondent, Utah Construction Company, was within its lawful rights in such use of said highway.

For this reason, these errors will be treated, considered and argued together.

No material, factual matter is in dispute except the physical effect the respondent's use of the highway has had upon the

plaintiffs' house occupied as their dwelling. Plaintiffs contend the vibrations to the adjacent ground upon which said dwelling rests caused by the continuous pounding of the highway with heavy loads of earth material used in the construction of said dike resulted in increasing and expanding cracks already existing in the foundation and walls of said dwelling and between the walls and foundation alleged to have been originally caused by respondent's use of said highway by similar heavy machinery and heavy loads some three years before the instant case was commenced and for which a settlement of \$3,000.00 was made without joining issue or going to trial (Tr. 32-33). Respondent contends the expansion and enlargement of such cracks and moving out of line of the original construction is the result of the natural settling and sinking of the foundation and has been caused by the natural elements and passing of years. Contractors or builders were sworn and testified expertly regarding the effect of such vibrations on the dwelling. Witness Peck sworn on behalf of plaintiffs (appellants here) definitely attributed the expanding cracks in the walls and foundation to vibrations caused by said Euclids (Tr. 50-62). Witness Paulson, superintendent of respondent, Utah Construction Company, testified that vibrations caused by the passing trucks did no damage to the house (Tr. 150-152). Witness Percival Young, general contractor, sworn on behalf of respondent, testified that vibrations caused by locomotives and freight trains would have no effect at all on adjacent buildings, (Tr. 180), but admitted he was not qualified to talk on vibrations (Tr. 189). And witness Hogan, University of Utah Engineering Professor, employed by respondent to make a seismometer and sound level tests of the effect of the use of

the Euclids in the area in question, made tests both upon the highway and adjacent to the highway, also within the home of the plaintiffs. Comparisons were made between the mean averages of vibration measurements of other vehicles using the highway, including light passenger cars, small trucks, heavier trucks such as P.I.E. etc., and the loaded Euclids (Tr. 203-214). The results of these tests are significant and definitely establish the fact that the loaded Euclids created an extra-ordinary use of the highway and created vibrations in terms of increased decibels much in excess of the ordinary traffic.

That the respondent's operations created dust, fumes and smoke adjacent to and in, around and upon plaintiffs' dwelling is not controverted, neither does respondent deny that the operation of said Euclids caused loud and disturbing noises, interfering with the peace and quiet of plaintiffs' home and the comfortable enjoyment thereof. Admitting all these elements the sole issue which divides the parties is whether as a matter of law such acts and operations of the respondent create an actionable nuisance to plaintiffs for which respondent should respond in damages.

Let us now look to the statute above referred to and to the pertinent expressions of this court in cases brought under said statute.

Section 104-56-1, Utah Code Annotated 1943, covers actions for nuisance such as the instant cases and reads:

"Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction 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.

In *Dahl vs. Utah Oil Refining Company*, 71 U. 1, 262 Pac. 269, this court declared that what constitutes an actionable nuisance in law under the statute cited is always a question of degree. And the test of whether the use of the property constitutes a nuisance is the reasonableness of the use complained of in the particular locality and in the manner and under the circumstances of the case, citing 29 Cyc. 1156.

"The right to recover damages for injuries occasioned by fumes, dust, smoke, foul air, etc., being cast upon one's property by another, in proper cases, is well established. But the rule of liability is not absolute and the law does not afford redress for every such discomfort or annoyance. Extreme rights in this regard cannot be enforced. Of necessity some degree of inconvenience and annoyance must be endured or community and social life would be impossible. It thus follows that what constitutes in law an actionable nuisance is always a question of degree. The cases cited and relied on by the plaintiff are instances where, under all the circumstances, the use of the property complained of was held unreasonable. Here, where the facts and circumstances, both with respect to the origin and nature of the thing complained of and the degree of its offense, differ essentially from those of the cases cited, we have an entirely different legal question." Excerpt from *Dahl case supra*.



The following is cited with approval in the Dahl case:

"What amount of annoyance or inconvenience caused by others in the lawful use of their property will constitute a nuisance, is largely a question of degree depending on varying circumstances, and is incapable of exact definition. (Citing cases). The injury or annoyance must be of a real and substantial nature, and the pertinent inquiry ordinarily is whether the acts or conduct proved are such as materially to interfere with the ordinary comfort, physically, of human existence, or are materially detrimental to the reasonable use, or value of the property (citing cases.)"

—Cumberland Corporation vs. Metropoulos, 241 Mass. 491, 135 N. E. 693.

The principles laid down in the Dahl case *supra* fairly reflect the weight of authority where the basis for liability applicable in private nuisance cases is concerned.

In 39 American Jurisprudence, Page 296, Section 16, the general rule is stated as follows:

"While, as a general proposition, a man may do what he will with his own, this right is subordinate to another, which finds expression in the familiar maxim 'sic utere tuo ut alienum non laedas,' which, it has been said, is peculiarly applicable in nuisance cases. Generally, a person has a right to use his own property for any lawful purpose, provided he does not thereby deprive others of any right of enjoyment of their property which is recognized and protected by law and his use is not such a one as the law will pronounce a nuisance. For annoyance and injury which are merely consequential on the legitimate use of the property, the law of nuisance furnishes no redress, and the injury is *damnum absque injuria*."

The precise limits of one's right to do as he pleases with his own property are difficult to define. The use must be a reasonable one, and the right implies and is subject to a like right in every other person. One cannot use his property so as to cause a physical invasion of another person's property, or unreasonably to deprive him of the lawful use and enjoyment of the same, or so as to create a nuisance to adjoining property owners or the public, and any unreasonable or unlawful use which produces material injury or great annoyance to others, or unreasonably interferes with their lawful use and enjoyment of their property, is a nuisance which may be enjoined and will render him liable for the consequent damage.

What is a reasonable use and whether a particular use is a nuisance cannot be determined by any fixed general rules, but depend upon the facts of each particular case, such as location, character of the neighborhood, nature of the use, extent and frequency of the injury, the effect upon the enjoyment of life, health and property and the like. A use of property in one locality and under some circumstances may be lawful and reasonable, which under other circumstances would be unlawful, unreasonable, and a nuisance. It has been held that what is a reasonable use of property is sometimes a question of law and at others a question of fact, and that when it depends upon an inference from peculiar, numerous or complicated circumstances, it is usually a question of fact. And according to some authorities, the question of what constitutes unreasonable and unlawful use of premises, and of what constitutes an unlawful and unreasonable injury to other property arising from such use, are questions of law, and cannot be submitted to the jury.

A business which is lawful in itself may become a nuisance, either because of the locality in which it is carried on or because

it is conducted in an improper manner. According to some of the courts, such a business may, under some circumstances, even become a nuisance per se, although the weight of authority is to the contrary. See 39 American Jurisprudence 323, Section 43.

## "NOISE AND VIBRATION"

Section 47. Generally.—Generally, noise is not a nuisance per se, but it may be of such a character as to constitute a nuisance in fact, even though it arises from the operation of a factory, industrial plant, or other lawful business or occupation.

To render noise a nuisance, it must be of such a character as to be actual physical discomfort to persons of ordinary sensibilities." (Supported by long list of cases, Footnote 19).—39 Am. Jur. 330.

A notable case among said authorities cited in the footnotes to the above quoted rule is found in 102 Fed. 85, 50 L.R.A. 488, Chicago G. W. R. Co. vs. M. E. Church. In that case there was involved the erection of a water tank in a public street 35 feet from a church, and of a passenger railway station 60 feet therefrom, thereby enveloping the church in smoke and filling it with offensive odors and more or less smoke and cinders, and disturbing the congregation by the loud and incessant noises caused by the blowing off of steam, the ringing of bells and sounding of whistles, and the backing of trains. The court held such acts constituted a private nuisance for which compensation must be made or the nuisance removed.

And under Section 52, Page 335, Volume 39 American Jurisprudence, appears the following statement:

"Jarring or vibration may amount to a nuisance where it injures adjoining houses or interferes with the comfortable occupation or enjoyment thereof. Thus it has been held that an injunction will issue to restrain the operation of steam machinery which jars and shakes the complainant's house so as to render it unsafe or unfit for habitation. It has been held, however, that an injunction would not issue to restrain one from operating machinery in a lawful business on the ground that it shakes and cracks the walls of the plaintiff's adjoining house and diminishes their rental value, where it appeared that an adequate remedy existed in an action for damages, and that the plaintiff did not object to the erection of the machinery but submitted to its use for seven years."

One of the leading cases found in the footnote (6) to the above statement is Stanley Kobielski and wife, appellants, vs. Belle Isle East Side Creamery Co., 22 Mich. 656, 193 N. W. 214, involving the operation of a creamery turning out 2,500 cases of milk per day in a residential district, separated from a dwelling house only by a narrow alley, through which the loading platform is reached, the operation of which, by noises of horses, cans and automobiles, and loud talking of men in the night, disturbs the sleeps of inmates of the dwelling to the injury of their health. The court held the acts to be a nuisance. In passing on the question the court used the following citation from 20 R. C. L. 445, which is directly in point with the instant case in relation to the night time use of the highway by respondent, to-wit:

"The authorities are numerous which hold that noise alone, or noise accompanied by vibration, if it be of

such character as to be productive of actual discomfort and annoyance to a person of ordinary sensibility, may create a nuisance, and be the subject of an action at law, or an injunction from a court of equity, though such noise and vibration may result from the carrying on of a trade or business in a town or city. To have this effect the noise must be unreasonable in degree; and reasonableness in this respect is a question of fact, depending on the character of the business, the manner in which it is conducted, its location and relation to other property, and the other facts and circumstances of the case. The number of people concerned by the noise, and the magnitude of the industry complained of, are both elements entitled to consideration in reaching a conclusion as to the fact. And, again, the time at which noises are made is an element to be considered in determining whether a noise constitutes an actionable nuisance. A noise incident to the operation of machinery during the day may not be a nuisance, while the same noise during the usual sleeping hours of the night would constitute a nuisance. And noises on Sunday may constitute a nuisance though they would not have been such if made on a week day. (Underscoring mine).

And see also *Mitchell vs. Flynn Dairy Company* (Iowa) 582, 151 N. W. 434, 154 N. W. 878.

"That which would be permitted at one hour or season may be restrained at another."

—*Stevens vs. Rockport Granite Company*, 216 Mass. 486, 104 N. E. 371.

Thus, under the authorities cited herein, while the respondent's use of the highway in question during the daylight hours might from the standpoint of fuel fumes, dust, smoke

and attendant noise of powerful diesel engines of 150 horsepower, carrying heavy loads over 2 to 3 minute intervals be within the lawful rights of respondent, still projecting such use into the late hours of the night when plaintiffs were entitled to an interval of rest from such annoyances would constitute an actionable nuisance.

Considering the character and type of equipment used by respondent, the time of day when the use commenced and the period of the day through which the use continued, the intervals between the vehicles as they proceeded to and from the dirt pits, the months through which the work continued without abatement, with all the attendant elements of annoyance, the fuel gases emitted, the smoke and dust circulated into the air and settling constantly upon and within the dwelling of plaintiffs, the noise and vibrations caused by the speed and excessive loads of the Euclids daily, eighteen hours each day, except the lunch hour, plaintiffs believe respondent's use of the highway was unreasonable and unwarrantable. Although injunction was not sought against respondent's manner of use of the highway and possibly would not lie in such use, still under the authorities cited the use was extraordinary, out of the usual pattern of use even for the heaviest of traffic and certainly applied at unreasonable hours of the night. No emergency justifying such use existed and plaintiffs should not be required to suffer as the evidence clearly showed they suffered without compensation therefor. See *Lewis vs. Pingree National Bank*, 47 Utah 35, 151 Pac. 558.

"There is no doubt of the general proposition that a man may do what he will with his own, but this right



is subordinate to another, which finds expression in the familiar maxim: Sic utere tuo ut alienum non laedas. A landowner's rights, says the United States Supreme Court, 'will not justify him in maintaining a nuisance, or in carrying on a business or trade that is offensive to his neighbors. Ever since Aldred's Case, 9 Coke 57, it has been the settled law, both of this country and of England, that a man has no right to maintain a structure upon his own land, which, by reason of disgusting smells, loud or unusual noises, thick smoke, noxious vapors, the jarring of machinery or the unwarrantable collection of flies, renders the occupancy of adjoining property dangerous, intolerable or even uncomfortable to its tenants. No person maintaining such a nuisance can shelter himself behind the sanctity of private property.' "

—20 R. C. L., Page 381, Section 2.

Text supported by *Camfield vs. United States*, 167 U. S. 518, 17 S. Ct. 864, 42 U. S. (L. ed.) 260.

Assuredly, the \$3,000.00 settlement made by respondent with plaintiffs (appellants) (Tr. 32-33), was not intended as and for a permanent and complete adjustment of a continuing nuisance which might recur over a period of years into the future, when viewed in the light of the work remaining to be done upon said dikes.

Under the principles laid down in the statute cited and the judicial interpretations thereof by this court and the authorities from other jurisdictions cited herein, appellants respectfully submit the evidence presented to the trial court

does not support the Findings, Conclusions and Decree rendered in this cause, but on the contrary does justify a finding of actionable nuisance for which damages should be awarded.

Respectfully submitted,

E. LEROY SHIELDS,

*Attorney for Appellants*