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

Utah Supreme Court

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Ray, Quinney & Nebeker; Attorneys for Respondent;

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Case No. 7470

IN THE SUPREME COURT
of the
STATE OF UTAH

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

Appellants,

vs.

UTAH CONSTRUCTION COMPANY,
a corporation,

Respondent.

FILED

SEP 20 1950

Clerk, Supreme Court, Utah

BRIEF OF RESPONDENT

RAY, QUINNEY & NEBEKER,
Attorneys for Respondent.

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BRIEF OF RESPONDENT

I. STATEMENT OF THE FACTS RELATING TO
RESPONDENT'S MOTION TO STRIKE TRAN-
SCRIPT OF RECORD AND ARGUMENT THEREON.

The defendant and respondent, Utah Construction Company, has served and filed herein its motion to strike appellant's transcript of official record because it was not settled or filed as provided by law. A copy of the motion is included in the brief as Appendix A.

The record shows that the findings of fact and conclusions of law and judgment were signed and filed on June 8, 1949. On July 8, 1949, the plaintiff served and filed a motion for new trial. On September 6, 1949, the court made and entered its order as follows:

“Upon the motion of Grover A. Giles, counsel for the plaintiffs and good cause appearing therefor, it is ordered that the plaintiffs’ motion for new trial be, and the same is hereby denied.”

It is respondent’s contention that since the motion for new trial was denied upon the motion of Grover A. Giles, counsel for plaintiffs, that it was not necessary for the defendant to serve notice of overruling of the motion for new trial in order to start the time running within which the appellant must prepare, serve and file the bill of exceptions.

On November 26, 1949, the appellant served, and on November 28, filed their notice of appeal. On December 17 an order was made and entered extending the appellant’s time from December 26, 1949, to January 26, 1950. On January 21, 1950, appellant, proceeding under the Utah Rules of Civil Procedure served a designation of record on appeal and proceeded upon the theory that the rules of civil procedure made unnecessary the perfecting of the appeal under the old statute which included the serving and filing and settling of a bill of exceptions.

Respondent does not take issue with appellant’s theory that since January 1, 1950, bills of exception

have been made unnecessary in the new appellate procedure. It is, however, respondent's contention and position that the rules of procedure were not effective prior to January 1, 1950, and that since the time for appellant to prepare, serve and file a bill of exceptions had expired on October 6, 1949, which was thirty days after the motion for new trial was overruled *upon motion of appellant's attorney*, that neither the notice of appeal thereafter served nor the rules of civil procedure thereafter adopted could revive the bill of exceptions by calling it a designation of record on appeal or by any other means. It was not the intention of the Supreme Court in adopting the Utah rules of civil procedure to make it possible for an appellant, whose time to prepare, serve and file a bill of exceptions under the procedure theretofore existing had expired, and who had served and filed a notice of appeal prior to the effective date of the new rules, to file a designation of record on appeal under the new rules and thereby cure a fatal defect in the procedure required for the filing of a bill of exceptions under the former practice.

Rule 75(a) with respect to designation of contents of record on appeal provides:

“Within ten days after the filing of the notice of appeal, the appellant shall serve upon the respondent and file with the District Court a designation of the portion of the record, proceedings, and evidence to be contained in the

record of appeal unless the respondent has already served and filed a designation.”

Appellant's notice of appeal was served and filed on November 28, 1949, and the designation of contents of record was not served and filed within ten days of that date.

It is our position simply stated that the time to serve and file the bill of exceptions expired on October 6, 1949, which was thirty days after the motion for new trial was overruled upon motion of appellant's own attorney. The thirty-day period was not started anew under the Utah cases by the appellant's thereafter serving and filing the notice of appeal.

Rule 1 provides that the rules govern all proceedings brought after they take effect and all proceedings in actions then pending except to the extent that in the opinion of the court the application in a particular action pending when the rules take effect, would not be feasible or would work injustice, in which event the former procedure applies. If appellant asserts that the new rules apply his designation of record is ineffective because it was not filed within ten days after the filing of notice of appeal. While there is no Utah precedent on the point, the language of rule 1 quoted above seems to definitely provide that where the appellant was in no position to file a designation of the record within ten days from the date of appeal, that he should have continued the method of perfecting his appeal under the

old statutes and should have had a bill of exceptions served, filed and settled within the time provided by law.

In *Jensen v. Lichtenstein*, 45 Utah 320; 145 Pac. 1036, the court held that the plaintiff's bill of exceptions should be stricken. The records show that the judgment was filed and entered January 28, 1914, and on May 25, 1914, plaintiff's counsel served notice of the decision upon defendant's counsel. Defendant's counsel signified his intention to appeal and incorporated into their bill of exceptions only so much of the proceedings as they deemed material to their appeal. Plaintiff had obtained an extension of time to prepare and settle the bill to May 20, 1914. The bill of the plaintiff was settled on June 25. Plaintiff contended that this was within time because he was entitled to notice of the decision from defendant's counsel and that since no notice was served upon him that the time within which to prepare and serve a proposed bill of exceptions had not commenced to run when his proposed bill was in fact served. Holding that the plaintiff was in error in this contention, our court said:

“To hold that the Legislature intended that both parties must serve and are entitled to notice of the entry of a decision in a particular case is to hold that it intended something unreasonable, if not absurd. The whole purpose of the statute is to give the aggrieved party who may intend to appeal, sufficient time within which to prepare and serve his proposed bill of exceptions, in which either all or so much of the proceedings of the trial court may be set forth as

may be deemed necessary to such appeal. The notice provided for in the section is intended to set the time in motion within which the proposed bill of exceptions must be prepared and served. Now, is it reasonable to suppose that the party who prepares and serves the notice, which must contain a statement of the time that the decision was filed, is entitled to a further notice of what he must be conclusively presumed to know? Is not the notice which he prepares and serves upon his adversary also notice to him of what it contains? Why should it be held to impart notice to the person upon whom served but not upon him who is required to prepare and serve it? As already intimated, to so hold would, in our judgment, lead to an absurdity. Under all of our holdings, therefore, the court was without power to settle and allow plaintiff's proposed bill of exceptions and therefore we cannot consider it for any purpose."

If notice served by the plaintiff on the defendant in the above cited case is also notice to the plaintiff of the entry of judgment it would seem absurd and an unnecessary requirement to say that where plaintiff's own counsel has himself moved that this motion for new trial be overruled and if such is the ruling in open court and in the presence of plaintiff's counsel that he must nevertheless be served with written notice of overruling of his motion for new trial in order to start running the time within which a bill of exceptions must be served and filed, it would result in a holding by the court that notice must be given to the attorney who was the only one as shown

by the record who was present in court when his motion for new trial was overruled, and apparently the only one who knew that it was overruled because as shown by the record defendant's counsel proceeded to have it overruled again without knowledge that it had been theretofore denied.

In *Cody v. Cody*, 47 Utah 456; 154 Pac. 952, it appeared that the plaintiff obtained a decree of divorce on November 6, 1913. On June 19, 1914, more than six months after the entry of judgment, the plaintiff appealed from the interlocutory decree entered on November 6, 1913. Plaintiff's counsel contended that his appeal was in time because no notice of original decision was served upon plaintiff, as to this contention the court said and held:

“As to the first proposition, we remark that the record is conclusive that the decree as entered was entirely in favor of the plaintiff and that the same was prepared by her attorneys. Surely the statute requiring notice of a decision in order to set in motion the time for serving and filing a notice of motion for a new trial was not intended to apply to the party in whose favor the decision was given, when that party has prepared the findings and conclusions, and decree, must of necessity, as pointed out by us in *Jensen v. Lichtenstein*, 45 Utah 320, 145 Pac. 1036, be deemed to have notice of the decision, and hence is not entitled to further notice thereof. The plaintiff, therefore, was not entitled to notice of the decision in the divorce proceedings, and hence her notice of motion for a new trial was not filed within the time required by our statute,

and it therefore could not be used as a means to extend the time within which to take an appeal.”

If these cases make it clear, as we submit they do, that the plaintiff was not entitled to notice of overruling of the motion for a new trial when it was overruled upon his motion and as shown by the record in the absence of counsel for defendant, then it is clear that the time within which a bill of exceptions should have been prepared, served and filed commenced to run on September 6, 1949.

The remaining question is whether or not the notice of appeal served on November 26, and filed on November 28 gave plaintiff a new and additional thirty days commencing on November 28, during which he could file his bill of exceptions. Section 104-39-4 in subdivision 2, provides:

“In case an appeal is taken before the bill of exceptions is settled, service of the notices aforesaid shall not be necessary and time shall run from service of his notice of appeal.”

This provision of the statute was analyzed in *Findlay v. National Union Indemnity Co.*, 85 Utah 110; 38 Pac. (2d) 760. The court held the appeal method of starting the time to run “is applicable only when time has not already started to run either by notice or by the provisions of the statute without notice.” (Page 122 of 85 Utah.)

In that case it appeared that the plaintiff had judgment on his verdict and a motion for a new trial was denied on March 15, 1932. Notice of denial of the motion was served on the 16th and filed on the 17th of March, 1932. Notice of appeal to the Supreme Court was served and filed on the 2nd of April, 1932. On April 29, 1932, the District Court entered an order granting the defendant and appellant sixty days from the 1st day of May, 1932, in which to serve, settle and file the bill of exceptions. Respondent filed a motion to strike the bill of exceptions on the theory that the notice of denial of motion for new trial started the time within which the bill should have been prepared running on March 17, 1932 and that the time expired at the end of thirty days. In holding that the filing of the notice of appeal did not start a new thirty-day period but was applicable only when the time had not already been started by some other method, the court said:

“When the time limitation fixed by the statute has been started running by any one of the methods provided by the statute, except by notice of appeal, may such time as has elapsed be cut off and the time started to run anew and from the date of the service of notice of appeal? We think it was neither the purpose of the statute nor the intention of the Legislature in making the amendment to thus permit an extension of time when once started as provided by the statute: ‘In case an appeal is taken before the bill of exceptions is settled service of the notices aforesaid shall not be necessary’ to start the

time running within which to prepare and serve the bill of exceptions. When the time has once been started by the service of the required notice, it may no more be cut off by serving and filing a subsequent notice of appeal than the time could be similarly cut off in case of entry of judgment on a verdict where no notice is necessary in the absence of a motion for a new trial. The appeal method of starting the time to run is applicable only when time has not already been started to run either by notice or by the provision of the statute without notice.”

It therefore appears clear that since the action of plaintiff's counsel in making the motion in open court that the motion for a new trial theretofore filed by the plaintiff should be denied is the equivalent of notice of denial upon that date and that plaintiff cannot thereafter assert that he is entitled to such written notice, and that the time within which the bill of exceptions in this case should have been prepared and filed commenced to run on September 6, 1949, and expired on October 6, 1949, and that since that time had expired when the new rule became effective appellant's effort to have the evidence in the case placed in the record in form of a designation of record on appeal under the new civil rules is abortive and that the court should strike the purported transcript of official record and consider the appeal only on the judgment roll.

II. STATEMENT OF THE FACTS UPON THE MERITS OF THE CASE.

The case below was tried to the court sitting without a jury. The court made findings and conclusions and judgment in favor of Utah Construction Company. The only question before this court is whether the findings and judgment are supported by the record. The appellant alleges as error the court's *conclusions of law* number one, two and three and that the judgment for defendant is erroneous. No errors are alleged relating to the admission or exclusion of testimony. Appellant does not claim that the findings of fact are not supported by the testimony.

Appellants own a farm on 33rd South Street at 80th West. Eightieth West Street, which is a public county road, extends south from the tailings pond of Kennecott Copper Corporation. The respondent used this public highway to haul gravel from a pit south of appellant's farm to the tailings pond which is north of appellant's farm, to reinforce the earth bank. This suit involves only a period of approximately seven months of use commencing in July, 1948.

In order to clarify the issue before this court it is proper to ask what facts are controlling in this case. We wish to emphasize at the outset that we will not contend the trucks of respondent did not make *any noise or dust*. There are two fundamental reasons why the judgment of the trial court should

be sustained. First the record shows that the use of the highway was a proper and lawful use different only in degree from the use of highway by other users. The record shows there was an increased use and volume of traffic with the resulting increase in all the burdens sustained by those who live on such a highway—noise and dust and perhaps some fumes. Second, the appellant's suit is based on the theory of a nuisance and the measure of damages is the depreciation in the market value of his farm. There is no evidence in the record that his farm has depreciated in market value in any sum. There is no testimony showing the sale or rental value before or after the operation of the trucks of respondent. The court could not make a finding that the appellant had sustained one dollar in damages by reason of the defendant's use of the public highway. The loss of sale value or rental value must be based on direct testimony.

The record shows that the plaintiff had filed a prior suit against the same defendant in which he had alleged that in a prior period the Utah Construction Company had damaged his home because of the operation of its trucks on the public highway. On October 16, 1946, the former case was settled and the plaintiff received \$3,000 and signed a release in full for all damages theretofore sustained. (Exhibit 17) Respondent introduced the complaint and release not as a bar to the present suit between the same parties but to show that according to plaintiff's sworn complaint the cracks in his house were there when the respondent

commenced its truck operations in July, 1948. Appellant could not recover twice for the cracks he alleged were caused prior to October 16, 1946. He had the burden of proving the extent in dollars of the damage (depreciation in market value), if any, which resulted from the second hauling period. There was testimony that the old cracks had opened up worse but no attempt was made to show depreciation in market value caused by the second period of operation as distinguished from the prior period which was settled.

This is a law case, being an action for damages to real estate. The defendant in the court below had no burden of proof to discharge and it is accurate to state that the judgment of the trial court must stand unless the evidence in support of plaintiffs' theory of the case is so convincing that to fail to find in favor of the plaintiff would be arbitrary and capricious. The Supreme Court in this case does not have the obligation nor the power to weigh the evidence as it would in an equity case and constitute itself a body to find the facts from the preponderance of the weight of the testimony, but it is only concerned with the question of whether there is sufficient testimony in the record so that a finding for the defendant upon the issues involved would not be arbitrary without support in the testimony.

It therefore becomes useful to examine the testimony produced on behalf of defendant. J. Melvin

Paulson testified that he was superintendent of the Utah Construction Company and had started to work on the job in question on February 1, 1945. What has been referred to as the first job started December 28, 1944, and lasted about three months (R. 167). The second job, or the one involved in this lawsuit, commenced the 26th of July, 1948, and ended after seven months (R. 65). The trucks started running at five o'clock in the morning and ran until eleven o'clock P.M., with thirty minutes out on each shift for lunch. Drivers were changed at two o'clock in the afternoon. The gross load is from 81,000 to 84,000 pounds. They had six pneumatic tires, and Exhibit 12, which is a photograph, shows one of the larger units. The tires are about five feet in diameter and about fourteen inches across the face of the tire. There would be a truck passing a given point in one direction or the other approximately every three minutes (R. 170). Delays frequently occurred resulting from break-downs.

“A. Prior to the beginning of our operation in July of 1948 we oiled the road and put a coat of slag from the smelter on top of the oil coat to reduce the dust and to sink into the oil. As time went on and some dust perhaps accumulated on the road we used a sprinkler truck to operate back and forth, up and down 80th West constantly.” (R. 171).

The attention of the witness was called to Exhibit 5, and he then testified as follows:

“Q. Did you observe that house or that part of the house or crack prior to July 26 in 1948, in the year 1948?”

“A. At Mr. Coon’s request I went in and looked at the condition of his home in the spring of 1945 and he called this particular corner to my attention, stating he had plastered that up in October of 1944 and showed me that there was an additional crack that had developed after it had been plastered.

“Q. This is what he told you at what time in 1945?”

“A. This was in the spring of 1945, either the last of March or early in April.

“Q. That was at the end of what you call the first job, approximately that?”

“A. Yes sir, yes sir.” (R. 178-179)

At page 135 of the record the witness who had testified that the crack shown in Exhibit 5 was in the house in 1945 and testified that he saw it again in 1948 when the second job was in progress, testified:

“Q. Did you observe this corner of the house?”

“A. I did from the roadway.

“Q. And did you observe it at intervals after that?”

“A. Yes sir.

“Q. Now do you have any opinion as to whether or not there is any change in that from

the time that you first saw it in 1945 until the present time?

“A. I don’t think there is any change whatsoever.” (R. 180-181)

Mr. Paulson further testified that the horsepower of the diesel motors used in the Euclid trucks was 150 horsepower and that the commercial transports used on highways generally have horsepower ranging from 150 to 275.

With respect to the dust we find the following at page 140 of the transcript:

“Q. And why was it necessary a little later to put a sprinkler on an oiled road?

“A. With the hauling equipment and the travel of the public there was a little dust accumulated on the road and knowing the attitude of the people on 80th West we made it a special point to not only oil the road but to sprinkle it frequently to keep down the dust and there was no dust.

“Q. There wasn’t any dust at all?

“A. No sir.

“Q. Not at any time?

“A. Not at any time except perhaps when we would have a hot, dry spell.” (R. 185-186)

Two sprinklers were available for sprinkling the road so that one or the other of the trucks was operating constantly, day and night, except when there was rain. (R. 188)

With respect to the alleged damage to the house resulting from vibration caused by moving of the trucks on the highway, Mr. Paulson testified at page 150 of the transcript:

“Q. And is it your testimony that this vibration of those trucks didn’t do any damage to the house?

“A. Yes sir.”

* * * * *

“Q. Now I ask you upon what you base your conclusion?

“A. I don’t think the trucks would cause any damage from vibration.” (R. 195)

On cross-examination Mr. Paulson was asked:

“Q. What caused the cracks?

“A. Old age and settlement.

“Q. This is a brick house, is it not?

“A. Insufficient foundation.”

* * * * *

“Q. And when did you see it before?

“A. 1945.

“Q. That was when you were operating your trucks?

“A. We had finished the operation at that time.

“Q. But there had been operation for three months when you saw the house?

“A. That is correct, but Mr. Coon showed me the crack in this pillar in the spring of '45 and said he had plastered that three-quarter-inch crack up in October of '44.” (R. 196-197)

Mr. Percival Young, a general contractor who had made a special study of causes of cracking in houses, when shown Exhibit 5, testified:

“A. That is a picture taken of the southeast corner, near the enclosed porch and in the general direction of north and west and that picture was taken to show the crack at that point?

“Q. And will you describe for the record the nature of that crack?

“A. That is what we normally term a settlement crack occurring at the corner of the house.

“Q. Would you have an opinion as to how long it has taken that crack to develop?

“A. Oh, I would say that that crack has been in there for as much as twenty years.”

* * * * *

“A. This house at this point has no basement under it. It has no gutters on the edge of the roof and it has been my experience that as the water runs off the roof it collects and seeps along the foundation walls. If the walls aren't deep enough and if the footings aren't wide enough it develops a spongy condition and causes settlement.”

* * * * *

“Q. Is it the general rule or is it the exception to find houses with cracks in them?

“A. I have never yet seen a house without cracks in it.”

* * * * *

“Q. Does that Exhibit or the previous Exhibit, which you have identified or discussed, in your opinion show any damage which resulted from vibration?

“A. I have never been able to recognize damage from vibration.

“Q. You mean in that house?

“A. Not in this house.” (R. 210-214)

Examining Exhibit 6, the witness Young testified:

“Q. The porch slab that is like a concrete sidewalk that is placed on dirt fill in order to bring the porch level up to approximately the main level of the house. It is like a concrete sidewalk setting on this dirt fill. After the brickwork is completed it is poured against the brickwork.”

* * * * *

“A. Now these cracks of this nature we term as shrinkage cracks. Whenever you build anything from concrete as the concrete cures or takes its set it shrinks. That is the reason we put expansion joints in sidewalks and I have never read a specification for a building which didn't say that wherever a concrete slab or any other concrete material is put that an expansion joint must be placed there. Now if a person doesn't want an unsightly joint in a place like that the only way I know of to correct it is to cast it against an expansion joint and I am quite

positive this is what we term a shrinkage crack in the concrete. I cover in my opinion the crack in the porch slab. The other crack, that vertical crack, I have described as a crack five-eighths of an inch wide maximum. That would be at the maximum point between bricks, and here is a structure some forty-six feet long, north and south, and as I remember about thirty feet wide, east and west. From the high temperatures in the summer to the cold temperatures in the winter there is quite a variation; some movement due to expansion and contraction. We generally term this as an expansion crack. The reason it occurred at that point is that this concrete block wall terminated at this point and is not bonded or tied in to the brick. Nor was there bond in these three courses of brick above."

* * * * *

"Q. In your opinion, did the cracks that you have identified and discussed in this Exhibit result from vibration?

"A. No." (R. 214-216)

Mr. Mervin B. Hogan, Professor of Engineering at the University of Utah, who holds a Doctor of Philosophy Degree from the University of Michigan (1936), testified as an expert witness on behalf of the defendant. He was employed by the defendant in April, 1948, to scientifically measure the claimed vibration in the plaintiff's house, as well as the noise resulting from the defendant's operation on the highway. On April 17, 1948, the defendant operated its Euclid trucks, both loaded and empty, just as they were operated during the period of time involved in

the lawsuit, in order to enable Mr. Hogan to measure the noise and claimed vibration. Mr. Paulson at page 271 of the record testified that he was present at these tests, and the same trucks were loaded with substantially the same loads and operated at a speed of not to exceed 20 m.p.h. loaded, or 25 m.p.h. empty, and that during the regular operations the drivers were instructed to travel at that speed and were checked by the Assistant Superintendent, Job Foreman, or Safety Engineer at different intervals.

The instrument used by Professor Hogan to measure vibration is called a falling pin seismometer, which consists of a perfectly horizontal piece of glass, upon which are placed six rods one-fourth inch in diameter. The rods stand perpendicularly on their ends and are from 6 to 15 inches in length, and machined square on the ends. If vibration causes disturbance of the glass base on which they are standing, they will sway or fall over within a tube which is one and one-eighth inches in diameter and acts as a compartment for the rod so that one falling rod will not disturb other rods. It is a well recognized, practical instrument for the purpose of measuring vibrations, resulting from heavy traffic (R. 197). The instrument was first set up on the west side of the highway (80th West) a little south and east of the Coon's residence, and as the Euclids passed back and forth, "there was no discernible disturbance whatever indicated by the instrument." The instrument was next set up on the back porch of Mr. Coon's home

in the presence of and with Mr. Coon's consent. There was again no disturbance. "However, it was observed by all of us that anyone walking on the floor would cause those pins to be disturbed" (R. 244). The pins did not tip over, but they wobbled on their base. At Mr. Coon's suggestion, the instrument was then placed on the table inside the kitchen with exactly the same results. "There was no evidence of any disturbance as the trucks went by." It was noticed, however, that when Mr. Coon's little grandchild walked around on the floor these pins were obviously wobbling (R. 244). At Mr. Coon's suggestion, the instrument was then placed on the table in the dining room.

"So I set the instrument up again and observed it as the Euclids went by and the 12-inch pin, I believe it was, again slightly quivered. It was an extremely questionable observation. I give it the benefit of the doubt and say it quivered slightly. Again that could have been attributed just as easily to one of us moving his foot slightly on the floor as to any extra disturbance." (R. 247)

On December 16, 1948, which was within the period of the regular operation of the defendant, Professor Hogan made measurements of sound at the Coon home when the trucks were operating, by using a Type 759-B Sound Level Meter (R. 248). "This is an electronic device constructed and standardized, recognized by the American Standards Association as to its construction and it is the nationally used instrument

for making sound level readings'' (R. 248) The instrument has a scale which is calibrated from zero to one hundred decibels. The instrument was set up at 35th South and 80th West, and 25 feet west of the center line of 80th West, which is on the highway joining the home of Mr. Coon, and on which the trucks were operating.

“I observed six Euclid trucks going south, upgrade, with a mean reading of 90 decibels and maximum reading of 99.5 decibels. The numerical average is 94.9 for those six Euclids going south upgrade. While there I observed three commercial vehicles or ordinary passenger cars going along 35th South. Again just for comparison's sake a commercial truck going east with a reading of 91 decibels; a passenger car going east, 78; a commercial truck with a reading of 88 going east. The mean reading of the three being 86.3 decibels.” (R. 251)

For further comparison, Professor Hogan took the instrument out on State Street, opposite the American Smelting & Refining Company plant, which seemed to him to afford a typical example of ordinary county highway traffic.

“ . . . The northbound traffic ranged from a minimum of 72 to a maximum of 89, with a numerical mean of 81 decibels. The southbound traffic had a minimum of 66 decibels and a maximum of 82, the numerical mean being 73. I would like to make it clear that at this point I am on the east side of the highway. Southbound traffic is removed from the instrument considerably

farther than the northbound which of course accounts for the difference there in the two readings or the mean readings. While at that particular spot I observed several heavier trucks particularly. There was a snow plow going southbound that gave a decibel reading of 85; a diesel truck that gave a reading of 86 going south. Another one southbound making a reading of 90; a heavy commercial truck which read 93; the mean of that ordinary heavier traffic being 88.5. Then I moved farther south on State Street to 5300, right at the marker indicating the south reading of 53rd. I was ten feet west of the pavement edge. There is a mile upgrade for the southbound traffic there I felt possibly simulated the grade going south, or to the east of Mr. Coon's home. I made six readings of trucks there. The minimum was 79, the maximum was 86, with a mean of 83.5. I read six passenger cars, those likewise with a minimum of 69 and a maximum of 75, with a mean of 72.7 decibels. That should, I feel, give a very satisfactory check on the county traffic so as to offer some information. Regarding the city commercial traffic I took the instrument to Second West and 9th South Streets where, as we all know, a good deal of commercial traffic passes. I made a reading of a traction bus at that intersection of 74 decibels; a diesel truck at 75 decibels; a heavy truck 88 decibels, with a mean of 82.3 decibels at that particular point. In order to check a little further I took the instrument out at 1199 Beck Street, which is the Second West highway going north and the address is that of the State Highway Commission storage shed and supply station on the west side of the street. I set the instrument up alongside the fence there on the west side of the highway, thirty-five feet

from the center line of the highway. I made readings of the southbound traffic going into the city. There is a slight grade there and I observed that ordinary passenger cars ranged from 68 to 78 decibels at that vicinity, with a mean of 75.

“Q. Excuse me. Were you on the west side of the highway?

“A. The west side of the highway, yes sir.

“THE COURT: A mean of what?

“A. A mean of 75 decibels. I observed an oil truck—its reading was 84; another oil truck 85; a diesel truck 87 decibels. A P.I.E. truck that exceeded a hundred; a P.I.E. truck 91 and a P.I.E. truck 87; an oil tanker 97; a traction bus, ordinary traction bus 89. Another traction bus 84 and a heavy truck 84. The mean of those is 89. Those constitute the data that I obtained with the sound level instrument on this test of December 16th.” (R. 252-3-4)

It was Professor Hogan’s conclusion:

“... If any one of the six pins remain standing we would say there has not been potentially damaging vibration in evidence.”

III. ARGUMENT UPON THE MERITS.

(A) AS A MATTER OF LAW, THE EVIDENCE FAILED TO SHOW APPELLANTS HAD ANY CAUSE OF ACTION.

It is significant that appellant’s brief does not contain any cases similar in its facts to the case at bar. Stripped of non-essentials appellant claims he

is entitled to damages because the use of the public highway annoys and disturbs the appellant. The appellant in his brief does not contend that the construction company was negligent in any of its operations or that the appellant's rights of ingress or egress were violated by the construction company. While the appellant does not abandon his claim of damage to his house by means of vibration from the trucks, the Trial Judge found that the appellant did not sustain any physical damage to his real or personal property as a result of respondent's operations,

“ . . . the cause of such cracks and moving out of line has been the settling and sinking of said foundation and has been caused by the natural elements and the passing of years and is not the result of the operations of the defendant's Euclid trucks in whole or in part.”

The evidence in the record sustains this finding of fact so the case must be examined from the original proposition, viz., did the operations of respondent's trucks which admittedly caused some noise and fumes and dust incident to careful truck operation create in appellant a cause of action for damages to his real estate? The record shows the horsepower of the diesel engines used in the trucks operated by respondent was 150 H.P. Commercial vehicles on the highway hauling heavy loads frequently use 250 H.P. diesel engines. The noise of the trucks here involved is about the same as heavy duty trucks on the main highways where Mr. Hogan made the measurements of the noise

in decibels. Ordinary motor cars or trucks had average decibel readings near the Coon residence of 86.3 decibels (R. 251). The average for the trucks of defendant was 94.9 decibels. Frequent passage of cars and trucks makes a noise whether they are operated by the respondent or other travelers on the highway. The passage of a truck every $2\frac{1}{2}$ minutes would mean that only 12 trucks go north and 12 trucks go south in an hour. Certainly that is not "heavy traffic" when compared with the volume of traffic which passes on any of our main busy highways leading from any of the larger cities of the state. The record, when supplemented by matters of common knowledge of which this court takes judicial notice, supports the inference that there are many hundreds of miles of highway in this state which are noisier than the one on which Mr. Coon lives—both in volume of sound and continuity of sound. The Euclid trucks of respondent were out of use from 11 P.M. to 5 A.M. whereas our busy highways are in use day and night. It is not difficult to understand why there are no cases where recovery was allowed against one who used the public highway for the purpose and in the manner it was intended to be used. Such a fact situation simply does not spell out a cause of action.

Another reason why such cases have not shown up in the courts is because the state and its subdivisions have pre-empted the field of highway and motor vehicle regulation and control. An early (1905) California case tested the validity of an ordinance of

Marin County which made it a crime to operate an automobile between sunset and sunrise. The court observed that fearful accidents to persons driving animals which are frightened into unmanageable terror by automobiles are of common occurrence. As country horses are driven into cities and become used to automobiles the danger of their use on country roads will grow less. The ordinance was held reasonable (*Ex parte Berry*, 82 P. 44).

Title 36 of Utah Code Annotated relates to highways. Section 1-28 and 29-30 governs the size and weight and dimensions of vehicles including the size of tires for the weight of the load. Section 33 provides for special permits for excessive loads and Section 34 provides for restricted use because of climatic conditions, when operation of motor vehicles would damage the highway. Section 36-1-33 provides for special permits for excessive loads. It would be a strange legal anomaly if one who owned a home abutting on the highway could recover damages because of the operation of vehicles under such special permits in the absence of physical damage and upon proof merely that the excessive loads caused excessive noise and fumes. There is an inevitable conflict of interest between those who live adjacent to the highways and those who travel upon them. The court takes judicial notice of the efforts of public authorities to compose this conflict. Certain residential areas are given a reduced speed limit. Certain streets are given one way traffic and traffic is prohibited on some streets

at certain hours to permit children to play on them. Appellant's remedy, if any, is to obtain state or county or municipal legislation to restore the streets which intersect in front of his house to their original status as country lanes on which the surrey with the fringe on top lurched through the mud of winter or the dirt road of summer but was no doubt less frequent and less noisy than present-day traffic.

Section 57-7-207 of the motor vehicle code provides:

“Every motor vehicle shall at all times be equipped with a muffler in good working order and in constant operation to prevent excessive or unusual noise and annoying smoke, and no person shall use a muffler cutout, by-pass or similar device upon a motor vehicle on a highway.”

It will not be disputed that the road commission could and would deny the use of the highways to vehicles which caused “excessive or unusual” noise or “annoying smoke”. The fact that respondents were allowed to operate raises a presumption that their vehicles did not produce excessive or unusual noise or annoying smoke.

Section 57-7-113 contains speed restrictions. The court found respondent's speed was 20 miles per hour and appellant does not claim in his brief that this finding is not supported by the evidence. No claim is made that the speed was excessive.

In 1909 the Supreme Court of Utah decided a case which is strikingly similar to this one. *Twenty-Second Corporation of the Church of Jesus Christ of Latter-day Saints v. Oregon Short Line Railroad Co.*, 36 Utah 238, 103 P. 243. The headnotes reflect the holding of the court.

“The interference with religious services by the annoyance from the noises in the rightful operation of a railroad and train yards near a church, without any physical interference with the church property, does not give the religious society a right of action for damages against the railroad company, under the provision of Const. art. I, sec. 22, that ‘private property shall not be taken or damaged for public use without just compensation.’ ”

“The interference with religious services by the annoyance from the noises in the rightful operation of a railroad and train yards near a church, without any physical interference with the church property, is not a private nuisance giving the religious society a cause of action against the railroad company.”

That case was an action by the Church against the Railroad, for damages caused by noise and smoke from trains interfering with the use of the adjacent property for religious purposes.

The court held the defendant was not liable and said:

“Does the operation of a railroad by passing of trains whether few or many, when operated

with ordinary care, constitute either a public or a private nuisance? Can the noises that emanate from moving trains be eliminated without preventing the trains from running at all? Moreover, do not such noises affect all who are similarly situated along the line of the railroad? If not in the same degree, do they not affect all to some extent? If this be so, how can it be said that in a legal sense such noises constitute a nuisance either public or private? The Court of Appeals of New York, in a comparatively recent case, namely, *Bennett v. Long Island R. Co.*, 181 N.Y. 431, 74 N.E. 418, in passing upon this point, uses the following language: 'The rumble of trains, the clanging of bells, the shriek of whistles, the blowing off of steam, the discordant squeak of wheels in going around curves, the emission of smoke, soot, and cinders, all of which accompany the operation of steam cars, are undoubtedly nuisances to the neighboring dwellings in the popular sense; but, as they are necessarily incident to the maintenance of the road, they do not constitute nuisances in the legal sense, but are regarded as protected by legislative authority which created the corporation and legalized its corporate operations. Nor does the legal nature of such annoyances change as traffic increases them in volume and extent.' "

A recent federal court case from the Eighth Circuit Court of Appeals is *Thompson v. Kimball*, 165 F. (2d) 677, decided in 1948. Kimball constructed or acquired a house in Omaha, Nebraska, adjacent to an existing railroad track and switch yard of the Missouri Pacific Railroad operated by Thompson as trustee in bankruptcy. Kimball alleged and proved that since

1937 the railroad had put an engine on its track directly in front of his house four or five times a day for about twenty minutes and during this time the fireman shook the ashes out of the grates and built up the fire by adding coal. This process caused the engine to emit quantities of smoke, soot, cinders and steam. It was the theory of Kimball's attorney and the trial court found spotting the engines nearer to plaintiff's property than was necessary resulted in an unnecessary nuisance and allowed recovery. The decision below was reversed. The court held that the fact that the defendant could stand its engines in front of another person's house instead of plaintiff's did not make a private nuisance and support recovery. Plaintiff claimed that the recent building of additional tracks nearer to plaintiff's house cast a new burden upon his house and premises which did not exist before that time and that for such added burden he was entitled to damages. The court, holding that such additional use and construction was within the purview of the original location quoted from an earlier Nebraska case:

“ . . . The evidence shows that within four years prior to the bringing of this suit the railway company constructed in the street, opposite the O'Connor property, an additional side track for use in connection with its coal house. This did not confer upon O'Connor any cause of action against the railway company. If a railway company condemns real estate for the erection thereon of a road, and builds one track thereon, then

we are of the opinion that the building of one or more additional tracks on the same right of way, and on the same profile or grade, that such additional tracks should be construed to be within the purview and purposes of the original condemnation."

and said:

"The court also stated that all elements of damage to property by reason of building a railroad in front of it and its continuous and proper operation must be included in the original settlement of damages; that it is common knowledge that a railway cannot be operated without smoke and soot; and that these things are within the realm of what would probably result from the proper and ordinary operation of the railway as constructed and are a part of the damages properly sustained by the original location and use of the railway."

The parallel between the case at bar and the federal court case is obvious. When Mr. Coon built his house at the intersection of 33rd South and 80th West he wanted the convenience of living on two public highways. He must accept that convenience burdened with the common knowledge that highways carry traffic which makes noise and dust and fumes when operated in the normal ordinary manner. The original location of the highways whether by condemnation or grant resulted in Mr. Coon or his predecessor in the title being paid for all elements of damage to the property, past and future.

Blumenthal v. City of Cheyenne, 186 P. (2d) 556. The City of Cheyenne, located in the midst of nothing but room, is a bottleneck for traffic. The city passed an ordinance requiring all commercial motor carriers passing through the city to follow a specified through route. The suit was by an owner of residence property abutting the truck route for himself and all others similarly situated to enjoin the enforcement of the ordinance. It was alleged and proved that the trucks made dust, noise, fumes and traffic hazards—that much of the area is residential and zoned as to kind and cost of buildings to be erected thereon. The ordinance made it mandatory for trucks passing through the city to take the specified route passing plaintiffs' houses. The court in an exhaustive opinion written by Judge Blume held the ordinance valid and within the powers granted by the Constitution and statutes of Wyoming. The discussion which is in point on the issues in the case at bar is found in subheads 22 to 25, inclusive, beginning at page 570. The court held that the plaintiffs had no rights which were infringed by the enforcement of this ordinance. Admitting that motor vehicles create noise and dust and fumes and vibration which did not exist in the same volume before the ordinance was passed, the use of the highway was legal and plaintiff had no right to the absence of heavy traffic. The case is so clearly parallel to this one that we quote at length from the well reasoned opinion:

“The streets, as the petition shows, have been dedicated to the public. The authorities are

unanimous in holding that streets are dedicated or otherwise established primarily for the public who have a common right to the use thereof, and who may make such use thereof by all the usual modes of travel thereon, including by vehicles which advancing civilization may find convenient and proper. Abutting property owners have no greater rights therein and thereto than the public generally, except only that they have the additional right of ingress and egress and of a few other analogous rights such as light and air. *Chicago, Burlington & Quincy Railroad Company v. West Chicago Street Railroad Company*, 156 Ill. 255, 40 N.E. 1008, 29 L.R.A. 485; *State ex rel. State Highway Commission v. Cox*, 336 Mo. 271, 77 S.W. 2d 116; *City of Elmhurst v. Buettgen*, 394 Ill. 248, 68 N.E. 2d 278, 281; *Thompson v. Smith*, 155 Va. 367, 154 S.E. 579, 71 A.L.R. 604; 25 Am. Jur. 434, 448-455, 456-459, *Dillon, Municipal Corporations*, 5th Ed., Sec. 1248; 40 C.J.S., *Highways*, Sec. 233. 'Dedication or condemnation of a street,' it has been said, 'contemplates the most onerous and injurious mode of use to which it can be lawfully devoted.' *Foster's, Inc. v. Boise City*, 63 Idaho 201, 118 P. 2d 721, 726. Plaintiffs bought and improved their property with the knowledge of these facts and their erroneous belief that no change in conditions would ensue is one that has not been uncommon in growing communities, but for which there is ordinarily no remedy in the courts. See 3-4 *Huddy Cyclopedia of Automobile Law*, 9th Ed., Sec. 2. Plaintiffs seek, in effect, to enjoin commercial through truckers from using the streets designated by the ordinance in question, though, it is true, they attempt to do so by indirection. But these truckers travel by a mode which is usual and accepted, and they are free

to use the streets above mentioned. If they can be kept off these streets, it can only be done by a regulation of the municipal authorities which represent the public. Plaintiffs claim in their petition, their argument in this court, and inferentially by their testimony, that such use by the truckers constitutes a nuisance. That contention finds no support whatever in any of the authorities. If, in the absence of the ordinance in question, truckers should voluntarily choose to use the route now designated by the ordinance, the abutting property owners would not, under the foregoing rules, have any remedy whatever. And the evidence in the case shows that many of them in fact choose to use it. If, in the absence of such ordinance, the truckers should use the route so designated pursuant to the mere advice of the city authorities the result would, we think, be the same. The mere direction of the city authorities that truckers shall use the designated streets in the ordinance cannot create a nuisance if no nuisance in fact existed without such direction. The privilege of truckers to use the routes designated by the ordinance is clearly inconsistent with the claim that the use by them of these routes constitutes a public or a private nuisance. See Elliott on Roads and Streets, 4th Ed., Sec. 1108; 1-2 Huddy, *supra*, Sec. 44. If it were such nuisance, it would be equally so when traveling along Central Avenue and the Lincoln Highway, and in such case the city should prohibit the use of all of the streets by them entirely. That that cannot be done is recognized even by counsel for the plaintiffs himself. The creation of noise, dust, dirt and danger to children by such trucks cannot be denied. These evils would be equally bad on almost any of the streets. They are unfortunate concomitants

of advancing civilization. Society would raise a loud cry to Heaven if any legislative body should attempt to forbid their use. In *Roebeling v. Trenton Pass. Ry. Co.*, 58 N.J.L. 666, 674, 34 A. 1090, 1093, 33 L.R.A. 129, the court stated: 'The owner of lands abutting a street holds his title subject to the inconveniences and injurious consequences, including those occasioned by noise and vibration, resulting from a user which is consistent with the legitimate and proper use to which these public thoroughfares are devoted.' In *Cadwell v. Connecticut Ry. & Lighting Co.*, 84 Conn. 450, 80 A. 285, 287, the court, speaking of a street railway, stated:

"It is bound to conduct its business with a reasonable regard under the circumstances for the rights of others. This does not, however, signify that every annoyance, inconvenience or feature, which might be regarded as objectionable, and to which damage might be traced, attending the construction or operation of a street railway furnishes the foundation of an action.

"Certain unpleasant, inconvenient, and disturbing features, from the point of view of an adjoining owner, naturally attend public travel upon a highway, if there is any considerable amount of it. This is distinctly true of highway use by street cars, and the greater the public demand and service, the greater these features almost certainly are. Dust cannot well be kept down, and vibration and noise in some measure is inevitable. Such things as these and other annoyances and inconveniences which result from a user of a highway which is consistent with a legitimate and proper use of it as a public thoroughfare are among the penalties which a modern and busy life imposes upon those who come

closest in contact with it. A user of a highway by a street railway forms no exception. Certain objectionable results are among its natural incidents. In so far as this is the case, and the consequences complained of flow naturally and normally from the conduct of the traffic under proper authority, in a reasonable manner and with due regard for the rights of others, one who conceives that he has been injured can have no redress."

"The case is cited with approval in *Nuttle v. Wichita R. & Light Co.*, 123 Kan. 517, 256 P. 128, where a number of similar or analogous cases are cited. To the same effect also see *State v. Hartford St. Ry. Co.*, 76 Conn. 174, 56 A. 506. That the principle involved in these cases and in the case at bar is the same is clear.

"We should, finally, inquire whether an additional servitude has been imposed upon the streets by the ordinance in question to which the abutting property owners can object. The precise question is as to whether or not the artificial increase of travel thereon by trucks which may be caused by the ordinance, is such additional servitude. There is no direct authority on the point. This is the first case on record, so far as we know, in which abutting property owners have objected to a regulation similar to that in this case. Many analogous cases have held in the negative. It is almost universally held that the use of streets by street railways pursuant to a franchise is not an additional burden for which abutting property owners are entitled to compensation, and to which, accordingly they cannot object. *Elliott, Roads and Streets*, 4th Ed., Sec. 886; *McQuillin*, *supra*, Sec. 1843; see 44 C.J. 986. In *Kipp v. Davis*-

Daly Cooper Company, 41 Mont. 509, 110 P. 237, 240, 36 L.R.A., N.S., 666, 21 Ann. Cas. 1372, the plaintiffs, abutting property owners, brought suit to enjoin the defendant from constructing a street railway along their street, pursuant to a franchise. The court held that plaintiffs had no cause of action, and were not entitled to any compensation by reason of such construction. The fee of the street was vested in the city, as the fee of the streets is vested in the City of Cheyenne, pursuant to Sec. 29-1209, Wyo. Compiled Statutes of 1945. The court, among other things, said: 'But it is not important to inquire where the fee is vested. The respective rights of the abutting owner and the public are dependant upon the fact of dedication. In view of these provisions as well as of the rule of law recognized everywhere, the authorities which control streets and highways may use or permit the use of them in any manner or for any purpose which is reasonably incident to the appropriation of them to public travel and to the ordinary uses of streets or highways under the different conditions which arise from time to time. *White v. Blanchard Bros. (Granite Co.)*, 178 Mass. 363, 59 N.E. 1025. For a highway is created for the use of the public, not only in view of its necessities and requirements as they exist, but also in view of the constantly changing modes and conditions of travel and transportation, brought about by improved methods and required by the increase of population and the expansion in the volume of traffic due to the ever-increasing needs of society. Were this not so, any change in these respects would require a readjustment of rights as between the public and the abutting property owner,

because the result of it would of necessity be held an imposition of a new burden upon the highway, and hence upon the property of the abutting owner.' If abutting property owners cannot object in such a case, it is difficult to see how they can object in a case such as is before us. If there is any difference, it is merely one of degree, not of kind. There is one distinction. The rights or privileges of truckers to the use of streets are greater than those of the operators of a street railway. The latter need a franchise, the former do not. The difference in effect, if any, would be to strengthen our conclusion herein, rather than to weaken it."

The Utah case, *Twenty-Second Ward v. Oregon Short Line Railroad* (supra), holding a railroad is not liable for the annoyance resulting to adjoining property owners from its non-negligent operation, is in line with the authorities which seem to be uniform. The Third Circuit Court of Appeals in 1913 decided *Roman Catholic Church v. Pennsylvania R. Co.*, 207 F. 897. The holding is reflected in the headnotes:

"The consequential, incidental, and unavoidable annoyance or damage resulting to the occupiers of land adjacent to a duly authorized railroad from its nonnegligent and careful operation does not constitute an 'actionable nuisance,' irrespective of the extent of such annoyance or damage."

"Nor does the causing of such damage to the property owner by such nonnegligent opera-

tion of the railroad constitute a taking or appropriation of his property without due process of law, or just compensation, in violation of the Constitution of the United States.”

(B) APPELLANTS FAILED TO PROVE ANY DAMAGE.

The appellant Coon did not prove any damage by reason of the operation of respondent's trucks. The measure of damages is the depreciation of the market value of the property affected. This rule is announced in *Ludlow v. Colorado Animal By-Products Co.*, 137 P. (2d) 347, 104 U. 221.

“The measure of damages for the maintenance of a recurrent nuisance is the depreciation of market value of the property affected. *Thackery v. Union Portland Cement Co.*, supra. The same measure of damages applies to permanent uninterrupted nuisances. See *Lewis v. Pingree National Bank*, 47 Utah 35, 151 P. 558, L.R.A. 1916C, 1260. It appears to be the view of appellant that the rule of diminution of market value was not properly applied. It is claimed that witnesses for plaintiffs made valuations from which they computed depreciation on some theory of absence of the plant structure and without reference to other existing industries, activities and facilities. However, at least one witness indicated he took into consideration the surrounding conditions, and he based depreciation solely on the odors emanating from defendant's plant. It appears that the trial court based depreciation on the frequent recurrence of stench, not on any

assumption that the building and other physical structures of appellant as located constituted a nuisance. The findings and conclusions of the court indicate that in assessing damages the trial judge used the proper criterion—the difference in market value of each tract with its improvements without the stench nuisance existing, as compared with the value as affected by such odors.”

The record contains no testimony upon which the court could find depreciation in market value.

Appellant’s cases support the general proposition that noise and vibration under certain facts and circumstances may be actionable either by injunction or an action for damages.

The Utah case of *Dahl v. Utah Oil Refining Co.*, 71 U. 1, 262 P. 269, cited by appellants, was the case in which a judgment for damages for plaintiff resulting from fumes and odors was reversed. The last paragraph of the opinion contains language which seems to be against the appellants in this case.

“In applying the foregoing legal principles to the case at bar, we must take into consideration the facts as shown by the uncontradicted evidence that the defendant’s oil refinery is lawful, useful, and necessary business, and is situated in the industrial or manufacturing section of the city; that it is a modern, well-equipped plant and is conducted in a careful manner and according to approved methods;

that it is not in close proximity to the plaintiff's house but at a substantial distance (1,000 feet or more) therefrom. There is no claim that the defendant, by any careless or extraordinary or unnecessary use of its property, produces the injury complained of. The sole ground of complaint is that offensive and disagreeable fumes or odors emanate from the refinery and are carried through the air to the plaintiff's house. It is admitted that the odors are not constant and are not injurious to life or health, and it is obvious that they cause no direct or physical injury to property. The extent of the offense claimed is that the odors are disagreeable and unpleasant and have at times wakened persons sleeping in plaintiff's house and required them to shut doors and windows. In these circumstances we are unable to say as a matter of law that a case of unreasonable use or actionable nuisance was made out. See *Strachan v. Beacon Oil Co.*, supra; *Petroleum Refining Co. v. Commonwealth*, 192 Ky. 272, 232 S.W. 421. No precedent for sustaining liability under similar circumstances has been cited, and we have found none. The essential facts with respect to the nature, locality, and manner of use of defendant's plant, and the situation with reference thereto of the plaintiff's house, and the degree and extent of the plaintiff's annoyance and discomfort, are so clear that the question presented is one of law. We therefore conclude that the trial court erred in not directing a verdict for defendant and in denying defendant's motion for a new trial."

The appellants cite another Utah case, *Lewis v. Pingree National Bank*, 47 U. 35, 151 P. 558. In that case the defendant constructed a bank building so that it occupied a portion of the public street (Washington Avenue). An injunction was denied and the adjoining property owner was allowed to prove his damages on a retrial of the case. It gives no support to the contentions of the appellants in the case at bar.

CONCLUSION

It is respectfully submitted that the appellants failed to follow the method prescribed by the Utah Statutes or the newly adopted rules of procedure in preparing the record on appeal and the transcript of record should be stricken and the judgment affirmed because the merits of the case are not properly before the court. If respondent is overruled in this contention we submit that appellants have failed to show any cause of action and have failed to show any damage or depreciation in the value of their property by reason of respondent's operations.

Respectfully submitted,

RAY, QUINNEY & NEBEKER,
Attorneys for Respondent.

APPENDIX "A"

IN THE SUPREME COURT
OF THE STATE OF UTAHMAUD D. COON and JOSEPH COON,
husband and wife,*Appellants,*

vs.

UTAH CONSTRUCTION COMPANY,
a corporation,*Respondent.*Case No. 7470
MOTION

—o—

Comes now the respondent, Utah Construction Company, and moves the court for an order striking the transcript of official proceedings and evidence, including exhibits, on file herein, on the ground and for the reason that said transcript and exhibits are not legally and properly a part of the record on appeal herein.

This motion is based upon the files and records in the above named case.

RAY, QUINNEY & NEBEKER,
/s/ A. H. Nebeker*Attorneys for Respondent.*

Received copy of the foregoing motion this 20th day of September, 1950.

/s/ E. LeRoy Shields

Attorney for Appellants.

CERTIFICATE OF MERIT

A. H. Nebeker hereby certifies: That I have prepared the foregoing motion to strike the transcript of official record and have examined the facts and the law relating thereto and in my opinion the motion is well founded and is not interposed for delay.

Dated this 12th day of September, 1950.

/s/ A. H. Nebeker