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Raymond R. Cannon v. Jack L. Neuberger and Evelyn L. Neuberger : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

RAYMOND R. CANNON,
Plaintiff and Appellant.

vs.

JACK L. NEUBERGER and
EVELYN L. NEUBERGER,
Defendants and Respondents.

Civil No. 8083
APPELLANT'S
BRIEF

Appeal from the District Court of the First
Judicial District of the State of Utah
In and for the County of Cache

Hon. Lewis Jones, Judge

GEORGE C. HEINRICH
Attorney for Plaintiff
and Appellant

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This is an action between two adjoining landowners for the abatement of an alleged nuisance. Plaintiff, whose premises are immediately west of the defendants, alleged that three unusually large Carolina Poplar and two Siberian Elm trees located on defendants' property ranging from 5 to about 15 feet east of the boundary line which separates their respective properties are a nuisance because the branches from the Poplars overhang his property about 35 ft., shades it more than half the time, robs the soil of moisture and food nutrients despite his best efforts of fertilizing and watering so that he cannot grow lawn, flowers or shrubs to any appreciable extent, that huge quantities of leaves fall

on his premises in the fall and seeds in the springtime, that during even ordinary winds great quantities of leaves, twigs and branches, some as large as an arm, are blown down upon his premises rendering the same unsafe and dangerous both to life and property, and that because of the age of the trees, particularly the Poplars, which are more than 50 years old, there is great danger of them being blown down upon his premises which could cause loss of life and inestimable damage to his home or garage or both. Complaint is also made of the Siberian Elms that some of the branches overhang upon the roof of his house, could damage the shingles, that they are a brittle fast-growing tree, and that before long will cover the roof of his house. Based upon such and other facts hereinafter appearing, the plaintiff prayed that the trees be held to be a nuisance and ordered abated or in the alternative that the trees be trimmed and barriers be placed by defendants so that neither the branches overhang plaintiff's premises or the roots invade his soil, and that the trees themselves be topped in such a way as to reasonably protect plaintiff against any danger of them being blown upon his property or any of the buildings thereon or upon any person who might lawfully be on his premises, and for costs expended. Under such facts, which are not denied, the lower court entered judgment holding that the presence of the trees on defendants' property is not a sensible injury to plaintiff, that the three Pop-

lar trees were a menace, ordered that they be trimmed about 20 feet and also to remove the heavy growth from the tops thereof to eliminate any danger of these being blown upon plaintiff's premises, and then leaving plaintiff to trim overhanging branches of the trees and the roots up to his boundry line, and to construct a cement abuttment on his soil to prevent the roots from invading his proptry if he be so advised, and disallowing costs to either party. It is from this judgment and decree of the District Court of Cache County that this appeal is from. The parties will be referred to herein as plaintiff and defendants.

STATEMENT OF FACTS

(a) *Location of Premises, Etc.*: Plaintiff and defendants are residents of Logan, Utah, and reside at 54 East 6th North and 56 East 6th North, respectively. This section of Logan City is well built-up. (Tr. 91) They are adjoining landowners. Don Allen, a witness, resides at 44 East 6th North, just west of plaintiff. Plaintiff's home premises are immediately to the west of the defendants. A boundary-line picket fence separates their respective properties. Plaintiff's house faces to the north and his lot is $57 \frac{3}{4}$ feet wide (east and west) and 13 rods deep (north and south). Located on his lot, is his house where he and his wife and three minor children reside. A cement driveway leads from his garage along the west side of his house to 6th North Street. The east side of his home is 10 feet 6 inches

west and the east side of the newly built addition to the house is 35 feet 6 inches west of the boundary-line fence. The garage is south and somewhat east of the west line of the home (See Pls. Ex. A) (Tr. 82) Flowers and shrubs are attempted to be grown along the east side of the house and alongside the boundary-line fence, and lawn on the balance of plaintiff's lot not covered by buildings, driveway and sidewalks. Although they interfere some, no serious complaint is made of invading roots and falling leaves and branches on that part of plaintiff's lot where he grows a garden south of the garage since the effect of the huge poplar trees is not too severe there. Farther to the north of where the Poplars are located, nearly east of plaintiff's house and about 5 feet east of the boundary-line fence, is where two large Siberian Elms are located. Complaint is made of these also because some of the branches overhang upon the roof of the plaintiff's house, could damage the shingles, are brittle, fast-growing trees, subject to breaking upon either a heavy wind or snowstorm, and that before long they will cover the roof of plaintiff's house.

(b) Obstruction of Property and Interference with the Comfortable Enjoyment Thereof; etc.: Three large Carolina Poplar trees, about 3 feet in diameter, 5 to about 15 feet east of fence line. Two Siberian Elm trees east of house 5 feet from fence line. Poplars 75 to 85 ft. high. Limbs extend 25 to 30 ft. on plaintiff's property.

(Tr. 78) Shades property until noon. Attempted over long period of time to landscape and beautify property, but have given it up. Trees take fertility from soil. Flowers, shrubs, lawn won't grow. Conditions getting worse. Hauling fertilizer and sprinkling property doesn't help. (Tr. 77-80). Simply causes root system to reach more and more for the water and fertility. Shade from trees also makes growth-competition of lawn, etc. with the trees futile. Only few roots when I excavated for my house 15 years ago compared with what there is now, a solid mass under my entire lot, extending from 5 to 7 inches below top soil to several feet deep even under foundation of house. (Tr. 32) When I excavated for new addition to house could not cut roots with shovel in excavation process, had to use ax. (Tr. 69). (Tr. 26-31-58). Mass of roots from poplar trees extend $35\frac{1}{2}$ ft. west of fence line, underneath sidewalk and driveway. Cement cracking-nothing solid to rest upon. (Tr. 80) Area completely undermined by roots. Trees 50 to 65 years old. (Tr. 56) 3 ft. in diameter. (Tr. 32-34). Trees topped 13 years ago. Dead joints in them. (Tr. 58) Wind storms come from East. Necessary to haul load upon load of leaves away each fall. (Tr. 37-38, 78) Also, wind blows twigs, leaves and limbs across plaintiff's property and onto the neighbor's on the east, a distance of 60 ft. or more. Shoots from Poplars also cut underneath plaintiff's driveway and onto neighbors property. (Tr. 73). Nothing growing on ground underneath trees

on defendants property; that's some reason why roots reach so for moisture, fertilizer, etc. on plaintiff's property. (Tr. 73-74)) Plaintiff many times during storm (wind) has feared trees will blow over on garage—has gotten upon middle of night and taken car out. His wife also worries about them blowing over—when a storm arises, takes precaution that all children are out from under trees. Condition growing worse as time goes on. (Tr. 81) During wind storm, lot, even extending to vegetable garden, covered with leaves and limbs, etc. For about at least two weeks in spring of year seedling (bodkins) from tree so dense cannot hang out wash. Messes up lawn. (Tr. 75-80)

F. A. Pehrson, expert, justifies fear of trees blowing over. Says he, "Wouldn't sleep myself if they were around my house at all". Poplar trees in weakened condition—dead part way back. Roots follow surface. May as well not plant shrubs, flowers, lawn—roots will overcome them. Roots have gone under sidewalk. Roots follow fertility. If trees were trimmed root system would grow more—you would have to put a barrier to stop them. Would cause a sucker growth to break out. Carolina Poplars are out of place around buildings, etc.; satisfactory on large estates. (Tr. 65-68) Two Siberian Elms on east side of property. Branches are soft and brittle. Considered a weed tree; they throw an abundance of seed. The branches were hanging on plaintiff's house; they could loosen shingles. They grow rapid-

ly-before many years could cover plaintiff's house. They break easily. (Tr. 63-64)

(c) Jack Neuberger's father owned the premises before him; altogether about 3 acres used for pasture. Acquired property about 1882. Father sold or lost property for non-payment of taxes. Other persons have purchased and now moved in and built-up the vicinity. Raises no lawn by trees and stores ashes and levels same off south of home. (Tr. 78-80) Defendants moved to present location 1937; three houses on block then. (Tr. 84-90) Defendants have many trees on lot; simply claim right to maintain trees because they afford shade. (95-98) Before suit filed plaintiff offered at his own expense to remove trees and plant in their place hard-wood trees of defendants own choosing. Refused (Tr. 104) Such offer ceased after filing of suit. (Tr. 81). Defendants simply take the position the trees are large ones, simply must grow, which they can't help or control. (96-98)

ARGUMENT

POINT NO. 1: The lower court failed and refused to apply to the undisputed facts in the case at bar the clear provisions of Sec. 78-38-1, U. C. A., 1953, which defines a nuisance as being "Anything which is . . . an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property" and then provides that by judgment "the nuisance may be enjoined or abated, and damages also may be recovered."

The applicable statute is, Sec. 78-38-1, U.C.A., 1953, which defines a nuisance, provides for right of action and for judgment, as follows:

“Anything which is . . . 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 an person whose property is injuriously affected, or whose personal enjoyment is lessened by nuisance; and by the judgment the nuisance may be enjoined or abated, *and* damages may also be recovered.”

The facts plaintiff contends are undisputed that because of the presence on defendants' adjoining lot of three huge Carolina Poplar trees with its branches extending more than half the width of plaintiff's lot and its roots penetrating, massively, the entire width of his lot, thus resulting in practically denying him the use of his property for the growing of shrubs, flowers, and lawn, even though he yearly spends considerable sums of money and efforts in an attempt to do so, that this is “an obstacle to the free use of property” and that this “interferes with the comfortable enjoyment of property.” Furthermore, it cannot be nor was it denied that the very presence of these three large trees with their overhanging branches on plaintiff's property, was a constant threat of injury and damage to both persons and property, and, therefore, “interferes with the comfortable enjoyment of life.” Such obstruction and interference, it is submitted, injuriously affects

plaintiff's property, and it also lessens his personal enjoyment thereof, and constitutes a nuisance, "and by the judgment the nuisance may be enjoined or abated, and damages may also be recovered." All requirements required to make out a nuisance case by the statute, it is submitted, are present, and in great measure. The only answer given by defendants upon the trial in effect is, that my father many years ago—more than 50—planted these trees when he owned this and other property which was used for pasturing cows that I succeeded to the property I am now living upon, that he sold the remainder part of which is now owned by plaintiff; that I like the shade given by the trees and that, if they interfere with your enjoyment of your property, that is too bad. It is submitted such continued use of his property is unreasonable and unwarrantable, and deprives plaintiff of the reasonable enjoyment of his property and that the above statute was enacted to remedy such an attitude and such mischief.

Upon rendering its decision, the court recognized the Poplars were a menace and "directed defendants to abate this menace by shortening the height, etc," and "by taking part of the heavy growth from the tops of the trees to remove the danger of them blowing over." The court then further finds that the Poplars and Siberian Elms "are not injurious to the health, not indecent, not offensive to the senses," (as to which no contention was ever made) and "not a legal obstruction." And,

“that the roots of these trees which do pass under the boundary line do not constitute a sensible injury and that the limbs of the trees, particularly the Siberian Elms, which hang over the boundary line do not constitute a sensible injury to plaintiff; and in any event, the plaintiff may, up to the boundary line, remove said boughs and limbs and on the boundary line construct a cement abuttment if he be so advised.” It is contended by plaintiff that such a holding in the face of undisputed facts is to flatly ignore the facts and is contrary to the mischief intended to be remedied by the enactment of Section 78-38-1, above. To recognize the danger to life and property (the heighth nuisance. Tr. 11) of the Poplars and to order their shortening is simply to temporarily remove the danger of them being blown over, but, at the same time increasing the damage to plaintiff’s property resulting from increased absorption by the trees’ roots of moisture and soil nutrients needed if plaintiff is to have any use at all of his lot for the purpose of growing lawn, etc. It is common knowledge that thus cutting the tops of the trees increases root system growth. So, also is the testimony of plaintiff’s witnesses, including F. A. Pehrson, an expert. In fact, in this very case the trees were once topped which cured nothing as is apparent from a reading of the testimony herein.

Furthermore, the whole record is undisputed that the root system, to all practical purposes, denies to

plaintiff the use of his premises for the growing of flowers, etc., although yearly he expends a great deal of effort and considerable money for the purchase of fertilizer in an effort to have his home surroundings pleasant and more liveable. Certainly such a desire and effort on the part of citizens is not to be considered an unreasonable use of his property nor is he to be deprived of such use because of a well-nigh arbitrary attitude and action on the part of his adjoining property owner. That to say the effects of such a root system is not a "sensible injury" is a distinct defiance of the affect of undisputed contrary facts. And, plaintiff further contends that what has been said regarding the roots applies, under the undisputed facts in this case, regarding shade, falling seeds, leaves, twigs, and branches, with equal force regarding the court's statement that the effect of the limbs of the trees, particularly the Poplars, which hang over the boundary line do not constitute a "sensible injury." In fact, this holding seems to contain a tacid admission, at least, that the overhanging limbs of the Poplar trees is a "sensible injury" to plaintiff. And then the final conclusion of the court is, "and, in any event, the plaintiff may, up to the boundary line, remove said boughs and limbs and, on the boundary line, construct a cement abuttment if he be so advised." ,Tr. 108) It is contended by plaintiff that this pronouncement by the court completely fails to give to plaintiff the relief provided for

by statute, to-wit: "enjoin or abate the nuisance," and that such a holding in effect gives the defendant license to continue on and in effect deprive plaintiff of the use of his property. Finally, carrying-out the court's decision—by topping the poplars 20 ft. (which would still leave them 55 to 60 ft. high (and they lean to the west) the overhanging branches trimmed to the boundary line, and a cement barrier placed to prevent the roots from entering plaintiff's soil—could pose serious practical consequences because it must be remembered that the trees are between 5 and about 15 feet east of plaintiff's property line and very close to defendant's house. The decision itself is not a practical one. In the language of one of the defendants, (Tr. 95) "I object to anything that will kill the trees and make a hazard out of it, and if you cut it in two, how can the other half stand?"

POINT NO. 2: Decisions based on statutes both identical and similar to Sec. 78-38-1, above, upon facts not even as severe as those in the case at bar, hold the same constitute a nuisance and abatement proper.

By a reference to the above section it will be noted that statutes from California, Idaho and Montana are either identical, substantially so, or similar. Statutes from some other states are also alike.

In the case of *Gostina vs. Ryland*, 199 Pac. 298, (Wash.), reported in 18 A. L. R. at page 650, based upon a statute identical to ours, the action was based

upon a slight interference compared with the very substantial interference in the case at bar, that of overhanging branches and a creeping vine which interfered only slightly with the use of plaintiff's property, and the court ordered the nuisance abated under the statute. And in this case the court also stated: "Although the right to trim encroaching branches must be conceded, it may be said that the watching to see when trimming of noxious branches would be necessary, and the operation of trimming, are burdens which ought not to be cast upon a neighbor by the acts of an adjoining owner". See also cases in 18 A.L.R. 659, under heading Rights to Compel Removal, further annotated in 76 A.L.R. 1113. Anything which is "hurtful, harmful, injurious, or destructive is noxious, and a nuisance." *Johnson vs. Northport Smelting & Refining Co.*, 97 Pac. 746 (Wash) *Crance, et al. vs. Hems*, 62 Pac. 2nd 395, *Stevens vs. Moon*, 202 Pac. 961, *Shevlin vs. Johnson*, 205 Pac. 1087, *Bonde vs. Bishop*, 254 P2d 617, all California cases, and *Gostina vs. Ryland*, supra. 18 A.L.R. 650. In *Crance vs. Hems*, supra, "in opposition to these views, respondent cited *Corpus Juris*, Vol. 1. page 1233, Sec. 95, to the effect that: "One adjoining owner cannot maintain an action against another for the intrusion of roots or branches of a tree which is not poisonous or noxious in its nature; his remedy in such case is to clip, lop off the branches or cut the roots at the line" and in answer to this

contention the California court said: "What is said in the excerpt from Corpus Juris is restricted to the roots or branches of a tree which is not poisonous or noxious; that is, where no injury results". It must therefore be clear from the allegations of the complaint and also from the evidence in support thereof, that clearly the trees complained about are noxious.

In *Shevlin vs. Johnson*, 205 Pac. 1087 (Calif.) the plaintiff complained that the roots of eucalyptus and cottonwood trees on defendant's land (from 1 to 10 ft. from the boundary line) penetrated plaintiff's land and sapped the soil of its fertility, etc., and the court held:

"That the defendant shall abate said nuisance, either by removing said trees entirely or by constructing a trench or by building barriers sufficiently to prevent the roots of said eucalyptus and cottonwood trees and the shoots and sprouts of said cottonwood trees from entering, penetrating, or growing into or upon the land of plaintiff; . . . that said abatement shall be permanent in its nature, and that the roots, sprouts, and shoots of said trees shall not hereafter, be permitted to enter, penetrate, or grow into or upon the land of plaintiff".

In this case the court further held that plaintiff was not restricted to an action at law for damages, as the injury was of a continuing and increasing nature.

In *Grandona vs. Lovdal*, 11 Pac. 623, (Calif.) where complaint was made concerning overhanging branches, the court said:

“Trees whose branches extend over the land of another are not nuisances, except to the extent to which the branches overhang the adjoining land. To that extent they are nuisances, and the person over whose land they extend may cut them off *or have his action for damages, and an abatement of the nuisance* against the owner or occupant of the land on which they grow.”

Parsons vs. Luhr, 270 Pac. 443, (Calif.) was an appeal by plaintiffs from a judgment against them, ordering them to remove a eucalyptus tree which is growing on the boundary line between the property of plaintiffs and defendants. Plaintiffs alleged that it had been planted for ornamentation and shade more than 25 years ago; that the trunk stands partly on the lands of plaintiffs and partly on the lands of defendants. At page 443 the court quotes from the allegation in the pleadings:

“That it has been allowed to grow to such size that it has caused damage to the lands of the defendants, by lessening its value, and that, by reason of its enormous size and brittle qualities, it is a constant menace to the house and property of said defendants; that in the past, limbs have fallen from said tree, endangering the lives and property of said defendants; that the land of defendants is planted with lawn and garden, and that the roots from said tree sap the land of said defendants and extract therefrom the elements necessary to permit the growth of such lawn and garden; that the leaves continually fall from said tree, and so cover the lawn and garden of *plaintiffs* (typographical error as appears from following page of opinion) as to give it an

untidy appearance; that the said tree, by reason of the facts alleged, constitutes a nuisance.”

Then follow the findings of the trial court which substantially supports the pleadings, above, and then at the bottom of page 444 (3) the court has the following to say:

“The finding that the tree in question was a constant menace to the property of the defendants is sustained by the testimony to the effect that in the past large branches had fallen on the roof and porch of defendants’ house, one of such branches tearing a hole in the roof; that the leaves filled the gutters, and littered the porch and lawn. Clearly, under the testimony appearing in the record here and the findings of the trial court, this tree was “an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property.” Sec. 3479 Civ. Code.”

Stevens vs. Moon, 202 Pac. 961, (Calif.) was an action wherein it was claimed property was injuriously affected and personal enjoyment lessened because roots invade the adjoining property and withdraw moisture and food nutrients from the soil, etc. Abatement was ordered. In this case it was contended by defendant that, “Plaintiff can abate the nuisance by cutting off the roots, that this was his sole remedy” to which the court answered that such “contention is without merit.” Other cases to the same effect are cited in 76 A.L.R. 1112 and 1113.

Bonde et u vs. Bishop et. al., 245 Pac. 2d 617, (Calif.) is a recent California case (1952) where action was brought by the plaintiff against the defendant alleging that defendant's tree overhanging plaintiff's premises was a nuisance. The facts are interesting because so far as the branches are concerned there is a similarity to the facts in the case at bar. In fact, there was evidence that there was decay in the tree itself and that because of the decay the branches were weakened and might fall. In the case at bar there is evidence that the trees themselves might fall on plaintiff's premises. The Supreme Court of California ordered abatement of the overhanging branches by defendant, *at his expense*, and in connection therewith had the following to say, first column page 619:

“The above testimony is amply sufficient to demonstrate that the overhanging branches are a nuisance. Apparently this is one of those rows between neighbors in which the defendants are standing on what they erroneously believe to be their strict legal rights to the exclusion of any consideration of the fair, decent, neighborly and legal thing to do.”

“The fact that an overhanging branch did fall, the age of the oak tree, the evidence of some decay, indicates that there is danger of the overhanging limbs falling. But assuming as claimed by defendants that the tree is safe in that respect, there is still ample evidence that its limbs constitute a nuisance as to plaintiffs. The constant dropping of small branches on the roof and in the

yard, the inability to leave their baby in the patio because of that fact, the constant work required to keep their premises clean, alone establish the nuisance."

In this case the court also affirmed the rule that to the extent that limbs or roots extend upon an adjoining landowner's property, the landowner may remove them, citing cases, but it will be observed that this rule does not apply in the cases where either the trees, roots, or branches are a nuisance in which case, under the nuisance statute, as the cases above indicates, an action may be brought for abatement *and* damages also if desired.

Dahl vs. Utah Oil Refining Company ,(Utah), 262 Pac. 269 was a case where plaintiff's dwelling was located in an industrial section of Salt Lake City where, besides the Utah Oil Refining Company plant, is located an electric railroad track, roundhouse shops, yards of O.S.L. Railroad Company, bathing resorts, gravel pit or works, rock crusher, estray pound, and creamatory. The vicinity is low and damp and is occupied generally for industrial and manufacturing purposes. Plaintiff brought suit alleging that her dwelling house had been rendered uncomfortable and undesirable for residence purposes and its value thereby depreciated in consequence of gasses, odors, and fumes being carried to and discharged thereon from an oil refining plant operated by defendant. The jury gave plaintiff a verdict and judgment for \$500. Upon appeal, our Supreme Court set aside the verdict and rendered judgment for the de-

defendant, stating that defendant was operating a lawful business in an industrial section of the city, conducted in a modern, well-equipped plant, and in a careful manner. That the plant itself is not in close proximity to plaintiff's dwelling—1000 feet or more away—and that under such facts and circumstances prevailing, nothing defendant did amounted to a nuisance. That plaintiff supplied no precedent for sustaining liability under such circumstances and that none has been found.

Gostina vs. Ryland, *supra*, was a case where the court ordered an abatement of a rather small obstruction to the free use of property (compared with the large ones in the case at bar) under a statute identical to ours, which caused a dissenting opinion to be written. The uncontradicted record is that the obstruction to plaintiff in the case at bar is "mountainous" compared to that sustained in the Gostina vs. Ryland case, yet the court below says (Tr. 109), in support of his decision, that he "accepts the minority opinion" in Gostina vs. Ryland and the "so-called menace doctrine as expressed in 175 N. E. 490 as the correct rule, except as to the menace doctrines as announced in the recent California cases (being Bonde vs. Bishop, and Parsons vs. Luhr, *supra*, heretofore cited both of which were contrary holdings decided under a statute identical to ours and which the court apparently refused to follow)" and then states that these views are consistent with the language used in the Utah Oil Case, *supra*. The Utah Oil Co. has

been referred to above and it is believed that the facts therein are so different as to afford no useful analogy with the facts in the case at bar. Certainly the language or views expressed therein must be read and interpreted in the light of the facts and decision rendered thereon.

It is submitted that such an attitude and holding on the part of the lower court is in complete disregard of admitted and uncontradicted facts and amounts to a denial to plaintiff herein of the benefits of the statute referred to and which was no doubt enacted for the purpose of remedying mischief such as defendants maintain and insist they have a right to maintain. 175 N. E. 490, *Machalson vs. Nutting* (Mass.) reported in 76 A.L.R. 1109, is a case based on common law rules prevailing in states where there exists no such statute as we have in Utah and other surrounding states. After a very diligent search, the writer has been unable to find any case with facts such as those wholly admitted in the case at bar where relief in the form of abatement has been denied to a plaintiff where there exists statutes similar or identical to ours.

POINT NO. 3: The court erred by its refusal to find and hold that trees, branches, and roots all constitute a nuisance under Section 78-38-1, and that the trees should either be removed by defendants, or that defendants should be required to trim the trees to reduce all hazard of falling, cut off the overhanging branches and roots and provide permanent barriers to be placed on defendants soil to prevent roots invading upon plaintiff's property.

The findings of the court simply find that the plaintiff and defendants are adjoining property owners, that each of them have thereon their dwelling house, etc. and that the defendants maintain, in close proximity to the eastern boundary line of plaintiff's premises, ranging from 5 to about 15 feet, three unusually large Carolina Poplar trees approximately 50 years old and also farther to the north two large Siberian Elm trees. The findings then further state that branches and roots extend and invade plaintiff's property and also partly shade it; that the shade which results from the tree is natural, that the leaves which blow and fall upon plaintiff's premises are also natural, and that the plaintiff cannot control the elements. Finding No. 4 recognizes that the heighth of the trees constitutes a hazard to plaintiff's property and the occupants thereof and that they should be topped by defendants. The findings then further recite that the plaintiff may trim overhanging branches and invading roots if he be so advised. The conclusion and decree then follow the findings. As to damages, plaintiff desires to point out the statute referred to permits "*and damages may also be recovered.*" Plaintiff could waive damages if he so desired. The reason plaintiff did so is obvious. (Tr. 83).

Plaintiff and appellant respectfully submits to this Honorable Court that the findings, conclusions, and judgment and decree of the trial court based thereon, are wholly unsupported and in error and should be

reversed and giving to plaintiff the relief prayed for,
together with costs expended.

Respectfully submitted,
GEORGE C. HEINRICH
Attorney for Plaintiff
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