

1954

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

Utah Supreme Court

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Geo. D. Preston; Attorney for Respondent;

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# In the Supreme Court of the State of Utah

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RAYMOND R. CANNON,  
Plaintiff and Appellant.

vs.

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

Civil No. 8083  
RESPONDENTS'  
BRIEF

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

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Hon. Lewis Jones, Judge

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GEO. D. PRESTON  
Attorney for Respondent

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## STATEMENT OF FACTS

We do not have too much objection to the statement of facts presented by the appellant, but do desire to point up some additional, and what we feel to be highly pertinent facts. Plaintiff states that Siberian elms “are a nuisance” tr. 38. Yet, his neighbor, Mary Beutler ,(tr. 84) testified that he obtained these elms from her and planted them himself. When the Court tried this case, the plaintiff had, in his own yard, a large Siberian elm, close to his house. Plaintiff was asked on cross examination (tr. 45) “On these Siberian elms, you say they are a nuisance just by being a Siberian Elm”? A. “That’s right, they are”. Q. “Why don’t you cut the one in your own lot down?” Plaintiff, after

denying that he planted the elms, admitted (tr. 46) that he got the elms from his neighbors, across the street, (the Beutlers) and planted them himself.

Plaintiff did not claim any damage to his property which is termed by the Courts, "sensible damage", because he specifically waived any claim therefor. We quote: "Mr. Heinrich: (tr. 83) One other matter, your honor, that we've alleged and which we don't care to follow up, and therefore waive, and that's any damages." The real cause of complaint of the plaintiff is that the trees on defendant's property, shades his property, because (tr. 43) he was asked: "You think you're entitled to have these trees removed because they shade your property?" A. "I do."

### ARGUMENT

This action could be summed up by pointing to the attitude of the plaintiff towards his neighbors. There were no elms on the block until he brought them from across the street (tr. 47). He planted, nurtured grew on his own lot, exactly the same kind of tree of which he complains, but he claims that the elms on his lot are not noxious (tr. 47). It is the elms on defendants property which are noxious. A decision in this matter could have such far reaching effects as to amount almost to a public tragedy. During the trial the Court went upon the premises (tr. 51), and after a view upon the ground returned to Court whereupon the plaintiff waived any claim to damages; so that we begin with the proposition

that plaintiff has suffered no monetary damages. It is conceded that a person may enjoin a nuisance, even if he has a similar one on his own premises. However, that proposition pre-supposes the actual existence of the nuisance. *Carter v. Chotiner*, (Cal.) 291 P. 577 correctly states the law:

“When appellants’ own acts create the same type of danger of which they are complaining, those acts may certainly be considered in determining whether respondents’ acts actually constitute a nuisance under all the circumstances.”

The lower Court, upon viewing the premises found as a matter of fact that the trees in question did not constitute an actionable nuisance. The State department of Agriculture provides a list of weeds which have been determined to be noxious. This list includes Canadian thistle, burdock, morning glory, white top, etc., but in our search, nowhere do we find any tree grown in this State as being noxious.

Our Supreme Court has not passed on the question here presented as it pertains to trees, but it has, very definitely, defined the limitations surrounding the matter of actionable nuisance. It will be remembered by members of this Court that the case of *Dahl v. Utah Oil Refining Co.*, (Utah, 1927) 262 P. 269 sets out at great length the testimony of the complaining parties, and that a jury awarded the plaintiff \$500.00 damages. Plaintiff there, fortified her position by numerous relatives and neighbors, all to no avail, because this Court

took the position that no actionable nuisance was shown and said:

“The rule of liability is not absolute and the law does not afford redress for every such discomfort or annoyance. Extreme rights in this regard cannot be enforced. Of necessity some degree of inconvenience and annoyance must be endured or community and social life would be impossible. It thus follows that what constitutes in law an actionable nuisance is always a question of degree . . . 29Cyc 1157, 1158. The law relating to private nuisances is a law of degree, and usually turns on the question of fact whether the use is reasonable or not under all the circumstances. No hard and fast rule controls the subject, for a use that is reasonable under one set of facts would be unreasonable under another.”

The lower Court found that the use we were making of our property was reasonable, provided we so trimmed the tops as to relieve a hazzard.

In dealing with the matter of trees as a nuisance, the authorities are not in full accord. Some states follow what is known as the “Massachusetts rule”, (Smith v. Holt—Virginia—128 A. L. R. 1217, and annotation and others the so-called “California rule”, Gostina v. Ryland, (Wash.) 199 P. 298.

However, the Supreme Court of California, Bonde v. Bishop, 245 P. 2d 617 very recently, in effect, modified the California rule because that case seems to be based on an award of damages, and said:



“The weight of authority is that to the extent that limbs or roots extend upon an adjoining landowner’s property THE LATTER MAY REMOVE THEM, BUT ONLY TO THE BOUNDARY LINE” (ours).

We take the position, that unless the Dahl case (supra) is to be overruled, this jurisdiction has been committed to the more common sense doctrine announced in the Smith v. Holt case (supra):

“The common sense of the common law has recognized that it is wiser to leave the individual to protect himself, if harm results to him from this exercise of another’s right to use his property in a reasonable way, than to subject that other to the annoyance, and the public to the burden, of actions at law, which would be likely to be innumerable and in many instances, purely vexatious”. The Court further stated: “The overhanging branches of a tree not poisonous or noxious in its nature are not a nuisance per se in such a sense as to sustain an action for damages . . . to constitute a cause of action for nuisance, there must be not merely a nominal but such a sensible and real damage as a sensible person, if subjected to it, would find injurious . . . It would be intolerable to give an action in case of an innoxious tree whenever its growing branches extend so far as to pass beyond the boundary line and overhang a neighbor’s soil. The neighbor has a remedy in such case by clipping the overhanging branches.”

The cases are annotated in 18 A. L. R. 655, 76 A. L. R. 1111, and 128 A. L. R. 1217. The Supreme Court of Arizona, *Kubby v. Hammond*, 198 P. 2d 134, sums

up the plaintiff's situation by saying:

“The proper remedy for minor inconveniences arising from an alleged nuisance lies in action for damages, rather than injunction”.

In *Bonde v. Bishop*, (California) *supra*, the Court seemed to have some doubt of its own position, for in discussing whether a landowner may cut the overhanging branches, or may compel the owner, by injunction, to clear them, the Court said:

“He apparently has to prove that the encroachment constitutes a nuisance. At least the authorities on this question are not as clear cut as on the other”. (The Court was talking about the two remedies and the doubt was expressed as to the injunctive remedy).

It would seem that our Court has been much slower to grant injunctions than those Courts which follow the California rule relating to trees. *Kinsman v. Utah Gas and Coke Co.*, 177 P. 418—damages allowed, but injunction denied. *Ludlow v. Colorado Animal By-Products Co.*, 137 P. 2d 347—damages allowed, but injunction denied. Other cases are cited in the *Ludlow* case, but, it would serve no good purpose to multiply them here. In *Thompson v. Anderson*, 153 P. 2d 665, This Court refused to enjoin the business, but did enjoin to a certain extent the method of operation, such as unusual noises in the nighttime. That is exactly what the lower Court did here, i. e. the tops of the trees and dead parts may constitute a hazzard, so ordered them

trimmed and topped, but not removed.

The most recent Utah case we can find on this subject is *Coon v. Utah Construction Company*, 228 P. 2d 997. Plaintiff contended defendants trucks damaged his home, but failed to prove any monetary damages. No relief was permitted, because defendants operated their trucks in the usual manner, and this was held not to be an actionable nuisance. The Utah case of *Shaw v. Salt Lake City*, 224 P. 2d 1037 has not been overlooked, but here the construction and operation of a hot-mix asphalt plant in the Cottonwood residential was enjoined prior to commencement of construction. It was a nuisance per se.

In reading over the evidence by Mr. Cannon, it seems to be a fair assumption that he is an eccentric person, because, for instance, at p. 37, he complains that the morning winds that blow out of Logan Canyon, and off College Hill, (from one to two miles east of his home, which is only a few rods east of Main Street) carry leaves upon his premises. The law of nuisances is not designed to assist such people in nurturing their own peculiarities. A very interesting and well reasoned case is found in *Erickson v. Hudson*, (Wyo. 1952), 249 P. 2d 523. This case involved the rights to maintain a "spite-fence". The Court held that the height of the fence was made from a purely malevolent spirit on defendant's part, and had him lower it. Just as we have been ordered to lessen the tree tops. But, the

Court further held that much of plaintiff's woes were idiocyncrisies, and that a normal and reasonable person would not have been effected.

We ask the question—if plaintiff can compel the removal of these trees, how far outside his own property line may he successfully use the injunctive remedy? We have seen the streets of Salt Lake City littered with branches and limbs (to say nothing of leaves) after winds. We submit, that if plaintiff's request is granted, it may become an utter impossibility for the small lot owner to maintain trees and shrubs. Plaintiff states in his brief (p. 8) that we are practically denying him the use of his property; states that lawn and flowers will not grow. Yet, when the Court personally went upon his premises and returned to Court, plaintiff abandoned any claim that he had been damaged. That is about the same situation in *Erickson v. Hudson*, *supra.*, and the Wyoming Court simply lessened the height of the fence as our Court ordered us to top the trees to eliminate any danger.

Logan, we feel it will be conceded, is one of the most beautiful cities in Utah. Almost every street in the City is bordered on either side by ditches or culverts running with fresh, clear mountain water. In the fall, these are constantly filling with leaves and other matter blown from nearby trees. This requires constant cleaning. Are these to be abated? We call this matter to the Court's attention to point up the fact

that courts have adopted the “common sense” doctrine, and have refused to apply the California rule, such as has been done in the Pacific coast states of California and Washington. We believe the rule laid down in *Smith v. Holt*, (Virginia) *supra.*, to be the more consistent with logic and reason where there has been no “sensible damages” proved or shown.

The matter of issuance of injunctions against encroachments is exhaustively covered in an annotation of about 80 pages, in 28 A. L. R. 2d 680. Most of the cases relating to trees are there reviewed beginning on 749, but no new principles are shown. Probably the most frequently quoted case on trees is *Gostina v. Ryland* (Wash.) 199 p. 298. It involved a Lombardy poplar and other trees. While the holding in this case is contrary to our contention, it is highly noteworthy that the Court split 3 to 3, and therefore the decision of the lower court was affirmed. The prevailing opinion states exactly the situation before this Court:

“But, in this case the respondent did describe some annoyance and damage-insignificant, it is true; so insignificant that respondents did not even claim them or prove any amount in damages”. (Note: The Washington Court held that while damages were insignificant, they were still “sensible damages”, and issued the injunction. On the other hand the 3 dissenting justices were just as strong in their conviction that there was no “sensible damage” proved. Therefore, it should be borne in mind, that the lower Court,

after viewing the premises found as a fact, that there were no "sensible damages" to plaintiff.)

The defendant is permanently incapacitated physically, and practically the only enjoyment and comfort in the summer time is enjoying the cool shade of the trees on his lot. Such is the case with many other of our people. This Court has held that a municipality is not immune to the extra-ordinary remedy by injunction, *Shaw v. Salt Lake City*, supra. Note what is testified to by the expert called in by plaintiff, at p. 63:

"The whole Washington Avenue (Ogden) is lined with Siberian elm".

We feel that this Court will take judicial knowledge of the fact that all over the State cities and towns have planted populars and other types of trees which now overhang, and roots run under private property. To say that these are nuisances without proving actual damages, and the removal may be compelled by injunction, seems to us to be a dangerous policy of judicial pronouncement. However, we conclude that it is fortunate for our people that we will seldom find one so allergic to trees as is this plaintiff.

Respectfully submitted,

GEO. D. PRESTON

Attorney for Respondent.