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Raymond R. Cannon v. Jack L. Neuberger and Evelyn L. Neuberger : Appellant's Reply Brief

Utah Supreme Court

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George C. Heinrich; Attorney for Plaintiff and Appellant;

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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 REPLY
BRIEF

Appeal from the District Court of Cache County, Utah

Honorable Lewis Jones, District Judge

GEORGE C. HEINRICH,
Attorney for Plaintiff and
Appellant.

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APPELLANT'S REPLY
BRIEF

STATEMENT

Plaintiff deems this reply necessary in order to point out to this court some flagrant misstatements of fact and quotes of incomplete and disconnected bits of evidence, contained throughout respondents' brief in order that the real facts may not be lost sight of, and to answer such new matter as appears therein.

ARGUMENT

POINT No. 1: That the defendants in their brief gave no sufficient reasons based either upon the undisputed facts or upon the law applicable thereto in answer to the points presented in Appellant's brief; and that inasmuch as Respondents presented their entire ARGUMENT under their single point, Appellant will answer the same in like manner.

Defendants' for example admit as they must do because there is no direct conflict in the evidence everything stated in plaintiff's Statement of Facts concerning

the three huge Poplars, the two Siberian Elms, and the disastrous consequences resulting therefrom, but say “they desire to point up some additional and what we feel to be highly pertinent facts.” These “highly pertinent facts” so given are:

That plaintiff stated Siberian Elms are a nuisance, that his neighbor Mary Beutler testified he obtained these trees from her and planted them himself, that plaintiff had a “*large*” Siberian Elm close to his house, and that when asked why he did not cut it down, he first denied and then admitted he got the elms from the Beutlers. What does the record show? Plaintiff, to mention only two places, (Tr. 45, 55) did so testify the two elms are a “nuisance” and it seems to the writer he gave good reasons for making the statement. But at no place did he say he planted the two Siberian Elms on defendants’ property; in fact he stated he did not. (Tr. 47). Nor did Mrs. Beutler say he planted Siberian Elms on defendants’ lot. She simply said that plaintiff obtained some trees from them when he bought his premises and that he planted them on his lot. (Tr. 83). He planted two of these trees on his parking lot, both of which were removed years ago, and one on his back lot which he intended to remove as he had hardwood trees to replace (and which has been removed). (Tr. 46). Nor did he, as defendants state bring the Siberian Elms on defendants’ lot. But he did say seeds could have been blown northward from across the street (Beutlers) or from Fred Neuberger’s place, immediately east of defendants’ premises. But the defendants themselves planted two Siberian Elms on their own lot. (Tr.

87). Nor is it stated anywhere in the record that the Siberian Elm on plaintiff's lot is a large one. It was planted under the overhanging branches of the Poplars on defendants' lot and was not to exceed six inches in diameter. At no place did plaintiff deny he planted a tree on his lot nor on the parking in front of his premises.

Counsel next stated on page 2 of brief that plaintiff did not claim any damage to his property which is termed by the court, "sensible damages," and then quotes where the writer of this brief waived damages; and then picks up another fragmentary bit of evidence to the effect that plaintiff claims he is entitled to have these trees removed because they shade his property. Because the record is so complete with so many other reasons for wanting the alleged nuisance abated, no further comment shall be made on this "shade" statement. Our Statute, Sec. 78-38-1, U. C. A., 1953, was quoted and commented on at page 8 of Appellant's brief and the court's attention is directed thereto. It will be observed from a reading of the statute that it ends by providing: "and by the judgment the nuisance may be enjoined or abated, *and* damages may also be recovered." The damages referred to is no doubt monetary damages. It was only these that were waived. Furthermore, to "waive" does not imply that there were no damages; in fact the reverse is true. Under our statute, certainly no prejudice could result because plaintiff did not care to follow through for these damages. It will also be observed from reading the cases cited herein, that in most instances relief was awarded without monetary damages. Most plaintiff simply want the nuisance removed so they can enjoy their property. In *Coon vs. Utah Con-*

struction Co., (Utah) 228 P. 2d, 997, cited by defendants at page 7 of their brief, for example, the plaintiff failed to prove monetary damages and so this court failed to award any. But this court did not for that reason fail to grant the “nuisance” relief asked for. The plaintiff failed to prove the “nuisance” feature also. The facts in this case are entirely different from the facts in the case at bar, but it does indicate that because “monetary” damages are either not asked for nor awarded that this is no reason plaintiff is not entitled to the other relief provided for by the statute.

Counsel for defendants states at page 2 of brief, and repeats at page 8, that after a view of the premises by the court, plaintiff then waived damages. This is not the fact. The record shows (Tr. 82) the court recessed at 12:05 and reconvened at 2.00 p. m. On the next page (Tr. 83), counsel for plaintiff waived damages. Defendants then put in their proof and at page 106 (Tr.) Mr. Preston says: “Do you want to go out in the rain and look around.” Then at the bottom of next page (Tr. 107) the court says: “Be in recess until next Monday at 10 o’clock, and we can go up now and view the premises in question.” Recessed at 3:15 p. m. The intended innuendo is wholly unwarranted because it is unsupported by the record, and because furthermore there is no evidence on the part of the defendants refuting plaintiff’s testimony as to size and condition of trees, overhanging branches, damages done by root system, leaves, falling branches, etc. In fact, the plaintiff even volunteered to the court to spade any part of the premises desired by him. (Tr. 50).

At Tr. 37 plaintiff testified to the enormous quantities of leaves which fall upon his premises, due in part because the winds customarily blow westward out of Logan Canyon. At page 7 of brief counsel states that it is a fair assumption that plaintiff is an eccentric person because he complains that the winds carry leaves upon his premises and that the law of nuisances is not designed to assist such people in nuturing their own peculiarities. At page 10 of brief, closing sentence, counsel says: "However, we conclude that it is fortunate for our people that we will seldom find one so allergic to trees as is this plaintiff." And at page 7 of brief counsel says: "But, the Court further held that much of plaintiff's woes were idiocyncrisies, and that a normal and reasonable person would not have been affected." I think it would have been more helpful as well as fair had counsel discussed facts. However, I do not feel that such statements and criticism should go unchallenged and so I shall answer the last first.

The record shows (Tr. 49) that in college plaintiff majored in Education, Vocational Agriculture, and that he is now vocational agriculture instructor at South Cache High School. (Tr. 27). In fact he has held this position for some years. His wife, and F. A. Pehrson, expert testified to much the same line of testimony as did plaintiff, and so did his neighbor, Don Allen, but to a lesser extent. I have re-examined the Findings of Fact, Conclusions, and Judgment and Decree of the lower court, as well as the decision of the court shown at Tr. 108-109, and nowhere do I find any such statement made by the court. It is inconceivable that the lower court would make such state-

ment. Just why counsel for the defendants should regard the making of any such unfounded statement as either advisable, necessary or appropriate is not understandable to either the plaintiff or the writer of this brief.

Next criticism. If the winds customarily blow out of Logan Canyon westward, and the trees themselves, as a result lean toward the west, and your home and other buildings and children and perhaps others are either in the path of these trees or underneath them in case they should be blown down, is this not an additional reason why the hazard is not increased by the wind, and cause for concern? F. A. Pehrson, expert, testified that he, "Wouldn't sleep myself if they were around my house at all." Is not such a wind an element? Because a person sees and recognizes such an element, and danger, is he eccentric? Is he nuturing a peculiarity? Especially, so, when there is not even evidence to the contrary produced by defendants. Is a person under these corcumstances to be called ellergic to trees? If so then the decisions of courts abound with relief being given to persons in the same plight as this plaintiff who seeks relief under statutes identical or similar to ours. It is submitted there is no merit to the criticism levelled at plaintiff. We believe the law of nuisances under our statute is designed to cover just such conditions. As stated in *Erickson vs. Hudson*, (Wyo.) 249 P. 2d 523 at page 529, "What would be a nuisance in Belgrave square would not necessarily be so in Bermondsey."

Counsel next states on page 2 of brief that this action could be summed up by pointing to the "attitude" of

plaintiff towards his neighbors; and that a decision in this matter could have such far reaching effects to amount to a public tragedy. Let us therefore look at the facts for a moment and see who has the “attitude” in this case. Within an area of one square rod east of plaintiff’s lot — between his fence line and the rear part of defendants’ house — is concentrated three huge Carolina Poplars. And between the area back or south of the house and east of the garage — the garage is immediately south of the house — is concentrated four additional good-sized trees. (Tr. 95). It is fair to say that these four trees are concentrated within an area of two square rods south and east of the one square rod upon which stands the three poplars. It is submitted that common knowledge alone dictates that such a concentration of tree growth on such a small area so close to an adjoining neighbor is unreasonable and a greater burden upon the soil than it can possibly support. The damage resulting to a neighbor must be obvious without the testimony of an expert. As an excuse for not wanting the three poplar trees abated, counsel at page 10 of brief states that the defendant is physically incapacitated and enjoys the shade. Assuming the reason given to have some legal significance, it would seem that whatever the real reason for not wanting the three poplars abated it could not be for “shade” reasons alone because there would still exist very close to the house the four mentioned additional trees. In fact these trees would duplicate much of the shade given by the poplars. And it would be difficult to see why for the same reason defendants would object to the removal of the two Siberian Elms. And further bearing on “attitude” is must be recalled that plaintiff before filing

suit (but not after) offered to pay the cost of removing the three poplars and two elms, if permission were given, and to plant in their place hardwood trees of defendants' own choosing.

At Tr. 40, plaintiff testified defendant said, when asked if he would permit removal of the trees, "We decided I want to keep those trees because they're good for people" and also "for sentimental reason." "Therefore, we will not take them down. If they bother you, that's too bad. I won't remove them." Defendant did not deny making this statement, so it must be taken as true. I therefore think defendants' point on "attitude" of plaintiff is very poorly taken, and that instead of amounting almost to a public tragedy to grant plaintiff the relief prayed for, I think the reverse would be true, to fail to grant to plaintiff and to others, if any there are, who are obliged to suffer the consequences of such a concentrated tree growth so close to their property. It is submitted that the trees concentrated in such a small area to the rear of defendants' property is "somewhat of a forest" and affords sufficient shade to accommodate a large herd of cows.

At the bottom of page 2 and continuing on page 3 of brief, defendants cite and quote from *Carter vs. Chotiner*, (Cal.) 291 P. 577 to the effect that when appellants' acts create the same type of danger complained of, such acts may be considered in determining whether respondents' acts actually constitute a nuisance under all the circumstances. It is submitted that this case cannot help defendants under the circumstances. The question still remains whether the trees on defendants' premises constitute

a nuisance. The only thing defendants can mention is the Siberian Elm (not to exceed about six inches in diameter) which was standing under the shade of three poplars. Furthermore, in the case of *Carter vs. Chotiner* there was at least a conflict in the evidence, whereas in the case at bar there is no conflict at all regarding the hazard of the poplars, the overhanging branches, and the damage done by the roots, etc. In fact the roots of the poplar trees were identified as being the ones causing the damage.

At page 5 of brief defendants cite and quote from *Kubby vs. Hammond* (Ariz.) 198 Pac. 2d. 134, as follows: "The proper remedy for minor inconveniences arising from an alleged nuisance lies in action for damages, rather than injunction." A reading of this case discloses that the question involved was whether or not the operation of an auto wrecking business violates a rezoning ordinance and whether loud noises interfere with plaintiff's peaceable enjoyment of his home and cause a depreciation of the value thereof. At page 140 of the opinion the courts says:

"However a single instance of offensive noise was shown to have occurred on September 11, 1946, when a motor was being removed from one of the cars. It is obvious that as applied to a situation of this kind such an incident standing alone is wholly insufficient to sustain the issuance of an injunction. The maintenance of a nuisance ordinarily implies a continuity or recurrence of action over a substantial period of time."

It is believed that the quote supplied by counsel is so inapplicable to the facts in the case at bar as to require no further comment. Certainly the matters complained of by plaintiff in the case at bar are not minor.

Defendants at page 7 of brief cite and point to Erickson vs. Hudson, *supra*, as a well-reasoned case. The opinion is rather long, but the facts are simple. The court ordered defendant to reduce the height of a "spite-fence" erected from a purely malevolent spirit because it deprived plaintiff of air, light, and view. The court recognized plaintiff's rights by ordering the fence reduced and the defendant's too by permitting the fence to stand regardless of the motive he had in erecting, but in permitting the fence to stand the court was particular to see that no substantial or reasonable rights of the plaintiff were invaded. Consider the difference in the facts of the case at bar. No doubt the fence did not have "roots." It must also be remembered that the trees on defendants' property are not "rootless" trees. The damage these roots cause plaintiff have not been contradicted. Nor is it denied that trimming the tops of the trees aguments roots growth and so increases the damages to plaintiff's property. In fact the trees were trimmed once before and this really solved nothing. At least part of the tops of the trees carry dead timber. In the case at bar the lower court simply recognized the height hazard when it ordered the tops reduced. It really did not fully or adequately, it is submitted, solve the problem as did the Wyoming court and it is further ventured that if this case had been before the Woming court it would have granted to plaintiff the relief prayed for. We think this case, is a holding in plaintiff's favor.

Reference is made to pages 18-20 of appellant's brief where plaintiff cites and discusses Dahl vs. Utah Oil Ref.

Co. (Utah) 262 P. 269. Defendants also on pages 3-4 of their brief refer to and quote from this case. The facts are as different as the night is from day. In the Dahl case, plaintiff's home was located in an industrial section of Salt Lake City and about a 1000 feet or more away from plaintiff's business, which the court found was operated in a modern and well equipped plant and in a careful manner. It would be difficult to see how the court could make any such finding with reference to the tremendous tree growth on such a small area on defendant's lot having in mind that the parties here reside on adjoining lots in a closely built-up residential section of Logan City. The defendants simply insist they have the right to maintain these large trees regardless of the consequences to plaintiff. (Tr. 40). It is here pointed out that their "attitude" is in error and based upon a wrong conception of their rights as adjoining property owners. The facts in the case at bar are clearly distinguishable from those in the Dahl case and the quote supplied by defendants must be applied to the facts in that case. We think the law given in the Dahl case when applied to the uncontroverted facts existing in the case at bar justified a holding in favor of plaintiff. But defendants next say the court found that they would be making a reasonable use of their property if they trimmed the trees to reduce the hazard. This appeal is taken because plaintiff believes the lower court misapplied the law to the undisputed facts. It is further submitted that the mere fact that the lower court viewed the premises cannot and does not in the least alter the undisputed facts testified to by the plaintiff which cannot and were not denied.

At page 4 of brief defendants say that the authorities are not in accord in the matter of trees being a nuisance, and then point out that some states follow what is known as the "Massachusetts rule" (Smith vs. Holt (Virginia) 128 A. L. R. 1217, and the annotation there given, and others follow the so-called "California rule" Gostina vs. Ryland (Wash.) 199 Pac. 298. In this counsel for plaintiff begs to differ with defendants and desire to point out that in those western states where there exists a statute such as we have in Utah the decisions are uniform, and that in states (mostly southern and some eastern) where no such statute exists the so-called "Massachusetts rule" is followed. Plaintiff pointed this out in its brief filed herein at pages 12 to 20 and so to avoid duplication these same line of cases which defendants refer to at page 5 of their brief will not here be discussed. However, defendants state at page 4 of brief that the Supreme Court of California modified the "California rule" and then quotes from Bonde vs. Bishop, 245 P. 2d. 617. With this statement plaintiff disagrees and desires to point out that the quote is inapplicable and misapplied by defendants. By a reference to that case will be observed that damages were disallowed because they were improperly pleaded. The quote supplied applies to situations where the action brought is not based upon the nuisance statute, and California also has a nuisance statute almost identical to ours. (See headnote 6). It is also interesting to note that in the Bonde case only one tree was complained of, whereas in the instance case complaint is made of three large trees, each of which appears to be considerably larger, besides the two elms, and that while damages were disallowed

because improperly pleaded, yet the judgment of the court was permitted to stand. Counsel for defendants next argue at page 5 that unless the Dahl case is to be overruled this jurisdiction is committed to the "common sense" doctrine announced in *Smith vs. Holt* (Virginia) *Supra*, and from which he copiously quotes. The conclusion reached by counsel, it is submitted, does not follow, and inasmuch as this contention has been previously answered no further comment will be made, except to say that our Statute cannot be ignored as must be done if the case of *Smith vs. Holt* is to be followed.

Defendant recognizes at page 3 of brief that this court has not passed on the question here presented as it pertains to trees and yet at page 6 states that it would seem that this court has been much slower to grant injunctions than those courts which follow the California rule relating to trees and then cite *Kinsman vs. Utah Gas & Coke Co.* 177 P. 418, *Ludlow vs. Colorado Animal By-Products C.*, 137 P. 2d 347, *Thompson vs. Anderson*, 153 P. 2d 665, *Coon vs. Utah Construction Co.* 228 P. 2d 997 and *Shaw vs. Salt Lake City* 224 P. 2d 1037. These holdings are in line with holdings of other states involving similar questions. The writer has read all of these cases and for the reason that the facts therein are so entirely different no comment will be made because it seems that none of them could afford any precedent for the question here presented. It seems to the writer that the case of *Shaw vs. Salt Lake City*, *supra*, would have more bearing than any of the other cases cited because there the court held the construction and operation of a hot-mix asphalt plant in

the Cottonwood residential district a nuisance per se and the same was enjoined prior to commencement of construction. It also held that damages would provide no adequate compensation even if they could be obtained. It seems to the writer that the damages resulting to plaintiff are so aggravated that the trees complained about might also amount to a nuisance per se.

Defendants also state at page 3 that the State Dept. of Agriculture provides a list of weeds which have been determined to be obnoxious, but that their search does not reveal wherein this state has declared any tree to be noxious. The complete answer to such statement is, we believe first, that weeds are not an issue in this case; and secondly that Sec. 78-38-1, U. C. A., 1953, is provided. The meaning of the word "noxious" has been treated at page 13 of Appellant's brief. The question under the statute is whether or not the trees in question constitute a nuisance. Clearly, the finest trees could under certain circumstances become noxious ones, just as a weed may, under certain circumstances, be a flower. And at page 8 the question is posed if plaintiff can compel the removal of these trees, how far outside his own property may he successfully use the injunction remedy; that the streets of Salt Lake City have been littered with branches and limbs (to say nothing of leaves) after winds (defendants could also have added littered with large trees blown thereupon) and that if plaintiff's request is granted, it may become an utter impossibility for the small lot owner to maintain trees and shrubs. That Logan (and it is conceded) is one of the most beautiful cities in Utah, that its streets are bordered

with ditches running with fresh clear mountain water and that in the fall leaves, etc. blow therein. Then asks, "Are these to be abated." No favorable comment is made in the evidence concerning the Siberian Elms on Washington St., Ogden. It is believed Ogden City would not again permit the planting of these trees on its streets because the danger of blowing over is too great. Certainly it is not the policy of Logan City to plant them. At any rate, the question in this case is the problem between two adjoining landowners.

We think the defendants appear to be unduly alarmed. No such dire results have been reached where similar nuisance statutes have been enforced in Washington, California, etc. Then too streets are not involved in this action. In this action the closest Elm asked to be abated is at least 20 feet south of the ditch where runs water and the closest Poplar is 5 rods south thereof. If this court is to take judicial knowledge of the streets of Logan, and we suggest it does, then we desire to point out to this court that for more than twenty years last past and continuing to this very day, Logan City has at its own expense removed not only hundreds but many, many thousands of elms, poplars and other similar huge trees not only on the parking but on the property of property-owners growing close to the sidewalk, all of which were trees planted in a by-gone day. As a result Logan City now has many miles of its streets lined with beautiful hardwood trees, namely maple and white ash and linden. Never heard of a problem resulting from leaves from these trees cluttering up the ditches and culverts. As elsewhere the citizens of Logan solve this

problem. It is difficult to see where any pronouncement resulting from a favorable decision to plaintiff in this case will adversely affect any small lot owner in the reasonable use of his property in the growing of trees, shrubs, etc. We believe counsel's fears are unwarranted.

In conclusion it is submitted that defendants have not in their brief given any reasons either upon the facts or upon the law applicable to the undisputed facts which warrant in law upholding the decision of the lower court and that the same should be reversed giving to plaintiff the relief prayed for, together with his costs expended herein.

Respectfully submitted,
GEORGE C. HEINRICH,
Attorney for Plaintiff and
Appellant.