

1961

# Lawrence V. Robinson v. Chester Whitelaw : Brief of Plaintiff and Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE  
STATE OF UTAH

FILED

MAY 8 - 1961

LAWRENCE V. ROBINSON,

Plaintiff and Appellant

vs.

CHESTER WHITELAW,

Defendant and Respondent

Clerk, Supreme Court, Utah

Case No.

9377

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BRIEF OF PLAINTIFF AND APPELLANT

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Plaintiff and Appellant	)	
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BRIEF OF PLAINTIFF AND APPELLANT

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STATEMENT OF FACTS

Plaintiff's Amended Complaint, filed in the District Court of Iron County, State of Utah, alleges that in 1945 he purchased a home and farm at Beryl, Iron County, Utah, and that he was still the owner of the same at the time of the filing of the Complaint against the defendant.

The defendant owns a farm adjoining the farm of the plaintiff on the west, 15 acres of which lie southwest of the

plaintiff's farm and home, which property was not at the time of the filing of the Complaint being farmed by the defendant and had not been for some years.

At the time plaintiff purchased his property in 1945, the 15 acres of land referred to above was covered with a natural growth of sage and other native brush and plants, which native cover formed a natural windbreak and served as protection against the prevailing winds which blow from the southwest in this area.

That in 1947 or thereabouts, the defendant cleared and plowed his farm, and particularly the 15 acres above referred to, and cropped the same for two or three years, but since that time the defendant has not farmed said 15 acres and has allowed it to lie bare and idle.

That no crops have been raised thereon for several years and, because of

the natural cover having been removed by the defendant, said 15 acres was a prey to the prevailing winds referred to above.

That said prevailing winds near Beryl, Iron County, Utah, and in the Escalante Valley generally, are from the southwest, which winds, particularly in the spring months, carry great clouds of sand and dust from the said 15 acres of the defendant's land which he cleared of brush and native plants as set forth above, on to the property of the plaintiff, which said dust and sand seeps into the home and on to the land of the plaintiff, causing large sand dunes on the land of plaintiff, thereby damaging his property as alleged in said Complaint.

That due to the clearing of said land by defendant, as aforesaid, and leaving the same in a denuded condition,

as alleged, the said prevailing winds carry said sand and dirt from said 15 acres into the home of plaintiff, making it impossible to keep the same clean and in a habitable condition, and impairing the home life of the plaintiff and his family.

That the blowing dust and sand from defendant's said 15 acres creates large sand dunes upon plaintiff's land which make the same difficult to farm and unreasonably interferes with plaintiff's farming said land.

That by reason of the blowing sand and dust from defendant's property, as above set forth, sand dunes have been formed upon plaintiff's property, making it impossible to properly irrigate the same, to the damage of the plaintiff in the sum of \$1,000.00.

That on account of said sand dunes

being formed as aforesaid, the plaintiff has had to employ earth-moving equipment to remove said sand dunes, at a cost to the plaintiff of the sum of \$292.50.

In defendant-respondent's Answer to plaintiff-appellant's Complaint, defendant admitted owning the land as alleged, and admitted plaintiff's ownership of the land as alleged in said Complaint. Defendant admitted brushing, leveling and plowing said 15 acres, and that he did grow crops thereon. Defendant further admitted that the prevailing winds at Beryl, Utah and in the general vicinity of the Escalante Valley of Iron County, Utah, are from the southwest, and that said winds, particularly in the spring and at all other times carry great clouds of sand and dust. But defendant alleged that the home of plaintiff is not any dirtier than any other home in the valley.



After the filing of the Amended Complaint and the Answer of defendant, defendant filed a Motion for Dismissal of plaintiff's Amended Complaint, on the ground and for the reason that said Amended Complaint failed to state a cause of action against the defendant for which the Court could give redress or take jurisdiction, and upon the further ground that the cause of action was barred by Sections 78-12-25 and 78-12-26 of the Utah Code Annotated, 1953. In other words, that said action was barred by the Statute of Limitations.

The Motion for Dismissal upon the grounds stated above was duly set for hearing, and upon the 24th day of September, 1960, the Court entered a Judgment of Dismissal of the action, and thereafter appeal was duly made to the Supreme Court of the State of Utah.

## STATEMENT OF POINTS

### POINT NO. I

That the Court erred when it granted the Motion to Dismiss on the ground that the Amended Complaint failed to state a cause of action against the defendant.

### POINT NO. II

That the Court erred when it granted the Motion to Dismiss on the ground that the cause of action was barred by the Statute of Limitations.

### ARGUMENT

For the purpose of the present Argument, all of the material allegations of the Complaint are admitted.

"A Motion to Dismiss concedes the truth of the matters alleged, if they are well pleaded, and construes the allegations of the pleadings most favorably in the pleader's favor."

41 Am. Jur. Sec.332,p. 518

"A Motion to Dismiss Complaint admits truth of all ultimate allegations of fact, but such Motion does not admit legal conclusions."  
179 P.2d 252 (Ariz.)

It is therefore conceded that prior to 1947 the 15 acres in question in plaintiff's Complaint was in its natural state, with natural shrubbery and grasses and, therefore, was no problem as far as the dust was concerned. Thereafter, the defendant brushed, plowed, leveled and scraped said land and cropped it for two or three years, and thereafter left it denuded, bare and idle, and directly in the path of the prevailing southwesterly winds which carried the dirt and dust on to the plaintiff's lands and into his home, making the land difficult to irrigate and the home almost uninhabitable.

In the present case, there is actual, great and continuing damage to the plaintiff and his family, both to their irrigable

land and to their home, which said damage did not occur until defendant plowed, scraped and brushed his land and thereafter left it in a denuded condition, knowing full well that the prevailing winds would and did and would continue to cause the damage alleged.

"The determination of what is actually an actionable nuisance is dependent upon the facts of each case."

142 P.2d 690 (Utah)  
Ute Stampede case.

In an old New York case mentioned in 3 A.L.R. 318, reported in 30 N.E. 1152, a dealer in sand kept a large pile of molding sand near the plaintiff's house.

"When the wind blew, it blew the sand about her house and it percolated into it, settling on furniture, carpets, curtains and the like. The Court held, in affirming a judgment in favor of plaintiff, that a business lawful in itself may be so conducted as to constitute a nuisance, saying:

" 'The defendant's business is lawful, if properly conducted; it is not a nuisance per se, but may be so negligently conducted as practically

to become a nuisance. . . .The rule that you must use your own so as not to injure another is not of universal application... but the rule has at least this extent: You must not use your own so as to injure another if you obviously can, with reasonable care and without unreasonable effort or expense, avoid it. The question becomes one of relative obligation or duty, and the violation of this duty is negligence. Now here, can there be any doubt which is the more reasonable: That the defendant shall build sheds or put some covering over his sand, or that the plaintiff must abandon her property?"

The comment and questions are pertinent to the present case. Should the defendant be required, as most farmers do, to crop his farm and thus prevent damage by the winds and by the sand and dirt to plaintiff, or should the plaintiff be compelled to endure the discomfort and the cost or move away from the vicinity of the said 15 acres?

"A landowner may not develop his own property regardless of consequences incidental thereto."

173 N.W. 805 (Minn.)  
11 A.L.R. 1402

In a California case, McIvor, et al, vs. Mercer-Fraser Company, et al, reported in 172 P.2d 758, the Court held:

"Persons whose use and enjoyment of their land is substantially impaired by creation and maintenance of dangerous conditions on adjoining land by excavation thereon, need not show actual physical damage to their property in order to recover damages from owner of such adjoining lands."

And further the Court said:

"The deprivation of landowners' rights to enjoy their property to the full extent because of willful creation and maintenance of dangerous condition on adjoining land by excavation thereon constituted partial eviction, and the fact that it was only partial did not deprive them of the right of action against the owners of adjoining land for damages."

In the present case the defendant's use of his land has certainly created a condition which deprived the plaintiff of the right to enjoy his own property to the full extent, which condition could be reasonably remedied and avoided.

POINT NO. II

It is submitted that the conditions complained of are continuing from month to month and year to year, and the dismissal of the Complaint on the ground that the same was barred by the Statute of Limitations was in error.

It was held in *Brede vs. Minnesota Crushed Stone Company*, 173 N.W. 805, in an action to enjoin the operation of a limestone grinding plant,

"that a delay of more than 12 years in bringing suit did not preclude injunctive relief, and that persons who acquired property in the vicinity of the quarry after its operation was begun were entitled to relief."

It is submitted that the Court was in error in dismissing the plaintiff's Complaint on either or both of the grounds set forth above, and that the order of dismissal should be set aside and trial ordered on the merits of the case.

Respectfully submitted,

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