

1961

# Lawrence V. Robinson v. Chester Whitelaw : Brief of Respondent

Utah Supreme Court

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Patrick H. Fenton; Attorney for Defendant and Respondent;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

FILED

JUL 10 1961

LAWRENCE V. ROBINSON,  
Plaintiff and Appellant,

Supreme Court, Utah

—vs.—

Case  
No. 9377

CHESTER WHITELOW,  
Defendant and Respondent.

*RESPONDENT*  
BRIEF OF ~~APPELLANTS~~

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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LAWRENCE V. ROBINSON,  
Plaintiff and Appellant,

—vs.—

CHESTER WHITELOW,  
Defendant and Respondent.

Case  
No. 9377

~~BRIEF OF APPELLANTS~~  
*RESPONDENT*

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## STATEMENT OF FACTS

Plaintiff's Amended Complaint states generally that the plaintiff and the defendant are neighbors in the area of Beryl, Iron County, Utah; that each cleared his own land sometime ago, and thereafter dust has on occasion blown from the land of the defendant onto the land of the plaintiff. There is no allegation of affirmative action of the defendant in any manner creating this situation,

and the only item complained of by the plaintiff performed by the defendant is the act of clearing land in approximately 1947. Now, fourteen years later he is complaining because the defendant cleared land.

The defendant filed a motion for dismissal on the ground that the amended complaint failed to state a cause of action against the defendant for which the court can give redress or take jurisdiction, and on the further ground that this cause of action is barred by the following statutes, to-wit, Utah Code Annotated, 1953, 78-12-25 and 78-12-26.

After the filing of this motion, same was duly called for hearing on the 13th day of September, 1960, and the court indicated that it was the court's intention to dismiss the plaintiff's amended complaint, and to give plaintiff's attorney an opportunity to amend same. Plaintiff's attorney stated that he desired not to amend same, and thereupon the judgment of dismissal was duly entered.

## STATEMENT OF POINTS

### Point I

The trial court did not err 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 II

The trial court did not err when it granted the motion to dismiss on the ground that the cause of action was barred by the Statute of Limitations.

## ARGUMENT

### Point I

THE TRIAL COURT DID NOT ERR WHEN IT GRANTED THE MOTION TO DISMISS ON THE GROUND THAT THE AMENDED COMPLAINT FAILED TO STATE A CAUSE OF ACTION AGAINST THE DEFENDANT.

It is to be noted that unless the decision of the trial court is upheld in this matter, any person who farms a piece of ground and then for any reason satisfactory to him, fails to continue farming same, may be subject to an action of the type attempted to be initiated herein by the plaintiff.

Although extensive research was done by the undersigned, the undersigned fails to find any case in which the natural dust in itself has been held to be a nuisance. Although the undersigned found many cases in which items added to the dust had an influence thereon, in cases where blasting and processing of soils were held to be a nuisance, the undersigned failed to find any case where natural dust without adulteration in any fashion was held to be a nuisance. Apparently the plaintiff and appellant has had the same experience. He has cited no cases in which natural dust is held to be a nuisance.

The closest case found by the undersigned for dust being held a nuisance without something being added to it was the case of McIntosh v. Brimmer, 68 Cal. App. 770, 230 Pac. 203. This is a situation whereby plaintiff alleged maintenance in a chicken farm operation whereby the chickens scratched the soil and dust blew onto the plaintiff's property arising from the scratching by the chickens. It was held that this was a nuisance. This is a very interesting case inasmuch as in the decision the holdings showed, and the evidence held this finding:

“ \* \* \* Dust blown from the defendant's chicken corals into the plaintiff's grapes was not a pure soil, but was impregnated with effuvia of the nature of humous.”

The implication from this case is that if it had been pure soil there would have been no nuisance. Apparently, in this California case, which is the strongest the undersigned has found, it took the addition of the effuvia from the chickens to make a nuisance. In the case of McIntosh v. Brimmer there is a reference to the ruling of the Chancellor in the case of St. Helen's Smelting Co. v. Tipping (11 H.L. Cas 642). in the McIntosh Case, the California court recognizes the Chancellor's ruling in the St. Helen's Smelting Co. v. Tipping case as the outstanding authority in the matter of nuisance. The McIntosh case, purporting to quote from the St. Helen's Smelting Co. case, makes the following quotation:

“ \* \* \* It seems but reasonable and just that the neighbor who has brought something on his own property, which was not naturally there, harmless to others so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues if he does not succeed in confining it to his own property.

“We think this to be the law, whether the things so brought be beasts, or water, or filth, or stench.”

This ruling which the McIntosh case has incorporated from the St. Helen's Smelting Co. case apparently explains the reason why the undersigned and opposing counsel have failed to find any direct ruling in connection with dust alone being blown from an individual's property onto a neighbor's property. There is the implication in the McIntosh case that dust alone is not a nuisance, and the reference of the McIntosh case to the St.



Helen's Smelting Co. case and the adoption therein of the ruling propounded by the Chancellor in the St. Helen's Smelting Co. case, apparently limit nuisance to that which is brought onto the property and not kept there. There is no question that the cases are legion in which under certain conditions beasts, water, and filth have been brought onto property and then allowed to get onto a neighbor's property, and have then been held to be nuisances. Under some conditions, stench has been held to be a nuisance when not confined to the place they originated, and when they were caused by something brought onto the property. The undersigned has failed to find any sort of a case where a stench originating on property from natural causes has been held to be a nuisance. The undersigned has been unable to find any case where dust, except as created by some manufacturing process or some commercial enterprise, has been held to be a nuisance. It seems that with most nuisance cases accepting the St. Helen's Smelting Co. case as the eminent authority for nuisance, these items originating on the property from natural causes have been intentionally omitted from the nuisance doctrine. They certainly do not come under the rule laid down in the St. Helen's Smelting Co. case which is based on something being brought onto the property and then not confined there.

The plaintiff and appellant places great emphasis on the Ute Stampede Case, 142 Pac. 2d 690 (Utah), (which the undersigned found at Page 670) which certainly is not in point. However, it is noted that in this Ute Stampede case, action was brought under Utah Code annotated, 1943, Title 104-56-1, and following. The undersigned is of the opinion that the 1949 Legislature repealed this particular group of statutes, and that same have not been re-enacted.

The Dunsbach v. Hollister case, decided in 1888, reported in 30 N. E. 1152, and in 3 A.L.R. 318, mentioned

by counsel on Page 9 of appellant's brief, generally sets forth a fact situation in which other materials have been brought onto the lot and then blown off. Certainly this is not in point with the case at bar. The annotation on this particular case in 3 A.L.R. beginning at Page 310 and running through Page 324 inclusive, which includes the portion on Page 318 quoted by counsel, has a considerable annotation on dust as a nuisance. In this A.L.R. annotation, it is based entirely upon industrial dust created by a business of some sort moved onto the property, such as a cotton gin, which was the primary case involved, a blacksmith shop, a carpet cleaning plant, a coal or coke handling shop, electric light plant, a factory, a flour mill, a lime kiln, a sand pile, stonework handling, a threshing machine, a woodworking plant, a copper polishing plant, a saw mill, or a stonecutting plant. In all instances in this annotation 3 A.L.R. which counsel depends upon, something in addition was moved onto the property, not just natural dirt left there.

The item cited by counsel on Page 10 of plaintiff's brief, as 11 A.L.R. 1402, goes into a situation whereby the defendant was using his property on which to stack other materials that blew onto a neighbor's property. It is again noted that this comes from the decision of the St. Helen's Smelting Co. case advanced in the California courts in the case of McIntosh v. Brimmer previously cited, which is often called "The Chicken Case." In the item cited by counsel in plaintiff's brief, the sand was hauled onto the property and allowed to blow off. Also, this was in a very restricted, highly industrialized and residential area, and was not in a farming area. If the action at bar is allowed, one cannot help but wonder at what point the next farmer downwind from plaintiff will commence an action against the plaintiff on the same theory as the action now before the court.

There are many cases that hold that even when

items are brought onto the property they are not nuisances. One of the strongest in this regard is the case of *Atcheson, Topeka & Santa Fe RR. v. Armstrong*, which was in the Supreme Court of Kansas on 6 May 1905, cited as 80 Pac. 978, 71 Kansas 366. In this case there was a situation whereby a railroad had been going along a right-of-way adjacent to the property of Mr. Armstrong. They lowered the bed so that the top of the smoke stacks was even with the ground, thereafter, the smoke from the various smoke stacks passed into the home and premises of Armstrong, and he brought the action for damages and for abatement. The Kansas Supreme Court held that an authorized business, properly conducted at an authorized place is not a nuisance,

“ \* \* \* for whatever is lawful cannot be wrongful, and the owner of a railroad thus organized and operated does not level damages to any residences permeated by smoke, cinders and gas emitted from the engines to such an extent as to be injurious to the health and comfort of the inhabitants.”

The Kansas Supreme Court held further that one whose residence is rendered uncomfortable or unhealthy to the occupants by smoke, cinders and gas emitted from the locomotive engines of a railway company, cannot recover damages therefor, in the absence of any constitutional or statutory authority, where it appears that such company has not abused or exceeded its authority in locating or constructing the railroad track in the operation of its engines.

In the matter of *Dahl v. Utah Oil Refining Company*, Supreme Court of Utah, 20 June 1927, 262 Pac. 269, 71 Utah 1, the trial court filed a verdict of \$500 for the plaintiff. The Supreme Court reversed this, holding: “This is held not to be an actionable nuisance.” The court held that discomfort caused by impregnation of atmosphere

within a manufacturing community, by disagreeable odors and impurities, without injury to life or health, does not constitute a nuisance as a matter of law. It holds further that the operation of a modern, well-equipped oil refinery in an industrial section of a city, according to approved methods, a distance of 1000 feet or more from a dwelling house to which offensive and disagreeable fumes or odors, not injurious to life or health, and not causing any great physical injury or property injury, are occasionally carried, is, as a matter of law, a proper use of property.

Also, in *McMullen v. Jennings*, 41 Pac. 2d 753, 141 Kansas 420, decided by the Supreme Court of Kansas 9 March, 1935, concerning the dust from a grain elevator, it was held that this grain elevator was not a nuisance.

In the case of *McIvor v. Mercer-Fraser Co.*, 172 Pac. 2d 578, quoted on Page 11 of plaintiff's brief, the question of whether or not a nuisance exists does not arise from a question of dust, but arises from the question of excavation in which insufficient land was left to hold plaintiff's land in position. There is a great difference between the case whereby land is excavated and the neighbor's land runs into the pit, and in a natural dust question when and where the wind blows.

In the case of *Kendall v. Seaman*, 63 New York 68, 20 American Reports 567, the court held that where there is a fact situation of a lawful use in a proper area, there can be no redress for a claim of careless, extraordinary, or unnecessary use of the property.

In the present case, the defendant has not used his land in any fashion that created a nuisance. The only thing that plaintiff did was farm his land 14 years ago, and let it lie idle since. Can we say that a man must farm his land whether or not he feels like doing so, and regardless of his own personal conditions?

## Point II

THE TRIAL COURT DID NOT ERR WHEN IT GRANTED THE MOTION TO DISMISS ON THE GROUND THAT THE CAUSE OF ACTION WAS BARRED BY THE STATUTE OF LIMITATIONS.

Title 78-12-25, Utah Code Annotated, 1953, provides that within four years an action must be brought for reliefs not otherwise provided by law.

If counsel claims that this is a trespass upon real property, then Title 78-12-26, (1) would apply. It is noted that in this statute, various subsections other than (1) pertaining to a 3-year statute of limitations, in many fields contain statements that the action will not run until the act complained of has been discovered. This certainly would not be the case in the matter at bar, inasmuch as there is no question that the act complained of has been known for in excess of 14 years, and the wind has blown in excess of 14 years, according to plaintiff's amended complaint.

The cases are legion that hold that the statute of limitations does run. It is noted with interest that counsel cites the case of *Brede v. Minnesota Crushed Stone Co.*, 173 N.W. 805. Although this case is not in point with the case at bar, it is a question of dust from a quarrying operation, and from blasting. There was an area known as the Kletzen tract which had been worked for the last two years and was much closer than the other areas. The Minnesota court held that this was a nuisance and enjoined same, specifically holding that if the defendant were engaged in quarrying on the 40-acre tract only, which does not include the Kletzen tract, and was the original tract, and was not operating its dust mill on the Kletzen tract, the situation would be materially different. But the operations on the Kletzen tract and in the dust mill were begun only two years prior to the commence-

ment of this action:

“ \* \* \* Defendant is now blasting nearer to the plaintiff's premises than ever before, and is creating dust of a new character and in increased quantities. The period over which these conditions have extended is comparatively short, and no claim of laches can be made successfully.”

In this *Brede v. Minnesota* case, the court indicates that were it not for the new operation on the new piece of ground within the last two years, this action would not lie.

In the matter of *Kinsman v. Utah Gas & Coke Company*, Supreme Court of Utah December 3, 1918, 53 Utah 10, 177 Pac. 418, an action was brought to enjoin the manufacture of gas. It was shown that the plant was erected in 1906 and doubled in 1910. The court held that the plaintiff was guilty of laches and as such was not entitled to an injunction.

In the case of *Thomas v. Woodman*, 23, Kansas 217, 33 American Reports 156, the owner of land below a dam in the river built this dam to divert the water into a creek for milling purposes. Thereafter, the plaintiff delayed for two or three years after he discovered the water below the dam adjacent to his residence became stagnant, before taking the necessary steps to establish the existence of an alledged nuisance caused by such dam, during which time the dam was twice washed out and rebuilt. The trial court held that he was not entitled to equitable relief, and the Supreme Court upheld this decision.

In the matter of *Gibbs v. Gardner*, 80 Pac. 2d 371, 7 Montana 76, the defendant for a period in excess of twenty years removed water from a ditch by a specific type of headgate with boards therein. Action was brought by the plaintiff to stop him from removing water from the ditch, claiming that the headgate and boards therein

constituted a nuisance. The trial court held that although it did not give the defendant a right to any water of the plaintiff, the failure of the plaintiff to bring an action and to abate this nuisance for such a period of time, was such that this plaintiff had now lost his right to ask for equitable relief, and therein makes the statement that "One who slept on his rights will be denied equitable relief." The Supreme Court of Montana upheld this, and quotes the following cases in support of its position that abatement will not stand under an unreasonable period of time: Thomas v. Woodman, 23 Kansas 217, 33 American Reports 156; Whitmore v. Brown, 102 Me. 47, 65 Atlantic 516; Washington Lodge v. Frelinghuysen, 138 Mich. 350, 101 N. W. 569, Bradbury Marble Co. v. Laclede Gas Light Co., 128 Missouri App. 96, 106 S. W. 594.

In the matter of McMorran v. Cleveland, Cliff's Iron Co., 234 N.W. 163, 253 Mich. 65, there was a situation where a dock on which coal was stored and used to refuel the ships plying their trade on the Great Lakes was sought to be enjoined from its operation. The Supreme Court held that this matter was protected by laches.

In the matter of O'Hair v. California Prune & Apricot Growers Association, 20 Pac. 2d 375, 130 Cal. P.L. 673, it was held that where a defendant operated a fruit processing plant discharging waste water for 8 years into a sewer system which discharged into a slough flowing through plaintiff's land, plaintiff's laches barred damage action.

### CONCLUSION

The trial court did not err in dismissing the plaintiff's amended complaint.

Respectfully submitted,  
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Attorney for Defendant  
and Respondent