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Thomas E. Ludlow, Earl Ludlow aka T. E. Ludlow,
Edward B. Selene, Rufus Anderson, Margaret D.
Hanson, aka Mrs. Heber Hanson, John Angus,
Maylan Carter, Edward M. Beck, aka Reed Beck,
Paul E. Swartz, Edward Ludlow, and John Anderson
v. Colorado Animal By-products Company : Brief
of Appellant

Utah Supreme Court

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

THOMAS E. LUDLOW, EARL LUD-
LOW, otherwise known as T. E. LUD-
LOW, EDWARD B. SELENE,
RUFUS ANDERSON, MARGARET
D. HANSON, otherwise known as
MRS. HEBER HANSON, JOHN
ANGUS, MAYLAN CARTER, ED-
WARD M. BECK, otherwise known
as REED BECK, PAUL E. SWARTZ,
EDWARD LUDLOW, and JOHN
ANDERSON,

Plaintiffs and Respondents,

vs.

COLORADO ANIMAL BY-PROD-
UCTS COMPANY, a corporation,

Defendant and Appellant.

Case No.
6298

BRIEF OF APPELLANT

APPEAL FROM FOURTH JUDICIAL DISTRICT
COURT, UTAH COUNTY, UTAH

HON. WILL L. HOYT, JUDGE, PRESIDING

FILED

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IN THE
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THOMAS E. LUDLOW, EARL LUD-
LOW, otherwise known as T. E. LUD-
LOW, EDWARD B. S E L E N E ,
RUFUS ANDERSON, MARGARET
D. HANSON, otherwise known as
MRS. HEBER HANSON, JOHN
ANGUS, MAYLAN CARTER, ED-
WARD M. BECK, otherwise known
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EDWARD LUDLOW, and JOHN
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6298

BRIEF OF APPELLANT

APPEAL FROM FOURTH JUDICIAL DISTRICT
COURT, UTAH COUNTY, UTAH

HON. WILL L. HOYT, JUDGE, PRESIDING

APPEARANCES

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STATEMENT OF CASE

The original complaint in this action was filed August 18, 1937. Ten persons were named as plaintiffs; two corporations and four individuals personally and doing business under an assumed name were named as defendants. Each plaintiff claimed a cause of action against each defendant.

The demurrer filed by this appellant was overruled, (Tr. 176) and defendant answered. This answer was filed November 15, 1938. Thereafter and on the 2nd day of March, 1939, an amended complaint was filed (Abs. 2), with twelve plaintiffs joined, each alleging a separate and distinct cause of action against each of said defendants. This appellant demurred to the amended complaint (Abs. 15) and after the overruling of said demurrer by the Court (Abs. 23) filed its answer to the amended complaint on March 27, 1939 (Abs. 23).

After the case had been tried on its merits, a memorandum decision was filed (see Abs. 259) dismissing the action as to three plaintiffs and all of the defendants, except only the appellant. Injunctive relief was denied the remaining plaintiffs but the Court retained jurisdiction over the remaining plaintiffs, nine in number, and permitted them to further amend their complaint. Thereafter and on June 22, 1939, a supplemental complaint was filed (Abs. 27) in which there were the nine remaining plaintiffs joined, together with two of the former plaintiffs against whom the action had been dismissed, against

the appellant as the only defendant. (see Abs. 259). Demurrer (Abs. 39) was likewise filed to the supplemental complaint and overruled (Abs. 46) and a motion to strike the paragraphs of the supplemental complaint relating to the two plaintiffs against whom the action had previously been dismissed (Abs. 45) was denied (Abs. 46) and an answer to the supplemental complaint was filed on July 3, 1939. (Abs. 47).

After the trial on the supplemental complaint, the action of Edward M. Beck, otherwise known as Reed Beck, was dismissed for the second time (Abs. 402), and judgment was rendered in favor of the remaining ten plaintiffs, including the plaintiff Maylan Carter, against whom the action had previously been dismissed.

The complaint as filed (Abs. 2) alleges that the plaintiffs are the owners in severalty of "homes, yards and farms" situate in a locality "distant from general traffic and industrial manufacture where the inhabitants are chiefly engaged in farming and agricultural pursuits," and at a distance of from five rods to half a mile from the property of the defendant; that "this locality has for more than fifty years last past been distinguished as a residential and farming section"; "that said locality is especially valuable for residential purposes."

It is then alleged in the complaint that the defendant manufactures fertilizing materials and other animal by-products, from which operations odors float over the

property of plaintiffs and into their homes, rendering the same unfit for residential purposes, thereby diminishing the market value of the homes and land of the plaintiffs. The prayer is for an injunction.

The appellant's answer (Abs. 23) denied the material allegations of plaintiffs' complaint and alleged (Abs. 26) that because of the nature of the community, the defendant's rendering plant was a necessary aid to the comfort of the community in disposing of carcasses and offal that was exposed on the surface and permitted to rot; that the lands of the plaintiffs and defendant are industrial rather than residential properties; that they are contiguous to the main line of the Oregon Short Line Railroad Company, in a location where there are a peavinery, a sugar factory, and feed yards for live stock; that the defendant had operated its rendering plant for five years prior to a fire, and rebuilt it after the fire in the same location; that the plaintiffs' actions are barred by laches and the statute of limitations; (Par. 11 answer of def. trans. p. 53) (Par. 9 answer to amend complaint Abs. 27); that some of the plaintiffs moved upon the lands in the vicinity of the plant and constructed homes thereon since the defendant commenced operations. Appellant further alleged that there is a misjoinder of parties plaintiff and a misjoinder of causes of action, and that there is a defect in parties plaintiff, because there are many persons other than the plaintiffs directly interested in the ownership of the properties alleged to be affected.

The case came on for trial on the 3rd day of April, 1939 (Abs. 49). On the 7th of June, 1939 (Abs. 384), the Court made its memorandum decision in which the Court found, made and entered findings of fact and conclusions of law (Abs. 392), wherein the Court concludes that the plaintiffs are not entitled to have the defendant enjoined from operating the plant, but plaintiffs should be entitled to recover damage for loss or injury suffered and to be suffered by them as owners of the homes or lands adjacent to defendant's plant. The Court retained jurisdiction and permitted the parties to amend their pleadings (Abs. 259, 393), and to put in additional evidence upon the question of damages to which plaintiffs might be entitled.

On the 17th of October, 1939, the cause came on for hearing on the supplemental pleadings, and additional evidence on the question of damage was adduced (Abs. 260).

Whereupon the Court adopted its findings and conclusions of June 7, 1939 (Abs. 393), and then entered findings with reference to damage in each of the ten separate cases.

Appellant will now discuss each of the ten causes of action separately.

THOMAS LUDLOW testified (Abs. 57):

His occupation is farming, cattle and sheep; his home is located 200 rods west and 10 rods north of defendant's plant; he has 40 acres with a home, garage, three chicken coops, barn and

wash house; the fair, reasonable market value of his lands with improvements is \$10,000 (Abs. 58).

(It is alleged in the complaint that his property is worth \$12,000 (Abs. 4, 29).

He gets the odors from the plant maybe two days a week (Abs. 58); it is an unpleasant smell; none of his family has been sick from it (Abs. 59); he has manure on his farm (Abs. 94); the house is forty years old (Abs. 95), worth \$2,500; the barns, chicken coops, etc. \$1,500; the barn is probably 150 feet from the house; part of the barn yard is between the house and the barn; cows are kept in the barn yard; the manure is cleaned out twice a year and hauled away once a year; Exhibit 4 is a part of his yard (Abs. 96); dead sheep are burned on his place and dead horses and cows go to defendant's plant; he has pelted as high as 50 sheep in one or two days; defendant's Exhibit 3 looks like a place on the ranch; there are dry bones from three head of sheep; Exhibit 11 pictures the improvements around his home (Abs. 97); Exhibit 12 shows his barn; there could be dead sheep in the corral; the odor of manure is not offensive to him (Abs. 98); Earl Ludlow's yard, Exhibit 10, is 40 rods from his house; he hauled 426 tons of beets last year; he takes all the pulp from the sugar factory; the beet pulp has an unpleasant odor; it bothers people a little; it doesn't bother him; the defendant's plant used to be a brick yard; the brick yard and the sugar factory were running at the same time (Abs. 99); the center of population of Benjamin is one-half mile south and a mile west from his home; he sold carcasses to the

defendant; neighbors' animals are picked up as soon as they are dead and hauled over to the defendant (Abs. 100); the last two years he has sold the defendant three horses, a cow, and a calf and has disposed of sheep which died in the last two months (Abs. 101); the beet pulp is beneficial to him; all the beef feeders feed it (Abs. 102); he has 200 loads of manure on his place at one time; he feeds 2,000 head of sheep, 40 head of beef; his business is feeding live stock (Abs. 253).

On this evidence of the plaintiff the Court awarded this plaintiff \$1,360 (Abs. 396), more than 50% of the original value of the home which is more than 40 years old.

EARL LUDLOW testified:

He feeds stock; his home is 200 rods northwest from defendant's plant; he has 20 acres (Abs. 130); the odors from the plant occur every time they get a breeze from the east (Abs. 131); Exhibit 10 is a picture of his barn yard; the stuff in the foreground is manure; he has sold appellant a few pelts; he has bought three sacks of tankage and fed it to his pigs, 300 feet from his house; where they feed this tankage it smells (Abs. 132); he gave \$6,000 for this farm of 20 acres fourteen years ago to his father; he thinks it is now worth \$9,500; his four children, his wife and himself are healthy; they have never called a doctor on account of the smell; he paid his father at the rate of \$300 an acre for this land (Abs. 133).

In the complaint it is alleged that his property is worth \$7,000 (Abs. 7, 30). On this testimony the Court allowed Earl Ludlow \$920.00 (Abs. 397).

EDWIN B. (or Edward) SELENE testified:

He is a former employee of defendant, and worked in defendant's plant (Abs. 73); is now working for Mr. Greer, likewise a former employee of the company (Abs. 49), in a competitive business (Abs. 54, 55); acquired the property in 1931; the deed stated a consideration of \$3,000; he paid \$7,000 but this included water from the Strawberry Reservoir (Abs. 72); 17.69 acres; his land is 30 rods from defendant's plant; he is bothered by the odor and by the rats (Abs. 70); values his house at \$2,000 and his farm at \$200 an acre; his chicken coops, granary and barn are worth fifteen or sixteen hundred dollars (Abs. 74); eight shares of water worth \$100 a share; his present occupation is selling and handling pelts and hides; he maintains a pelt house in Salem; Exhibit 8 and 9 are pictures of his premises as now located (Abs. 75); he never called a doctor into his home on account of the odors (Abs. 73).

The Court awarded this plaintiff \$2,176 damage (Abs. 397) which represents more than one hundred per cent of the value of his home as fixed by himself (Abs. 74). Not the slightest damage was shown to his land or to his farm improvements. His farm is contiguous to the railroad right of way. When he moved away temporarily he had no difficulty in renting it. He testified his land grew just as large and abundant crops now as it did before the plant was there (Abs. 74).

The cause of action of Mr. Selene is essentially different from the cause of action of either of the Ludlows. Mr. Selene worked for the defendant and helped

build up its business as an employee in its present location in close proximity to his home. He is estopped not only from claiming the right to enjoin the business, but from claiming any damages at law on the business which, as an employee, he helped to establish.

Mr. Selene, as the principal agitator of this law suit, brought into the case his employer, Mr. Greer, and relied upon his testimony.

MR. GREER testified:

That he built the original plant for the defendant; he bought the land from the people who owned and operated it previously as a brick yard (Abs. 49); he helped build the defendant's plant in 1933; the plant continued until the fire (Abs. 50).

It was stipulated that the date of the fire was April 8, 1937 (Abs. 76).

The construction of the old plant was corrugated iron and cement; the new plant is brick and concrete; the cookers are the same kind of cookers as in the old plant and he thinks about the same capacity; the defendant has added entrail washers; outside of that the machinery and equipment is practically all the same; these odors arise from the cooking (Abs. 52); from 1934 to 1938 he bought pelts anywhere in the State of Utah he could and stored them in Salem; he worked six or seven years for defendant in a rendering plant before he came to Spanish Fork; after six years' experience as an employee of this defendant he

selected this old brick yard as a suitable site for the defendant to begin doing business (Abs. 54); within a year and a half after they started operations they actually started rendering carcasses in the Spanish Fork rendering plant (Abs. 55); Edwin Selene is working for him now on a commission basis (Abs. 56); the pea vinery is closer to the center of Benjamin than this defendant's plant; when he selected this site he personally took into consideration where the population of Benjamin was; it was in April, 1933 that he went there to locate this site (Abs. 57).

It is a singular thing that this first witness upon which the plaintiffs rely should have selected the site as a suitable site for the business of the defendant, and that all of the plaintiffs should have stood by from April, 1933 until the commencement of this action and rendered no complaint against the plant until two of the former employees of the plant should find themselves in competition with the appellant, one of them becoming the leading plaintiff and the other the leading witness. It is certainly to be inferred and to be argued that they would have no difficulty in inducing the rest of the plaintiffs to join them in this action when they held out the possibility of collecting damages against the defendant for something which had not otherwise bothered them all these years, arising out of the operation of a business which naturally adapted itself to the stock-feeding carried on in the neighborhood, and in part as an incident to the sugar factory and the pea vinery which produced the feed for the animals to be fed in the yards of the plaintiffs. Certainly the lower court erred in giving to the

plaintiff Edwin Selene more than one hundred percent of the value of the home, as fixed by the plaintiff himself, in damages, when the evidence of the plaintiff himself shows that the plaintiff was able to lease the home immediately upon his vacating the same (Abs. 73), with the plant present and in operation. Some value must be attributed to the home on account of this evidence alone, to say nothing of the evidence of the experts of the defendant as well as the plaintiffs.

The only possible conclusion that can be drawn from the amount of damage allowed by the Court to this plaintiff is that the Court allowed damages to the land, the chicken coops, the barn, pig pen and other outbuildings incident to the maintenance of the place as a farm in an industrial center, namely, a center for the feeding of live stock.

To allow damages to the land or any improvements other than the home is contrary to the evidence of the plaintiff himself. It is clear, therefore, that the damages allowed by the Court to this plaintiff were excessive and unreasonable, even were we to assume the right of this plaintiff to recover damages at all.

MARGARET D. HANSEN :

Heber Eugene Hansen, the son of the plaintiff, testified (Abs. 123) that there are nineteen and a fraction acres in this plaintiff's name and the remaining sixteen acres in the estate of Heber J. Hansen, deceased, not a party plaintiff. He

lives on this 35 acres and is now farming it; he is not a party to this action. The home is approximately eighty rods southwest from defendant's plant; the home is twenty eight years old; there is a barn, chicken coop, garage, coal shed, grain bins, thousand bushel granary, corrals and sheds; he has a full water right. He couldn't say how many shares of water belongs to his father's estate. The value of the lands and improvements is \$10,000 (Abs. 123). The odors come into his home; neither he nor his wife or children have been made sick by it; they are all well; it is intermittent and it is disagreeable (Abs. 124); he is bothered by rats and flies (Abs. 125); he purchases tankage from the defendant plant and feeds it to his hogs; he has sold an animal to the plant to be killed for fox feed. The home is worth \$5,000; the farm improvements \$2,100; the water \$3,000 (Abs. 126). He has been in the plant to use the scales of the defendant; from his home he smells the odor of the plant, and not the sump near the plant (Abs. 127). Exhibit 5 is a picture of the home; there is manure in the foreground (Abs. 128); his cattle have access to his whole yard at present; his pig pen is approximately five rods south of the water; the house is 200 feet from the corral and 300 feet from the pig pen; the pigs have access to the water in the corral shown in Exhibit 5; Exhibit 6 is a picture of the same corral; Exhibit 2 is the interior of the defendant's plant. Odors from the barn yard and pig pen never bother him; he has seen rat nests around his place (Abs. 129).

The Court allowed this plaintiff \$1,124.40 damage (Abs. 398). It is impossible to ascertain either from the findings or the decree what portion of this damage was

due to damage to the home, to the farm improvements, to the water rights, or to the land. This home of the plaintiff is about as far away from the plant as the home of Ludlow. In the Ludlow case the Court allowed more than 50% of the value of the home, and in this Hansen case the Court has allowed a little more than 20% of the value of the home, if we charge the entire amount of damage to the home itself.

If there is any difference in these two causes of action, it would seem that the advantage should go to the Hansen case rather than the Ludlow, because in the Ludlow case the plaintiff was really operating an industry of feeding more than 2,000 head of sheep and 40 head of cattle as a feed yard immediately adjoining his home. While it is true that the Hansens are raising live stock on their place, they have only twenty five acres, as against 40 acres of T. E. Ludlow, and could not accommodate as many cattle, but nevertheless their property is located within the same industrial area in which the feeding of live stock is the principal industry, operated in connection with the pea vinery, the sugar factory and the railroad.

The supplemental complaint describes 25.80 acres. The testimony of the son is that there are nineteen and a fraction acres belonging to the mother and sixteen acres to the father's estate. The Court makes no finding of fact as to how many acres there are upon which damages are allowed. In Finding of Fact No. 10 (Abs. 398),

the Court simply says that at the time of the trial of this case the value of the 25.80 acres of land etc. would be \$7,944. The Court no doubt took into consideration the value the son placed upon the thirty five acres, as well as the values placed upon the whole farm by the various witnesses testifying as to values. It cannot be determined from the findings upon what the damages of \$1124.40 are found to exist, or which of the thirty five acres the 25.80 acres are. Certainly under the evidence as it stands, the Court could not have awarded damage to the plaintiff on more than nineteen and a fraction acres. If the estate is to recover any damages on the sixteen acres, it would have had to be made a party to the suit. Living on the property the son suffered the injury the mother is awarded the damage. The son could still sue.

JOHN ANGUS testified:

He lives less than half a mile west of the defendant's plant; he has eight acres and rents eight acres; he has rented the eight acres adjoining the plant of the defendant for three years; he has a home, two chicken coops, granary, garage and blacksmith shop, a barn, and flowing wells. This is farming land; he grows hay, grain, sugar beets. The value runs from \$2,500 to \$3,000 (Abs. 87).

He purchased the property either in 1929 or 1930, paid \$535 for the land, 7.82 acres. Since 1933 at the time of the commencement of defendant's business he has built two chicken coops and a well on the property; they are now worth \$400; he did most of the building; the original lumber bill was \$300; the blacksmith shop was moved

onto the place four or five years ago; its present value is \$30 or \$50.

He started building a home in 1930; the home when it was completed had cost him \$1,250; it cost him \$350 to drive a well; electric lights cost \$120; there is nothing else to speak of (Abs. 89). He has five children, ages 24 to 9; they are all healthy; his wife and he are healthy. The rats in this vicinity breed in the grain fields around Benjamin; they are the kind of rats you see everywhere; the odor from the plant is stronger when they are cooking (Abs. 90); the smell which comes from the plant is a cooked smell (Abs. 91).

They had flies before the plant came; the flies are worse now; he has lived all of these years that this plant has been in operation and made these improvements; his family has continued to live there and grow up and be healthy (Abs. 93).

This plaintiff was awarded \$824.00 damage (Abs. 398). Although the plaintiff in his complaint alleges the total value of his property at \$3,000 (Abs. 5, 31), and himself testifies that the value of his property runs around \$2,500 or \$3,000, the Court in its eleventh finding of fact finds the value to be \$3,568.50 (Abs. 398), \$568.50 more than the highest amount claimed by the plaintiff and a like amount higher than the amount alleged in the complaint. The damage of \$824 represents substantially more than fifty percent of the cost of the home, namely, \$1,250, or \$1,370 with electric lights.

JOHN ANDERSON testified:

He lives about thirty rods north of defendant's plant; he started to build in 1934 after the defendant's plant was built; his wife and five children have lived with him at this place ever since he built it; he owns five and one-half acres of land (Abs. 108) with a water right; improvements are a home, chicken coop, shed, barn, pig pen, granary; the present value of the place is \$3,000.

He worked at the plant until April 1937, at the time the old plant burned down; he worked in the construction of the new plant whenever they needed an extra man.

They get odors whenever the cooker is in operation; it has never really made him sick (Abs. 109); they have flies and rats at their home; he got accustomed to the smell when he worked for the defendant; he didn't hesitate to accept employment from the plant from time to time whenever there was employment; he accepted the defendant's money for his services; he lived in his home while he was working at the plant; he built it there after the plant was established; when he worked at the plant he did some of the cooking (Abs. 110); the new plant is no worse than the old one he operated; he has used the new cookers; he doesn't know the difference in the construction of the present plant over the old one; he thinks they have some new machinery; the only smell he smelled was made while he was cooking; the rat situation has not improved or got worse since 1934; he helped build this new plant and saw the kind of construction it was; he thinks the building

is rat proof; the bone pile is where the rats are; the bone pile is no different now from what it was when he first moved there (Abs. 111); the flies get into his house the same as other people's. There are no more flies there now than there were before the old plant burned down (Abs. 112); there are meats on the inside of the plant that gather the flies; on the outside there are manure and bones; the cooking of fresh meat will have just as bad odor as the cooking of the dead meat; he lived at this place from the time he built the home until March, 1939, without instituting any suit for the removal of the plant; he didn't complain to the defendant company or any of its management while he was working at the plant or living in his home about their maintaining this plant there, and he didn't make any complaint to the owner when they hired him to help rebuild it after the fire.

His five and a half acres are worth \$200 an acre with the water; it is good land and raises good crops, just as good now as when he bought it, and produces just as much produce. Chicken coops, sheds, etc. are worth \$210 (Abs 113); four and a half acre feet of Strawberry water are worth \$100 a share; and four and a half shares of river water worth \$100 a share; they get drinking water from the well that is located on defendant's property; they have the permission of the manager to use the drinking water. None of this property stands in his name; it is in his wife's name. (Abs. 114).

This is the testimony of this witness. His wife is not a party to the suit. In spite of this testimony the Court finds, Finding No. 12 (Abs. 398), that at the time of the

trial of this case the value of the five acres of land described in the supplemental complaint as belonging to John Anderson, including improvements thereon, would be \$2,200; that said lands and improvements of John Anderson will be depreciated in market value to the extent of \$1,050 and said plaintiff will be damaged in said sum if defendant's plant continues to operate. There is a finding of fact that John Anderson is the owner, but the evidence is conclusive to the effect that John Anderson was not the owner of the property and had no right to collect any damage. His wife was the proper party plaintiff, and if this judgment were allowed to stand and defendant were compelled to pay it, there would be nothing to prevent the wife of this plaintiff from suing to recover on a cause of action which is hers and which is in no wise satisfied by the findings, conclusions or decree herein entered. Furthermore, it is to be noted that the plaintiff's own evidence shows that the total value of his property is \$3,000, \$1,100 of which is land, \$900 of which is water, \$210 of which is farm improvements (Abs. 113), leaving only a balance of \$790 for the value of the home. The amount of damage allowed Mr. Anderson, an employee of the defendant company, and who assisted the defendant in building even the new plant, is substantially more than the total value of the home. This home of the plaintiff, built since the plant was constructed, is dependent upon the industrial property which was purchased by the defendant from the brick yard for industrial purposes; this plaintiff gets his culinary supply of water from this industrial source

and continues so to do while suing the defendant for the maintenance of the industry which gives him his culinary water.

It would appear that the Court had increased the damage in this case because of the fact that the house was built after the plant was established, whereas we will endeavor to show that in purchasing this property and building upon it after the establishment of the plant, and while he was employed by the plant, he defeats any possible claim he might have for damages resulting from the operation of the plant, even if he, rather than someone else, were the owner of the property. It is to be noted here that this is not a suit for the temporary inconvenience of this plaintiff as a mere resident upon these premises, but is a suit to reimburse the owner of the premises for the difference in value of the premises with the plant operating and with the plant eliminated. This is a cause of action that can belong only to the owner of the land, if at all.

This action was dismissed as to Maylan Carter, Edward M. Beck and James Albert West, original plaintiffs in this action (Abs. 259). Thereafter, and without leave of Court, Maylan Carter and Edward M. Beck were included in the supplemental complaint. With the principal action dismissed as to these two plaintiffs, it is impossible to see how the Court could ultimately award them judgment on the basis of the supplemental complaint without having first reinstated them as plaintiffs

in the original action. To what was their complaint supplemental?

All of the evidence in the original proceedings is relied upon by the Court in awarding these two plaintiffs in the supplemental complaint the judgment allowed them. Furthermore, each of these plaintiffs claims to be the owner of real estate upon which there are no improvements.

MAYLAN CARTER testified:

That he owns a tract of land across the railroad tracks from the plant (Abs. 320); he paid \$225 per acre straight through; he has received the same rental from this property for the past fifteen years; he hasn't lost any money on the land since the plant came there; he has received just as much income from it since as before; he can continue leasing his property for as much now as before the plant came; that he figured when he bought it it was worth \$225 an acre as farm land; it is not the best residential property in the world next to the railroad; it is good farm land but poor residential land; he didn't remember whether the brick yard was there when he bought the land or not (Abs. 323).

For this the Court allowed Mr. Carter \$646.60 damage (Abs. 399). The allowance of such a damage, even if the right to damage were established, would be contrary to the evidence of this plaintiff himself, in which he says that he bought the land for farm land and as such it has not been damaged.

EDWARD LUDLOW testified:

He is a butter maker; lives in Benjamin and owns ten acres adjacent to the plant immediately on the south; the ground around there is worth \$300 to \$500 an acre; he farmed it himself until the last three years; the last three years he has rented it; the land has a water right (Abs. 134); the rats, squirrels and gophers are bad there (Abs. 135); he doesn't know whether the odors come from the plant or its surroundings; the record title in these ten acres is not in him; it hasn't been for about two years; it hasn't been since this law suit started. Sometimes the bone pile is at the plant and sometimes it is gone; Exhibit 10 would be a pretty good place to find rats (Abs. 137), and Exhibit 8 would be a pretty good place for them to breed; the situation in Exhibit 9 would be conducive to rat breeding, and Exhibit 6 shows another such place; he would say rats would breed in places like that on Exhibit 5; Exhibit 14 would be a good place for rats to live; he has leased his farm for the last three years and received rent for it; he wouldn't trade it for Thomas Ludlow's (Abs. 138); he paid \$250 an acre in 1918; he is Thomas Ludlow's cousin; second cousin to Earl Ludlow; his land is fertilized; there is a smell to it; it is the same kind of barnyard manure that they have at the defendant's plant that he puts on his land and farm (Abs. 139); the smell of manure from his barn yard bothers him; he doesn't like the smell; that is the smell that is objectionable to him on his land; he wouldn't want a condition to exist like that in Exhibit 10 in his own back door yard; he aims to keep his yard cleaned up; he doesn't want to say there is no smell comes from the situation

in Exhibit 9; doesn't want to say there is not enough smell to get to the house shown in that picture; he knows there would be; the flies have always been bad in farm communities in this county and their cities too, as far as that is concerned; he had just as many flies at his home before the plant came as he has now (Abs 140); every year you would have an increase of the number of manure piles and barn yards in Benjamin; with every extra barn yard he would expect to find a few extra manure piles, a few extra flies and rats; he has done business with this plant, bought fertilizer and sold them dead animals; he thinks it better to burn his animals up than to bury them; he has had experience of rats getting into dead animals; the recent tendency in this county has been to take care of dead animals by rendering them; this plant has served a useful purpose (Abs. 141) in this county in getting rid of dead animals; the pea vinery is in Benjamin; there are some disagreeable odors emanate from the pea vinery; he felt like closing his car window as he went by it; he doesn't like that any more than he likes the smell from the rendering plant; there are some odors and some offensive odors from the sugar factory; all of them go to make up the community with its industrial life; all of the industries that they have in Benjamin are really an incident to farming and live stock business, including this defendant's plant. This ten acres gives him as good a return as anything else he invested in; this property has never been for sale in 21 years; it produces a fair return on \$300 an acre (Abs. 142).

This piece of property has no home or improvements upon it and is in the same position as the Maylan

Carter property. The Court allowed \$427.87 damage to this 8.15 acres of land because of the presence of the plant. This damage is allowed to the father as plaintiff, although the record title is admittedly in the son who is not a party plaintiff. The land continues to be worth as much as it was before, as farm land, and to produce as many crops, and to bring in a fair return on \$3000, when the plaintiff only paid \$2,037.50 for it. It is the best investment he has.

There is no finding of fact and no evidence sustaining a finding of fact on which to allow an estimate of damage on either the Maylan Carter or Edward Ludlow case. The Court found this land to be worth \$1,711.50 (Abs. 399).

RUFUS ANDERSON testified:

He lives 40 rods southwest of defendant's plant (Abs. 117) with his wife and six children; has 19.53 acres with full water right; the land is under cultivation; improvements are chicken coops, barn, pig pen, granary, garage and home; he values the home and land at \$7,000; experiences the same odor in the new plant as with the old (Abs. 118); he had rats there before the plant came; his chicken coops cost him \$350; were built in 1936, after the plant was built; his barn cost him \$75 or \$175 and the granary \$75; the garage, \$50 (Abs. 119); he remodeled his home in 1935; it cost him \$1,200 in money; he judged he did \$300 work on it himself; he started remodeling in July and finished in October, 1935; he rebuilt his home from the foundation; he never tore out the old founda-

tion; it was built from the old foundation up with new foundation added on; the remodeling of the house cost \$1,400; he has 20 shares of water right for his land worth \$50 a share; the odor of the plant woke him up from his sleep last October; since last October he hasn't been bothered at nights with the odor from the plant (Abs. 120); it is the smell of the cookers that he smells; he may get the odor for only a few minutes during the whole day; he gets no odor from the sump (Abs. 121); he smells the pea vinery; it is the odor of decaying peas; he gets the odor of the beet pulp as it is hauled along the highway; he feeds pulp to his animals, so that he has it around him for certain periods of the year quite a bit; he doesn't mind the odor; he has ten pigs; he feeds garbage to his pigs, throws it into an open trough 25 rods from his house; he has never seen any rats on the land of the defendant (Abs. 122).

In the 15th finding of fact (Abs. 400) the Court makes a more detailed finding than in the previous findings pertaining to the other plaintiffs. In this finding the Court finds that the value of the land, exclusive of improvements, is \$4,296.60, and the value of the improvements \$3,100; that at the time the plant was built Rufus Anderson's improvements were worth \$1,200; that the value of the land is depreciated twenty per cent by defendant's plant and the improvements forty per cent, giving to Rufus Anderson \$2,099.32 damage. This forty per cent is based upon all of the improvements located on the land at present, and the Court includes the value of the improvements built since the defendant commenced operations.

Although Rufus Anderson alleges in his complaint that the total value of his property is \$7,000 (Abs. 5, 30), and although he testifies in the case that the value of his home and the land at the present time is \$7,000 (Abs. 118), the Court finds his property to be worth \$7,396.60. This forty per cent depreciation on the \$3,100 value placed upon all of this plaintiff's improvements gives the same depreciation to the barn, the granary, the garage, the chicken coops, the pig pen and the shed as to the house. There is no contention in the pleadings and no evidence which would justify forty per cent depreciation upon chicken coops and pig pens in which there are fed the products of the cooker in defendant's plant to the chickens and the pigs, and which carries with it the smell which is so objectionable to these plaintiffs. There is only one possible element of damage, even on plaintiffs' theory of the case, and that is the disagreeableness of the odor. So far as flies and rats are concerned, the evidence is almost conclusive that that condition could not be attributed any more to the defendant's plant than to the conditions that exist around the plaintiffs' barnyards and premises. Many of the plaintiffs so testify, as we have heretofore pointed out. This smell cannot affect the value of anything other than the home. In this 15th finding of fact (Abs. 400), there is no way of determining what portion of \$3,100 represents the home and what represents farm outbuildings. This is the first instance in the findings in which the Court has revealed even in part, the basis upon which the damage awarded has been computed. The same can be said about the

twenty per cent depreciation of the land. So far as the evidence shows, the land is just as valuable now with the plant there as it would be with the plant removed. In all of the other findings it is impossible to determine what portion of the damage was allowed for damage to the land.

PAUL E. SWARTZ testified:

His home is 130 or 140 rods north of the defendant's plant. He lives there with his wife and four children; has 30 acres of land, house, chicken coops, garage, coal house and sheep corrals; the smell affects his sleeping and eating on occasions (Abs. 103); he has sold the defendant a little wool and maybe a calf hide or two; all the people who live around the plant are engaged in farming, in the poultry business and in dairying (Abs. 104); it is his signature on Exhibit 13; he sold a cow to the company on February 24, 1939; the cow was not his; he lives close to the railroad track (Abs. 106); the smoke from the engines doesn't bother him; he figures his 30 acres worth \$6000; he has 30 shares of water worth \$3,000; his land produces just as many crops as it ever produced; he doesn't claim the odor from the plant or the smoke from the plant injures the crops (Abs. 107); the chicken coop is as valuable now as it was before; chicken coops are worth \$2,000; his shop is worth \$60; he hasn't placed any value on the corrals; live stock consists of horses, cows, pigs, a few sheep; none of them died from the odor (Abs. 108).

Mr. Swartz' property in the complaint is alleged to be of the value of \$10,000 (Abs. 6, 31) yet the Court, in

Finding No. 16 (Abs. 401) finds its value to be \$10,252.40 —\$252.40 more than that claimed by the plaintiff. It is impossible from the finding of the Court to tell whether or not in the valuation of \$5,252.40 placed on the land without improvements the Court took into consideration the \$3,000 worth of water. This water is transferable to other lands and could not under any circumstances be damaged by the operation of the defendant's plant. Certainly there is no evidence to show any damage to the value of the water. Although this plaintiff expressly states that his land has not been injured in any way, the Court allows twelve per cent of the value placed on the land, which evidently includes the water, as damages, and depreciates all of the improvements upon the land twenty per cent as damages, when the plaintiff expressly stated that his chicken coops are just as valuable now as before. The Court has included twenty per cent of this \$2,000 in damages; in other words, the corrals of the plaintiff, used in the business of feeding live stock, and the chicken coops were damaged as badly as the home, so far as the Court's finding is concerned. The Court awarded the plaintiff Swartz \$1,230 damage (Abs. 401).

It is interesting to compare the Court's fifteenth and sixteenth findings of fact (Abs. 400, 401). From these two findings it is clear that the Court allowed damage for improvements placed upon the land between the time the defendant originally began its operations and the time it reconstructed this plant after the fire in April, 1937, but has allowed no damages for improve-

ments placed upon the lands of the plaintiff since the fire in 1937. It is appellant's contention that no such distinction can be drawn either in law or from the facts; that if the rule of law applies to improvements placed since the rebuilding of the plant immediately after the fire, it would likewise apply, and particularly so in the case of Rufus Anderson, to improvements which were placed on the land after the defendant began operations in the beginning.

On the question of values, the evidence of the plaintiffs was supplemented by the following witnesses for the plaintiff: P. P. Thomas (Abs. 260); C. E. Hawkins (Abs. 287); L. M. Anderson (Abs. 306); and L. Johnson (Abs. 324).

The testimony of these men was all given upon the theory that this farm land was to be considered of primary value for homes and residences. No evidence was given other than the evidence of plaintiffs themselves with reference to the values of the lands in controversy as industrial farm lands.

The witness for the defendant, C. S. Woodward (Abs. 183) and the witnesses T. H. Heal (Abs. 350), Henry Jeppson (Abs. 366) and William Parry (Abs. 365) who made a joint appraisal, found no damage to the lands of plaintiffs whose primary value was for industrial agricultural purposes.

SPECIFICATION OF ERRORS RELIED UPON FOR REVERSAL OF JUDGMENT

1. *ASSIGNMENTS OF ERROR 1 to 44, INCLUSIVE* (Abs. 414-424). Errors in overruling general and special demurrer of defendant to amended and supplemental complaints of plaintiff.

2. *ASSIGNMENTS OF ERROR 45 and 47* (Abs. 436, 437). Court's error in failing to grant defendant's motion to strike the causes of action of Maylan Carter and Edward Ludlow. These two causes of action involved lands with no improvements upon them.

3. *ASSIGNMENT OF ERROR 48* (Abs. 437). The Court erred in denying defendant's motion to dismiss the supplemental complaint of the plaintiffs.

4. *ASSIGNMENTS OF ERROR 46 AND 49 TO 76, INCLUSIVE*. (Abs. 437-445). Errors assigned to rulings upon evidence.

(a) *Assignment of Error 46* (Abs. 437). The Court erred in refusing the defendant the right to examine into the sicknesses of the family of Paul Swartz to determine what, if any, relationship they bore to the odors from defendant's plant.

(b) *Assignment of Error 49* (Abs. 437). Court's refusal to receive in evidence defendant's Exhibits 18 and 18-A, exact copies of records contained in the office of the County Assessor of Utah County, prepared and

filed in that office by the Utah State Tax Commission (Tr. 638), Exhibit 18 detailing the improvements upon the property of Heber J. Hansen and Exhibit 18-A classifying the farm land. These exhibits were offered for the purpose of showing one of the bases upon which Mr. Woodward made his appraisal.

(c) *Assignment of Error 50* (Abs. 437). Court's refusal to receive in evidence defendant's Exhibits 102 to 112 (Abs. 371-2), copies of records of the Utah State Tax Commission containing the appraisal of properties, description of improvements, classification of lands, all based on fair market value as made by the State Tax Commission for the years 1933 and 1934, showing that in arriving at the value of improvements they took the replacement or reproduction value as shown in the exhibits and deducted therefrom for their age. These are part of the records made for the purpose of equalizing the assessment of land in the various counties, and includes part of a state-wide survey, all based on fair market value.

(d) *Assignments of Error 51 and 52* (Abs. 438). The Court erred in refusing the evidence defendant offered to show the sanitary condition of the plant. (Abs. 220.)

(e) *Assignment of Error 59* (Abs. 439). The Court erred in denying defendant the right to cross examine plaintiff's expert witness as to values T. M. Anderson,

as to what he took into consideration in making his appraisal.

(f) *Assignments of Error 65 to 74, inclusive* (Abs. 441-444). The Court erred in denying defendant the right to offer evidence pertaining to the industrial nature of the community in which defendant's plant is located.

(g) *Assignments of Error 75 and 76* (Abs. 444-445). The Court erred in refusing defendant's offer to prove 1929 to 1939 assessed valuation of plaintiffs' lands and improvements.

5. *ASSIGNMENTS OF ERROR 77 TO 92, INCLUSIVE* (Abs. 445 to 450). Errors in findings of fact:

(a) *Assignment of Error 77* (Abs. 445):

1. The Court erred in that it found the plaintiffs, with the exception of Maylan Carter, to be the owners of homes and farms.

2. The Court erred in finding that the operation of defendant's plant and the use of its land as a place of deposit of drainage from the plant causes noxious odors to be discharged into the surrounding atmosphere.

3. The Court erred in finding that the area occupied by defendant's plant cannot be classed as an industrial area.

4. The Court erred in finding that the odors emanating from defendant's plant injure plaintiffs by mak-

ing their homes substantially less desirable as dwelling places and by making their lands less attractive to tenants and prospective purchasers of home sites.

(b) *Assignment of Error 79* (Abs. 447). That the Court erred in its fourth finding of fact (Abs. 395) that the market value of lands of the plaintiffs has been depreciated by reason of the odors of the defendant's plant, and that they have been made less desirable for home sites.

(c) *Assignment of Error 80* (Abs. 447). That the Court erred in its fifth finding of fact (Abs. 395) in finding that the lands of the plaintiffs are substantially less desirable as dwelling places and substantially less attractive to tenants and prospective purchasers of farms or home sites on account of the odors.

(d) *Assignment of Error 81* (Abs. 447). That the Court erred in its sixth finding of fact in finding that purchasers of such land as plaintiffs' are usually desirous of acquiring lands upon which homes can be maintained; that the odors from defendant's plant depreciate the market value of farm lands adjacent to said plant.

(e) *Assignments of Error 82 to 91, inclusive* (Abs. 448-450). The Court erred in finding ownership, value, damage, in the case of each of the ten plaintiffs.

(f) *Assignment of Error 92* (Abs. 450). The Court erred in its 17th Finding of Fact in finding that there

was no difference in valuation of plaintiffs' properties from the time defendant commenced operating its present plant, and erred in failing to find the value at the time defendant originally instituted its plant.

6. *ASSIGNMENTS OF ERROR 93 TO 95, INCLUSIVE* (Abs. 451, 452). Errors in the Court's Conclusions of Law:

(a) *Assignment of Error 93* (Abs. 451). That the plant as operated and maintained constitutes a nuisance. (Conclusion No. 1, Abs. 402.)

(b) *Assignment of Error 94* (Abs. 451). That the plaintiffs are entitled to recover damage in the amounts set opposite their names. (Conclusion No. 3, Abs. 402.)

(c) *Assignment of Error 95* (Abs. 452). That plaintiffs are entitled to an injunction unless damages are paid in sixty days. (Conclusion of Law No. 4, Abs. 403.)

7. *ASSIGNMENTS OF ERROR 96, 97, 98* (Abs. 452, 453). The Court erred in rendering the decree filed herein.

8. *ASSIGNMENT OF ERROR 99* (Abs. 454). The Court failed to find on material issues:

(a) That the plant has benefited the health and comfort of the community by the removal of exposed carcasses and offal.

(b) That since the operation of defendant's plant Edward B. Selene has built improvements on his property; John Anderson has built his home; Rufus Anderson has entirely rebuilt his home from the foundation; Paul E. Swartz has remodeled, rebuilt and added onto his home.

(c) That plaintiffs have derived profit from the building and operation of defendant's plant, purchased products from defendant's plant for use on plaintiffs' property in feeding cattle; that some of the plaintiffs have helped reconstruct defendant's plant, and others were employees of the defendant's plant.

(d) That the depression or sump complained of was produced by the brick manufactory operating an industry upon the property prior to defendant.

(e) That defendant operates the plant in a sanitary manner.

(f) That the action was dismissed as to Maylan Carter.

(g) That non-condensable gases produced by defendant's plant are consumed by the fire of the boiler and do not go into the atmosphere.

(h) That screens have been installed in defendant's plant since the filing of the complaint.

(i) That the value of plaintiffs' lands has not been depreciated by defendant's plant.

(j) That the market value of plaintiff's improvements has not been depreciated by defendant's plant.

(k) That defendant's plant is located and operated in an industrial area.

(l) That the defendant's plant is built in an area heretofore used for beet loading and wool loading stations, located on the main line of the Union Pacific Railroad Company.

9. *ASSIGNMENT OF ERROR 100* (Abs. 456).
The Court erred in denying defendant's motion for new trial. (Abs. 409, 410.)

ARGUMENT

SPECIFICATION OF ERROR NO. 9 — DENIAL OF DEFENDANT'S MOTION FOR NEW TRIAL

The first ground of appellant's motion for new trial (Abs. 409) is that the damages are excessive and appear to have been given under the influence of passion or prejudice.

For the Court's convenience we have prepared Exhibit A which we have printed and which appears in the appendix to this brief. This exhibit gives in:

Column 1, the name of each plaintiff;

Column 2, the number of acres of farm land, as taken from the findings of fact of the Court;

Column 3, the distance of the plaintiffs' homes from defendant's plant, as taken from the Court's findings;

Column 4, the value of the properties of the plaintiffs, as alleged in the complaint;

Column 5, the damages alleged in the complaint;

Column 6, plaintiffs' testimony as to value;

Column 7, the appraised value of the lands shown on Exhibits 17 to 17-H, made by the State Tax Commission in its state-wide re-appraisal, taken from the County Assessor's office, appearing in the appendix to the abstract;

Column 8, the value as fixed by the Findings of the Court;

Column 9, damages awarded by the Court;

Column 10, percent of Court's value allowed as damages;

Column 11, the appraised value made by defendant's witness, Charles S. Woodward; (Mr. Woodward appraised no damage, taking the position that the establishment of an industry in an industrial section tended to increase the demand for homes for industrial workers, and that the presence of this plant would enhance, rather than detract from, the value of the real estate.)

Column 12, appraisals of Heal, Parry and Jeppson, the three appraisers selected by the defendant and whose appraisals were given jointly. (They, like Mr. Woodward, appraised no damage.)

Column 13, appraised values of P. P. Thomas;

Column 14, appraised damages of P. P. Thomas;

Column 15, percent damages allowed by Thomas;

Column 16, appraised values of Hawkins;

Column 17, appraised damages of Hawkins;

Column 18, percent damages allowed by Hawkins;

Column 19, appraised values of Thomas Anderson;

Column 20, appraised damages of Thomas Anderson;

Column 21, percent damages of Anderson;

Column 22, appraised values of Lawrence Johnson;

Column 23, appraised damages of Lawrence Johnson. Mr. Johnson appraised only the real estate.

Column 24, percent damages allowed by Lawrence Johnson.

THOMAS LUDLOW

It will appear from this exhibit that Thomas E. Ludlow testified his properties were worth \$10,000, al-

though the complaint alleged \$12,000. The Court finds his property to be worth \$10,400, \$400 in excess of the value placed upon the land by the plaintiff himself, and on that value awarded Thomas E. Ludlow \$1,360, which is 13.2% of the value found by the Court. This is two-tenths of a percent higher than the damages as appraised by Mr. P. P. Thomas, the banker for many of the plaintiffs. In arriving at his appraisals, Mr. Thomas on cross examination says:

He has experienced the odors from this plant for eight or ten years; he is not familiar enough with the odors to say whether over the ten-year period there has been any change or not; he frankly admits, "I don't know as I know very much about it. I have only experienced them from a distance (Abs. 264), and still I have based these estimated damages which I have made on the odors."

He knew there was a stink there that varies from day to day, probably could vary from year to year; he would say the smell is some kind of animal; he can't tell what, "something, I certainly don't know just what I did smell." He does not know how many hours during the day or how many days during the week or how many months during the year the smell would be present; he didn't base his estimate on how many hours a day, how many days a week, or how many months a year it is there; he based it on his judgment; in his judgment it was a very bad smell (Abs. 265); he doesn't think he has stopped at the plant; he was on Reed Beck's farm when he remembers last smelling it; that was about a

year ago; that is the last time he has smelled this smell on any of these men's lands; he has smelled the pea vinery from the highway; he would consider the pea vinery an industrial activity in that community located near the railroad; there are other industries in the community; there is the sugar factory, that is on the railroad; the pea vinery, the packing plant they call it, the flour mills; he doesn't think they are all on the railroad; they are not more than a quarter of a mile away; he remembers the brick yard where the defendant's plant is located; that was an industry carried on in the community for many years; there used to be an alfalfa mill there; he thinks that was on the railroad; from his experience in this county, most all the industries named would be located on or near the railroad. (Abs. 266.)

The witness was then asked the question,

“It is your opinion, is it not, when a railroad goes through a certain section of land, it pretty much makes that land industrial?”

to which question the Court sustained on objection of the plaintiff, to which defendant duly excepted, and the principle of which is covered by Assignments of Error 65 to 74, inclusive (Abs. 441-444).

The community has been served by the Union Pacific, and the Rio Grande Railroad is about $\frac{1}{4}$ mile away. In arriving at his damage he did not take into consideration the railroad being there; he considered the railroad an asset rather than a detriment; he didn't think that trains passing daily emitting smoke, making a noise, would

be an element to take into consideration in increasing rather than decreasing the value of the land immediately adjoining the railroad right of way; he thought it would decrease the lands on account of the railroad. His appraised values were given without consideration of the presence of the railroad; now that the railroad was called to his attention it may or may not require some reduction in the value on account of the presence of the railroad (Abs. 267); that he didn't take into consideration the pea vinery; he didn't think about it; if he were building a home he would prefer to be farther removed than nearer to the pea vinery; he has not at any time in any of his calculations given to the Court taken into consideration the presence of the railroad or the pea vinery; his valuations were based on a continuous, rather than an intermittent smell (Abs. 268); he has one of these plants right against his fence and "I don't like it;" he never thought anything about this damage until day before yesterday; he has given it his superficial attention in the last few days as to the valuation of these properties; he has known the plaintiffs all his life (Abs. 269); that the land would continue to produce as many and as bounteous crops in spite of the defendant's plant, the pea vinery (Abs. 270), the sugar factory or the railroad; a man's income would be the same from the land whether the plant was there or not; that they don't generally locate brick yards in the most fertile sections of farm land; the brick yard wouldn't affect the fertility of the surrounding farms; he has no more objection to the brick yard than the railroad; that so far as the intrinsic value of the land is concerned, there would be no difference; it is an advantage for men who are feeding livestock like many of these plaintiffs (Abs. 271) to have the pulp close at hand and to

have a railroad in the back yard and a pea vinery and rendering plant near by; it is essential to have some industry in connection with agriculture; the brick yard was an essential industry; if there were more industries in the community it would be even more prosperous; the value of the land has something to do with the prosperity of the community; if the industrial activities were doubled he thinks the values of the land in the vicinity of this plant would increase (Abs. 272); the steel plant at Springville is decidedly obnoxious; he wouldn't say the institution of that plant had decreased the value of property at Springville; he thinks it has helped Springville; the steel plant is about ten miles from defendant's plant; he has smelled the fumes from the steel plant a mile or so; the sugar factory was built in Benjamin twenty years ago; the pea vinery four or five, he guesses; he didn't want smoke from a brickyard in his back yard; there are some disagreeable features to a brick yard (Abs. 273); he doesn't like the smell of those industries (Abs. 274).

Mr. Hawkins, another appraiser for the plaintiffs, appraised the damages at 14.7% of the appraised value that he placed on the property, and the appraiser Anderson, for the plaintiffs (a brother of Rufus Anderson, one of the plaintiffs) appraised the damage at 13.2% of the appraised value, the same percentage as that used by the Court. The appraiser Johnson for the plaintiffs depreciated the land of Thomas Ludlow 10%, 3.2% less than the Court.

The fact that the damages allowed by the Court are excessive appears certain when the evidence is considered, showing that the Court's damage exceeded the percentage of depreciation allowed by two of the plaintiffs' appraisers. It equalled a third. The values of the property upon which this percentage of damage operated, as found by the Court, exceeded plaintiff's own appraisal by \$400, and amounted to three times the appraisal placed upon the property by the Tax Commission. This damage was allowed in spite of the fact that the land will bring to its owner the same income with the plant there as with the plant removed. The \$1,360 damage was awarded with no damage shown and with the use to which this plaintiff puts his property resulting in odors as offensive to some as the odors resulting from defendant's operations. In any event, this plaintiff utilizes his property for industrial purposes, namely, stock feeding, and has acquiesced in and consented to the operation of defendant's plant from the beginning by utilizing the services offered by defendant's plant in disposal of the animals which die on his land while feeding them there, and by purchasing by-products of the defendant's plant for the feeding of livestock upon his premises.

In arriving at this result, the Court entirely ignored all of the evidence of the defendant introduced by four totally disinterested appraisers who made a careful and detailed study of the situation, taking into consideration all of the circumstances surrounding the community.

Let us look further into the evidence of the expert witnesses who testified for the plaintiffs. We have already discussed Mr. Thomas' testimony. Mr. Hawkins testified:

He is engaged in farming and the live stock business in Benjamin; he was formerly county assessor of Utah County for ten years (Abs. 287); he has made some appraisals for the purpose of loans; the only general experience he has had was as county assessor; he knows of no sales between individuals that didn't involve foreclosures in that community; he has had no experience with the sale of property in that community or elsewhere (Abs. 289); he is different from many of the plaintiffs; he couldn't work in the plant; the values which he gave were the percentage of depreciation which he would place upon the land because of his feelings toward the odor of defendant's plant (Abs. 292); the entire community is a cattle and farm land community; some of the pastures and lands of the plaintiffs are used largely in different parts of the year as stock yards and feed lots for the owners of cattle; he made no difference in the values he placed between lands used for stock yards and lands used purely for the growing of crops; he thinks chicken coops would be depreciated on account of the smell just as much as a home; he didn't take into consideration the fact that in many instances (Abs. 299) the products of defendant's plant are used for chicken and cattle feed by the plaintiffs; he didn't take into consideration the fact that the defendant's plant is a benefit to the community; there used to be a stock loading chute three-fourths of a mile away from the plant; a beet loading or beet storage arrangement on the Union Pacific tracks

was located on the same property as the plant; beets were stored there, cleaned and hauled on cars; that industry continued for a long time; there was a wool loading platform there; the brick yard was there for twenty years; during that time the property of the defendant was used for industrial purposes; the sugar factory is within a mile and a half; there are three features he considered in depreciating the property: odor, disease and obnoxious condition of flies (Abs. 300).

It will be noted that there is no evidence to sustain any danger from disease, and the evidence shows that the fly situation is the situation common throughout the county. The Court made no specific finding on anything but odor. It is difficult to see how much weight could be placed upon Mr. Hawkins' testimony when his testimony is predicated upon such assumptions. Furthermore, he is the neighbor of the plaintiffs in Benjamin.

The witness Thomas M. Anderson, as heretofore stated, is a brother of Rufus Anderson, one of the plaintiffs in this action. He testified:

He never made appraisals in the district or in the vicinity of defendant's plant; his only experience is making appraisals as a member of the Spanish Fork Farm Loan Association; he never made any appraisals by himself; no one has ever acted on his judgment alone as to the value of lands (Abs. 307); he has never gone into the question of cost of building or replacement values; he has only been interested in seeing that they

had adequate security for the loans which they make (Abs. 309).

We call the Court's attention especially to his cross examination appearing at Abs. p. 316. It is apparent from his cross examination that the results reached in his appraisals on the various farms of the plaintiffs are not consistent, one with the other.

The other expert witness, Lawrence C. Johnson, testified: (Abs. 331.) (He appraised land only.)

He never had any experience with any other industrial plant depreciating property; he knows there are other industrial plants in Benjamin; he doesn't think the pea vinery depreciates Rufus Anderson's home; there would be no depreciation on account of the pea vinery, no matter how close the house was to it; there would be depreciation to land for living purposes close to a sugar factory; there is no depreciation in the value of the land for farming purposes; if there is any depreciation it is for living purposes; he bought land in 1929 and 1930 and some in 1925 a mile from the plant; he owns quite a bit of land and he is interested in keeping up the value of the land; he is looking to the time when he may sell his land; his mind is centered on doing everything he can to keep the price of that land up; he doesn't know much about the real estate business (Abs. 331); he farms, that is all; except for a sale along about 1930 of two acres with a four room brick house on it, that is the only sale he has had with other people; he doesn't recall any other sale; the State Tax Commission re-appraised all the land in Benjamin about 1936; he took that appraisal

into consideration; they appraised lands as A, B, and C land; he doesn't remember how many acres he gave Rufus Anderson in Class A; he has an idea 60%; he believes the rest would be Class B lands (Abs. 332).

In connection with the further cross-examination of this witness, we call the Court's attention to the defendant's proposed Exhibits 18 and 18-A, see Assignment of Error 49 (Abs. 437). These are the exhibits which indicate the State Tax Commission's classification and appraisal of these lands. This witness likewise admits that it is the ability of land to produce good crops which determines whether it is good or bad land.

It was this last witness who depreciated T. E. Ludlow's land only 10%, while the Court awarded damages to the extent of 13.2%.

EARL LUDLOW

The Court found Earl Ludlow's property to be worth \$6,400 (Abs. 397). Earl Ludlow testified that he paid \$6,000 for it fourteen years ago; he thinks it is now worth \$9,500 (Abs. 133), but there is no evidence to show that prices of land were higher in 1938 than in 1924. Still the Court finds Earl Ludlow's property to be worth \$400 more than he paid for it, with a forty year old house on it and no new improvements. Evidently the Court failed to depreciate the home in the last fourteen years in arriving at this excessive valuation. Based on that excessive valuation the Court allowed 14.8% damage.

It is difficult to understand why the property of Earl Ludlow, located 3300 feet west of the plant, should be allowed 14.8% damage, and his father, only 2915 feet northwest of the plant, should be allowed only 13.2%. Otherwise, the situation existing on both of these farms, as shown by the evidence, is substantially the same. They are both used primarily for stock feeding, and the pictures attached to Exhibits 17-D and E, and Exhibits 3, 4, 5, 10, 11 and 12 indicate the nature of the property for which the Court has allowed thirteen and fourteen per cent depreciation on account of the presence of defendant's plant. We call the Court's attention especially to the dead carcasses strewn throughout the feeding yards of Thomas Ludlow in Exhibit 3, the pile of burnt carcasses in Exhibit 4, the dead sheep in Exhibits 11 and 12, and the condition of the stock yards of Earl Ludlow in Exhibit 10. These exhibits, it is contended by defendant, indicate more eloquently than words the nature of the community in which defendant's plant is located, and the necessity in that community therefor.

In viewing this damage it must be kept in mind that these places are more than half a mile away from the plant of the defendant. Mr. Thomas in his appraisal only allows 14.2% depreciation as against the Court's 14.8%. Mr. Hawkins allows 17.3%, Mr. Anderson 15.2% and Mr. Johnson 10% depreciation of the land. The Court allows 14.8%, in spite of the fact that defendant's expert witnesses found no damage to this property, half a mile away.

EDWIN B. SELENE

We pass to the case of Edwin (or Edward) B. Selene, with a 40-year old home occupied by Mr. Selene while he worked for the defendant company as its employee. A picture of this property is attached to Exhibit 17-G. The plaintiff himself appraised this house at \$2,000. The Court awarded this plaintiff \$2,176 damage, \$176 more than the total value of the home as fixed by the plaintiff himself. The condition of this property is shown on Exhibits 8 and 9. Note the close proximity of the stock yards to the home.

The Court appraised this total property at \$5,484.20 (Abs. 397), and the damage at almost 40%. Mr. Thomas depreciated it 54%; Mr. Hawkins 60%; Mr. Anderson 59%. Mr. Anderson arrives at this 59% by taking 30% depreciation on the land and 100% depreciation on the house and on the barn yard improvements. The Court outdid Mr. Anderson by allowing 40%. We respectfully submit that this must, under any view of the case, be taken as excessive. From a look at the pictures of the house and the improvements of the plaintiff Edwin B. Selene, Exhibits 8 and 9, and the further fact that Mr. Selene for some time was an employee of and is now a competitor of this very industry, it is difficult to see how there is any justification for any damage, much less 40% allowed by the Court, or the 100% allowed on the house and improvements by the appraiser Anderson. Mr. Johnson allowed $33\frac{1}{3}\%$ on the land.

It should be born in mind that the properties shown in the exhibits last referred to with reference to the Selene and Ludlow properties were described in the supplemental complaint of the plaintiff as a precinct "distant from general traffic and industrial manufacture where the inhabitants are chiefly engaged in farming and agricultural pursuits; that on account of the situation and natural surroundings this locality has for more than fifty years last past been distinguished as a residential and farming section; that the principal and most valuable improvements in said precinct are rich farming lands, commodious and valuable homes surrounded by yards and gardens highly improved, ornamented and beautified; that on account of the repose, beauty and comfort of its situation and surroundings, said locality is peculiarly attractive and desirable as a farming community and is especially valuable for residential purposes." This allegation of the complaint, of course, was never sustained by any proof, but entirely disproved by all the evidence and particularly by the exhibits accurately portraying in photograph the exact nature of this locality.

MARGARET D. HANSEN

The property of Margaret D. Hansen is described in the complaint as 25.80 acres. Plaintiff's evidence is to the effect that the portion of their property on which the home is located and on which the son lives, is nineteen and a fraction acres; that this land stands in the name of his mother, Mrs. Margaret D. Hansen, otherwise

known as Mrs. Heber Hansen, a plaintiff in this action, and the remaining sixteen acres in the estate of Heber Hansen, deceased. This would make a total of 35 acres. Whether the 25.80 acres described in the complaint is a part of this nineteen and sixteen acres is not disclosed in the evidence. With the record in this condition as to title and ownership, the Court has taken into consideration a value placed upon 25.80 acres and finds that acreage, together with the improvements, to be worth \$7,944 (Abs. 398), and has depreciated that sum 14.2% allowing this plaintiff \$1124.40 in damages.

Plaintiff's testimony is that the total value of the property is \$10,000, made up as follows: 26-year old home, \$5,000; barns, pig-pens, etc, \$2,100; and water, \$3,000. This makes a total of \$10,100 without any value placed on the land, in spite of the fact that the complaint alleges \$10,000 as the total value of all, and the plaintiff's son testified that the entire property is worth \$10,000. The Court in its findings finds the total value of all of the property would be \$7,944. This must of necessity include the water, just as in the case of Edwin B. Selene there was \$800 worth of water included and depreciated 40% because of the presence of defendant's plant. In Mrs. Hansen's case we have \$3,000 worth of water depreciated 14.2%.

Why should the Court depreciate this property 14.2%, only 1695 feet removed from defendant's plant, when it depreciates Earl Ludlow's 14.8%, nearly twice as far away, 3300 feet, and T. E. Ludlow 13.2%,

2915 feet away? Mr. Thomas depreciates this same property the same percentage as the Court, 14.2%; Mr. Hawkins 19.6% and Mr. Anderson 21.4%. Mr. Johnson depreciates the land 20%. Exhibit 17-C and Exhibits 6 and 14 are typical pictures of the industrial agricultural section in which these plaintiffs live, and not the exclusive residential district pleaded.

JOHN ANGUS

The home of John Angus is 1875 feet away from the plant, roughly 200 feet farther than that of Mrs. Hansen. The Court awards Mrs. Hansen 14.2% damage and John Angus 23%. John Angus alleges in the complaint that his property is worth \$3,000; that his property at the time defendant built its plant was worth \$2,685, to which \$400 has been added since, making a total of \$3,085. His property is shown in Exhibit 17-B. For some unexplained reason the Court appraised this property at \$3,568.50 (Abs. 398)—\$900 more than the property was admittedly worth at the time the defendant built its plant—and the damages are 23% of this excessive appraisal, whereas in the case of Mrs. Hansen, living closer to the plant, the Court's appraisal was more than \$2,000 below hers, and only 14.2% of the lower appraisal was awarded her in damages. It is submitted that there is nothing in the evidence to justify 40% for E. B. Selene and only 13% for Thomas E. Ludlow except the difference in the distance of the property of the respective plaintiffs from the plant, and that there is nothing to justify the greater percentages allowed the

more distant properties, as in the case of John Angus and as we have already pointed out in the Earl Ludlow case.

Mr. Thomas, plaintiffs' appraiser, depreciated this property only 21%, 2% less than the Court, and his appraised value was less than the Court's. He allowed in dollars and cents \$740 damage, and the Court awarded \$824. Hawkins awarded 39%, Anderson 30% and Johnson 20%. The Court is 3% higher than Johnson on Johnson's depreciation of the land.

John Angus testified he owned \$350 worth of water, 23% of which he was awarded as damages, with no evidence whatsoever as to any depreciation or loss of value in the water; in fact, none is conceivable. Hawkins depreciated the property of John Angus 20%, Anderson 15% and Johnson 20% on the land, whereas the Court depreciated the Angus property 23%, higher than any one of the four appraisers of the plaintiff, and on a basis of \$900 more than the plaintiff testified the property was worth. Here is a clear case in which the Court has exceeded, so far as the depreciation of the land is concerned, the appraisements of all of the witnesses, the plaintiff included, and has allowed, in addition, the damage to the depreciation on the water. This is one of the numerous inevitable results of a misjoinder of eleven common law causes of action for damage in one action. Such an error on the part of the Court could not have been made, had there not been this misjoinder. This does, however, compel a reversal of the judgment of the

lower court, because this appraisal of damage is beyond any evidence offered in the case.

We are basing these comparisons upon percentage rather than upon any other basis because, so far as can be ascertained from the findings of fact, the Court figured the damage on a percentage basis, as is definitely shown by the Court's Findings of Fact Nos. 15 and 16 (Abs. 400, 401). This basis was also resorted to by the expert witnesses for the plaintiff. By careful analysis predicated upon a percentage basis, the excessiveness of the judgment is clearly demonstrated with mathematical exactness.

JOHN ANDERSON

The property shown in the name of the plaintiff John Anderson was depreciated 48% and he was given damages for that amount in the sum of \$1,050, without having proved any title to the property. In fact, Mr. Anderson testified: "None of this property stands in my name. It is in the wife's name." (Abs. 114.) The wife was not a party to the suit. With no other evidence concerning the title the Court allowed John Anderson damages. This, of course, is a prejudicial error to the defendant because this action would not bar the owner of the property bringing an action in her own right.

John Anderson's home is farther away from the plant than that of Edwin B. Selene. Selene's property was depreciated 40% and John Anderson's, ten feet farther away from the plant, 635 feet, was depreciated

48%. The plaintiff testified the value of his home was \$1,240. The amount of damage awarded, \$1,050, is almost 100% of the value of the home. This item of damage carries with it 48% of \$450 worth of water. It is the exact amount of damage in dollars and cents allowed by Mr. Thomas, representing 51% of the appraised value of Mr. Thomas. Mr. Hawkins allowed 62½%, Mr. Anderson 66%, and Johnson 33⅓% on the land. To arrive at 66% Mr. Anderson depreciated the house, the barn and other farm improvements 100% and the land 30%, 18% less than the Court depreciated the land. Mr. Thomas depreciated the land 25%, the Court 48%. Plaintiffs' Exhibit B and Defendant's Exhibits 19 and 20 show the condition of this property.

The John Anderson damage amounts to practically \$200 an acre, and represents an amount equal to the total value of the land. Whatever improvements were placed upon this land were placed there after the plant was built. He testified (Abs. 108) that he started to build there in December 1934, a year and a half after the defendant located its plant there in April or May, 1933. (Abs. 57.)

According to the rule of law for which we contend, it is the value of the property at the time the business was initiated that controls. (See p. 100 of this brief.) This would place John Anderson, if he were the owner, in the same position as Edward Ludlow and Maylan Carter, with unimproved land, for which the Court has given him damages in excess of 100% of the value of the land.

This is another glaring result of not only a misjoinder but a confusion of causes of action. The machinery of the law is not set up to try ten separate and distinct common law actions for damage at one and the same time.

RUFUS ANDERSON

The home of Rufus Anderson, depicted in defendant's Exhibit 17-A, is 970 feet from the defendant's plant. The complaint alleges his property to be of a value of \$7,000 (Abs. 5, 30). The plaintiff's testimony was to the same effect (Abs. 118), of which \$7,000 \$1,000 was water (Abs. 120). The Court finds the value of this property (Abs. 400) to be \$7,396.60, and awards the plaintiff 28.4% thereof in damages in the sum of \$2,099.32. The value found by the Court is more than four times the appraised value of land and improvements as found by the State Tax Commission. The home on this property is 25 years old. The Court finds, Finding 15 (Abs. 400), that the land, exclusive of the improvements, is worth \$4,296.60; that the improvements as now constructed on the land are worth \$3,100.

At the time defendant commenced its operations the improvements on the land were \$1,200. The additional improvements were added between the time defendant began its business and the time its plant burned down in 1937. The Court allowed 20% damage on the land and 40% on the improvements as they now are and as they were at the time the plant was *rebuilt*. The Court

does not find in any of these cases the value of the land at the time the defendant commenced operations, namely, April 1933, but makes all of its findings with reference to land as of the date of the trial, which is not the controlling date, as will specifically hereinafter appear (see p. 100 of this brief), and except for the improvements on the lands of Rufus Anderson and Paul E. Swartz, there is no finding as to what the value of the improvements was at the time the defendant began its operations. In the cases of Rufus Anderson and Paul E. Swartz, even after making this finding with reference to the value at the time of commencement of operations by defendant, the Court does not use the figure thus found, but rather the value of the improvements at the time of the remodeling or rebuilding of the defendant's plant in 1937. This, it is contended, leaves the record with no evidence on which to predicate values as of the controlling date, in the event the Court were to find that the plaintiffs were entitled to recover permanent rather than temporary damages. This being the case, the Court has awarded excessive damages to Anderson in any event to the extent of 40% of the difference between \$1,200 and \$3,100, and has likewise in this case included 40% of the \$1,000 worth of water in the total value depreciated.

Thomas depreciated the property 36.6%, Hawkins 62%, Anderson depreciated his own brother's property 57%, and Johnson depreciated the land $33\frac{1}{3}\%$. But even depreciating his own brother's property, the appraiser Anderson only depreciated the lands of his brother 30%,

whereas the Court depreciated it 20%, with no evidence to sustain a finding of any injury to the land, its productivity, its fertility, or the income therefrom, its value having, therefore, not in any wise been affected by defendant's plant. The Court depreciated the land as much as the plaintiffs' appraiser Thomas, that is, approximately 20%. Rufus Anderson appraised his own 25 year old home at \$2,600. The damage of \$2,099.32 almost entirely wipes out the value of the house.

PAUL E. SWARTZ

According to the Court's finding, Paul E. Swartz lives 2335 feet from the plant. According to Exhibit 17-H, it is 3960 feet, $\frac{3}{4}$ of a mile. It was assumed throughout the trial that Swartz' home was the farthest away from the plant of any. If the 2335 feet figure of the Court is correct, then Earl Ludlow is the farthest removed.

The Court depreciated this property an average of 15%, based on a total value of \$8,250.40 (Abs. 401), the value of the property at the time the defendant rebuilt the plant. This damage was actually arrived at by taking 12% of the value of the land at the time of the trial and 20% of the value of the improvements in 1937 at the time of the fire. The Court can certainly not be right in taking the value at both dates; either one date or the other must control, and in the theory of defendant's case, neither time can control but we must go back to 1933 when defendant began its operations. The temporary

break in operations during the rebuilding of the plant after the fire does not present a controlling date. The total value at the time of the trial was found by the Court to be \$10,252.40. The plaintiff alleged a total value of \$10,000 (Abs. 6, 31), and in his oral testimony the plaintiff claimed \$3,000 (Abs. 107) of that value was in water.

Thomas depreciated the total property 14.6% as against the Court's 15%, Hawkins' 27.6%. This property was not appraised by Anderson, and Johnson depreciated the land 20%. The value found by the Court is higher than the allegations of the complaint and the percentage of damage greater than that found by plaintiffs' appraiser Thomas.

MAYLAN CARTER

There was no finding by the Court as to the distance the land owned by Maylan Carter was removed from the plant. This 15.48 acres is unimproved property. The complaint alleges a total value of \$2,500 (Abs. 5, 31). The Court found a total value of \$2,786.40 (Abs. 399), \$286.40 more than the allegations of the complaint, and awarded 23% of this \$646.60 damages on this unimproved property. The appraiser Thomas for the plaintiff appraised the damage at \$619.20, substantially less than the Court, at 20.5% of Thomas' appraised value. Hawkins appraised the loss at 41%, Anderson at 30% and Johnson at 33 $\frac{1}{3}$ %.

There is no evidence of any damage to this land. There are no improvements on the land which could have been damaged. No one has ever lived on the land, so far as the evidence shows. Defendant contends there is no basis whatsoever for the allowance of damage in this case.

This value of \$2,786.40 includes a full water right, the value of which was not given in evidence.

After both parties had rested, the Court dismissed the case as to Maylan Carter (Abs. 259), on motion of the defendant (Abs. 145), on the ground and for the reason that there was no evidence adduced by the plaintiff and no evidence before the Court in support of any allegation of the complaint of the plaintiff, so far as Maylan Carter was concerned. Thereafter, without any further proceedings, Maylan Carter appears as a plaintiff in the supplemental complaint. The original action was also dismissed as against Edward M. Beck and James Albert West. Edward M. Beck was likewise joined as a party to the supplemental complaint. The joinder of Beck and Carter was error, unless we proceed upon the assumption that after the case has been partially tried to the Court as an equity case and the Court makes and enters its findings of fact and conclusions of law as to certain of the plaintiffs, and dismisses the others from the equity case, retaining jurisdiction of the case so far as the remaining plaintiffs are concerned for further action at law, that anybody and everybody, strangers to the original equity proceedings, might then

be joined in a suit (in equity), along with the remaining plaintiffs, to have their legal causes of action determined by a court of equity rather than by a court of law, and be judged by evidence adduced at the main hearing before they became parties. The mere statement of such a proposition should cause it to fall by its own weight as being wholly unsound and depriving the defendant of its right of trial by jury. The cause of action alleged in the supplemental complaint in favor of Edward M. Beck was finally dismissed by the Court, but Carter was awarded his damages as indicated.

EDWARD LUDLOW

The Court awarded Edward Ludlow 25% damages on account of the injury to his 8.15 unimproved acres of land, although he testified:

The record title in these ten acres is not in me. It hasn't been, I think, for two years. It hasn't been since this law suit started (Abs. 137).

Thomas would have allowed him $33\frac{1}{3}\%$, Hawkins 50%, Anderson 29.4% and Johnson $33\frac{1}{3}\%$. There was no finding by the Court as to the distance of Ed Ludlow's property from the plant. The Court depreciated plaintiff's water rights to make up damage allowed.

Value of Water Rights

This gave to the plaintiffs a total judgment of \$11,868.19 against the defendant. We have the evidence of six plaintiffs as to the value of their water rights and the value of the water rights of the other four are

not shown by the evidence. \$1992.50 of this \$11,868.19 is represented by depreciation to the water of these plaintiffs. How much more than this we do not know. If the same proportion holds out for the other four that has for these six, this \$1,992 might well be increased by two-thirds, making roughly \$3,320 damage on account of depreciation of water out of a total damage of \$11,868.19. For such a result there is no legal justification. In order that there be no question as to how defendant arrives at the \$1,992, the following figures are given:

	<i>Value of Water</i>	<i>Depreciation</i>	
E. B. Selene.....	\$800	40 %	\$320
M. D. Hansen	3000	14.2%	426
John Angus	350	23 %	80.50
John Anderson	900	48 %	432
Rufus Anderson	1000	28.4%	284
Paul E. Swartz.....	3000	15 %	450
			<hr/>
			\$1992.50

DEFENDANT'S APPRAISERS

Throughout the foregoing discussion defendant has merely mentioned the fact that its expert appraisers found no damage in the value of the property on account of the operation of defendant's plant. Defendant's appraisers were entirely disinterested. Charles S. Woodward testified:

His business is real estate; he lives in Salt Lake. He has been familiar with the town of

Benjamin and surroundings since 1898. He knows the people who live there and is related to most of them (Abs. 183). He had twenty years' experience with Ashton-Jenkins Company and Toronto Company selling, buying and appraising real estate. In his business with Ashton-Jenkins Company he had occasion to appraise property in Utah County and as far south in Utah as Cedar City. He has been familiar with property in and about Benjamin for the past eighteen years, and been a licensed realtor for twenty years. His appraisals as testified are contained in Exhibits 17 to 17-H, inclusive, set forth in the appendix to the abstract of record, and gives in each instance the basis of his appraisal (Abs. 184).

This witness testified in the original trial when the only question before the Court was the granting of injunctive relief, and at a time when no damages were asked or sought by the plaintiffs.

Mr. Heal, who made an appraisal together with William Parry of Springville and Henry Jeppson of Payson, testified:

He lives at Provo. He has been in the real estate business exclusively for twenty-five years in Utah County. That has been his sole occupation. He is generally familiar with land values for agricultural, industrial and home purposes in and about Benjamin. At the request of the defendant he made a survey and arrived at what he considered the fair market value of the plaintiff's property in the action (Abs. 351).

Mr. Parry, of Springville, testified:

He has been in the real estate business for 13 years and maintains an office in Springville; his real estate business involves transactions and listings in Spanish Fork down to Lake Shore, including Benjamin; he is familiar with land values in Benjamin; he has purchased and sold property for his customers in Utah for 13 years (Abs. 365); he has a regular real estate dealer's license from the State of Utah (Abs. 366).

Henry Jeppson, of Payson, testified:

He has lived in that vicinity since 1909 and is intimately acquainted in Benjamin. He is a building contractor (Abs. 366) and holds a general builder's license from the State of Utah; he has been actively engaged in the contracting business since 1928; there are very few people in the town of Benjamin he is not acquainted with; he is familiar with the location of defendant's plant and location of the pea vinery; the odors of the pea vinery are so much worse than the plant that there is no comparison; the odors of the sugar factory are not so intense as the pea vinery; he has been present at the defendant's plant and on the premises of these plaintiffs at various times (Abs. 367); he had a conversation with practically every one of the plaintiffs as he made his survey; all made statements as to the density of the smell and called his attention to that fact; in making these appraisals he took into consideration what was said by them, as well as his own observations (Abs. 368).

The appraisers for the defendant found that the values they gave were the fair values of the property either with or without the plant, and testified, so far as

the Court would permit them so to testify that the section was industrial, and that the plant was located in a suitable place.

There were introduced in this case Exhibits 21 and 21-A to 21-G, inclusive. These pictures were taken from the roof of the defendant's plant, Clyde Hicken, manager of defendant's plant, testifying concerning them as follows:

Exhibit 21 is a view of the Ed Selene property on the opposite side of the railroad and spur track, leading to defendant's property. 21 is looking north; 21-A represents a view immediately left of 21; 21-B a view left (Abs. 204) of 21-A. The camera is looking sort of to the northwest when 21-A was taken. 21-B you are looking west. 21-B shows the homes of Thomas Ludlow, Earl Ludlow and Jack Angus. The Thomas Ludlow property is marked with circle (1). Circle (2) is Earl Ludlow's property, and (3) is Jack Angus' property. C is immediately left of B; the home of Rufus Anderson is shown in this picture at the left edge and across the tracks (Abs. 205).

This is the property on which the appraiser, Anderson, brother of one of the plaintiffs, depreciated the home and farm buildings 100%, and that the Court depreciated 40%.

21-D is immediately to the left of 21-C. The Hansen home is shown below the mark (1) in the circle. The home is located on the other side of the state highway. The old sump of the brick yard is shown in the foreground. You are looking

south in 21-D. 21-E is to the left of D and looking southeast; the property of Ed Ludlow is immediately between the road and the fence shown in the foreground and immediately adjoining the property of the defendant. Exhibit 21-F is to the left of E, shows the roof of the plant in the foreground and beyond that the sump. The distance away from any homes on the east is readily noted. This is looking about east. Exhibit 21-G is to the left of F and to the right of Exhibit 21. On this exhibit the houses of the defendant and John Anderson's house are shown. The John Anderson house is in the background (Abs. 205).

The witness, Clyde Hicken, lives in the house in the foreground belonging to the defendant, with his wife and one child, 300 feet from defendant's plant. He says:

I have lived there a year and have not been bothered by the odors which emanate from this plant. It has not in any wise prevented me from eating my meals regularly or affected my sleep or my health. My wife and child are in good health (Abs. 206).

Appellant, in light of foregoing, should have been granted a new trial because of the excessiveness of the damages awarded, and this on the assumption that a cause of action for damages was proven, something appellant strongly urges was not done.

Inasmuch as this case was tried and considered by the lower court as an equity case, it is proper for this Court to review both questions of law and fact, upon this appeal.

Although it is appellant's contention that from the plaintiffs' evidence alone it is apparent that the damages awarded by the Court are excessive, and that in fact no cause of action exists because of the nature of the community and the propriety of the location of defendant's plant as located, appellant nevertheless feels justified in calling the Court's attention on this appeal specifically to the evidence offered in behalf of the defendant, which, to arrive at the result the lower Court did, had to be wholly ignored.

Defendant's Exhibit 16 illustrates the locality surrounding defendant's plant and the approximate distances to the lands of the plaintiffs and others from defendant's plant. This exhibit shows the relative location of the railroad tracks and just how sparsely populated the land is around the plant. The one home nearest the plant belongs to the defendant.

After plaintiffs had rested and defendant began its case, plaintiffs' case was re-opened for the purpose of taking the testimony of Lloyd N. Farner, a licensed physician and surgeon (Abs. 153). He testified that he was a deputy state health commissioner. On cross examination (Abs. 156) his attention was called to defendant's Exhibits 3 to 14, consisting of pictures of plaintiffs' homes and surroundings.

He stated in reference to Exhibit 3 that it presented an unsanitary condition which the local authorities should see is cleaned up; that

Exhibits 3, 4, 5, 6, 8, 9, 11, 12, 14, show unsanitary conditions from which odors emanate and permeate the homes that are shown in the pictures; that these pictures of the premises surrounding the homes of the plaintiffs show a condition conducive to the breeding of flies and rats; that the plant of the defendant (Abs. 157) is the only rendering plant in the State he ever visited; (Abs. 159) that he particularly observed when he visited the plant that there were not very many live flies; he found some dead ones; outside of the plant he found a septic tank that took care of the contents from the plant (Abs. 160); that was a proper place to have them go (Abs. 161); Exhibits 2 to 14, inclusive, show a community in which you would expect to find a lot of flies (Abs. 162); he didn't smell any odor from the defendant's plant in any one of the homes of the plaintiffs; he thinks the odors from defendant's plant would be stronger and would carry farther in the atmosphere than the odors emanating from the corrals and barn yards in the vicinity of the plant (Abs. 163).

Defendant's first witness was a man by the name of William Bona, who testified:

He lives in Benjamin south of the plant; he rents the house directly across the road from Mrs. Hansen, one of the plaintiffs; half a mile from defendant's plant and three-fourths of a mile from the pea vinery (Abs. 164); he didn't smell the odors from the plant as long as he has lived in the house; before the plant came dead animals could be found in the fields, very few were buried; since the plant came he has seen very few dead animals lying around like they

used to (Abs. 165); he has seen thirty head out in the field dead at the same time (Abs. 166).

William Chambers (Abs. 166) next testified:

That he had never had any connection with the plant or its employees or the owner; that he saw dead animals around before the plant started; that since the plant came he hasn't noticed any.

Joseph Hughes, of Spanish Fork, a physician and surgeon of twenty-eight years' practice, and deputy county physician, the family physician of some of the plaintiffs, testified: (Abs. 168)

That he has observed the odor at one of their homes; that it is his opinion defendant's plant is a sanitary method of disposing of dead animals and animal matter; that the plant serves a needed purpose in that community; that the community since the establishment of this plant with reference to dead animals and refuse is in a condition better than it was prior; that the odors emanating from the plant are not injurious, just disagreeable; they could not in any wise affect health (Abs. 170); odor from the pea vinery is just about as bad as the odor from the defendant's plant; that disagreeable odor comes from the pulp dump at the beet factory; (Abs. 175) that the odor is more pronounced at Mr. Anderson's home; the one that lives near the plant; that would all depend on the trend of the winds; that he hasn't smelled the odor of the plant in any of the homes of the other plaintiffs (Abs. 176); flies are not bred in this plant; they are generally bred around manure piles, pig pens and barn

yards; you don't have rats around cement floors; he was familiar with the fields of the plaintiffs prior to the coming of the plant (Abs. 177); generally dead animals were left to decay in the open; he has had to notify the marshal to see that they were buried; a scene of the kind shown in Exhibits 3, 4, 5, 8, 10, 14 were not uncommon in the Benjamin district; these pictures show places conducive to the breeding of flies and rats; they are not sanitary and not entirely inoffensive as far as odor is concerned; these pictures show a situation worse than the defendant's plant.

Why, in view of this statement of the plaintiffs' own family doctor, did the Court find that this plant is a nuisance to these plaintiffs in that community? Can they hold others up to a high standard of sanitation and require them to maintain an odorless business when their own business of feeding cattle in the same vicinity creates a worse situation? How could the lower Court, in making its findings and sitting as a court of equity, ignore the testimony of both Dr. Farner, produced by the plaintiffs as a witness, and Dr. Hughes, known by the Court to be the most eminent physician in that community? The doctor finally says (Abs. 180):

That he knows enough about the odor of the pea vinery to know that it is worse than the odor coming from defendant's plant when you get up to it.

Fred R. Taylor was next called and testified: (Abs. 180).

That he is a physician and surgeon residing in Provo, with nineteen years' experience as a practitioner; that he gave the employees of the defendant's plant a physical examination and found them to be healthy and to be suffering from no ailment in any wise attributable to their employment in defendant's plant (Abs. 181); that the plant as maintained and operated is in a sanitary condition.

Charles S. Woodward, the next witness, has lived in the community and has been acquainted with the community all his life. He likewise testified to the fact that animals were permitted to rot where they fell (Abs. 185); that the odors emanating from John Angus' place were such that he could not determine whether the odors came from his manure pile or defendant's plant (Abs. 186).

Zora Warthen (Abs. 192) lived in the same house as the witness Bona across the street from Mrs. Hansen for fifteen months, during which time she did not smell any odors from the defendant's plant, that far away.

The witness, Ed C. Thomsen (Abs. 193) is engaged in cleaning out ditches around the community; he testified that before the plant came there were always dead animals lying along the ditch, dead cows, horses and sheep. Now he does not find them there.

John W. Staker lives half a mile southeast of the plant (Abs. 194); has lived there thirty-three years; he thinks that the plant is a good thing for the community;

it gets rid of dead animals; that he had smelled the plant only once since February, during heavy winds.

Clyde Hicken, manager for the defendant testified:
(Abs. 197)

That he has purchased for the defendant dead animals from Thomas Ludlow, Paul Swartz, Gene Hansen, Earl Ludlow, and they have purchased the products of the plant; he has sold them tankage, which consists of cooked meat and bones; it is the product of the cooker; it is used to fatten pigs; Exhibits 1 to 14 are further explained by this witness, pointing out specifically the dead animals shown in these pictures on the premises of plaintiffs; these pictures were taken during the trial (Abs. 207); the operation of the plant was detailed by the witness.

Dr. Maurice G. Taylor of Salt Lake City Board of Health investigates causes and sources of disease (Abs. 213); stated that all germs are killed in the cooking process of the defendant plant; he does not know of any disease present in Utah which could be carried by flies from defendant's plant; health agencies generally consider dead animals should be disposed of by some heating process.

Warren E. Rasmussen (Abs. 219), a veterinarian duly licensed to practice his profession in this state stated that he is familiar with the rendering plants in other counties in Utah; that the Benjamin plant is maintained and operated in a sanitary condition.

R. W. Richter (Abs. 221) testified:

That he has been employed by the Cudahy Packing Company for 22 years; is the supervisor of the by-products plant there; the Cudahy Packing Company maintains a similar plant to defendant's plant under the same roof with their packing plant at Salt Lake City where fresh meat is packed for human consumption; the rendering plant has been operated there for 22 years; the process being used by defendant is substantially the same as in the Cudahy plant; the defendant's plant is operated in a sanitary condition; he never saw any employee of the Cudahy Packing Company working in the rendering plant become ill because of his employment; the gases are condensed or burned and thus killed (Abs. 224); he knows of no better way to dispose of the gases of the cooker than by burning; there are homes within two blocks of the Cudahy plant; never heard of any people complaining about the odors from the rendering plant (Abs. 224); the Cudahy plant is in as much of a residential section as defendant's plant in Benjamin (Abs. 225); they take care of all of the dead animals from the stockyards in North Salt Lake and all animals that are found diseased through federal inspection and ordered killed are handled in their rendering plant.

Clyde Hicken resumed his testimony concerning the operation of defendant's plant: (Abs. 227)

90% of the animals handled by the defendant come from Utah County (Abs. 231); not one of the plaintiffs ever complained to him about the plant; he was employed before the old plant burned down; the old building was corrugated

tin; the floors were concrete and frame; the new building is all concrete and brick; they never had any condensers in the old plant; then the steam and the odors from the cooker went straight into the air; Thomas Ludlow told him within the year the new plant was a great improvement over the old; that the plant was being kept in good condition.

Iona Rigtrup, an employee of the defendant in Idaho Falls, and her sister, Lenore Hicken, the wife of defendant's manager at Benjamin, testified they did not get the odors from the plant in their home and had never observed it in Clyde Hicken's home when they have visited there.

P. H. Soble, general manager of the defendant testified: (Abs. 238)

They operate twenty plants located in Texas, Colorado, Utah, and Idaho; in Utah they have rendering plants in Logan, Ogden, Spanish Fork and Heber City; in Salt Lake City they have a hide and fur house; the last plant to be built was the Spanish Fork or Benjamin plant, begun in 1933 and operated continuously there ever since, even during the time they were burned down they operated as a receiving station (Abs. 239); the building as it now stands represents an investment of approximately \$30,000; the plant is just east of the Union Pacific and west of the D. & R. G. (Abs. 240) six-tenths of a mile from the pea vinery; two miles from the sugar factory (Abs. 241); all the gases now enter underneath the grate and are positively burned; cannot get away (Abs. 242); the new plant is rat proof (Abs. 243); the only animals that they take are fresh; they kill 20%

of the animals themselves; much is fresh meat from the butchers; the fire box temperature is approximately 1350 degrees; the hydro carbon gases coming from the cookers are consumed at 550 degrees temperature; the Ogden plant is within the city limits of Ogden; homes are within 2½ blocks.

It was stipulated that Dr. Flescher, a graduate chemical engineer, residing in Salt Lake City, and Mr. Harrison, a graduate combustion engineer and consulting engineer residing and practicing his profession in Salt Lake City (Abs. 258-9), would testify that the gases which come from the rendering of animal substances, as the non-condensable gases, are hydrocarbon gases, and hydrocarbon gases are entirely consumed at temperatures between 550 and 650 degrees, and that the temperatures to which these gases were previously subjected in defendant's plant on occasions was as low as from 500 to 600 degrees; that since lowering the point of injection of these gases in the furnace they are now compelled to pass through a temperature of from 1200 to 1350 degrees. This evidence stands uncontradicted.

This judgment of \$11,868.19 which the Court has awarded the plaintiffs is on the basis of damage to 189.15 acres, or \$62.75 per acre without water, almost as much as the land is worth. Damage to such an extent cannot under any circumstances be upheld as reasonable and not excessive, in light of all the evidence in this case.

SPECIFICATION OF ERROR NO. 1

Specification of error No. 1 is based upon errors arising out of the overruling of the general and special demurrers of the defendant to the amended and supplemental complaints of the plaintiffs.

The demurrer and motion filed against the supplemental complaint of plaintiffs presents the question of the right of the plaintiffs, each claiming to own separate parcels of real estate, to amend their complaint to the extent of transforming the action into one for damages, when the original action was maintained by them jointly to obtain nothing but equitable relief, and when any equitable relief had been denied them by the Court.

The basic fact, as we have pointed out, is that this plant, according to plaintiffs, is located in a residential district, and to locate such a plant in such a district made the plant a nuisance regardless of the careful manner in which the plant may have been or might in the future be operated. The defendant contends that the plaintiffs cannot, at the conclusion of the equity case, amend their pleadings and, by means of a supplemental or new complaint, proceed upon a new theory and join eleven separate and distinct legal causes of action into one simply because they had previously been joined under the original complaint for the purpose of seeking equitable relief. This complaint is not an amended complaint. It is a supplemental action and is exclusively legal in character. Defendant cannot by such a method

be deprived of its right of trial by jury. See *State v. Hart*, 26 Ut. 229. A supplemental complaint serves the purpose of raising issues which do not exist at the time of filing the original complaint. If we treat this supplemental complaint as an amended complaint, then the demurrer should still be sustained. Under the authorities in this jurisdiction, had the allegations of the supplemental complaint been incorporated in the original complaint, the defendant would have been entitled to have each cause of action separately stated and separately tried before a jury. *Felt City Townsite Co. v. Felt Inv. Co.*, 50 Ut. 364. Plaintiffs cannot deprive defendant of this right by splitting this cause of action into an equitable action to be tried first and a legal one to be tried second.

*Demurrer Should Have Been Sustained to
Supplemental Complaint
Causes of Action Split*

Courts have said and, in a way, still say that it must be established that there is a legal wrong before equity will interfere. *Norback v. Board of Directors*, 84 Ut. 506. No court has ever said that a plaintiff should be required or permitted to establish, first, his equity right, and then thereafter proceed at law. Such a course of procedure is an absolute reversal of the order that was originally established.

The plaintiffs in effect contend that they may split their causes of action and sue first for equitable relief,

and failing in this they may thereafter pursue their right to damages at law in a court of equity.

In order to properly appreciate the error contained in the contention of the plaintiffs we must ascertain the fundamental concept of the Code of Civil Procedure, and to do this we start with this provision contained in the Constitution of Utah which is common to all codes. It provides:

“There shall be but one form of civil action, and law and equity may be administered in the same action.”

Sec. 19, Art. VIII, Utah Constitution.

In the case of *Naylor v. Jensen*, 38 Ut. 310, 113 Pac. 73, the Supreme Court used the following language:

“The Constitution of this state in section 19 of Article 8 provide ‘there shall be but one form of action, and law and equity may be administered in the same action.’ No doubt the framers of the Constitution thereby intended to permit the parties to actions to dispose of all questions whether legal or equitable, in one and the same action.”

Certainly neither the Constitution nor the Code intended that the parties should split up their causes of action and take part of those causes of action and join them together with parts of causes of action belonging to other persons, and try the controversy by piece-

meal or determine the problem upon a consideration of only fractional parts.

Each of the plaintiffs, if we assume the allegations of this complaint to be true for the purpose of demurrer, owns a separate and distinct tract of land. The ownership and possession of this land gives rise to a primary right of quiet enjoyment, and in the last analysis every nuisance involves an interference with that right to the undisturbed enjoyment of one's premises which is inseparable from the ownership or possession of realty. Such a diagnosis must apply to every true nuisance. 1 *Street's Foundations of Legal Liability*, 212.

Now, suppose the owner and possessor of a piece of real estate claims that a party defendant has done him a legal wrong by invading, disturbing and interfering with this right of quiet enjoyment which is a necessary incident to the ownership of any tract of land. If it is found that that wrong has been committed by the defendant, then, as we say in this brief, and as it is recognized in all the authorities, the Court may allow damages, or, if damages are found to be inadequate, the Court may allow equitable relief by way of injunction. In some instances the Courts have allowed both kinds of relief, but the mere fact that the relief has a double aspect does not mean that there are two causes of action existing in behalf of the owner of any particular tract of land.

This is well illustrated by the case of *Hahl v. Sugo*, (1901) 169 N. Y. 101, 62 N. E. 135. In this case it was held that a previous recovery of legal relief bars a subsequent recovery of equitable relief based on the same cause of action. In this case the facts were as follows: the plaintiffs and defendant were the respective owners of adjoining lots in the City of Buffalo. Defendant, in erecting a brick house on her lot, encroached on plaintiffs' lot. In 1896 plaintiffs brought an action to recover the land thus encroached upon. Plaintiffs recovered in this action and upon a second trial recovered again, and, in 1898, judgment was entered in their favor, establishing their title in fee to the land in dispute. But when an execution was issued the sheriff found that the land was occupied by a portion of the stone foundation and brick wall of the defendant's house, and he could not remove the same. Finally, after failure to maintain an intervening motion in that action, the plaintiffs brought a suit in equity to compel the defendants to remove said encroaching wall from their land.

The Court of Appeals of New York, in reversing the judgment of the appellate division, said:

“Let us now see whether the plaintiffs have more than one cause of action arising out of the wrong of the defendant, and, if not, what that cause of action is. The plaintiffs are the owners of a strip of land upon which the defendant has wrongfully entered and erected a wall, which is a portion of her house. The facts alleged show one primary right of the plaintiffs and one wrong

done by the defendant which involves that right. Therefore the plaintiffs have stated but a single cause of action, no matter how many forms and kinds of relief they may be entitled to. * * The plaintiffs' right is to recover possession of their land. The defendant's wrong consists in the entry upon and use of that land without the plaintiffs' consent. The particular nature of that wrong may require the application of different remedies for the enforcement of the right. But that does not change the nature of the cause of action, nor entitle the plaintiffs to split it into several causes of action. The complaint in the first action stated the facts upon which plaintiffs based their claim of title and right to possession. Under its allegations the title as well as the right to possession could be tested." (Citing authorities) "The right to possession involved the removal of the encroaching wall, for without such removal there could be no real transfer of possession. This in turn required equitable relief, which, under proper pleadings and an appropriate method of trial, could have been granted in the same action in which the title and right to possession were adjudicated." (Citing authorities) "The fact that plaintiffs' complaint lacked the averments which would have apprised the court of their right to equitable relief, and that the course of the trial furnished no indication that they intended to claim such relief, is no excuse for the commencement of a separate and independent action upon the single cause involved in the first action. It would be novel practice, indeed, to permit the correction of errors in that summary and extra-judicial manner."

As was said in *Stoner v. Mau*, 11 Wyo. 366, 72 Pac.

“It is too well settled to admit of controversy that, under the code procedure, a party may ask and obtain several kinds of relief in the same action.”

The opinion points out that both Mr. Phillip and Mr. Pomeroy agree that there is but one cause of action, and as Mr. Pomeroy expresses it, only the union of remedial rights flowing from one cause of action.

In the *Kinsman* case, hereafter in this brief discussed in detail, it was said:

“In the very nature of things, any noxious or offensive odors given off by defendant’s plant would gradually diminish as the distance increases, and the relief to plaintiffs, whose homes are near the gas plant, might and should differ from the relief which should be granted to those whose residences are at greater distances from defendant’s plant.”

In other words, one of these plaintiffs might be entitled to injunctive relief; another might be entitled to damages, and another might not be entitled to any relief at all. In order to try the case properly, with the plaintiffs joined as they are, it would be necessary to set up the facts showing:

1. The primary right of the owner or owners of each tract of land.

2. The invasion of that primary right of quiet enjoyment by the defendant and the nature of the invasion.

3. The amount of damage suffered by the owner of that tract of land.

And if it was claimed that damages would not be adequate then the facts, not conclusions of law, must show the necessity and the equitable propriety for the granting of injunctive relief.

If eleven different tracts of land, differently located and differently affected and separately and individually owned, are all to be dealt with in one complaint, it must of necessity follow that we have eleven different causes of action. To undertake to split each of these eleven causes of action and allow the owners of each of the causes of action to take the part that calls for equitable relief and join those equitable portions, if we may use that term, together, and then make one cause of action in one complaint, is to violate the fundamental spirit of the code. It violates the rule that a defendant shall not be subjected to more than one trial for the same wrong, and furthermore it involves the determination of the damage, if any, to each separate tract of land.

SPECIFICATION OF ERROR NO. 2

We have sufficiently discussed the assignments of error grouped in this specification in our statement of the facts of this case to call the Court's attention to the right of the defendant to have the causes of action of Maylan Carter and Edward Ludlow stricken from the supplemental complaint. These two causes of action,

improperly joined, involve land upon which there are no improvements, and upon which no one lives, thus basically differing from the other nine causes of action joined in the complaint.

The element of damage pleaded in the complaint is the disturbance to plaintiffs as residents upon the land, residing in homes thereon. No such element of damage is applicable to these two plaintiffs, and no other element of damage is pleaded and none proven by the evidence adduced under the amended complaint. This evidence clearly shows the impropriety of permitting these two plaintiffs to join in the cause of action, when their complaint presented no such damage as the damage alleged to be suffered by the other plaintiffs. If there is any possible damage to be recovered by these two plaintiffs, the damage must of necessity be a permanent damage, and a permanent injury to the land. Such a damage was neither alleged nor proven before or after the inclusion of these plaintiffs in the supplemental complaint. The damage, if any, recoverable by any of the plaintiffs under the pleadings and the evidence in this case, must be what is known as a temporary damage. If a cause of action for permanent damages had been pleaded rather than a cause of action for an injunction based upon recurring injuries in which no damage was sought, this defendant would have been entitled to have its plea of the Statute of Limitations declared a complete bar to this entire action. This cause of action if it is

pleaded as a cause of action to recover permanent damages, arose in 1933, by the plaintiffs' own evidence.

Now in the case at bar the land of the plaintiffs has not been hurt, and yet apparently the plaintiffs seek by their amendment to recover the depreciation in the value of their land and at the same time to retain that land without its productive capacity being in the slightest respect affected. These damages of a temporary character would at most relate merely to personal discomfort and annoyance, and could not include the personal discomfort of any member of the plaintiffs' families. Each plaintiff or person injured would have an entirely different case from every other plaintiff or person injured, and by no possibility could the personal claim of any person injured be assigned to another.

These observations are made for the purpose of illustrating to this Court the character of the cases and issues which the plaintiffs sought to present to the Trial Court. The matters involved cannot be tried in one suit because of their extensive range out into the domain even of actions for personal injuries. Instead of clarifying and tending to make simple, the clarification is merely on paper. The substance of the multiplicity is increased rather than decreased, with all the undesirable results of confusion.

SPECIFICATION OF ERROR NO. 3

Specification of error No. 3 is based upon the Court's refusal to dismiss the supplemental complaint

of the plaintiffs as to all of the plaintiffs. Only by granting this motion of the defendant could the defendant have secured the right of trial by jury to which it was entitled. By refusing this motion, the Court permitted the action to continue as an action in equity, with all of the plaintiffs misjoined, and with their causes of action improperly united and not separately stated, and barred by the Statute of Limitations. See *State v. Hart*, 26 Ut. 229.

Stockhausen v. Oehler, 186 Wis. 277, 201 N. W. 823 (1925) par. 2 of the syllabi states:

“Constitutional right to jury trial cannot, under rule that equity having assumed jurisdiction will retain it, be defeated by mere allegation of equitable cause of action which in fact does not exist.”

Par. 3 of syllabi:

“To warrant equity in retaining jurisdiction once assumed, and in granting legal relief, it is essential that an equitable cause of action growing out of transaction prior to the commencement of action exists, that equitable action was commenced in good faith, that equitable relief cannot be had or is impracticable, that constitutional right of trial by jury will not be denied, and that ends of justice will thereby be best served.”

In the opinion of Justice Crownhart appears the following:

“In the McLennan case, *supra*, the court speaks of the fact that the practice of granting

relief 'in the interest of a speedy and economical settlement of controversy has been so progressive that it can no longer be properly said that where the facts of a case warrant only legal relief, and were known to the plaintiff when he commenced his action for equitable relief, the court will not, should not, or cannot afford the former.' But the court there carefully pointed out, as we have shown, the limits of that progress. Our constitution provides that the right of trial by jury shall remain inviolate. And this court has held that that provision means the right of jury trial as it existed in the territory of Wisconsin, at the time of the adoption of the Constitution. *La Bowe v. Balthazor*, 180 Wis. 419, 193 N. W. 244, 32 A. L. R. 862. No progress in the law can be made by the courts beyond the limits of the Constitution, and none was intended by the language quoted. In some of the authorities from other states it will be found that statutes have extended equity jurisdiction beyond the limits permissible under our Constitution, and in some cases the courts, not restrained as here, have progressed in a similar degree in extending equitable jurisdiction."

In *Reynolds v. Warner*, 258 N. W. 462, 97 A. L. R. 1128 (Neb. 1935) the Supreme Court of Nebraska said:

"When the trial court determined that the interveners were not entitled to equitable relief, the court was without power to determine the legal action without the intervention of a jury. It is a general rule that, where a court in the exercise of its equity powers acquires jurisdiction for any purpose, its jurisdiction will continue for all purposes, and it will try all issues."

(Citing authorities.) “But where there is no equitable relief granted, a court of equity will generally decline jurisdiction to enter a money judgment on a legal cause of action. This is especially true where such a course would operate to deprive a party of his constitutional right to a trial by jury. The constitutional right to a trial by jury cannot be defeated by an allegation of an equitable cause of action which does not exist.” (Citing authorities.) “The interveners were not entitled to equitable relief in this case, and the parties did not waive their right to a jury trial upon the question of the amount, if any, due interveners.”

In the case of *Brinckerhoff v. Bostwick*, 105 N. Y. 567, 12 N. E. 58 (1887) Mr. Justice Peckham said:

“When a party alleges a cause of action of an equitable nature, he must prove one, so far as the question of a trial by jury is concerned; and he cannot escape such tribunal by alleging an equitable cause of action, and, while wholly failing to prove it, obtain a trial by the court of a common law action arising out of the transaction.”

In *Boonville Nat. Bank v. Blakey*, 166 Ind. 427, 76 N. E. 529 (1906) the Court said:

“* * * under the code, where law and equity are administered in the same court, a plaintiff cannot be permitted to deprive the defendant of the right to a jury trial by the making of allegations whereby an equitable issue is tendered, and then maintain the finding on the ground that sufficient

facts were shown to warrant a recovery in a court of law.”

In *Van Auken v. Dammeier*, 27 Ore. 150, 40 Pac. 89 (1895) the Court, speaking by Chief Justice Bean, said:

“Where the rights of the several plaintiffs are purely legal, and in themselves perfectly distinct, so that each party’s case depends upon its own peculiar circumstances, and the relief demanded is a separate money judgment in favor of each plaintiff and against the defendant, there is no ‘practical necessity’ for the interposition of a court of equity, and we can find no authority for holding that it will assume jurisdiction simply because the parties are numerous. A defendant is entitled to the constitutional right of trial by jury, of which he cannot be deprived because numerous parties are asserting claims against him, even though such claims may be founded upon the same questions of law and fact.”

SPECIFICATION OF ERROR NO. 4

A great many assignments of error based upon the lower Court’s erroneous rulings upon evidence appear in the record. Under Specification No. 4 we have grouped all of these assigned errors, and desire at this point to discuss specifically those to which the cases cited in this brief have special application, and indicate the seriousness of the lower Court’s errors in prejudicing the rights of the defendant in the trial of the action:

(a) In the examination of Paul Swartz, it appeared that he had on occasions taken his family to the doctor. If we assume there was any damage which could have been allowed either under the pleadings or the proof in this case on account of any personal injury suffered by the plaintiffs because of the odors emanating from this plant, we contend that the defendant was entitled to inquire in detail into the actual causes of illness which required the attendance of a physician upon the family of Paul Swartz. If, on the other hand, as defendant very earnestly contends throughout this brief, the only element of damage pleaded was an injury to property, then of course the Court's ruling in this respect did not constitute prejudicial error. It is submitted, therefore, that this ruling for its validity depends in turn upon the view this appellate court takes in reviewing the law and the evidence in this case.

(b) and (c) The evidence in this case discloses the fact that the Utah State Tax Commission in 1934 to 1936 made a re-appraisal of all of the lands of Utah County in connection with similar appraisals throughout the State of Utah, to arrive at the actual value of property in the State, together with the actual replacement cost of improvements thereon, for the purpose of equalizing taxes throughout the State. It is submitted, to have denied the defendant the right of this evidence for purposes of comparison was to deny a substantial right. The defendant was not only entitled to have this evidence admitted, but to have the Court determine, as a

court of equity, the weight to be given thereto, taking into consideration all of the facts and circumstances in connection therewith.

Even one of the plaintiff's expert witnesses as to value, Lawrence C. Johnson (Abs. 332), testified that he helped make the State Tax Commission's re-appraisal in Benjamin about 1936, and took it into consideration in the appraisals he made. He further stated that the State Tax Commission appraised it from the standpoint of what it would produce. He was one of those appointed to classify the real estate as "A", "B" and "C" land, but upon his cross-examination he couldn't tell what this classification was with reference to any of the lands of the plaintiffs. Had these Exhibits 18 and 18A and similar exhibits with reference to each of the lands of the plaintiffs been admitted in evidence, this witness could have been thoroughly cross-examined concerning the same, and caused to state his reasons, if any he had, why the appraisal he made for the State Tax Commission based upon what the land would produce did or did not constitute a reasonable market value therefor, and why it differed from his appraisals given on this trial.

This presents essentially a different case than the case of placing in evidence the valuation assessed against the land by the County Assessor, upon which tax levies are based. There is no good reason why, in an equity case in which the Court is called upon to take into

consideration all of the facts and circumstances, the assessed value of the land as fixed by the County Assessor for tax purposes should not be taken into consideration for comparative purposes, where there are eleven different tracts of land, all in the same vicinity, to be considered by the Court in a single action. The Court's error in refusing to permit the introduction of the assessed valuations by the County Assessor is covered by sub-division (g) of this specification of error, and it is submitted should be considered in connection with our present discussion.

This case does not present the reasons for eliminating this evidence that are present in an action involving but a single tract of land, where the necessity for comparing the values is not to be found. These exhibits furthermore showed the farm land to be classified with reference to its fertility, and an appraisal was placed upon the value of the various acreages found in the three classes, "A", "B" and "C". Johnson, one of the very men who made this classification, comes into this case, and defendant is denied the right to place in evidence the classification which he himself made of these lands. The prejudicial error is the more apparent when it is appreciated that Mr. Johnson's appraised values given in this case made no classification of the land, and he testified that one acre was as valuable as another, and appraised all of them at the highest price.

There are several other assignments of error involving this same general principle which we will not

take the space to comment on separately, but would appreciate the Court's consideration of them all in weighing the seriousness of this basic error.

(d) The error covered by this sub-division may or may not be an important specification of error. The Court made no specific finding as to whether the plant was operated in a sanitary condition or not. If this Court, in reviewing the evidence, does not consider the sanitary condition of the plant an issue under the pleadings or under the evidence, then whether the defendant was permitted to offer evidence to show the sanitary condition of the plant by those competent through long experience to speak, would not be serious. If, however, the damage is in any wise predicated upon the manner in which the plant was operated or constructed, rather than upon the premise that it was illegal to operate the plant under any circumstances in its present location, denying to the defendant the right to show the plant was operated in a sanitary condition was an extremely prejudicial error, and went directly to a denial of the defendant's right to mitigate damages which might have been or were adjudged against the defendant. Here, again, the question of just what issues were raised by the complaint is brought into question, and appellant's position is definitely to the effect that neither the pleadings nor the evidence discloses an issue as to the method of operating the plant, but is confined alone to whether such an industry could be operated under any circumstances in that locality.

(e) Defendant contends that it was entitled to show on cross-examination of plaintiffs' expert witness on value, T. M. Anderson, that Anderson did not take into consideration, in assessing the value of his brother Rufus Anderson's improvements at 100% loss, that these improvements, for the most part, were placed upon the land after defendant's plant began operations.

In the first place, there would seem to be no reason why it should not be competent for defendant to show exactly what the expert appraiser took into consideration and what he did not, in order that the proper estimate or weight to be given to this testimony might be intelligently determined by the Court. By all of the authorities, an expert is entitled to be subjected to the most scrutinizing cross-examination to determine not only his knowledge and experience but the actual basis upon which he predicated his assessment, and to develop, if possible, essential elements which he failed to take into consideration. His is essentially opinion evidence. Furthermore, it is one thing for a man to say that his property is 100% depreciated by the presence of the defendant's plant when the plant came after his property was improved. It is essentially a different situation when the improvements are placed upon the property after the plant is in operation, and it is submitted any fair appraisal would have to take this into consideration.

(f) If there is one issue in this case more controlling than any other, it is the issue as to the nature

of this community. The Court in its findings says it is not industrial. This finding is contrary to all the evidence. Counsel could not understand upon the trial of this action and cannot now understand what possible justification the lower Court could have had in denying to the defendant the right to offer evidence pertaining to the industrial nature of this community, even though the question in substance and form called for the conclusion of expert appraisers. Here, again, it was important to obtain the opinion of appraisers in determining their view point, and thus explaining their appraisal.

It was defendant's purpose to show that this defendant's appraisers appraised said land as industrial and considered the coming of industry into that section a circumstance to increase rather than decrease the value of real estate. The values which they gave which appear in Column 11 and 12 of Exhibit 1 appearing in the appendix to this brief are the values of the property with or without the plant there. Defendant endeavored to show that this opinion was predicated in part upon the fact that the highest possible value obtainable for this land would be for industrial purposes, and that the value of farm lands for use strictly for residential purposes would never amount to anything unless it were residences for industrial workers. To deny the defendant the right to go into this question of the nature of the community in the light of this Court's decision in the *Dahl* case was not only erroneous but prejudicially so.

SPECIFICATION OF ERROR NO. 5

(a) 1. Elsewhere in this brief we have commented upon the fact that the evidence of the plaintiffs clearly showed that John Anderson, Ed Ludlow and Mrs. Hansen were not the owners of the property described in the supplemental complaint. In spite of this fact, the Court found, as we point out in sub-division (a-1) of this specification of error, that the plaintiffs were the owners of the lands and farms. No evidence as to title was introduced except the statement of the plaintiffs themselves, and when their testimony discloses a title vested elsewhere, there is nothing left upon which to predicate this finding by the Court.

It is an essential element of the case, and without it these plaintiffs would not be entitled to the damage the Court awarded them. It would, therefore, conclusively appear that regardless of the validity of any other contention of the defendant, the judgment of the Court including damages to these plaintiffs was erroneous and obviously prejudicial.

(a) 2. That defendant's premises were far less objectionable than plaintiffs'; so far as manure and the drainage therefrom is concerned, is clearly established by the evidence. In this respect the defendant's plant was maintained in a far more sanitary and a much less objectionable condition than the very back yards of the plaintiffs, and, therefore, the Court grievously erred in finding that the surroundings of defendant's plant caused

noxious odors to be discharged into the surrounding atmosphere, and in failing to find that these “noxious” odors were the same identical odors emanating from each of the manure piles, each of the barn yards, each of the pig pens and chicken coops of the plaintiffs.

The lower Court certainly did not use the word “noxious” advisedly, because there was no evidence throughout the trial that any odor of any kind emanating from defendant’s plant was a “noxious” odor. The definition of “noxious” would clearly indicate that the lower Court did not mean “noxious” as that term is properly understood, but rather intended simply “objectionable” or “unpleasant” odors, harmless to human beings, animal or plant life. If the Court intended more than this by the use of this term, then this use is clearly contrary to and not supported by any evidence in this case.

The Court found as a fact that the deposit of manure on defendant’s premises is partially covered with cinders (Abs. 182). Dr. Taylor testified that it was covered with lime and cinders (Abs. 371). Mr. Soble testified, “We throw the waste matter on the premises and sprinkle it with fresh lime all the time.” The Court might well have found the fact to be that the manure at defendant’s plant was covered with lime, as well as cinders. We urge the Court, as a court of equity reviewing the facts as well as the law, to compare this method of treatment with the condition of the plaintiffs’

premises, as shown by the exhibits and the testimony of the doctors.

(a) 3. This subdivision forms the basis of a good deal of discussion concerning the industrial nature of the community in which defendant located its plant. It is, therefore, at this point simply submitted that the Court erred in finding that this area was not industrial, and likewise erred in failing to find its true nature. It is furthermore urged that whether the community be classified as industrial or not, the Court does not find it was an improper community for the location of such a plant as the defendant's, and there is no law which justifies the conclusion that defendant's plant could not be built outside of an industrial area; in fact, its propriety in a section strictly agricultural, where the basic agricultural industry is stock raising, would seem to be too clear for argument.

It is appellant's contention that the *Dahl* case, hereafter in this brief discussed in detail, controls in light of the evidence in this case, regardless of whether the community be called agricultural or industrial. The fact remains that this was a proper place for the location of this plant—proper when the plaintiffs' witness Greer located it there for the defendant;—proper when the plaintiff Selene worked there;—proper when the plaintiff John Anderson worked there before the fire;—proper when the plaintiff John Anderson helped to rebuild the plant and worked there after the fire; and proper throughout its entire history as the various plaintiffs

came there with their dead animals to be disposed of, their live animals to be killed and disposed of, and to purchase the products of the plant for the feeding of their live stock in their own agricultural business. It was, moreover, a proper location for the establishment of:

1. Union Pacific Railroad main line.
2. Denver & Rio Grande Railroad main line.
3. Utah-Idaho Sugar Co. sugar factory.
4. Pea vinery to handle local crops.
5. Flour mill for local wheat.
6. Brick yard for local building materials.
7. Alfalfa mill for feed for local live stock.
8. Cattle feed yards—local stock yards.
9. Stock loading yards on both railroads.
10. Beet storage and loading chutes on both railroads.
11. Wool loading platforms and storage on railroads.
12. Steel plant near by.
13. Defendant's rendering plant for local use.

(a) 4. This finding goes to the elements of damage. This finding is not supported by the evidence, in view of the conditions existing around these homes and on the premises of the plaintiffs themselves. Furthermore, the elements of damage therein found would only be properly found where the district was strictly a residential dis-

trict, that is to say, a finding that the plant was located in an unreasonable and, therefore, improper or unlawful location. Such findings do not appear in the record, and, as contended throughout, none is justified by the evidence.

The damage allowed is permanent when temporary damages at best could be recovered. The damages allowed is to property; the damage proven is the personal discomfort of plaintiffs.

Temporary as Distinguished from Permanent Damages
(Spec. of Error No. 5)

(b), (c) and (d). In the case of *Johnson v. Utah-Idaho Cent. Ry. Co.*, 68 Ut. 309, in discussing the case of a railroad constructing a road along a street in the city of Ogden constituting a nuisance to the property owners whose residences fronted said street, the Court, quoting from *Wood on Limitations*, (3d Ed.) Sec. 180, says:

“But while this is the rule as to nuisances of a transient rather than of a permanent character, yet when the original nuisance is of a permanent character so that the damage inflicted thereby is of a permanent character, and goes to the entire destruction of the estate affected thereby or will be likely to continue for an indefinite period, and during its existence deprive the landowner of any beneficial use of that portion of his estate, a recovery not only may but must be had for the entire damage in one action, as the damage is deemed to be original; and as the entire damage accrues from the time the nuisance is created and

only one recovery can be had, the statute of limitations begins to run from the time of its erection against the owner of the estate or estates affected thereby.”

Again, in the case *O'Neill v. San Pedro, L. A. & S. L. R. R. Co.*, 38 Ut. 475, 114 Pac. 127, the plaintiff sought to enjoin the maintenance of a spur track claimed to constitute a nuisance. Our Court again in this case says:

“True, in cases like the one at bar the damages must be recovered once for all in one action, and must be assessed as having occurred at the time when the first injury to the property arose because a complete cause or right of action then arose in favor of respondent. To this right nothing could be added, since it was just as complete a cause or right of action after the first train passed the house and shook it and injured it to some extent as it was after a hundred trains had passed and had shaken it, and injured it more.”

See also 104-56-1, Revised Statutes of Utah, 1933.

Under statutes such as 104-56-1 it is said in the note in 61 A. L. R. 937:

“Where there are statutory provisions for relief from a nuisance either by enjoining it or allowing damages to compensate for the injury ascribable to it, the court may consider the detriment to the plaintiff from denying injunctive relief and the hardship to the defendant by granting such relief, and, if the business or industry complained of is a lawful one, injunctive relief may be denied where to grant such relief would

subject the defendant to a loss much greater than any advantage to the plaintiff, and the latter will be left to pursue the statutory remedy for damages. *Daniels v. Keokuk Waterworks* (1883), 61 Iowa 549, 16 N. W. 705; *Madison v. Duckstown Sulphur, Copper & Iron Co.* (1904), 113 Tenn. 231, 83 S. W. 658; *Union Planters' Bank & T. Co. v. Memphis Hotel Co.* (1911), 124 Tenn. 649, 39 L. R. A. (N. S.) 580, 139 S. W. 715; *Cowper v. Laidler* (1903), 2 Ch. (Eng.) 337 referred to in annotation in 31 L. R. A. (N. S.) 899."

Where a nuisance consists of the use of a structure which is lawful and not in itself a nuisance the relief should be by enjoining such use and not by destruction of the structure. There are nuisances of a *permanent* character and nuisances of a *temporary* character. Of course, where a single plaintiff is granted equitable relief against a nuisance it is proper to award that plaintiff such damages as he has already suffered; but where there is a permanent nuisance a plaintiff cannot recover entire damages, past, present and prospective, and also obtain equitable relief. If the plaintiff wishes permanent damages he should elect to proceed to recover the same, and his election must be as between such damages or for a removal of the nuisance by means of an injunction. He cannot have both, and it is submitted that he cannot try first for one and then for the other and keep the door open so that he may thereafter elect to take that which is most beneficial to him.

The doctrine of election requires a determination by the party who is required to exercise it at the time he

commences his first suit. It is not permissible even on the trial to change the theory upon which the suit was brought, and certainly it is not permissible to try the case out upon one theory and then have its determination held in abeyance, allowing the case to stand without final decree until the plaintiff tries out another inconsistent theory. See *Cook v. Covey Ballard Motor Co.*, 69 Ut. 161, 253 Pac. 196.

The finding of the Court here complained of finds an element of permanent damage, whereas the evidence discloses nothing but a temporary or intermittent damage, a subject which is thoroughly discussed in this brief. Furthermore, the element of damage is again predicated upon the existence in this vicinity of a strictly residential community, in which industry in its various phases would be unlawful.

The alleged wrongs are intermittent and occasional. Permanent damages are not recoverable for such injuries. To allow a recovery for alleged depreciation of plaintiffs' properties would be contrary to and against the law, in that the same would not be the lawful measure of damage for any personal discomfort that has been suffered by any of the plaintiffs. The result of this contention, if sound, requires a reversal of the judgment and a dismissal of the action. There is no proof of the extent of temporary damages suffered by any of these plaintiffs for or on account of personal discomfort. Plaintiffs have attempted to recover for an alleged decrease

in the value of their real estate. These are permanent damages. The Court so finds in its findings.

Take the case of any one of the plaintiffs. If he recover the judgment awarded him by the lower Court he retains the judgment and his property. Then, if the evidence of the plaintiffs were true, if the plant discontinued operations or moved away, or its operations were enjoined by someone else, the plaintiffs' property would immediately rise in value in an amount equal to the judgment. The plaintiff would then have his property with its present value unimpaired, plus the amount of the judgment in cash. Certainly such a result cannot be authorized by law, and the courts do not permit the recovery of permanent damages under such circumstances. Permanent damages are barred by the Statute of Limitations.

A clear distinction between the basis of damages for a temporary nuisance and the basis for a permanent nuisance is drawn by the courts, and the use of the wrong basis is reversible error. For a temporary nuisance, the basis is a *loss of use*, or a *depreciation in rental value*; for a permanent nuisance, the basis is a *depreciation in market value*. The lower Court failed to make this distinction. In its findings (No. 13 of its Memorandum decision as incorporated in Finding No. 1, Ab. p. 391) it found the odors sufficient to injure the plaintiffs by making their homes substantially less desirable as dwelling places and by making their lands less attractive to tenants. It was error to give a judgment of a depreciation in market value which follows this finding of temporary injury.

Vogt v. City of Grinnell, (Iowa 1094), 98 N. W. 782.

In this case the defendant discharged its sewer into the river opposite plaintiff's farm. A judgment for the plaintiff was reversed, the Supreme Court saying:

“The mere fact that the city sewers were of permanent construction did not render the nuisance occasioned by them permanent also, for the municipality had the right at any time to abate it. In this respect cases like the present one differ from *Powers v. City of Council Bluffs*, 45 Iowa 652, 24 Am. Rep. 972, for there, as was observed in *Hunt v. Iowa Central Ry.*, 86 Iowa 15, 52 N. W. 668, 41 Am. St. Rep. 473, ‘the whole injury was regarded as having occurred at one time, and, that time having been more than five years prior to the commencement of the suit, it was held to be barred. The injury was of such a character as to be beyond the defendant’s power to remedy. It would be compelled to go onto lands of others to erect barriers to prevent the damage. In this case, as is shown by the evidence, the remedy is in the defendant’s own hands, by work done upon its own land.’ Again, it was pointed out in *Bennett v. City of Marion* (Iowa), 93 N. W. 558, that the injury in the Powers Case was beyond the city’s power to repair. ‘The remedy to be applied there, if any, was the construction of a wall on plaintiff’s premises, where defendant had no right to go. Here the remedy could be applied on defendant’s own premises, and there can be no doubt of its duty to abate the nuisance.’ ”

The Court continued:

“The measure of damages flowing from a continuing nuisance is not, as suggested in the motion, the depreciation of the market value of

the land, for it may be abated some time, but ordinarily the loss in its use caused thereby, and such special damages as may result therefrom."

The case of *Bartlett v. Grasselli Chemical Co.*, 92 W. Va. 445, 115 S. E. 451, 27 A. L. R. 54 (1922), is both interesting and instructive. The judgment was for \$15,500 in favor of a farmer owning and residing upon a tract of land containing about 137.5 acres, and was against a corporation owning and operating a large industrial plant situated on a 160 acre tract owned by it. In this plant the Chemical Company reduced zinc ores, and it was claimed that certain gases, smoke, dust and fumes coming from the furnaces of the chemical plant injured the agricultural, residential and market values of the farm. These fumes, gases and dust were carried over the land of the plaintiff by air currents and spread over it through the air. One of the deposits complained of was zinc oxide, which, having been deposited on vegetation on the farm and eaten by live stock proved to be deleterious and fatal in some instances. Another deposit was sulphur dioxide, and this caused an excessive acidity of the soil, resulting in diminution of its fertility and producing capacity.

This brief statement, without going further, will illustrate that the damages were substantial. The Court pointed out in its opinion that it was an important factor in the determination of the character of an injury to real property to determine the character of the wrong itself. It said that the injury or wrong might be slight and readily compensable in damages. On the other hand,

it might be of considerable magnitude and yet not be continuous. There might be a continuing cause without a continuing injury. After such consideration the Court said:

“There are some general propositions, however, that can be asserted with safety, as to the requirements of a cause of action for original and permanent damages. The injury must be constant and continuous, not occasional, intermittent or recurrent.”

Later on it is pointed out that it was an important matter to determine whether the cause of the injury was temporary or intermittent. If under certain circumstances the plant can be operated without doing any harm and yet under other circumstances it may do harm, then the injury is of a temporary character. Permanent damages are given on the theory that the cause of injury is fixed and interminable, and that the property injured must always remain subject to it. The Court then said:

“This requisite element of permanency does not exist and cannot be found in those cases in which the structure, business or other agency of injury is unlawful and may be abated, at the instance of the injured party. To make the cause of the injury permanent in the legal sense of the term, there must be legal right to maintain it in force or operation. If, against the will of him who has set it in force, it may be abated by legal process, at the instance of the complaining party, it must necessarily be temporary and the damages temporary, and so the authorities say.”

Now, to think, using John Anderson's property as an illustration, that Anderson could recover and collect a judgment for substantially fifty per cent of what the Court found to be the market value of his property, after he had actively participated as an employee of the defendant in the operation of the old and the construction of the new plant, and then go on and enjoy that same property in its entirety, is indeed an extraordinary peculiarity of the law, if such is the law. Would not every person owning property similarly situated to that of Anderson have a like right to recover fifty per cent of the value of his property, or at least some percentage? If the judgment is awarded and paid it is on the theory that the property has been permanently damaged and that the owners of the plant have paid that permanent damage and have a continuing right to maintain and operate the plant, inasmuch as Anderson's property is concerned. This certainly could not bind some other person who owned other property in the vicinity of the plant who has not recovered a judgment in this case, particularly John Anderson's wife, in whom the title to the property vests. The other owners of property, including John Anderson's wife, might see fit to have the alleged nuisance removed and do away with the cause of the depreciation, and might also in another action succeed. The payment of all of the judgments which might ultimately be given against the defendant in this and in future suits might well bankrupt the defendant and thus compel defendant to abandon its plant and business. Such an abandonment would immediately restore the value of plain-

tiffs' properties to the values claimed for said properties in the absence of defendant's plant. Here again, the plaintiffs would have their property without depreciation and the amount of the judgment also.

The West Virginia Court further said: (par. 5 of syllabi)

“Damages to land, occasioned by emission of smoke, gases, dust, and fumes from smelting furnaces maintained and operated on an adjoining or neighboring tract of land, causing deposits or chemical substances which impair its enjoyment, productiveness, and value, are temporary in the legal sense of the term, and permanent damages are not recoverable for such an injury.”

In the case of *Thackery v. U. P. Cement Co.*, 64 Ut. 437, 231 Pac. 813, this Court cited this West Virginia case and seemed to approve of the distinction the West Virginia Court made between temporary and permanent damage. This Court says:

“No good reason appears, therefore, why, if the parties so elect either by agreement or by acquiescence, the Court should not permit a recovery of compensation as for a permanent injury in one action.”

The Thackery case rests upon the fact that the record shows an agreement or acquiescence of the parties plaintiff and defendant, for the Court to permit a recovery of compensation as for a permanent injury. It was suggested by the defendant in the Thackery case that

the Court had no power to permit such a recovery, but the Supreme Court held that the trial court did have power, where both parties had acquiesced and agreed to the Court making an award as for a permanent injury.

The difference between the Utah case and the West Virginia case cited by the Utah Court appears to be that the Utah Court permitted the parties to acquiesce in the recovery of permanent injuries, whereas, the West Virginia Court concluded that the case had been tried upon an altogether erroneous and untenable basis and disregarded the effect of acquiescence.

There has been no agreement or acquiescence in this case. The appellant has at every step insisted there can be no recovery at all, and has specifically made its objection relying upon the distinction between temporary and permanent damages. It has said and now says that the wrong, if wrong there is, is merely a temporary one and can only be compensated for while it continues. If this defendant should in some manner acquire these properties that are owned by the plaintiffs, and all other properties similarly situated or affected, then it should not be required to pay damages as might be sustained or suffered by these properties after defendant became the owner thereof, or if the plant went out of business or was lawfully abated by injunction, the award made to the plaintiffs by the lower Court would be grossly unjust and excessive. It is submitted that under the facts and circumstances as they exist in this case, there is no cause

of action for permanent damages, because the presence of the rendering plant inflicts or causes no such injury. The plaintiffs have proceeded on an erroneous and untenable basis, and the lower Court has fallen into the same error. See *Ehlert v. Galveston H. & S. A. Ry. Co.*, (Tex. Civ. App. 1925) 274 S. W. 172.

In *Theisen v. Pittmans & Dean Co.*, 162 N. W. 76, the Michigan Supreme Court said:

“The case at bar was instituted for the purpose of recovering the difference between the market value of the property at the time it was purchased by the plaintiff and the market value at the time he sold it upon the theory that the erection and maintenance of the structure in question constituted a permanent nuisance. The court at the close of the plaintiff’s case directed a verdict in favor of the defendant upon the ground that under the facts of the case the nuisance complained of was not permanent, and therefore that depreciation in the property itself could not be recovered, and, as plaintiff did not claim anything in this action on account of the depreciation of the usable or rental value, he could not recover.

“The sole question presented by appellant’s four assignments of error is whether the trial court was in error in directing a verdict for defendant upon the ground that the erection and maintenance of a barn on the premises adjacent to those of the plaintiff did not, under the authorities, constitute a permanent nuisance.

“Under the decisions of our own court, we are of opinion that the action of the learned trial judge was proper. . . .

“Judgment is affirmed.”

What is the true nature of the cause of action? Is the action one for permanent damage? Have permanent damages been established by the proof? The damage is mere personal discomfort suffered for part of one day and perhaps not suffered again for several days. If a visitor or an employee of the plaintiffs suffers such personal discomfort which results in actionable injury, this visitor or employee cannot be compensated for the inconvenience suffered by awarding the owner of the property damage for its depreciation on that account. This would be giving to the owner a damage which he had not sustained, because he was not present when the visitor or employee endured this personal discomfort. The recovery of such a damage by the owner would not defeat the visitor's or the agent's cause of action. If it existed at all, it would continue to exist in spite of the award, and even the payment, of such damage to the owner of the land. The true nature of the cause of action, if any there be, is a temporary personal injury, and the plaintiffs, without any acquiescence on the part of defendant, have attempted to obtain damages which do not proceed or at all result from the injury complained of in the evidence. These plaintiffs have undertaken to prove personal injury of a temporary character, and then recover for a permanent injury to real property. Surely the

law will not permit such a recovery as permanent damages when the injury is at the very most only temporary and purely personal. This appellant seriously contends that there is no competent proof in this record of any damage or injury that has been done.

In considering the West Virginia case the Court must keep in mind that the injuries done did affect and materially injure the land, and the crops that would ordinarily be grown thereon. There was strictly temporary damage to the land. In the Thackery case dust from the cement company's plant passed over and settled on the land. The Supreme Court held that this was "a recurring nuisance." There it was claimed that there was an injury to grown and growing crops and hay stored on the premises. It also held that even though the plaintiff had delayed in bringing his action for ten years, still it could not be said that the injury was a permanent one so as to bar the plaintiff's right of action by lapse of time. The Court said that this nuisance was recurrent in its nature and not "uninterruptedly continuing" in its nature. If the nuisance had been a permanent one, as contradistinguished from a temporary or recurrent one, the statute of limitations would have barred the plaintiff's right to recover. In both the West Virginia and the Utah Thackery case there was a substantial injury to the property. In the case at bar there is no injury to the property. Personal discomfort complained of, if within the zone occupied by plaintiffs' property, would be just as great

to a person not owning property as to a person owning property.

Paragraph 13 of the Court's original memorandum embodied in its Finding of Facts No. 1 (Abs. 391) specifically finds that the odors emanating from defendant's plant do not constantly permeate the homes of any of the plaintiffs, and the extent to which they permeate the homes of the plaintiffs is not the same in each instance, but rather depends upon the direction of the wind and the distances separating the plaintiffs' homes from defendant's plant. The evidence further shows that some of plaintiffs complain of the odor of the manure pile in the defendant's yard, others the odors from the cooker only when the cooking operation is carried on. This is intermittent, some days longer than others and some days not at all. This is clearly a finding by the Court of a temporary injury rather than a permanent injury. The Court makes no conclusion of law as to whether the damages are permanent or temporary.

In *Cross v. Texas Military College*, (Texas Civ. App.) 1933, 65 S. W. (2d) 794, the plaintiff alleged that because of the odors of defendant's slaughtering pen the reasonable market value of plaintiff's premises was reduced to the extent of \$300, and that by reason of the fact that plaintiff was forced to abandon his home and could not rent the premises to other parties, he was damaged in the sum of \$200. The Court said:

“It is evident that the nuisance alleged, and that which the testimony tends to establish, could have been abated, either voluntarily removed or avoided by the aggrieved party, and the alleged value of appellant’s property restored. In fact, the record shows that the nuisance had been removed at the time of the institution of this suit. It is well settled in this state that, in such cases, the depreciation in rentals and such consequential personal inconvenience and hurt as may be the nature and direct proximate result arising from such a nuisance are the elements of damage recoverable, and not the depreciation in market value of such property. *City of San Antonio v. Mackey’s Estate*, 22 Tex. Civ. App. 145, 54 S. W. 33, 34; *City of Paris v. Jenkins*, 57 Tex. Civ. App. 383, 122 S. W. 411; *Baugh v. Railroad Co.*, 80 Tex. 56, 15 S. W. 587; *City of Honey Grove v. Mills*, (Tex. Civ. App.) 235 S. W. 267.

“In the case of *City of San Antonio v. Mackey’s Estate*, supra, involving a cause of action based on stench and bad odors similar to the case at bar, the court said: ‘Such being the case presented by the evidence, the depreciation in the market value of the land was not the measure of damages, and the judge presenting that issue to the jury can have no other tendency than that of misleading them. As to a nuisance capable of abatement, the depreciation of the value of the property can have no applicability. The settled rule of damages in such cases is the difference in the rental value with and without the nuisance.’

“In consonance with this holding, our Supreme Court, in *Baugh v. Railroad Co.*, supra, announced the terse rule that: ‘ * * * When the

nuisances complained of are of a temporary character, such as may be voluntarily removed or avoided by the wrong-doer, or such as the injured party may cause to be abated, only such damages as have accrued up to the institution of the suit or (under our system) to the trial of the action can be recovered. For such damages depreciation in the value of the property affected by the injury is not a measure, and in such a suit the amount of such depreciation cannot be recovered.'

"We conclude that the trial court did not err in sustaining appellee's motion for an instructed verdict."

In *Oates v. Algodon Manufacturing Company*, 217 N. C. 488, 8 S. E. (2d) 605 (1940), the plaintiff recovered damages for pollution of a stream across plaintiff's farm. The Court instructed the jury:

" 'and that damage would be the difference that you find between the value of his land immediately prior to the pollution of the stream, if you find it was polluted, and the reasonable marketable value of his land immediately after it was polluted and in addition thereto, any inconvenience and annoyance by way of odors suffered by him to his land, any damages by virtue of not being able to use the stream for the watering of his stock and any other usual use the stream could be put to during those dates.' Exception.

"The trial court inadvertently fell into error in stating that the measure of damages would be the difference between the reasonable market value of the land immediately before and after

the injury. 'In cases of this kind, when the damage is due to a cause that may be removed or a nuisance that may be abated, the measure of damage is not the difference in the market value of the land before and after the injury, but is estimated by comparing its productiveness before and after the flooding. *Spilman v. Roanoke Navigation Co.*, 74 N. C. 675 (16 Am. & Eng. Enc. 984.' *Adams v. Durham & N. R. Co.*, 110 N. C. 325, 14 S. E. 857, 860; *Jones v. Kramer & Bros. Co.*, 133 N. C. 446, 45 S. E. 827; *Garrett v. Board of Com'rs.*, 74 N. C. 388.

"For the error, as indicated the appellant is entitled to a new trial. It is so ordered."

In *City of Ada v. Melberg*, 160 N. W. 257 (Minn. 1916), the plaintiff brought an action to enjoin the flowing of sewage across his land and asked for damages.

The Court said:

"The court instructed the jury that they might assess the damages to the appellant by reason of the injury to his land, and that the measure of damages was the difference between the value of the land with the sewer on it and the value thereof without the sewer. The jury found for appellant. Respondent moved for a new trial, which was granted on the ground:

'That the court erred in instructing the jury upon the question as to the measure of damages and in the admission of evidence with reference to damages.'

"This appeal is taken from the order granting a new trial.

“The only question presented on this appeal is whether or not the court laid down the correct rule of damages. The trial court evidently submitted the case to the jury on the theory that the noxious odors, the noisome deposits, and the flow of tainted water from the sewer would continue permanently, and thus constitute a permanent injury to the land, leaving out of consideration appellant’s right to cause the nuisance to be abated by injunction. Examination of the record leads us to the conclusion that this is a continuing nuisance, and that the learned trial court properly granted a new trial. It will not be presumed that the nuisance will be continued, or that the municipality will make no effort to abate it. *Sloggy v. Dilworth*, 38 Minn. 179, 36 N. W. 451, 8 Am. St. Rep. 656; *Gilbert v. Boak Fish Co.*, 86 Minn. 365, 90 N. W. 767, 58 L. R. A. 735. It is very probable that this will be done. The attitude of the city officials at the trial justifies us in this assumption.

“We cannot treat this action as in the nature of an assessment for damages in a condemnation proceeding. It was not such a case, and nowhere in the record is the suggestion made that a verdict rendered in this action would give to the city of Ada any greater rights in appellant’s land than it had before the action was brought. The case has resolved itself into an action for damages for the maintaining of a nuisance, and we may not, especially in the absence of statutory authority, convert it into a condemnation proceeding.

“That the action was begun by the respondent as an equitable action for an injunction, and that the appellant in his answer sought equitable relief, have no material weight here. We have to do with substance rather than with form. The

remedy sought was merely pecuniary compensation for injuries to the appellant and his family, his personal property and his land, between the 1st day of January, 1912, and the date of the trial. Nothing further was demanded, and, as we have already said, it is not to be presumed that the nuisance will be continued.

“It is urged that the structures and the sewer system being permanent, the injuries to appellant’s land must necessarily be permanent. But the test whether an injury to real estate is permanent is not necessarily the permanent character of the structure causing the injury, but—

“ ‘whether the whole injury results from the original wrongful act, or from the wrongful continuance of the state of facts produced by such act.’ *Bowers v. Mississippi & Rum River Boom Co.*, 78 Minn. 398, 81 N. W. 208, 79 Am. St. Rep. 395; *Heath v. M., St. P. & S. S. M. Ry. Co.*, 126 Minn. 470, 474, 148 N. W. 311.”

In *City of San Antonio v. Mackey’s Estate*, 54. S. W. 33, the Texas Court of Civil Appeals emphasized the error that the court in the case before us committed. The case involved the recovery of damages for stench arising from the deposits of garbage and filth by the defendant city near plaintiff’s home. The Court said:

“The jury returned a verdict, not only for loss in rental value and care of premises, but for \$3,732.55 for depreciation of property. The verdict was clearly erroneous, and was in effect, allowing double damages, but it was in direct response to an instruction to the effect that, in

case they found the injury permanent, the measure of damages, in addition to the rental value thereof, was the depreciation in the market value of the property. The loss of rental value is never made a part of the damages, where there is permanent damage to the value of the property, because full compensation is given by the recovery of the loss in value of the land. In a case decided by the supreme court of Pennsylvania, cited by Sutherland in his work on Damages (section 1042), it was said that 'damages for use must not represent in any part the damages for the permanent injury; it is the duty of the court to see that one does not overlap the other.' *Seely v. Alden*, 61 Pa. St. 302."

See also *Racine v. Catholic Bishop of Chicago* (Ill., 1937), 8 N. E. (2) 210.

The foregoing cases show how the lower court has committed error in granting damages based on the depreciation of market value:

1. By basing its judgment for permanent damages partly upon findings of temporary damage—loss of rental and usable value.
2. By using a basis of permanent damage for its judgment when the evidence shows that the odors are only intermittent and are abatable at any time by the defendant.
3. By using a basis of permanent damage when the statute of limitations has run against permanent dam-

age. Plaintiffs' evidence shows that the defendant's plant was established about September, 1933 (Abs. 50). The statute of limitations was pleaded, and is urged. Plaintiffs are in a dilemma. Either the action was brought for permanent injuries, in which case the cause of action arose prior to 1934, and the statute has run, or the action was brought for a continuing nuisance, with temporary damages, in which case the measure of damages was wrong.

In either case there is reversible error.

4. There is no evidence upon which to predicate either a finding of fact or a conclusion of law as to what prospective purchasers might or might not take into consideration in arriving at a market value for this land. The element of damage here attempted to be found is too speculative and remote, beyond any of the pleadings or the evidence in the case, and not in any wise directly attributable to or a proximate cause of the injury here complained of.

Some future prospective buyers, in the light of all the evidence in this case, would undoubtedly look upon this as industrial property, as did the expert witnesses for the defendant, who were men long experienced in the business. It would be more appropriate to speculate upon such a hypothesis than that assumed by the Court in this so-called finding of fact.

Specification of Error 5(d) (p. 55 herein)

The defendant Company is itself a potential prospective buyer for this property of the plaintiffs as homes for its employees in the future, the same as in the past. Its value for such purposes would in no wise be depreciated by the presence of the defendant's plant. It is the plant which would give it its value.

Specification No. 5 (e)

Value of Plaintiffs' Lands

The value of plaintiffs' property as alleged in plaintiffs' amended and supplemental complaints is denied by the answer of the defendant. The appraised valuation, as fixed by the State Tax Commission in its state-wide re-appraisal of lands, is specifically set forth in the appendix to the abstract of record and appellant's Exhibit A appearing in the appendix to this brief. The total appraised value of the properties of the plaintiffs as fixed by the State Tax Commission's re-appraisal, is \$18,648, exclusive of Carter's. The total value alleged in the complaint is \$62,000, exclusive of Carter's. It is rather hard to believe that property reappraised for purposes of equalization at a total value of less than \$19,000 can have at the same time a market value of \$62,000. The damage of \$11,868.19 represents more than 62% of this appraised value.

There Is No Competent Evidence or Proper Measure of Damages Shown by the Evidence

We have the testimony of expert witnesses Thomas, Hawkins, Anderson and Johnson upon the subject of values. These values relate to but two situations:

(1) Value of the property of any plaintiff without the plant, that is, without the plant being located as it is; and

(2) Value of the property with the plant located as it is.

No consideration was given by any of the witnesses for the plaintiffs as to what the value of the plaintiffs' properties would be if there were some other industry located on the site of defendant's plant in place of the defendant's plant, such as the brick kilns that were formerly located there. The values testified to are the opinions of these witnesses based on the assumption that there is no industry whatsoever located on the site of defendant's plant.

Let us consider the brick plant. Were we to proceed logically upon the theory of the plaintiffs, the brick plant itself would make the lands of the plaintiffs less desirable for residential purposes, because of the presence of this industry in close proximity thereto. Only a question of degree separates the brick yard on the one hand and the defendant's plant on the other, at best. It is this difference in degree alone that could be recovered in damages. This degree of difference, even on their own theory, the plaintiffs failed to prove. The Court's findings are for the full amount without subtracting therefrom the percentage or degree of depreciation caused or which would have been caused by the continued maintenance and operation of the brick yard as it was operated for

twenty years preceding defendant's operations on the same tract. Which one of these plaintiffs or their predecessors in interest sold this property to the brick yard, to be used by the brick yard for industrial purposes? Would he now be entitled to recover back damages after having received the full purchase price of the property sold for the purpose of being used for industrial purposes? The question answers itself. If the proper measure of damage had been applied, the plaintiffs would have been required to offer some evidence upon which to base an award of damage measured by the proper scale. The findings of the Court could then have been predicated upon evidence relating to the proper measure of damage rather than to the measure of damage adopted by the Court, and we might say in passing that it is impossible to determine from the findings what measure of damage the Court did adopt. The damage allowed does not conform in any case to any of the proof adduced either by the plaintiffs or the defendant, but would seem on its face to represent some opinion of the Court not in any wise taken from the evidence.

It is, of course, possible that if testimony had been taken upon the subject there would have been some elements in relation to the operation and maintenance of brick kilns and a brick yard on the premises occupied by the defendant, which would have reduced the market value of plaintiffs' premises as much as the presence of defendant's plant. This might readily be the case if the extent to which the premises were occupied as a brick

kiln were sufficiently great in comparison to the small plant of the defendant as to make the deteriorating effect of each industry equal, in which case even on plaintiffs' theory there could be no recovery of damage.

The evidence of plaintiffs' expert witnesses further revealed the fact that they did not depreciate the plaintiffs' property any because of its close proximity to the main lines of railroad running through the neighborhood, nor did they depreciate the property any on account of the pea vinery, the sugar factory or any other industry. If all of these industries are to be overlooked in arriving at damage, then clearly it must be upon the theory, and the theory alone, that this is an industrial community, in which event the discomfort suffered by the plaintiffs on account of the odors emanating from defendant's plant is just a further inconvenience to be suffered because of the industrial nature of the vicinity.

Whether considered as legal or equitable, there is no competent proof upon which a finding of damage can be predicated. The detracting influences, if such they may be called, have had their effect upon these properties of the plaintiffs for the last twenty years, and there is no proof from which it may be inferred or found that the coming of the defendant's plant affected or depreciated the value of these properties here involved in any respect whatsoever. No expert witness of the plaintiffs has told us what would be the value of any one of the properties with the brick yard operating as it did for twenty years. No witness has testified as to the differ-

ence in value of any of the properties of the plaintiffs with the brick yards operating, in one instance, and the defendant's plant operating, in the other. Assume that all these conditions are thrown aside. It is submitted that the finding of the Court as to the damage is without foundation in the evidence and is excessive in fact.

It is submitted that the weight of the testimony, in view of all that has been said and done in this case, compels a finding that no plaintiff has been in any respect damaged by having the value of his property in any wise depreciated by the presence of defendant's plant.

*Speculative Value of Lands too Remote to Be
the Predicate of Damages*

It is common knowledge that what will make property more attractive to one person will in some cases make it less attractive to another. There is no dispute about the fact that a great many people consider that properties have been decreased in value when even churches are located in close proximity thereto. Others will have the viewpoint that properties are made less valuable by the coming into the community of certain individuals. A bad neighbor can often make your home very undesirable. Trespassing children, especially when they belong to someone besides yourself, often have a tendency to decrease the joys of life. The presence of negroes is always regarded as detrimental by the whites.

But the law of the land cannot speculate and deal with all of these various peculiar tastes of men or future speculative values of land. The law itself recognizes that it has a very narrow zone within which it may properly function. Matters of taste and the congeniality of neighbors or of neighborhoods, and their standing socially or in the business world, even their color or their integrity, must be disregarded by the law of the land; otherwise all society would be in a constant jangle and furore.

Assume for the argument, and for that purpose only, that the value of the plaintiffs' homes has been materially decreased by the presence of the defendant's plant. The finding of the Court is that the real estate will grow just as good and just as much garden produce with the rendering plant present as with it absent; that no one's health living in any of the plaintiffs' homes will be affected; then it seems that under those circumstances, logic and reason drive us back to the conclusion that this decrease in value, if any decrease exists, is because of personal taste or personal discomfort, and the rule of law seems to be very well established that individuals, as members of society, must tolerate a certain amount of personal discomfort.

Before anyone can say that there have been substantial damages to be recognized by law, he must make it manifest to any fairly instructed eye, and it must be such

as can be shown by a plain witness to a plain juryman. There is not a particle of doubt that the passing of a heavy engine at a high rate of speed through Benjamin, the blowing of whistles and the ringing of bells and the vibrations that are incident to this event, all make life a little less desirable in any of the residences that are even within 2500 feet of the railroad; and there is not a particle of doubt that any one living in any of these houses in and about Benjamin must endure these noises and these vibrations. Whether he likes it or not the law affords him no ground of complaint. All the plaintiffs live as close, if not closer, to the railroad than to defendant's plant.

This subdivision 5(e) involves a specification of error in which is included the specific findings of the Court with reference to ownership, value and damage in the case of each of the ten plaintiffs. We have already pointed out the impropriety of such findings with reference to the plaintiffs John Anderson, Edward Ludlow and Mrs. Hansen. Included within this specification of error is likewise the basic error to be found throughout the Court's findings, conclusions and decree in finding a nuisance value of the property and damage.

The Court finds (Abs. 384) Finding No. 1 of its original findings, that the plaintiffs are the owners of the lands respectively referred to and described in the amended complaint, thus including in this finding the lands of John Anderson, which he testified he did not own, but that his wife owned; the lands described as

the lands of Margaret D. Hansen, a substantial portion of which belongs to the estate of her deceased husband; and the lands described as the lands of Edward Ludlow, the title to which he testified was vested in his son. These are all the general basic grounds upon which this specification of error rests.

Specification of Error 5(f)

In addition to those already pointed out, there are some detailed specific grounds covered by subdivision (f) applying to one plaintiff and not the other. Specifically these latter consist of the evidence which shows that much of the improvements placed upon the lands of John Anderson, Rufus Anderson, Paul E. Swartz and John Angus were placed thereon after the beginning of the original operations of defendant but before the rebuilding of the defendant's plant. The Court has allowed in these specific findings full value and full damage for all such improvements placed upon the lands of the various plaintiffs between the original date of commencement of defendant's plant and the date of the fire.

One of two situations must be ultimately determined by this Court on appeal, either that the damage was permanent, on the one hand, as found by the lower Court, in which event the cause of action became complete at the commencement of defendant's operations, and barred by the Statute of Limitations, or that the damages are temporary, intermittent and occasional, in which event the decision of the lower Court would have to be reversed as based and predicated upon a fundamentally wrong

basis or measure of damage. In either event, the decision of the lower Court must be reversed.

SPECIFICATION OF ERROR NO. 6

This specification of error is based upon the lower Court's conclusions of law. The principal arguments in this brief are made for the purpose of demonstrating that just the contrary should have been the Court's conclusions, that is to say, that there was no nuisance, plaintiffs are not entitled to damage, and that the Court erred in not concluding that the defendant's plant as located was reasonable and lawful.

SPECIFICATION OF ERROR NO. 7

It would necessarily follow if any of the contentions of the appellant herein are correct the decree of the lower Court would of necessity have to be reversed either in whole or in part.

SPECIFICATION OF ERROR NO. 8

It is respectfully submitted that this defendant was entitled to have the lower Court find:

(a) That the defendant's plant has actually benefited the health and comfort of the community by the removal of carcasses and offal that were formerly left on the premises of the plaintiff to stink, decay and ultimately bleach. So far as the plaintiffs' testimony is concerned, it simply confirms in part, if not in its en-

tirety, the contention of defendant's witnesses with reference to this important matter. Such a finding would determine the propriety and the reasonableness of the location of defendant's plant.

(b) That since the building of defendant's plant the plaintiffs Edwin Selene, John Anderson, Rufus Anderson and Paul Swartz have all built improvements on their property. This was a fact defendant was entitled to have found, in order that the appropriate law could be applied thereto and any element of damage or depreciation to these improvements eliminated from the judgment of the Court. The lower Court appreciated the rule of law, but it is submitted applied it to the improper period, namely, since the rebuilding of the plant rather than from the beginning of operations.

(c) That the plaintiffs had profited by the building and operation of defendant's plant, had patronized it, and had even acquiesced in its location and existence to the point of assisting in its operation and construction, and originally in the selection of the site by the defendant for the purposes used. Such acquiescence in the beginning does not and cannot support the present objections of the plaintiffs. The cases so holding are cited elsewhere in this brief.

(d) As to the condition of the property upon which its plant is located, and particularly the sump, during the twenty-odd years the property was operated as a brick plant.

(e) That the defendant operated its plant in a sanitary manner. To this effect is all the competent evidence in the case.

Throughout this extensive record, there is no evidence of the plant itself being operated improperly or in an unsanitary manner. There is some evidence that the manure pile maintained in connection with the rendering plant is unsanitary, but the evidence even of the plaintiffs' witnesses is to the effect that it is no more unsanitary, if as much so, as the manure piles and the stock feeding yards of the plaintiffs, in which there is to be found manure up to the belly of the stock being fed.

(f) That the action was dismissed as to Maylan Carter. This is the fact, as we have heretofore pointed out.

(g) That the non-condensable gases produced by defendant's cooking operations were consumed in passing through the fire of the boiler, and that nothing but the smoke from their consumption reaches the atmosphere. There is no evidence to the contrary. This fact is clearly shown by the evidence which we have herein pointed out.

(h) The installation of screens over all openings since the original trial of the case. In page 8, Findings of Fact No. 8 of the Court's original findings, included in par. 1 of the Court's final findings by reference, the Court found:

“That the defendant’s plant has been operated without screens and tends to attract flies and the particular species of flies known as blow flies.”

In Finding No. 4 (Abs. 395), the Court finds, upon the second trial of this case, that the defendant’s plant at the time of re-opening of the case and the trial of issues relating to damage, was being operated in a manner similar to that described in the Court’s former memorandum, entirely ignoring, although it stands uncontradicted, the evidence of the defendant (Abs. 370: Mr. Soble) that they have made some changes in the plant since the last hearing of the case; that they have entirely equipped the building with screens and made changes in the grease basin or septic tank so that there is no refuse that goes into the pond except clear water.

In spite of the fact that the only allegation of injury either in the amended complaint or in the supplemental complaint is the odors produced by the defendant’s plant, the Court permitted a very large amount of evidence to be received concerning flies and rats, and no doubt the Court took the finding above set forth in its original findings into consideration in arriving at the damage, but it is respectfully submitted that this element of damage is entirely beyond the scope of the complaint or any pleadings in the case.

The Court’s 9th Finding of Fact is interesting in this particular and would tend very definitely to establish

the conclusion that the defendant's plant was not a nuisance. Finding No. 9 reads: (Abs. 389)

“That the operation of defendant's plant, if operated in a proper location and sanitary manner is desirable and beneficial in the interest of public health and sanitation since it results in the gathering of carcasses of animals which would otherwise, in many cases, be left unburied or insufficiently buried and be allowed to contaminate the surrounding atmosphere with noxious odors as well as constitute a feeding and breeding place for flies and vermin.”

The Court makes no finding of fact that the location of defendant's plant is not a proper location, nor does it find that the plant is operated in an unsatisfactory manner. Without a finding to this effect it is to be assumed that the plant, from the findings as found by the Court, is a decided benefit to the specific locality in which it is located. If so, its location would almost necessarily be a proper location.

(i) The defendant was entitled to a finding that plaintiffs' lands were not depreciated by the defendant's plant. This, together with sub-divisions (j), (k) and (l) are thoroughly discussed throughout this brief, and needs little further discussion at this point.

There is no finding of fact by the Court as to the character of the community. In paragraphs 10 and 11 of the lower Court's original memorandum decision, adopted by reference in the Court's Finding of Fact No.

1, we have the only finding the Court made as to the nature of the locality. In paragraph 10 it is true the Court says (Abs. 390) :

“that the area occupied by defendant’s plant cannot be classed as an industrial area.”

This is a conclusion of law, pure and simple, and is not a finding of a fact or the statement of a fact.

When the Court finds that there is a pea vinery, a sugar factory, a railroad and formerly a brick yard it is finding the facts. It should have also found two railroads, several stock and feed yards, flour mill, and formerly an alfalfa mill, wool loading platforms, beet storage and loading station and cattle loading yards and chutes on the railroads and the steel mills not far away. There is no conclusion of law that in view of these facts this area is a residential district; in fact, there is no finding of fact from which the conclusion that it is a residential district could be drawn, and certainly no evidence to sustain any such finding. The very beginning of paragraph 10 “that the defendant’s plant is located in an area which is essentially agricultural” is likewise a conclusion of law, but the decree is not based upon any such conclusion, because the Court does not include any such conclusion of law in its “Conclusions of Law” as filed. If we take paragraphs 10 and 11 above referred to and consider the actual findings, then only one conclusion can possibly be drawn therefrom, and that is that the defendant’s plant is properly located, so far as environment is concerned.

THIS IS A SUIT IN EQUITY

This action is basically one for equitable relief, permanently enjoining, forbidding and restraining the defendant from further continuing to operate the rendering plant at Benjamin. The sole ground for recovery pleaded is the odors produced by defendant's plant. The damages allowed by the Court were not confined to the pleadings (see par. 8 of the Court's findings, Abs. 389).

As has been suggested heretofore, this is an equity appeal, and appellant is entitled to a review by this Court of the facts, as well as the law. The degree of proof to substantiate an equitable cause of action properly pleaded exceeds that which is required to satisfy a law court, that is to say, something besides a mere preponderance of the evidence is necessary to properly invoke the extraordinary relief granted by a court of equity. There is neither evidence nor finding to satisfy such a requirement of proof. Unless this Court, sitting as a court of review, is satisfied far beyond a mere preponderance of the evidence, the granting of equitable relief could not be justified. In the recent case of *Starley v. Deseret Foods Corporation*, 93 Ut. 577, 74 Pac. (2d) 1221 to 1225, this Court said, in speaking of equitable relief:

“The evidence must be clear, convincing and satisfying.”

See also *Cook v. Forrester*, 77 Utah 137,
3rd par. of syllabi.

*No Right in Trial Court to Retain Jurisdiction for
Purpose of Assessing Legal Damages.*

If the legal demand is incidental to equitable relief, and is averred and proved *along with the equitable demand*, it may be determined in a court of equity, but unless there is some substantial ground of equitable jurisdiction, both alleged and *proved*, then there is nothing to which the legal demand may attach itself, and consequently equity has no jurisdiction to retain. The real purpose of the action was not to regulate the operation of the plant, and no allegation was made that it was improperly or negligently operated, but it was to abate and *prevent all operation*.

In *Graeff v. Felix*, 200 Pa. St. 37, 49 Atl. 758 (1901), the Supreme Court of Pennsylvania said:

“It is quite true, as held by the learned judge below, that equity, having acquired jurisdiction of a case, may decide all matters incidentally connected with it, so as to make a final determination of the whole subject; but this rule does not extend to a case where only some incidental matter is of equitable cognizance, and thereby enable the court to draw in a main subject of controversy which has a distinct and appropriate legal remedy of its own.”

And in *Broadis v. Broadis*, 86 Fed. 951 (1898) it is said:

“While a court of equity, having taken jurisdiction of a case for one purpose, will, in general,

retain it for all purposes, so as to do complete justice, still, where it has obtained jurisdiction only to pass upon the validity of a decree of foreclosure, it cannot go further, and pass upon the validity of the mortgages themselves, and of the title sought to be conveyed thereby.”

These two cases are merely illustrative of the rule that incidental matters, even though of equitable cognizance, cannot constitute a basis for the retention of jurisdiction to grant legal relief where all substantial grounds of equity jurisdiction have failed of proof.

The substantial ground in this case was that the rendering plant in its location in Benjamin was a nuisance because Benjamin was a strictly residential community. It was not claimed by the plaintiffs that there had been any negligent operation of a rendering plant that was properly located, but it was claimed that because of the character of the community the plant could not be located in that community at all; *that to locate it and operate there even with most extreme caution was unlawful.*

This basic claim of the plaintiffs failed of proof. This basic claim not only was asserted as a ground of recovery, but was a predicate upon which the right of the plaintiffs to join was sustained by the trial Court. The cause of action stated by the plaintiffs as joined was the alleged wrongful location of this rendering plant, and when the location was shown to be legal and not unlawful, then the right to join failed along with

the right to abate. The cause of action, if any, which each of the owners of the separate and distinct tracts of land had to recover damages for depreciation of the value of that land is not in any sense joint. There are eleven different tracts of land, and if causes of action exist at all for damages, consisting of a depreciation of the value of this land, they are eleven separate and distinct causes of action.

The case as presented is somewhat similar to that of *Benson v. Rozzelle*, 85 Ut. 582, 39 Pac. (2d) 1113, decided by this Court in 1934. In that case the Trial Court found a partnership, ordered a dissolution and directed an accounting. The case was brought to this court upon appeal and by means of a writ of review, and on inspection of the record it was found that there was no evidence whatever of a partnership. This court then held that there being no partnership, the Trial Court was without jurisdiction to order an accounting. The writ of review was sustained and the judgment of the Trial Court was reversed.

Apply the reasoning of the *Rozzelle* case to the case at bar, and is not the conclusion compelled that when the Trial Court has denied the equitable relief of injunction and abatement, that court is then without jurisdiction to retain the case for the purpose of attempting to assess damages? In this case the Trial Court has refused to enjoin, has declined to grant any equitable relief, has found against the plaintiffs below, in and so far as the matters of equitable cognizance are concerned,

and consequently the Trial Court has no jurisdiction to retain.

It is submitted that under the case of *Dahl v. Utah Oil Refining Co.*, 71 Ut. 1, there is and can be no right of recovery, either at law or in equity, by the plaintiffs below, and that the Trial Court was without jurisdiction to proceed to a determination of any issue of damages—in fact, there is no cause of action existing in favor of any plaintiff.

The *Dahl* case controls in fact, the case at bar. It conclusively appears that damages cannot be awarded either as a substitute for equitable relief or in addition to equitable relief, or even as the consequences of an action at law. We get right down to where this Court got in the *Dahl* case, except that that case did not involve a misjoinder of parties or of causes of action, which makes it all the more decisive as to the present case. The *Dahl* case further differs from the case at bar because in that case evidently the trial court found that the question was one for the jury. Though this Court on an appeal of a law question would and should hesitate to interfere with the judgment of the trial court, who has seen the witnesses and noticed their demeanor on the stand, yet this Court in the *Dahl* case unanimously reversed the trial court because they were unable to say, as a matter of law, that a case of unreasonable use or actionable nuisance was made out. This Court emphatically said:

“No precedent for sustaining liability under similar circumstances has been cited and we have found none.” (71 Utah, 14)

In the case at bar, on the contrary, this Court is charged with the duty of reviewing the evidence, as well as the law, which distinction between the two cases makes the ruling of this Court in the *Dahl* case more conclusively in favor of the appellant herein. This opinion was concurred in by the entire Court, including my worthy opponent on this appeal, Judge Elias Hansen.

The only consequence that has resulted from the presence of the plant or is shown by the findings of the Court is that there has been some personal discomfort. That personal discomfort, if such there was, has undoubtedly been sustained by every person who lived in the vicinity of the plant or happened to be in that vicinity. Such personal discomfort is not and cannot be in any wise connected with the ownership of the realty. It does not form the proper basis for joinder of plaintiffs. It would make not a particle of difference as to the effect of that discomfort whether a man owned ten acres, one acre or not even a foot of property in the vicinity of the plant. If he merely happened to be in the community he might endure some slight personal discomfort that is occasionally caused by the presence of any industry, either defendant's plant or such a plant as the Columbia Steel plant a little farther up the tracks. If one could so torture the evidence as to make out a personal injury to

someone who might breathe in the odors, it would be a strictly personal action. A remedy for such an injury is wholly disassociated from the ownership or possession of real or personal property, or of the action here pleaded. Here again we call attention to the *Wasatch* case. In paragraph 15 of the syllabi (92 Ut. 50, 63 Pac. (2d) 1071):

“Where case is one in equity, rule that equity having once taken jurisdiction of cause will retain it for purpose of administering full and complete relief, does not apply when facts relied on to sustain equity jurisdiction entirely fail of establishment.”

The Court in this case dealt with the *Kinsman* case, *Kinsman v. Utah Gas & Coke Co.*, 55 Ut. 10, 177 Pac. 418. After reviewing the facts in that case the Court said:

“The *Kinsman* case stands for this: That where the evidence shows actionable nuisance but there is an intervening fact such as delay on the part of plaintiff in bringing the suit so that the equity court will not enjoin the operation of the plant, damages will be assessed in lieu of equitable relief and that such damages will be fixed by the court in the exercise of its equity jurisdiction.”

If there is no actionable nuisance proven, the fact that the Court finds an intervening fact such as delay on the part of the plaintiff in bringing suit, as the lower Court did in this case, cannot justify the application of the rule

above announced, and thereby confer jurisdiction on the part of the equity court to assess damages. Its basic jurisdiction must be predicated on a finding properly supported by the evidence that there is a nuisance such as to justify the intervention of equity.

In the *Kinsman* case Mr. Justice Gideon said:

“The cause is therefore remanded, with directions to the district court to allow amendments to the pleadings if desired, and proceed to hear testimony and determine the past and future damages to each plaintiff by reason of the continued and perpetual operation of the company’s plant at its present capacity, and to make separate findings upon such issue of fact, and enter judgment or judgments accordingly; or the court may call to its assistance a jury to determine the amount, if any, of such damages, *as in other equitable proceedings.*” (Italics ours) 53 Utah, 24.

Mr. Justice Frick cited cases from the United States Supreme Court and from the State of New York. The Court then said:

“In the foregoing cases it is held that where business enterprises constitute a continuing nuisance, like defendant’s gas plant, and an injunction is refused as a matter of right, the damages may, nevertheless, be assessed in the equity action; that is, the court may deny the injunction as a matter of right, but may assess the damages caused by the nuisance in that action.”

It is plain from these quotations that this Court, in deciding the *Kinsman* case, treated and considered the damages which it ordered assessed as equitable and not legal in character. It may be that the Court erred in considering the delay of the plaintiffs in bringing their suit in the *Kinsman* case as an intervening fact, just as the lower Court in this case may have made the same error, but nevertheless the principle upon which the *Kinsman* case was decided was that the delay was an intervening fact and that such intervening fact prevented the granting of an injunction as a matter of right. The Court, however, granting damages in lieu of such injunction, never for one moment stepped out of equity and into the law. It is hardly to be presumed that this Court failed to appreciate the distinction which exists between an action where eleven plaintiffs join in a complaint seeking an injunction and abatement, and a case where eleven plaintiffs join seeking the remedy of damages, the damage of each plaintiff being different from the damage of each other plaintiff.

In the case at bar, the lower Court undertook to find, if anything, legal damages, not equitable damages. The damages were for loss of market value of real estate, as found by the Court, whereas, as disclosed by the evidence, they were for personal discomfort. The Court exercising such equitable powers need not call in a jury, and, as in the case at bar, gave to the defendant no opportunity for a trial by jury. Whenever in such a case the basic ground of equitable jurisdiction has been

established by the evidence, which, of course the appellant contends was not the case in the case at bar, then the case remains as it was in the beginning, equitable in character, and the relief granted, whether that relief consists of an injunction or a decree for specific performance or damages in lieu of such drastic remedies, is equitable and not legal. This is clearly the effect of the decision of this Court in the case of *Wasatch Oil Refining Company v. Wade*.

The action which this Court attempted to try commencing October 17, 1939 (Abs. 393) was not one action, but it was eleven actions at law to recover eleven different judgments. In any one of these eleven judgments the owner of the property would have a separate and distinct ownership from that of all other plaintiffs. The cause of action, if cause of action there was, would be entirely different from that which might exist, if one could exist, with reference to each other piece of property. In the instant case, one of these eleven causes of action was dismissed.

We have heretofore in discussing these several cases definitely pointed out how separate and distinct they are, and how in the various causes of action we find different facts and circumstances, different defenses, and cases calling for different results, even upon the assumption that there is a nuisance maintained by defendant. Personal discomfort, as has been pointed out, may be suffered by a man who owns no property. Even the chil-

dren of plaintiffs' families may have suffered personal discomfort. From that standpoint each such personal discomfort is actionable. Those children would have just as sound a cause of action as would any of the plaintiffs. It would be a suit in the nature of a personal injury, certainly not a suit involving a nuisance, either as defined by the statutes herein quoted or by the common law. It would not be assignable. It would be similar to infecting a person with germs, or exposing him to the yellow fever. These actions would be actions at law, where the pain, suffering, loss of health or employment would all be elements to be considered in determining the amount of any verdict that might be rendered. No lawyer would contend that such an action to recover for such an injury would have the slightest equitable feature about it, or permit of numerous such suits to be joined in one action to collect damages.

*There Being no Basis for Equitable Relief, There Is a
Misjoinder of Parties Plaintiff.*

Since the plaintiffs have no joint or common interest in the damages sustained by each other, and the actions of the plaintiffs thus are misjoined, the suit must be dismissed. The lower Court erred in failing so to do.

This contention is based upon the assumption, indulged in for the purpose of argument only, that each of the owners of the eleven tracts of land is the owner and

has a cause of action, legal in character, to recover damages from the defendant because of the maintenance and operation of its plant.

See the case of *Reynolds v. Warner*, heretofore in this brief discussed in connection with Specification of Error No. 3 (page 87).

It may be added that the statutory prohibition against misjoinder of parties plaintiff, and the improper union of causes of action, cannot be defeated by alleging an equitable cause of action which does not exist.

It might be said that no demand was made for a jury in this case. The original trial of this case commenced the 3rd of April, 1939 and continued to April 27th. The cause of action stated in the complaint then was strictly equitable in character. Of course no demand for a jury was made prior to the trial. It would be a ridiculous proposition to think that part of the case could be tried without a jury and then part of it tried with a jury. When the equitable features failed of establishment the defendant's plea of misjoinder commenced to operate. It did not operate merely to a partial extent. It operated to the extent of requiring a dismissal of the action. If a jury had then been called it would have acted only in an advisory capacity. On the theory upon which the Court resumed the trial on Oct. 17, 1939, that the action was still equitable, the demand for a jury would have availed nothing. The plea of misjoinder of parties

plaintiff stood out as a bar against a judgment in favor of any plaintiff in any amount whatsoever. At that point the Court should have permitted the separation of the causes of action. Its refusal to do so made a demand for a jury trial an impossibility. We have pointed out that no court, much less a jury, has the machinery for determining property elements of alleged damage in eleven distinct and different types of injury. The only reason that a joinder of the plaintiffs could be allowed was that the lower Court found an equitable cause of action stated in their complaint, in which they were all jointly interested. The point of common interest was the injunction, but the trial was had and this common point failed of establishment in the proof, as required by the ruling in the case of *Wasatch Oil Refining Company v. Wade*. Then the equitable feature was gone.

We know that the existence of a nuisance is a matter of fact and law. Courts of equity should require a person claiming the existence of a nuisance to make out that existence in a court of law before he comes into equity. *Norback v. Board of Directors*, 84 Ut. 506.

Personal discomfort, if it can be worked into a cause of action at all, must constitute a personal action. The idea of saying that a man has been legally wronged by some act of the defendant and that the injury is that of personal discomfort, and then undertaking to establish the damage that should be allowed by hearing proof which

tends to show a depreciation of the value of unimproved real estate owned by the person who endured the personal discomfort, but upon which no one lives to be personally discomforted, is wholly unsound, because this would result in the principle that only those who happen to own real estate could join or recover. Other men living in the same community and suffering the same amount of personal discomfort, or even a greater amount, could not recover at all, because they did not own real property at the time the alleged unlawful injury was inflicted upon them. The extent of personal discomfort varies with the physical and mental constitution of the injured person. One would suffer more than another in the same community. The extent of such suffering does not depend upon the ownership of real estate. This makes it clear that the alleged causes of action are strictly personal in nature, that they are non-existent as a matter of law. The personal discomforts complained of are of the kind of annoyances and inconveniences that everyone in such a community is required by law to endure. There is no special damage to the plaintiffs other than that suffered by the public generally.

*It Is Contended by the Plaintiffs That They May
Join Together in One Action.*

This contention is made in the face of the fact that there are at least eleven separate, individually-owned tracts of land described in the complaint. The proposition has often been laid down that several persons injured by a nuisance common to all may unite in seeking equit-

able relief, although they own distinct property interests and the injury is not joint but merely common, and this statement, when properly understood, is true, but they cannot join when the object of the suit is to restrain that which is a distinct and special injury to each of their properties.

In the case of *Davidson v. Isham*, 9 N. J. Eq. 186, the Court said:

“Where several complainants unite in a bill of this kind, the injury or grievance complained of must be common to all. The several complainants cannot unite their distinct and individual causes of complaint, and by their combination make a case of nuisance, which separately would not establish the complaint.”

The same equitable principle was applied to the *Kinsman* case, in which it was said:

“In the very nature of things, any noxious or offensive odors given off by defendant’s plant would gradually diminish as the distance increases, and the relief to plaintiffs, whose homes are near the gas plant, might and should differ from the relief which should be granted to those whose residences are at greater distances from the defendant’s plant.”

We are not dealing in this case as in the *Kinsman* case with rows of homes built close to each other on small city lots (all 59 homes were within a radius of 132 to 800 feet from the plant) but rather with a few

ranch houses separated by tracts of land located in different directions from the plant and at distances varying from 650 ft. to three-quarters of a mile.

It would be rather fanciful to assume that the odor would be so substantial three-quarters of a mile away as to justify the granting of an injunction. Yet plaintiffs would undertake to make these complaints about odors near the plant which are distinct, individual causes of complaint, work a nuisance in favor of the most remote plaintiff. This under the *New Jersey* case cannot be done, and under the *Kinsman* case was not done because the Court, by authorizing the amendment on remand, treated the causes of action of the individual plaintiffs as separate and distinct, even suggesting separate appeals as to each plaintiff.

The case of *Fogg v. Nevada C. O. R. Co.*, 20 Nev. 429, 23 Pac. 840, was decided in 1890 by Chief Justice Hawley, one of the most learned judges who ever graced the bench. What did he say in the case cited? Three plaintiffs, Fogg, Brookins and Peterson were the separate owners of three certain town lots in Reno, Nevada. Each of said plaintiffs had a dwelling house upon his lot in which he resided with his family, consisting, among others, of children of tender years. The said premises abutted and fronted on East street. The defendant railroad company had constructed a railroad track in the middle of the public street and raised it six or eight inches above the level of the street. It was claimed that

said tracks and railroads so constructed “are an existing, continuing and constantly recurring nuisance and obstruction in said East Street.” It was claimed that it made the street extremely dangerous, especially for children of tender years, and rendered destruction by fire of each of said plaintiffs’ houses extremely probable; that it interfered with the approach of vehicles to each of the plaintiff’s residences; that freight cars were left standing for hours at a time in front of these houses; that these annoyances and others of a kindred character, not necessary to specify, were constantly recurring, and greatly decreased the value of the premises of the plaintiffs, all to their irreparable damage. The prayer was for an abatement and an injunction. No damages were asked.

Now, it seems that we have a case directly in point with the complaint in the case at bar. It will not do to say that Judge Hawley did not understand the legal and equitable procedure. He said:

“Did the court err in sustaining the demurrers to this complaint? To enable the plaintiffs to maintain this action, it must be clearly shown that they have sustained or will sustain, a special and peculiar injury, irreparable in its nature, and different in kind from that sustained by the general public.”

He then quoted Section 3273 of the Nevada statutes, which is identical with Section 7240 of the Compiled Laws of Utah, 1917. In fact, a comparison reveals no dif-

ference, even in phraseology, between the two statutes, and he said:

“This statute, instead of changing, simply affirms the rule above stated.” (Citing authorities) “It was copied from the statute of California, and, prior to its adoption by the legislature of this state, the supreme court of that state, in construing the statute, held in *Blanc v. Klumpke*, that if the nuisance complained of only affects ‘the plaintiff in common with the public at large, although in a greater degree, he cannot have his private action.’ 29 Cal. 159”

He then points out that this same principle, under the same statute, was ultimately affirmed in other California cases, citing them.

What becomes of the argument to the effect that the injury to the plaintiffs in the case at bar was the same in kind but different in degree?

Hawley said, quoting the Supreme Court of California:

“If it only affects the plaintiff in common with the public at large, although in a greater degree, he cannot have his private action.”

After discussing the claims of the appellant, he said:

“The averment relative to the branch track does not merit any consideration, as it is not specific enough to enable us to determine whether or not any special injury other than is alleged by

the construction of the main track, is occasioned thereby.”

Again he says:

“Injunctions ought not to be granted in cases of this character, unless ‘the threatened use of property or the act sought to be restrained is clearly shown to be such as leaves no doubt of its injurious results; such results as are recognized to be substantial legal injuries. The bill must set forth such a state of facts as leaves no room for doubt upon the question of nuisance, for, if there is any doubt upon that point, the benefit will be given to the defendant. Mere allegations of conclusions or opinions as to the contemplated injuries are not sufficient, the precise manner in which he is to be injured must be stated.’ *Garnett v. Railroad Co.*, 20 Fla. 902. In *Lewiston T. Co. v. Shasta & W. W. R. A. Co.*, the court said, citing from previous cases, ‘that where the damages are special—that is, such as do not necessarily arise, or are not implied by law, from the act complained of—the facts out of which the damages arise must be averred in the complaint.’”

And then he takes up the question of the sufficiency of the allegation of danger, and he quotes from *Wood on Nuisance* as follows:

“The courts very wisely have unswervingly adhered to the rule that an individual, in order to be entitled to a recovery for injuries sustained from a public nuisance, must make out a clear case of special damages to himself, apart from the rest of the public, and of a different character, so that they cannot fairly be said to be a part of the com-

mon injury resulting therefrom. It is not enough that he has sustained more damage than another; it must be of a different character, special and apart from that which the public in general sustain, and not such as is common to every person who exercises the right that is injured." *Wood on Nuisance*, 646.

We are entitled to infer from the allegations of plaintiffs' complaint that the great damage is suffered by the entire community, that is, the public at large. It is not alleged that the damages of the plaintiffs are different in character or special and apart from those which the public in general sustain. Later on in the opinion Justice Hawley says:

"The mere fact that the alleged inconvenience and annoyance is greater in degree to the plaintiffs than it is to other citizens does not authorize a private action to be maintained. All the authorities agree that, to support the action, the damage must be different, not merely in degree but different in kind, from that suffered in common; hence it has been well settled that, though the plaintiff may suffer more inconvenience than others from the obstruction by reason of his proximity to the highway, that will not entitle him to maintain an action."

A long list of authorities is cited, and he then passes to the question of misjoinder. He says:

"The bill is objectionable on the ground of a misjoinder of parties. The complainants are owners of several and distinct lots, having no common

interest, but seeking to enforce several and distinct claims. They seek to enforce no common right, as in case of right of common, nor to obtain relief against a common wrong. * * * The bill seems to have been framed under the impression that the nuisance was a grievance common to all the land-owners, and therefore, that all might properly be joined. But each complainant seeks relief for special injury to his own property by the construction of the railroad. On this ground the bill is clearly demurrable." (Citing authorities)

In *Hudson v. Maddison*, 12 Sim. 416, 35 Eng. Chanc. 362, 59 Reprint, 1192.

"In the present case the bill is filed by five persons each having a separate tenement; and they represent that the erection of the steam engine and chimney will operate as a nuisance to all of them. They, therefore, have joined their cases together. It is obvious, however, that as each of them has a separate nuisance to complain of, that which is an answer to one may not be an answer to the other; and if, upon such a bill, a decree were to be pronounced, it must be a decree which would provide for five different cases; and I do not think that such a decree could be made."

In *Burroughs v. City of Dallas*, 276 Fed. 812, the plaintiff sought to restrain the operation of a scenic railway as a nuisance. This scenic railway was maintained on the exposition grounds of the City of Dallas and it was alleged that it disturbed the occupants of the

plaintiff's property, a boarding house, resulting in a substantial impairment of the value of that property, lessening the revenue and rendering it less beneficial. There was a conflict in the evidence and the lower Court denied the injunction. The Circuit Court of Appeals of the Fifth Circuit said:

“It is familiar law that injunction will not issue to enforce a right that is doubtful, or to restrain an act the injurious consequences of which are merely trifling. If the evidence be conflicting and the injury doubtful, this extraordinary remedy properly may be withheld when it is applied for before the asserted right has been established at law. *Consolidated Canal Co. v. Mesa Canal Co.*, 177 U. S. 296, 20 Sup. Ct. 628, 44 L. Ed. 777; *Parker v. Winnepiseogee Lake Cotton & Wollen Co.*, 2 Black 545, 17 L. Ed. 333.”

City of Pana v. Central Washed Coal Co., 260 Ill. 111, 102 N. E. 992.

In this case a decree had been found for the complainant and an appeal was taken from that decree. The facts were reviewed and the Court laid down this rule:

“The existence of a nuisance not having been established by an action at law before bringing this suit in chancery, under all the authorities the facts must be clearly established, and the law be without question before an injunction will issue. No such strong or exceptional case of such pressing necessity as would justify the interference of a court of equity exists here.”

See also *Stoddard v. Snodgrass* (Ore), 241 Pac. 73.

“The law cannot take notice of things which are not offensive to normal persons. If it did there would be no limit to litigation.”

“Since the defendants have expended large sums of money in constructing the building and preparing the same for carrying on the business, should they be enjoined from conducting their business in said building it would result in great loss and hardship to them.”

The injunction was denied, although this undertaking establishment was in the vicinity of dwellings and had a depressing effect upon the occupants of the dwellings.

See also *Pearson v. Bonnie*, 209 Ky. 307, 272 S. W. 375. The Kentucky court refused to enjoin the conducting of an undertaking business in a residential portion of the City of Louisville, Kentucky, because the injuries were not sufficiently substantial to justify an interference by equity with the harsh remedy of injunction.

The business of the defendant in the case at bar is not a nuisance. The persons who have organized the defendant corporation have made a large investment. It is true it is not comparable in value with many of the greater plants that exist throughout the country, but the Court knows from the evidence that it is a substantial investment; that it means much to the stockholders in-

terested in the defendant corporation. Nothing appears in this complaint to show that this location of the plant was made in bad faith or with malicious intent to annoy the plaintiffs, and nothing is alleged to show that there was an objection by the plaintiffs to the location of this plant.

The case of *Kinsman v. Utah Gas & Coke Co.*, 53 Utah 10, 177 Pac. 418 (1918), is the case relied upon by the plaintiffs for a justification of their application for alternative relief. It seems that fifty-nine plaintiffs joined together in an action to enjoin the operations of the gas plant by the defendant. In the lower Court they obtained a decree. Each plaintiff had a separate and individual claim or right of action for damages growing out of the same trespass. (Quoting Judge Gideon's opinion.) Both Judge Gideon and Chief Justice Frick rendered opinions, whereby they suggested that even though equitable relief was denied, the plaintiffs might be allowed to amend and the amount of each plaintiff's damages might be determined without requiring the plaintiffs to bring separate actions.

Chief Justice Frick and Justice Gideon relied upon statements made by Mr. Pomeroy in his work on Equity Jurisprudence, where he states the law to be as follows:

“If a person appeals to a court of equity for an injunction to restrain the maintenance or to compel the removal of the structure, the court to which such appeal is made has the power to deter-

mine the amount of unpaid damages, and to withhold an injunction, and to direct that the structure be permitted to remain and be operated, provided the assessed damages are paid.” *Pomeroy’s Equity Jurisprudence*, Sec. 473.

Justice Gideon makes the following quotation:

“The rule has already been stated, as one of the foundations of the concurrent jurisdiction, that where a court of equity has obtained jurisdiction over some portion or feature of a controversy, it may, and will in general, proceed to decide the whole issues, and to award complete relief, although the rights of the parties are strictly legal, and the final remedy granted is of the kind which might be conferred by a court of law.” *Pom. Eq. Jur. 3rd Ed. Sec. 231.*

But notice this portion of Justice Frick’s opinion:

“A majority of the court doubt both the propriety and the necessity of enforcing the alternative relief suggested in the quotations from Pomeroy; therefore both Justice Gideon and myself defer to their judgment, and have yielded assent to the judgment as stated.”

From this quotation it appears that the majority of the Supreme Court, consisting of Justices McCarty, Corfman and Thurman, did not accept the suggestions made by Justices Frick and Gideon, but however that may be, it is submitted that on account of the peculiar facts as they are shown by this record, there cannot be any retention of jurisdiction in this case for the purpose

of adjudicating the alleged purely legal rights of the plaintiffs.

Compare later case of *Norback v. Board of Directors*, 84 Ut. 506.

The following cases cited by Justice Gideon in his opinion in the *Kinsman* case are decided by the Federal Courts and by the Supreme Court of Wisconsin and by the Appellate Division of the New York Supreme Court.

Take the case of *Waite v. O'Neil*, 72 Fed. 348, and 76 Fed. 408. This is the same case as decided by the trial court and as decided by the appellate court. In the trial court Judge Hammond denied specific performance on the ground that the enforcement of the covenant would be unconscionable, and yet held that there was such a show of equitable cognizance in the bill that the case would be retained for the purpose of affording such other relief, even purely legal in character, as the proofs might justify. He said that the unconscionable character of the covenants did not arise out of the covenants themselves but out of the construction that was thereafter put upon them. In other words, intervening facts had made the covenants unconscionable, and under those circumstances he retained the cause for the purpose of granting legal relief.

When the case came to the Court of Appeals, Circuit Judge Lurton held that though specific performance was refused, there was such a showing of equitable cogni-

zance that the cause should be retained for the purpose of affording other relief, even purely legal in character, and it is also shown in this case that there was a failure to make the objection that the bill was without equity at the earliest possible moment.

These two cases can be laid aside as having no application to the case at bar.

The case of *Combs v. Scott*, 76 Wis. 664, 45 N. W. 532, is a case for specific performance, but it appeared that pending the suit the statute of limitations had run on the contract. Therefore, the plaintiff was deprived of his remedy at law. Under those circumstances, and because of this intervening fact, the Court retained the case for the purpose of granting purely legal relief.

Goddard v. American Queen, 59 N. Y. S. 46, is also a case for specific performance, where to grant it would inflict an injury upon parties innocent of any wrong. Under those circumstances the case comes within the well known principle that damages may be allowed in lieu of specific performance.

It would seem that according to the opinions of Justices Frick and Gideon the rules adopted in actions where specific performance is sought are applicable to suits for injunction.

In 25 R. C. L., p. 345, Sec. 172, the subject of damages in lieu of specific performance is discussed. It is pointed

out that a bill for specific performance of a contract will not be retained for the assessment of damages where a case is not made out for specific performance and no other special equity is shown which will support the jurisdiction of the Court.

“The rule has been laid down that a court of equity will not grant pecuniary compensation in lieu of specific performance unless the case presented is one for equitable interposition such as would entitle the plaintiff to performance but for intervening facts, such as the destruction of the property, the conveyance of the same to an innocent third person, or the refusal of the vendor’s wife to join in a conveyance.”

Bradley v. Aldrich, 40 N. Y. 504; 100 Am. Dec. 528.

This case was decided in 1869, after the adoption of the Code of Civil Procedure in New York. It applies with peculiar force to the case at bar, because it appeared that damages were not alleged in the complaint nor claimed upon the trial. The Court said:

“It does not appear that the plaintiff at any time treated the action as brought to recover damages. No such idea could be suggested by the complaint; no such claim appears to have been made at the trial.”

Under such circumstances the Court of Appeals of New York held that the plaintiff, not being entitled to equitable relief, could not in that action recover damages.

Dobler v. Smith, 294 Pac. 1089, decided by the Supreme Court of Oklahoma in 1930, states :

“We are cognizant of the fact that in certain cases a court of equity, when unable to grant specific performance of a contract, will not dismiss the petition, but will retain jurisdiction and award damages in place of such performance. *Cornell v. Rodabaugh*, 117 Iowa 287, 90 N. W. 599, 94 Am. St. Rep. 298; *Sanitary Dist. of Chicago v. Martin*, 227 Ill. 260, 81 N. E. 417, 10 Ann. Cas. 227. But the rule in this regard is that a court of equity will not grant relief unless the parties asking the relief bring themselves clearly within the rule entitling them to specific performance, and that specific performance cannot be awarded for the reason that the corpus or the thing in action has been disposed of, or for some reason that a decree for specific performance would not give the complaining party an adequate remedy. *Marks v. Gates* (C.C.A.), 154 F. 481, 14 L. R. A. (N.S.) 317, 12 Ann. Cas. 120; 25 R. C. L. 346. In cases of that nature, that is, cases falling under the special circumstances indicated, no special pleading in regard to damages is required.”

In *Bourget v. Monroe*, 58 Mich. 563, 25 N. W. 514 (1885), Justice Campbell says :

“It is claimed, however, that, if specific performance cannot be granted, complainant can have a decree for damages. But there is no authority for holding that equity can grant damages unless there is some case of equitable relief made out also, to which the damages would be applicable or subsidiary.”

See also *Schook v. Zimmerman*, 188 Mich. 617, 155 N. W. 526 (1915). The Supreme Court of Michigan said in this case :

“While equity will retain jurisdiction to settle controversies for which courts of law afford adequate relief when they are involved with and grow out of an equitable cause which gives the chancery court jurisdiction, the bare pleading in connection therewith of equitable rights not proven, does not confer jurisdiction to try controversies, which otherwise are of exclusive law jurisdiction, and legal remedies administered in equity must be connected with and grow out of an equitable right, both alleged and proven.”

See also *Toledo R. R. v. St. Louis R. R.*, 208 Ill. 623, 70 N. E. 715 (1904).

As was said by Vice Chancellor Reed in the case of *Stout v. Phoenix Assurance Co.*, 65. N. J. Eq. 573, 56 Atl. 691 :

“A court of equity in this state can deal with legal questions only so far as their decision is incidental or essential to the determination of such equitable question. Merely because a court of equity has acquired jurisdiction for one purpose, it is not empowered to retain the case for complete relief.”

Chief Justice Beasley said in *Loder v. McGovern*, 48 N. J. Eq. 279, 22 Atl. 200 :

“It is not true, by any means, that when a court of conscience has acquired cognizance for one purpose, it thereby acquires cognizance over the entire controversy for all purposes.”

But it may be said that these are cases from New Jersey, where equity and law are still separate and distinct. Let us pass to West Virginia:

In *Wyoming Sales Co. v. Smith-Pocahontas Coal Co.*, 105 W. Va. 610, 144 S. E. 410, 62 A. L. R. 740, it is said:

“The rule that equity will retain jurisdiction once assumed, and dispose of all matters in litigation, is limited to cases where that jurisdiction has been rightfully invoked. An equitable right must be both averred and proved before a purely legal right will be adjudicated by a court of chancery.”

And quoting from the opinion:

“The rule is that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and should dismiss the bill without prejudice.”

10 R. C. L., Sec. 120, p. 370.

This section states the general doctrine, which is to the effect that a court of equity once having assumed jurisdiction of a cause on any equitable ground will reach and draw into its consideration and determination the

entire subject matter, and will dispose of all matters involved in the controversy, even though it is required to pass on strictly legal questions or grant legal remedies. That is the general rule, but in Section 121, on page 372, the rule is laid down as follows :

“While it is true that a court of equity, having once obtained jurisdiction of a cause, will retain it for all purposes and administer complete relief, it is generally conceded, despite the existence of a few opposing decisions, which may be characterized merely as variants from the general rule, that in order to authorize relief which can be obtained in a suit at law there must be some substantial ground of equitable jurisdiction, and if there is no equitable ground of jurisdiction and the remedy sought can be as well obtained in an action at law, a court of equity cannot retain jurisdiction and grant a purely legal remedy. Mere statements in a bill on which the chancery jurisdiction might be maintained, *but which are not proved*, will not suffice to authorize a decree on such parts of the bill as, if standing alone, would not give the court jurisdiction, but to justify the retention of a cause not only must some special and substantial ground of equitable jurisdiction be alleged, but it must also be proved on the hearing. For instance, a bill for specific performance of a contract will not be retained for the assessment of damages where a case is not made for specific performance, and no other special equity is shown which will support jurisdiction of the court. So in general when the jurisdiction fails, all the power of the court also fails, except to give judgment for costs. Otherwise, as the

courts have frequently pointed out, a litigant, by a pretended claim for equitable relief, might deprive his opponent of advantages incident to an action at law, as for instance, his constitutional right of trial by jury.’’

1 *Pomeroy's Equity Jurisprudence*, Sec. 237, p. 341.

“The award of mere compensatory damages, which are almost always unliquidated, is a remedy peculiarly belonging to the province of the law courts, requiring the aid of a jury in their assessment, and inappropriate to the judicial position and functions of a chancellor. It may be stated, therefore, as a general proposition, that a court of equity declines the jurisdiction to grant mere compensatory damages, when they are not given in addition to or as an incident of some other special equitable relief, unless under special circumstances the exercise of such jurisdiction may be requisite to promote the ends of justice.’’

Wimer v. Wagner, 323 Mo. 1156, 20 S. W. (2d) 650, 79 A. L. R. 1231, was a suit for specific performance, decided by the Supreme Court of Missouri in 1929. It holds:

“The rule that equity, having once become possessed of a cause, will retain it for the purpose of administering full and complete relief, does not apply when the facts relied on to sustain the equity jurisdiction fail of establishment.’’

And in *Marks v. Gates*, 154 Fed. 481, the Ninth Circuit Court of Appeals said:

“The facts presented in the complaint are not such as to entitle the court to retain the case for the assessment of such damages as the appellant may have sustained for breach of the contract. A court of equity will not grant pecuniary compensation in lieu of specific performance unless the case presented is one for equitable interposition such as would entitle the plaintiff to performance but for intervening facts, such as the destruction of the property, the conveyance of the same to an innocent third person, or the refusal of the vendor’s wife to join in a conveyance.” (Citing authorities.)

There are, in fact, no intervening facts in the case at bar. It must be assumed that all of the plaintiffs knew the character of the community in which they lived. They may have chosen to call it a residential community, but you cannot change the character of a community by calling it one thing or the other. There was no ground here for equitable cognizance, and it is submitted there is no ground for legal cognizance. In practically all of the cases above discussed taken from the opinion of the Court in the *Kinsman* case, there was no issue raised as to a misjoinder of parties or causes of action, as there is in the case at bar. All of the facts which have been developed by the evidence, both before the filing of the supplemental complaint and after, should come before a jury if the matter is to be tried as an action at law. Each plaintiff should be required to bring his own action, and stand upon his own feet. The idea of trying an action as if it were strictly equitable in its nature, and

then, after the completion of the trial, transforming it into a law action, certainly cannot be commended.

All of the evidence admitted by the Court prior to the filing of the supplemental complaint in the equity proceedings was considered by the Court in determining the issues raised by the supplemental complaint. The *Kinsman* case, when read and thoroughly considered, is not an authority for the contention made by the plaintiffs that they may try their case as they have tried it, contending at every point that it was a suit in equity and not one for damages; that they might proceed up to the point where the Court was ready to sign findings of fact, conclusions of law and decree and then, upon motion, have the Court re-open the cause, amend the complaint and transform it into a suit for damages. Such a consideration of the *Kinsman* case makes inevitable the following conclusions:

1. That portion of the opinion of Chief Justice Frick which reads:

“A majority of the court doubt both the propriety and the necessity of enforcing the alternative relief suggested in the quotations from Pomeroy. Therefore, both Justice Gideon and myself defer to their judgment and have yielded assent to the statement as stated”

makes it extremely doubtful in the mind of the writer whether the opinion can be considered as an authority

for the proposition that where an injunction is denied as a matter of right, a Court of equity may still retain the case and assess damages caused by the alleged nuisance.

2. Does not the *Kinsman* case, if accepted as authority for the proposition that a court of equity may retain a cause, where an injunction is denied as a matter of right, and assess the damages as a matter of law, constitute a severance of each plaintiff from every other plaintiff, and thereby transform one action into fifty-nine separate actions? (There were fifty-nine plaintiffs in the *Kinsman* case.)

It will be noticed in the opinion of Justice Frick that he says:

“Nor does such procedure affect the right of appeal of any one or all of the parties to the action. In actions where the rights of the parties are separate, but where they join in one action, to avoid a multiplicity of suits or for some other good reason, each one may prosecute an appeal independently.”

(He also discussed the right of the defendant to appeal as to any one or more or all of the plaintiffs.)

3. Has it ever been supposed that merely because many persons have been separately injured in one accident, or by reason of one wrong, in order to avoid a

multiplicity of actions all the persons thus injured could join? Is such a test an accurate one by which to determine the right of plaintiffs to join in one suit?

The cases cited and relied upon by Justice Gideon, to-wit: *Robinson vs. Appleton*, 124 Ill. 238, 15 N. E. 761; *Browder vs. Phinney*, 30 Wash. 74, 70 Pac. 264; *Waite v. O'Neil*, 72 Fed. 348; *Waite v. O'Neil*, 76 Fed. 408; *Combs v. Scott*, 76 Wis. 664, 45 N. W. 532; *Goddard v. American Queen*, 59 N. Y. S. 46, are each and all, with only one possible exception, predicated upon the doctrine that equity would have granted relief except for an intervening right, and did not involve multiplicity of parties plaintiff or misjoinder of causes of action. Furthermore, in the *Kinsman* case the finding of a nuisance by the Court was sustained by the evidence. In the case at bar it is not.

In *Browder v. Phinney*, supra, the action was one for damages based upon the ground that the defendant had wrongfully evicted the plaintiffs from certain leased premises. It appeared that the plaintiffs were put in possession in October, 1899; that they paid rent for the months of October and November, and said rent was accepted by said defendant; that on the 12th day of January, 1900, they were evicted from the premises. The contract or lease upon which they relied was claimed to be invalid in law, because it was not acknowledged, and it was claimed that the facts showing part performance of the contract could be enforced in equity but could not

be shown in an action at law. For this reason upon motion of the defendant, the action was dismissed. The Supreme Court of Washington held that the Court was empowered to try all of the features of the action and that it was a question for the jury whether there was sufficient testimony to establish part performance.

If the case at bar were a case by a single plaintiff, then the element of misjoinder would be eliminated, but the question of a right to a jury trial would still be present. In the Washington case there was no question of misjoinder. The action was one at law and was being tried before a jury. In the case at bar all the evidence has been taken before the Court without a jury.

4. Under the *Dahl* case, the plaintiffs have no right to recover in an action at law, and it is well settled that the equitable principle of retaining jurisdiction has no application to a case where there is no right to recover either at law or in equity. *Hennessy v. City of Boston* (Mass.), 164 N. E. 470, 62 A. L. R. 780.

To summarize the foregoing contentions, defendant claims:

1. Plaintiffs had no right to re-open their case, and an order allowing them to re-open it is an abuse of discretion and constitutes reversible error.

2. The suit as originally commenced and tried was one in equity. The right to join could exist only in equity.

Equity jurisdiction has failed. To transform the action now into one at law is not supported by any legal or equitable rule of procedure.

3. To permit the case to be reopened and the action to be determined as one at law for damages denies the defendant's right to insist upon a misjoinder of parties plaintiff, a misjoinder of causes of action, and denies defendant's right to a jury trial.

To sustain the decree in this case would not only permit every nuisance suit instituted to follow the same procedure, but would invite this practice. Such a practice would forever defeat every future defendant's right to a trial by jury in a nuisance action. There is hardly a nuisance conceivable affecting more than one person which would not lend itself to such treatment. Such a practice, once established, would be a departure from due process of law, and violative of the basic and constitutional rights of litigants.

*Multiplicity of Suits Alone Does Not Justify
Equitable Interference*

The mere fact that eleven plaintiffs have a community of interest in the questions of law and fact presented by this controversy will not warrant the interposition of equity.

The case of *Tribette v. Illinois Central R. R. Co.*, 70 Miss. 182; 35 Am. St. 642, 12 So. 32, 19 L. R. A. 660,

is one of the leading authorities of the country. If it is the position of the plaintiffs that mere multiplicity of suits can justify the Court in retaining jurisdiction of this case, and determining the right of each individual plaintiff to recover damages as against the defendant, then the Tribette case is a complete answer to that position.

Cumberland v. Williamson, 57 So. 559, was decided in 1912. The Supreme Court of Mississippi again reviewed the contention to be found in some of the editions of Mr. Pomeroy's work on Equity Jurisprudence, and refused to accept that doctrine.

See also *Turner v. City of Mobile*, 135 Ala. 73, 33 So. 132. In this case the Supreme Court of Alabama, speaking through Chief Justice McClellan, reviews what is known as the doctrine of multiplicity of suits and holds:

“Where several persons hold tracts of land under different titles, and there is no privity between them, but a person brings an ejectment suit against each of them, plaintiff's cause of action in each depending on the same state of facts and principles of law, there is no ground for equity jurisdiction to prevent a multiplicity of suits.”

In the course of the opinion Chief Justice McClellan says:

“We have considered the position of Mr. Pomeroy on this question thus at length because the views of no text-writer of the law are entitled

to more consideration than his, because his work is the authority mainly relied upon by the appellants in this connection, and because we are disinclined to repudiate any proposition advanced by him without a thorough examination of it."

When it is remembered that Chief Justice McClellan at one time said in substance that the only place he had disagreed with Pomeroy was upon this question, then the force of the Alabama opinion is made manifest.

He quotes Judge Cooley very extensively, but Cooley's quotation may be summed up in one pointed sentence: "Suits do not become of equitable cognizance because of their number merely."

The Alabama Court also quotes Judge Nelson of the Federal bench in part as follows:

"There is scarcely a suit at law or in equity which settles a principle, or applies a principle to a given state of facts, or in which a general statute is interpreted, that does not involve a question in which other parties are interested, as, for instance, the doctrine of trusts, and the statutes of descents, of frauds, of wills, and the like; yet no lawyer would contend that such an interest would justify the joinder of parties as plaintiffs, in cases arising under the law of trusts, or under any of the statutes mentioned. The same may be said of questions arising under the revenue laws, such as the tariff and the excise laws, which are the subject of litigation in the courts almost daily. Large classes of persons other than the parties to

the suit are interested in the questions involved and determined. To allow them to be made parties to the suit would confound the established order of judicial proceedings, and lead to endless perplexity and confusion."

Justice McClellan himself says:

"It is a palpable non sequitur to say that when numerous persons have like, but independent, legal estates or legal rights in respect of which severally they have no right to invoke the jurisdiction of chancery, yet because they are numerous, the separate legal right of each is metamorphosed into an equity right in all, or in one for all."

He points out that when each plaintiff has a right to come into equity on some identical ground, then several plaintiffs having this common right would be allowed to come in together, on the theory of multiplicity of suits, but it does not follow that merely because plaintiffs are numerous, or the suits are many, because of the multiplicity, equity jurisdiction has been created.

It is submitted that to try the issue between the defendant and the individual owners of the eleven different tracts of land in one action cannot result otherwise than in confusion and injustice. This could not be demonstrated more clearly than by the results reached in this case.

Neither Plaintiffs' Rights nor Injuries Are Common

These properties are in some instances located on the east, in some on the west, in some on the north and in some on the south of the defendant's plant. Some of the properties constitute tracts of considerable size and others are small. Some of these tracts are improved; others are not improved; some are in close proximity to the plant, others more than three-quarters of a mile distant. One of the properties may be subjected to some odor when the wind is blowing from the plant and toward that property, whereas the other properties at that time may not get any odor at all. Some of the properties may have a large amount of fertilizer upon the properties, creating an odor as bad as any that could be produced by the rendering plant. The odors at the worst are intermittent and cannot affect all of these tracts at one and the same time.

Going to the owners, some of the owners have had a pecuniary interest in industrializing the particular tract whereon the plant is located. Others participated in its operation and construction. The defenses as to one party may be no damage at all, whereas, the strongest defense against some might be in the nature of estoppel. There is, however, one defense common to all, and that is the case of *Dahl v. Utah Oil Refining Company*, supra. Under that decision there could be no recovery at law; certainly none in equity.

It would be strange doctrine to believe that the plaintiffs could join together and make an untruthful allegation to the effect that the community was strictly residential and have the evidence show that this allegation was not sustained by the proof, and then have that unsupported allegation continue in its use and only by the Court's contrary finding serve as a basis for giving legal relief. This would be one of the most anomalous positions that was ever insisted upon in a court. Its novelty, however, is exceeded by its want of merit.

With such several rights and injuries and defenses there can be no joinder either in equity or at law.

*Persons Owning Distinct Property Interests in Severalty
Cannot Bring a Joint Action to Recover Damages
for a Nuisance.*

The reason for this rule is that they have no common interest either in the object of the suit or in the amount to be recovered. Some of the cases already cited support our contention. Merely because there are numerous plaintiffs, or there may be a multiplicity of suits, or, as one judge put it, a "bundle of separate suits", is no sufficient reason for permitting a joinder, either at law or in equity.

As Mr. Justice Peckham said, speaking for the United States Supreme Court in *Hale v. Allinson*, 188 U. S. 56, 47 L. Ed. 380:

“It might be that the exercise of equitable jurisdiction on this ground” (referring to multiplicity of suits), “while preventing a formal multiplicity of suits, would nevertheless be attended with more and deeper inconvenience to the defendants than would be compensated for by the convenience of a single plaintiff.”

One learned author has referred to bills of complaint of this character as “spurious bills of peace.” We know that each plaintiff must make his own case upon the facts. One might succeed and another fail, and to permit persons so severally interested to join in either a legal or equitable suit would confound the established order of judicial proceedings and lead to interminable confusion and embarrassment.

In *Bliss on Code Pleading*, Third Edition, Sec. 76, the following is found:

“This permissive union of parties is limited by the terms of the rule. All who would unite must be interested in the subject of the action and in the relief. It may not be possible to define with absolute precision the phrase “subject of the action’, which is used in different parts of the Code, but we may say, in general, that it is the matter or thing concerning which the action is brought, and though one may be interested in that matter, unless he is also interested in the relief which is sought by another, he is not permitted to unite with him.

“Thus, to take the cases which have been cited, two or more owners of mills propelled by

water are interested in preventing an obstruction above that shall interfere with the downflow of the water, and may unite to restrain or abate it as a nuisance; but they cannot hence unite in an action for damages, for, as to the injury suffered, there is no community of interest. There is no more a common interest than though a carrier had, at one time, carelessly destroyed property belonging to different persons, or the lives of different passengers. The abatement or prevention of the nuisance involves but a single judgment, in obtaining which all the mill-owners are interested, and by which they are all benefited; but to enable them to unite in an action for their several damages, there must be some connection—something in which they have a common interest.”

Nahate v. Hanson, 106 Minn. 365, 119 N. W. 55 (1908):

“All persons whose property is affected by a nuisance, though they own the property in severalty, may unite in an action to abate the nuisance; but they cannot join with a cause of action for that relief their several claims for damages, in which there is no joint or common interest.”

The Court in its opinion said:

“But plaintiffs have no joint or common interests in the damages sustained, and it is clear that their separate claims in that respect cannot be joined with the cause of action for the equitable relief, in which they do have a joint and common interest.”

In *Foreman v. Boyle*, 88 Cal. 290, 26 Pac. 94 (1891) under a code identical with that of Utah, the plaintiff Foreman, owning a tract of land in which his co-plaintiff had no interest, joined with another plaintiff Rogers and brought suit against the defendants because the defendants had diverted the waters being used by both of the plaintiffs. Foreman owned water and land and Rogers owned water and land, but neither plaintiff had any interest in the water or land or ditch of the other. The Supreme Court of California laid down the rule that the plaintiffs had no common interest in the damages, and that they could not unite in an action for damages, saying:

“Two or more owners of mills propelled by water are interested in preventing an obstruction above that shall interfere with the down flow of water, and may unite in its restraint or abate it as a nuisance, but they cannot hence unite in an action for damages, for as to the injury suffered there is no community of interest.”

This is a quotation from *Bliss on Code Pleading*, Sec. 76.

Barham v. Hostetter, 67 Cal. 274, 7 Pac. 689 (1885) was an action brought by eleven plaintiffs to restrain the alleged diversion of the waters of a certain creek by the defendant and for damages for such alleged diversion. One plaintiff was alleged to be the sole owner of 60 acres of land affected by the deprivation of the water caused by the defendant; two plaintiffs were alleged to be

joint owners of 40 acres; another plaintiff of 100 acres; another plaintiff of 60 acres; another plaintiff of 20 acres, and so on until it was shown by the complaint that each of the plaintiffs owned some particular tract of land. The Supreme Court of California said:

“The cause of action for damages is not joint as to all the plaintiffs, but undoubtedly several; it is joined with a cause of action for an injunction which is common to all the plaintiffs.”

The Court then quoted the section above cited from Bliss. This case is authority for the proposition that a cause of action for injunction which is common to all the plaintiffs cannot be joined with a cause of action for damages which is not joint as to all the plaintiffs but is undoubtedly several.

It may be helpful to consider the nature of the two theories upon which the suit in equity for abatement rests on the one hand and the action for damages rests, upon the other hand. Evidently the plaintiffs claimed that the defendant was guilty of maintaining a nuisance which could be abated or suppressed by a court of equity. It was claimed by the plaintiffs that the operation of this rendering plant polluted the air with offensive odors injurious to health. The Court's findings disclose no irreparable injury to any plaintiff. The Court does find common law damages to the lands of plaintiff but no justification for the joinder.

Forms of Action Not Abolished by Code

Section 104-7-3, Utah Statutes 1933, in part provides :

“Plaintiffs may unite in the same complaint several causes of action, legal or equitable or both,” etc.

Section 104-9-5 provides in part:

“A defendant may set forth by answer as many defenses or counterclaims, legal or equitable or both, as he may have”, etc.

All through the code of Utah and all through the decisions that have been rendered in construing and applying that code this Court has recognized what was known as a suit in equity, and made marked distinctions between such suits and actions at law, generally holding that the equitable issues shall be determined before entering upon a trial of the legal issues.

In 1878 Philemon Bliss gave to the bench and the bar his work upon Code Pleading, and in 1887 he published a second edition. In 1894 a third edition was published by Elias F. Johnson. In Section 10 he says:

“We have seen that in the States adopting the New York system, except Kentucky, Arkansas, Iowa and Oregon, the distinctions between actions at law and suits in equity are abolished, either directly or by providing that there shall be but one form of action. Is the distinction, in

fact, abolished, and was it necessary to expressly retain equity jurisdiction in the States named?

“The expression is not a happy one, for it is not easy to see how it is possible to abolish the distinction between these two classes of actions. One or the other may be abolished. The law-making power may say that suitors shall no longer be entitled to equitable relief—that is, that hereafter they shall be allowed to sue only for money or for specific property; or, on the other hand, that they shall be entitled to equitable relief only—that is, that they may sue for the specific performance of a contract, but not to recover damages for its breach. But it cannot abolish the distinction between the two actions; and if both these remedies continue to be allowed, the distinction remains. That it does remain is clear. The codes provide for trial by jury of substantially the same issues as were so triable before their adoption—that is, issues of fact in actions for the recovery of money or of specific real or personal property. This provision covers all the issues of fact in common-law actions, and probably a few others; as, where it formerly became necessary to resort to equity to recover a money debt. They also provide that every other issue—that is, in addition to issues at law, those which formerly were tried by the chancellor—shall be tried by the court. Thus the chief distinction between actions at law and suits in equity is preserved. The distinctions abolished are simply those which formerly existed between the two classes of actions in the manner of stating the facts, in the style of the writ, and the mode of submitting evidence; those which arise from the mode of trial and from the nature of the re-

lief are as marked as before. * * * Legislation may affect modes of procedure; it will be found more difficult to reform a language."

In *Park v. Wilkinson*, 21 Ut. 279, 60 Pac. 945 (1900) the Court said:

"The equitable issues should be first passed upon by the court, for upon such determination as to the relief claimed by a defendant will the necessity of proceeding with the action at law depend."

No one can successfully contradict the proposition that the Code of Civil Procedure, especially in Utah and in California, abolished forms but retained substance, and the distinction between law and equity is one of substance rather than form. Some court (in Utah the District Court) has the general jurisdiction to grant or award either legal or equitable relief. Litigants seeking such relief all enter the court by the same door. Any litigant may invoke such court's general power to grant either or both kinds of relief, but legal relief has not been made synonymous with equitable relief, and, as Judge Bliss well said in the section above quoted: "If both of these remedies continue to be allowed, the distinction remains."

In the note 19 *L. R. A.* (N. S.), 1075, there is contained a discussion of the effect of code provisions. That note reads:

“The effect of statutory changes providing for the granting of judgments at law and equitable relief by the same tribunal, and abolishing distinctions in the form of pleadings, may be best traced in detail in the decisions hereinafter set forth. It may here be stated, however, that the inherent distinctions between actions at law and suits in equity are still recognized; and the effect, broadly stated, of such statutory changes, is to permit the retention of a case in which the allegations of the complaint to which an answer has been filed disclose, in addition to a claim for equitable relief, the existence of a cause of action at law.

“But where the complaint, as framed, discloses only a cause of action in equity, the court cannot, upon denying equitable relief, enforce a legal right disclosed by the proof.”

On Page 1077 the same author says:

“But an allegation of grounds in plaintiff’s complaint for equitable relief and nothing else, where proof of such grounds fails, does not permit the court to try without a jury a cause of action at law appearing to arise out of the transaction.”

Park v. Minneapolis Ry. Co., 114 Wis. 347, 89 N. W. 532:

“It must not be overlooked, that, as a general rule, legal rights should be enforced in a court of law, where the constitutional right to trial by jury is preserved. Only in exceptional cases, where unnecessary hardship clearly demands, should courts of equity assume that province.”

In *Schroeder v. Ennis*, 5 N. & S. R. 881, it was said:

“It was argued that the court, having once obtained equitable jurisdiction of the case, should retain it for the purpose of deciding all the questions and doing justice between the parties. If this be so, all that a party need do, to transfer his litigation to a court of equity, is to allege grounds of equitable jurisdiction, and, upon the trial, come in with a purely legal cause of action or defense. It must be the facts, and not the allegations, which call upon the court to exercise its equity jurisdiction.”

Gentry v. Gentry, 90 Fla. 595, 106 So. 473, on p. 477 the Court says:

“All grounds of equitable jurisdiction having been properly denied and eliminated, the court was not justified in decreeing that the appellee be restored to the offices of president and director, nor in adjudicating his right to recover the full amount of his salary from October 1, 1922, to the date of the decree. This was not germane, nor incidental to any ground of equitable jurisdiction existing in the case; all such having been extinguished. * * * The appellee should have been relegated to his legal remedies as to recovery of salary and as to restoration to office.”

It is not believed it is logical for anyone to say that the question being discussed is substantially affected by the Code of Procedure. That Code, of course, has never been applicable to federal courts, and yet federal courts have gone quite as far in administering what is

known as “alternative legal relief” as have any of the state courts.

Where equitable and legal remedies are granted by the same court, then as between a single plaintiff and a single defendant, if, after failure to prove the allegations of a complaint which would give equity jurisdiction, enough still remains in that complaint to make out a cause of action at law, and there is sufficient evidence to sustain it, the Court should not dismiss the action. It should give either party an opportunity to demand a jury trial, and if such jury is demanded it should retain the case and try it before a jury. If a jury trial is waived by both parties, then under such circumstances the Court would have both a power and a duty to render judgment for such an amount as was established by the evidence. This is giving full effect to both the letter and spirit of the Code of Procedure.

But where there are numerous plaintiffs, each owning separate and distinct properties and having no community of interest, except that they are all complaining of the same alleged nuisance, and are all permitted to join together, seeking equitable relief in the form of an injunction, then a failure on their part to prove the averments of their complaint that would give equity jurisdiction is fatal to all the jurisdiction that the plaintiffs *thus joined* had the power to invoke, and the action must be dismissed either by the plaintiffs themselves,

without prejudice, or by the court with leave granted to each plaintiff to sue at law.

If this is not true, then numerous plaintiffs may join together eleven actions at law, and, as one judge has said, give eleven cases one complaint and one number in the clerk's office, and thereby deprive the defendant of the advantages of separate trials, of all benefit of the distinctions which exist between legal and equitable remedies in the trial court, and then in this court materially alter the scope of its power of review. No code has ever yet destroyed the distinctions referred to, nor can it so long as we have legal and equitable remedies for accomplishing the results just delineated.

Considering the rights of the plaintiffs to damages in actions at law, or, for that matter, in any action, the object of such matters stands out in direct contrast to that of the object to be attained by the suit in equity for injunction. Actions at law have for their purpose that of compensation for injuries wrongfully inflicted. The compensatory damages, if any are found and allowed, are not a substitute for or an incident to equitable relief, but the defendant held liable to pay such damages is compensating each plaintiff for the injury that the maintenance of the wrongful structure has done.

Nuisance at Law Must First Be Established

Injunctive relief should not be given, except under exceptional circumstances and with clear and convincing

proof of the necessity therefor, without first having the nuisance established at law. This principle is clearly recognized by this Court in the recent case of *Norback v. Board of Directors*, supra. The Court held:

“The primary purpose of the instant case is the establishment of an easement based upon an alleged prescriptive user. If plaintiff fails in this his cause of action fails. The right of injunctive relief cannot come into existence until the easement has been established. This issue the plaintiff was entitled to have tried to a jury.”

The *Kinsman* case is not cited in the majority opinion of Justice Moffat, but is cited in the dissenting opinion of Justice Straup and was, therefore, not overlooked by the Court.

In the *Norback* case Mr. Justice Moffat, speaking for the Court, cites with approval the case of *Rhea v. Forsyth*, 37 Pa. 503, 78 Am. Dec. 441, which was an action for injunctive relief in a court of equity, and quotes therefrom as follows:

“ ‘The American cases are very numerous to the effect that the right of the complainant ought to be admitted or established at law before granting an injunction. (Cases cited.) * * * Neither the equitable jurisdiction of the court below, nor our jurisdiction, can properly attach until the plaintiff has established his right at law. Has the alley been in common use so long that the successors in the title may set up the presumption of a grant?

If not, did the defendant dedicate it to the use of the plaintiff's lot? These are questions for a court and jury to decide in an action at law.'

and continues :

"In *Taylor v. Wright*, 76 N. J. Eq. 121, 125, 79 A. 433, 435, we find :

" 'If the easement here asserted by complainant exists, it arises from well-defined rules of law and is a legal as distinguished from an equitable estate or interest. * * * That tribunal is the proper tribunal to determine the existence or non-existence of an easement or other legal estate in lands, and this court cannot properly determine an issue of that nature except to such extent as may be necessary to prevent irreparable injury.' (Cases cited.)

"Whether or not the law courts and the equity courts were separate courts, the analogy of the situation is pertinent to the issues in the instant case. The necessity of establishing the easement at law before equity principles or 'Equity Jurisprudence,' as distinguished by Pomeroy, may be applied to injunctive relief, is apparent, although under our procedure both may be accomplished in the same action."

It is submitted that such contentions as are made in the dissenting opinion in the *Norback* case, and as are made by the plaintiffs in the instant case, are based upon an erroneous conception of the effect of the Code of Civil Procedure. That Code was not intended to destroy the right of trial by jury. As was said in the

opinion in the *Norback* case, "That either party to an action at law has the right to trial by jury when timely and properly demanded, is supported by the law and the decided cases." (84 Utah, 514.)

On the same page this Court quotes with approval from *Hansen v. Hart*, 26 Ut. 229, as follows:

"It has long since been held that under our system a legal and equitable remedy may be sought in the same action; but each remedy must be governed by the same law that would apply to it if the other remedy had not also been asked for."

It would be strange indeed if any Court should hold that the Code of Civil Procedure providing "that there shall be but one form of civil action, and law and equity may be administered in the same action" (Article VIII, Sec. 19, Utah Constitution), had the effect of making actions equitable which had theretofore been legal in character. It is the substance and not the form of things that controls. It would be even stranger to find that equity could be given jurisdiction by means of false allegations in the pleadings, and then, having acquired jurisdiction by such means, it could determine the strictly legal rights of the parties without regard to their right to a trial by jury, and even in disregard of the misjoinder of parties plaintiff.

What is said with reference to an easement in the case quoted should be equally applicable to the case of a nuisance such as we have in the case at bar.

WHAT IS A NUISANCE

The Utah statute, Section 104-56-1, reads as follows:

“Anything which is injurious to health, or indecent, or offensive to the senses, or 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 any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, and damages may also be recovered.”

Section 103-41-1 reads as follows: ,

“Whatever is dangerous to human life or health, and whatever renders soil, air, water or food impure or unwholesome, are declared to be nuisances and to be illegal, and every person, either owner, agent or occupant, having aided in creating or contributing to the same, or who may support, continue or retain any of them, is guilty of a misdemeanor.”

Section 103-41-3 reads as follows:

“A public nuisance is a crime against the order and economy of the state, and consists in unlawfully doing any act, or omitting to perform any duty, which act or omission either:

(1) Annoys, injures or endangers the comfort, repose, health or safety of three or more persons; or,

(Applied: Dahl v. Utah Oil Ref. Co., 262 P. 269, 71 U. 1)

(2) Offends public decency; or

(3) Unlawfully interferes with, obstructs or tends to obstruct, or renders dangerous for passage, any lake, stream, canal or basin, or any public park, square, street, or highway; or,

(4) In any way renders three or more persons insecure in life or the use of property.”

These various sections codify and attempt to define what constitutes a nuisance. It is significant that in none of these statutes does it define a nuisance as that which depreciates the market value of lands as home sites. In this connection it is respectfully submitted that there is but one basis upon which the Court finds the plaintiffs entitled to damage. In its Finding No. 4 (Abs. 395) the Court finds:

“That by reason of such discharge of noxious and disagreeable odors by the defendant’s plant and the carrying of such odors by movement of the atmosphere to the lands of the plaintiffs the market value of such lands has been depreciated as hereinafter set out, and the said lands have been made, and by the continued operation of defendant’s plant will be made, substantially less desirable as home sites.”

and in Finding No. 5 the court finds that these odors

“are sufficiently intense and obnoxious to injure each of the plaintiffs by making their lands sub-

stantially less desirable as dwelling places and substantially less attractive to tenants and prospective purchasers of farms or home sites.”

and in Finding No. 6:

“That purchasers of farm lands, such as the lands described in plaintiffs’ supplemental complaint, are usually desirous of acquiring lands upon which homes can be maintained and the frequently recurring presence of obnoxious odors such as are discharged from defendant’s plant depreciates the market value of farm lands adjacent to such plant.”

This Finding No. 6 is purely gratuitous on the part of the lower Court. No pleadings are to be found in the case raising any such issue, and no evidence is adduced from which the Court could properly find that purchasers of farm lands are usually desirous of acquiring lands upon which homes can be maintained. This, it is submitted, is not a finding of fact but a conclusion on the part of the Court, a conclusion in effect that people generally would seek out property of this nature contiguous to railroad rights of way for the building of homes. This Court will take judicial knowledge of the fact that there are many farm lands so located that the owners or tenants prefer to live in the town and go and come from the farm as the industry of the farm requires, rather than to make the farm their home.

These findings clearly indicate that the Court found nothing more in this action upon which to predicate dam-

ages than a depreciation in the market value. In light of the foregoing statutes of this State, it is submitted this does not in and of itself constitute a nuisance. It is no more possible to recover from a neighbor on the ground that what the neighbor lawfully does upon his land depreciates the market value of the land in the vicinity than it is possible for the person who so uses his land to increase the market value of the community can recover from those benefited an amount equal to the increase in the market value of their lands. Land owners must in the very nature of things accept the unearned depreciation in lands as well as the unearned increment.

The lower Court has wholly ignored the fact that with the coming of industry into a community such as the one in question, the plaintiffs have actually been benefited by this new industry, not only so far as the health and sanitation of the community are concerned, but likewise from the standpoint of employment and from the standpoint of the use and occupancy of such homes as are built in the vicinity of industry by the industrial workers. The Court does not find damages in this case because of injury to health, quoting the words of the statute, or because of anything that is indecent or offensive to the senses or because of an obstruction to the free use of property, or because of an interference with the comfortable enjoyment of life or property, and those are the only elements for which the first statute provides; nor does the Court predicate damages upon

anything which is dangerous to human life or health or renders the soil or the air or the water or food impure or unwholesome, as provided in the second section of the statute above quoted; nor have damages been awarded because of any public offense peculiarly injuring these plaintiffs. Throughout these statutes, the term "use of property" is used, but nowhere "sale of property", so that the lower Court has gone entirely beyond the terms and scope of these statutes to find its basis of damage.

Society could not exist if the peculiar tastes and dispositions of individuals were taken into consideration and given recognition by the law. There is scarcely a human activity that does not in one sense annoy some individual who comes in contact with that activity. There are many noises and odors that are unpleasant to everyone, and yet life cannot exist without human beings coming into the presence of such odors. It all depends upon the places and circumstances under which they are encountered as to whether it is reasonable to endure them or not. When one goes into a slaughter house he does not expect to go into the same atmosphere that he would expect to find in the quiet of a refined library. Defendant's plant, it is respectfully submitted, is entirely proper and in place in the midst of stock feeding corrals and is necessarily incident to the business of stock raising and feeding.

The law of nuisance proceeds on the theory that one man must so use his property as not to inflict injury upon

owners in their use of other property. If industrial workers, by making their homes near industry, could transform the community from industrial to residential by virtue of their so establishing their homes, as John Anderson undertakes to do in this action, industry could be completely destroyed by these same workers having the industry declared a nuisance because of their homes which they built with their wages earned in the industry.

Compare the situation presented in the *Dahl* case by the Utah Oil Refining Company plant, within the city limits of Salt Lake City, within a thousand feet of the St. Marks Hospital, an institution to promote and restore the health of those who are suffering physically. Can any reason be found why the law of this State, as declared in the *Dahl* case, should not likewise protect this defendant. Judge Cherry, in his opinion, says :

“There is no claim that the defendant, by any careless or extraordinary or unnecessary use of its property, produces the injury complained of. The sole ground of complaint is that offensive and disagreeable fumes or odors emanate from the refinery and are carried through the air to the plaintiff’s house. It is admitted that the odors are not constant and are not injurious to life or health, and it is obvious that they cause no direct or physical injury to property. The extent of the offense claimed is that the odors are disagreeable and unpleasant and have at times wakened persons sleeping in plaintiff’s house and required them to shut doors and windows. In these circumstances we are unable to say as a matter of

law that a case of unreasonable use or actionable nuisance was made out.” (Citing authorities) “No precedent for sustaining liability under similar circumstances has been cited, and we have found none. The essential facts with respect to the nature, locality, and manner of use of defendant’s plant, and the situation with reference thereto of the plaintiff’s house, and the degree and extent of the plaintiff’s annoyance and discomfort, are so clear that the question presented is one of law. We therefore conclude that the trial court erred in not directing a verdict for defendant and in denying defendant’s motion for a new trial.”

It is well to remember that this *Dahl* case was a law case tried before a jury, and was predicated upon the depreciation of the value of plaintiff’s property as a place to live. The plaintiff in that action had not engaged in any industry, as have the plaintiffs in the suit at bar. The property of the plaintiff was a city home, located on a city lot. This Court had no discretion, but was bound strictly by the rules of law that required the evidence to be in such a condition as to permit of but one conclusion in the minds of reasonable men, and yet this Court, having that rule of law in mind, was compelled to reverse the trial Court for not directing a verdict in favor of the defendant. When this is fully appreciated, then the power of the *Dahl* case is manifest. Surely it will not be contended that it takes less evidence to establish a nuisance in equity than it does at law. The rule is clearly settled to the contrary. One must prove the

existence of a nuisance, and he must prove every element that is required for recovery on the law side of the court, and then only is he entitled to proceed with the necessary additional proof to recover in any wise in equity.

*First Establish Nuisance at Law Before
Seeking Equitable Relief*

The rule that a litigant must first establish his claim to damages at law before seeking equitable relief is still as salutary a rule as it ever was, regardless of the fact that some courts have not adhered strictly to this rule. See case of *Norback v. Board of Directors*, 84 Utah 506.

In the *Dahl* case Mr. Justice Cherry cited with approval *Strachan v. Beacon Oil Co.*, 251 Mass. 479, 146 N. E. 787 (1925). 190 plaintiffs alleged that the defendant maintained in the City of Everett a nuisance by reason of causing the emission of noisome and offensive gases and odors and by reason of the occurrence of loud and violent explosions and frequent and dangerous fires, all of which acts and conditions were alleged to have been done in the conduct of its business. Those plaintiffs sought an injunction and an assessment of damages as a result of the alleged nuisance. Testimony was taken before a master and it was finally reviewed by the Supreme Court of Massachusetts.

It is submitted that one cannot read this case without coming to the conclusion that the finding in the case

at bar must be for the defendant. When one compares it with the *Dahl* case he will be forced to the conclusion, however, that the *Dahl* case is a stronger authority than is the *Strachan* case, for the reason that in the *Dahl* case the Supreme Court of the State of Utah reversed the verdict of a jury, whereas in the *Strachan* case the Supreme Judicial Court of Massachusetts merely affirmed the findings of the lower court.

If the coming of the railroad, the brick yards, the pea vinery, the sugar factory, the flour and alfalfa mills, the beet dump and the loading racks, the stock feeding yards and the other industrial activity testified to does not to some extent alter the character of a community or determine its character as industrial rather than residential, then it is difficult to see how this small rendering plant of the defendant could change the character of the community in the slightest respect, or disturb the residential character of the same. Compare the slight effect this little plant has upon the community as compared to the steel plant at Springville or the industries that have grown up incident thereto in a community which a few years ago was given over to farms and small industries such as now exist in the vicinity of defendant's plant.

*Mere Diminution in the Value of Property, Without
Irreparable Mischief, Will Not Furnish Any
Foundation for Equitable Relief.*

Are we not to be bound by an authority so well established as *Story's Equity Jurisprudence*, when he declares the law to be

“So a mere diminution of the value of property by the nuisance without irreparable mischief will not furnish any foundation for equitable relief.”

(2 *Story's Equity Jurisprudence*, Sec. 1253, 13th Ed.):

To apply this rule to the case at bar entirely defeats the Court's finding of nuisance. If no nuisance exists there is no equitable jurisdiction, and no jurisdiction to retain the case for the purpose of awarding damages, a subject upon which appellant elsewhere herein addresses itself.

The case of *Biber v. O'Brien*, 32 Pac. (2d) 425, Dist. Ct. of Appeal, Cal., 1934, is cited because it is a rather thorough discussion of that phase of the law which relates to apartment houses and hotels in cities and as they affect residential property. It was presented to the Court by some of the ablest members of the California bar. One portion of the opinion is applicable to one viewpoint that may be taken of the case at bar. The Court said:

“As hereinbefore stated, an individual complaining of an unlawful structure must show that

he has suffered some exceptional damage other than that suffered by the public generally. An increase in fire hazard or in insurance rates has been generally held not to constitute such damage.” (Citing authorities) “Nor will the fact alone that property will be depreciated in value by the mere proximity of an unlawful structure have that effect.”

It should be remembered that there is not a particle of evidence from which it might be inferred or found that any of the plaintiffs’ property has been damaged in any respect by odors or fumes. None of the plant or animal life that exists on any of the plaintiffs’ property has been affected in any way.

As appellant reads the *Dahl* case, its effect is not confined alone to an industrial section, but rather lays down the rule as applicable in any situation where the activities of the defendant complained of are a reasonable use, in view of the nature of the locality. There is no evidence to show the unreasonableness of maintaining a rendering plant in a stock feeding area. Whether we classify stock feeding as agricultural or industrial, we can with the same propriety designate defendant’s activity by the same name. Its business is an incident to the raising and particularly the feeding and fattening of livestock. To talk about maintaining residences up and down the stock-feeding area of Utah County contiguous to the main lines of the Oregon Short Line Railroad and the Rio Grande Railroad is to talk about temporary maintenance. These lands and these homes are

awaiting the coming of the industry which their owners, as well as everybody else, hope to see come. The owners, of course, desire to get something in the way of income to pay taxes and make whatever use they can of these properties until the time arrives when the properties may be applied to an appropriate and beneficial use that will yield returns justifying the amount of money invested in such properties. If it were not for the future hopes of industry in this locality, the identical lands of the plaintiffs would not have the value which is now claimed for them.

It is said that one must so use his own property as not to injure another, but the law applies this maxim with an eye to practical justice, in order to preserve order and maintain a just equilibrium between the rights of man and man. As one author has said:

“The problem is to discover the exact point where such equilibrium can be maintained. This must always be done on the particular facts of each case since, generally speaking, there is no inflexible criterion for determining just when an act constitutes a nuisance.”

Chief Baron Pollock at one time said:

“I do not think that the nuisance for which an action will lie is capable of any legal definition which will be applicable to all cases and useful in deciding them. The question so entirely depends on the surrounding circumstances, the place where; the time when; the alleged nuisance, what; the mode of committing it, how; and the duration of it, whether temporary or permanent.”

Everyone knows that the taking up of a residence in any community naturally entails some inconvenience, and a man is not allowed to complain of little annoyances which are inseparable from the turmoil of towns and the business which is normally pursued in their different sections.

Anyone is required to accept the consequences of his environment, and he is also compelled to endure the annoyances which are inseparable from the turmoil of the locality in which he lives. This is especially true when he helps to create the turmoil (odors), as have the plaintiffs in the community in which they live. Parties are not allowed to stand upon extreme rights and maintain actions merely because of their peculiar tastes and sensibilities. Diminution of the value of property, even when it is direct and substantial, and even when it is such as can be shown by a plain witness to a plain jurymen, may be adequately redressed in an action for damages, but does not give rise to any equitable action or any equitable jurisdiction. In the case at bar there is no direct injury to the property whatsoever. As was said by Mr. Justice Cherry in the *Dahl* case, referring to the odors:

“It is obvious that they cause no direct or physical injury to property.” 71 Ut. 14.

If a man lives upon land that is decidedly appropriate for industrial and manufacturing purposes, and it is a fact that his residence upon that land is maintained in

anticipation of the property in the vicinity of the land being ultimately applied and put to that use for which it is most appropriate, then the coming of the anticipated industries and their location cannot be complained of as a nuisance, and it is necessary that he should suffer the consequences of the operation of those industries which may be carried on in his immediate locality. Those industries are actually necessary for trade and commerce and for the enjoyment of the very property upon which he lives, and for the benefit of the inhabitants of the community in which he lives and the public at large. He has no ground of complaint because he cannot have the quiet of a hermitage.

In fact, the value of property depends upon the use to which it may be put. It is only as communities are settled and become intensely populous that the value of property may be said to increase. Property peculiarly appropriate for industrial and manufacturing purposes, even though used for residential purposes, cannot be irrevocably and irretrievably held for such residential purposes. There is a place for residences and there is a place for industrial concerns, as well as stock yards, stock feeding and fattening, and stock raising.

Actionable Nuisance

There is not and has not been any actionable nuisance established by the evidence for which equitable relief in the way of an injunction or legal relief in the way of damages may be awarded. The lower Court can-

not confer upon itself equitable jurisdiction by a finding of nuisance and then avoid the necessity of recognizing it on the ground of laches, when in fact the evidence discloses no actionable nuisance at all. In making this contention the appellant desires to establish the fact that the lower Court should have permitted the cases of *Dahl v. Utah Oil Refining Co.*, 71 Ut. 1, and *Norback v. Board of Directors*, 84 Ut. 506, and *Wasatch Oil Refining Co. v. Wade*, 63 Pac. (2d) 1079, to control rather than the case of *Kinsman v. Utah Gas & Coke Co.*, 53 Ut. 10, 177 Pac. 418. If there is any conflict in these cases, the three cases first mentioned are the latest declarations of this Court, and would take precedence over any earlier decision, so far as it is related to the facts of this case. The question of the kind of neighborhood was not discussed in the *Kinsman* case.

NATURE OF COMMUNITY

Industries such as defendant must be located where they benefit a locality, rather than where there is no need for the industry. They are entirely dependent on the community for their raw materials. Defendant's plant does not constitute a nuisance, because it is located in a proper location.

So far as the odors are concerned, the allegations of the amended complaint are denied, and the history of the community, and particularly that portion of it where the rendering plant is located, is shown. This identical

site upon which defendant's rendering plant is located was industrialized at least twenty years before the coming of the defendant, and used for twenty years as the brick yard for the towns and communities near by. This particular place is on the outskirts, the very fringe of Benjamin, and likewise on the fringe, and a little farther removed, from the town of Spanish Fork. Most, if not all, of these plaintiffs, and their fathers before them, assisted in the development of this particular location as the center of such industrial activity as was to be found in that community. The history of this community is the same as the history of all communities up and down the valleys of this State traversed by railroads. That land lying in close proximity to the railroads and on the outskirts of our towns and cities has become the industrial property. Transportation is the most vital element with which industry is concerned. The result has been that industry follows the railroad track into the towns. The exact number of miles from the Benjamin railroad station to the land of the plaintiffs is not shown by the evidence. The sugar factory is two miles closer to the town on the railroad right of way than defendant's plant. The pea vinery is three-quarters of a mile closer to the town. The evidence shows that this plant of the defendant is the farthest removed of any plant of any industry in the community. Near the railroads and in this same vicinity there is or has been a flour mill, alfalfa mill, railroad stock loading yards and chutes, beet loading yards, wool loading yards and cattle feed yards.

The plaintiffs may say that they had nothing to do with the building of the sugar factory, although they grow sugar beets on their lands. They may say that they had nothing to do with the building of the pea vinery, although they grow peas on their properties and their cattle consume the by-products. But more than all of this, they and their fathers before them have been making a living off this land, feeding the crops grown and harvested off these lands and the products of the sugar factory, pea vinery, flour and alfalfa mills to live stock which they brought upon these lands for winter feeding. Are we going to say, as the lower Court in effect has said in awarding damages to these plaintiffs, that it is an industry to operate a rendering plant in which the losses occasioned in the stock feeding business are profitably disposed of, but it is not an industry which produces these very losses? On the other hand, it is defendant's contention that the feeding of live stock in feed yards in close proximity to the railroad over which the stock can be shipped in and out, is as much an industry as the rendering plant operated by this defendant, and the operation of which in this same community is condemned by the lower Court.

Let us look for a moment beyond the limits of this small community with its relatively small industries, to a metropolitan city like Chicago. The feed yards maintained in connection with the Union Stock Yards Company of Chicago represent a tremendous industry, and

in the heart of this industry are to be found the largest rendering plants in the world, known the world around, such as Armour, Swift, Morris, and others. A skyscraper has been built in the middle of these feed yards to house the army of employees required to operate this industry in all of its ramifications. Appellant ventures to say that even the respondents will not contend that stock feeding carried on on as a large a scale as it is in Chicago is not an industry. If this be the fact, where are we going to draw the line? Are we going to say that it is not as appropriate for this defendant to have a \$30,000 rendering plant in the heart of the stock feeding district in the south end of Utah County, in a community in which one plaintiff alone feeds more than 2,000 head of livestock, as it is to have rendering plants worth \$30,000,-000 or more in a similar district in Chicago? It is defendant's most serious representation that its rendering plant, located where it is, is the farthest removed of any industries from the town of Benjamin, and is an industry naturally developed on account of the industrial activities of these feeders of cattle, making out of their yards and their gardens stock feeding centers, and thereby maintaining on their own premises an industry which would be most offensive in and of itself in any residential section. Thus the defendant brings itself strictly within the rule announced by this Court in the case of *Dahl v. Utah Oil Refining Company*, supra. This case is purely and simply a case of the owners and operators of one industry complaining of the operators of another, when

the odors produced by each emanate basically from the same source, and are equally objectionable to those who do not appreciate the smell of livestock and its necessary incidents.

Of the four homes that are in close proximity to the plant, that is to say, less than seven or eight hundred feet away from it, one home is owned by the defendant, and two homes were built there in the days of the brick kilns, and the natural inference is that they were built so close thereto to accommodate the employees thereof. They have since been used to house the employees of this defendant's plant. The fourth home has been built since the plant was built, and to the owner and occupant of this home the defendant has furnished employment from time to time. The occupant of this latter home, John Anderson, admits in his testimony that he assisted the defendant in rebuilding its rendering plant after the fire in 1937, and was employed in both the old and new plants.

So far as the rest of the plaintiffs are concerned, they are so far removed from the plant that a mere inspection of their premises alone would show that any odors permeating their homes come from their own back door yards, rather than from a small plant a half mile or more away.

This community is naturally adapted to industrial pursuits, being more sparsely settled than any vicinity

in Utah County adjacent to the railroad. This is demonstrated in the panoramic view of the surrounding territory taken from the roof of defendant's building and shown in Exhibits 21 to 21-G, inclusive. Much of this land around the plant is farm land without improvements upon it, the owners living in town and farming this ground either individually or through tenants. Much of the land, as will be seen from Exhibit 16, is in the possession of others than the plaintiffs.

The defendant has constantly improved the operation of its plant. Only shortly before the trial of the case, expert combustion engineers changed the operation of the plant so that all gases emanating from the cooking operation, which seemed to be the main source of the odors complained of by the plaintiffs, were either condensed and carried off with the water, or passed through a temperature in excess of 1300 degrees and were entirely consumed before passing into the atmosphere through the smoke stack from defendant's boilers.

The contention of the plaintiffs is that the location of their lands is a residential district, and the contention of appellant is that the district in which they live is industrial, including the agricultural industrial pursuits of the plaintiffs themselves. The evidence does not disclose the kind of a community alleged to exist in the complaint or found by the lower Court to exist in its findings.

Not a single word of evidence was offered by anyone for the purpose of showing this community to be a

residential community. Plaintiffs' first and really principal witness, Mr. Greer, testified that he selected the site of defendant's plant and purchased the property for the defendant and helped build the plant (Abs. 49, 50); that he had worked six or seven years in a rendering plant for this defendant before he came to Spanish Fork; that he selected this old brick yard as a suitable site for the defendant to begin doing business; that his employment continued until after the defendant began rendering carcasses in its plant in question (Abs. 54).

Some of the plaintiffs themselves, particularly E. B. Selene, an employee of Mr. Greer now engaged in a competitive business, and John Anderson, testified that they had been employees of the defendant previously, and had worked in this plant, and John Anderson testified that he had helped to construct the new plant after the fire. It would be idle to contend that Mr. Anderson and Mr. Selene did not know the purpose for which the new plant was being built, and it should be equally idle for them to contend that they did not acquiesce in the use of defendant's premises by defendant for the purposes which they testified have now become offensive to them. For these services Selene and Anderson received valuable consideration. They were willing to recognize the lawfulness of this industry and were satisfied to have their homes near by so long as they were employees. This all tends to establish this locality as a proper one for defendant's plant.

The Supreme Court of Louisiana has decided a very important case, *Meyer v. Kemper Ice Co.*, 158 So. 378 (1935).

Passing over a portion of the opinion, we come to subdivision marked “3” of the opinion, reading as follows:

“Plaintiff alleged in her petition, and the judge of the lower court said in his written opinion, that this ice plant was located in an exclusively residential section of the city.”

(This portion of the opinion is highly important if one is considering the contention of the plaintiffs in the case at bar with reference to the locality in which their homes are located being a residential community, plaintiffs appearing to have the idea that the presence of two railroads or a pea vinery or a sugar factory or a beet loading rack has nothing to do with determining whether a given community is residential or of some other character. Let us see what the Louisiana court has to say on that subject. After using the language above quoted, the opinion continues:)

“Some of the witnesses called by plaintiff said that, but we do not find it so. The undisputed facts are that there are some seven or eight business houses located along Railroad Avenue, which forms the western boundary of the block in which plaintiff’s residence and the ice plant are located. A railroad runs within 100 feet of the ice plant, and just across the railroad within a short dis-

tance of plaintiff's residence there is a cotton gin and a rice mill, a sash and door factory, and other industries. The mayor testified that Railroad Avenue is given over principally to commercial enterprises. He further testified that he considered the site selected by defendant a proper location for an ice plant. Several witnesses testified that, while there were no business houses located in that block on Vine or Liberty streets, yet there are in the block more business houses than residences."

From an examination of this evidence the Court held that the allegation that the plant was located in an exclusively residential section of the city was not supported by the evidence.

The Supreme Court of Louisiana expressed the same idea that is to be found in the opinion of Justice Cherry in the *Dahl* case.

The Meyer case is direct authority, of a persuasive character, in support of the appellant's contention that the refining plant is not located in a community residential in character.

What Is Industrial Property as Contradistinguished from Residential Property?

A thing either personal or real that has no value for any purpose cannot be said to be property, and in the language of Chief Justice Bleckley in the case of *Wells v. City of Savannah*, 87 Ga. 398, 13 S. E. 442:

“The value of property consists in its use, and he who owns the use forever, though it be on condition subsequent, is the true owner of the property for the time being. This holds equally of a city lot or of all the land in the world.”

The use to which property may be put is what gives it a value, and in the case of real property, perhaps this rule operates with greater force than in the case of personal property. The appropriate uses are often numerous and are indeed variable with the march of time, the increase or decrease of population and the exigencies of life.

Some horses are built for speed; others for draft purposes. In one age the horse was almost a necessity. Since the coming of the railroad train, the automobile and the aeroplane, he is almost a luxury.

Some land is agricultural in character, whereas other land is mineral in character. Some streets in towns and cities are strictly residential; others are given up to mercantile purposes, and even these mercantile purposes are further classified. In one part of the mercantile district you will find the wholesale houses and in another part the retail concerns.

In some instances the character of land is to be determined by comparing its value for one purpose with its value for another purpose. In looking over this territory one can see that generally speaking the railroads have run parallel to each other and in close proximity to one

another. This was done because there was really no other place to put them. There was Utah Lake on the west and the mountains on the east. In a sense, their location was surveyed for them by nature's obstacles. We find both of the railroads, Denver and Rio Grande R. R. and Union Pacific R. R. paralleling each other in this locality.

It was all right to permit dead animals to decay and dry up where they fell in the early days of the pioneers, when farms were large and distances between ranches great, but as communities grew in number and farms and ranches diminished in size, it became just as necessary for the establishment of plants such as defendant's plant to take care of the dead animals as for the growth of any other industry. To this extent defendant's industry has not only been necessary for the further growth of the community, but extremely beneficial to the community since its initiation. This makes the location of defendant's plant not only appropriate but legal, that is to say, invulnerable in every respect as against the attack made upon it on the ground that it is a nuisance.

*Plaintiffs Have Acquiesced in the Use of These
Premises for Industrial Purposes*

In the case at bar, as pointed out, the plaintiffs have been actively engaged in assisting or participating in and receiving benefits from the operation of this plant. It does not make any difference that the brick yard sold out and went away, and defendant came. It does not make

any difference that upon analysis it can be found that the odors produced by the one plant are different from the odors produced by the other plant. It may be well to examine a few authorities.

In the case of *Galliker v. Cadwell*, 145 U. S. 368, 36 L. Ed. 738, cited in the *Kinsman* case, the Court said:

“But it is unnecessary to multiply cases. They all proceed upon the theory that laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced—an inequity founded upon some change in the condition or relations of the property or the parties.”

In quoting from a Pennsylvania case, Justice Gideon in his opinion in the *Kinsman* case approved of the following language:

“A suitor who by laches has made it impossible for a court to enjoin his adversary without inflicting great injury upon him will be left to pursue his ordinary legal remedy.”

In the case of *Chaffee v. Telephone & Telegraph Construction Co.*, 77 Mich. 625, 43 N. W. 1064, 6 L.R.A. 455 (1889), the majority of the Court used the following language:

“Failure to protest against a nuisance for a long space of time will not prevent an action to abate it, upon the principle that each day of its continuance is a new nuisance; and many courts hold that the right to maintain a nuisance can

never be gained by prescription. *But I can find no authority anywhere, and I should doubt its being good law if I did find it, that will permit a man to build by the side of these telegraph and telephone poles and wires, without any protest or demur whatsoever against their standing there, when they are on his own land, and go on for years, without finding any fault whatever, and allow a tenant to use one of the wires for business purposes in his building, and then, when a fire arises, and the poles are found to hinder the firemen in their work of extinguishing it, charge up to the corporation maintaining these poles the loss occasioned by such fire. To do this would be to violate one of the plainest principles of justice; and the law, in my opinion, will not permit it.*" (Italics ours.)

In *Karcher v. City of Louisville*, 213 Ky. 281, 281 S. W. 1010 (1926) the plaintiff sought to recover damages from the City of Louisville for the construction, maintenance and operation of a public incinerator in close proximity to his residence near Camp Taylor. This incinerator was used for the burning and destruction of dead bodies and gave off offensive and obnoxious fumes and odors, which permeated his home and premises and rendered them unfit for residential purposes. It was claimed that the plaintiff, for a valuable consideration, sold, transferred and conveyed by deed of general warranty to appellee the incinerator plant, to be used by it for the burning and destruction of dry and wet garbage, including dead animals gathered from the streets and public places. The Court held:

“If plaintiff, complaining of operation of public incinerator on property sold by his wife to city through his own efforts, might have foreseen injury of which he complained at time of making sales, he is not entitled to relief therefrom.”

It approved the conclusion of law made by the trial Court, reading in part as follows:

“The owner of property or one having an interest therein, who conveys it to another with knowledge of the purpose for which it is purchased or the use to which it is to be applied, is not in a position to complain that the use of the property, bought for a specific purpose, constitutes a nuisance.”

The Court cited *L. & N. R. Co. v. Daugherty*, 36 S. W. 5, 18 Ky. Law Rep. 273 (1896). In this Daugherty case it appeared that the railroad company had erected a dam along its road some 80 yards from the premises of the plaintiff Daugherty, and constructed a large pond from which it used water in the operation of its trains. There were two actions brought for damages, one by Daugherty for himself and one by him and his wife Jane. It appeared that Daugherty was active and influential in the negotiations resulting in the purchase by the railroad company of the ground whereon the pond was erected. The Court, among other things, said:

“If the ground on which the pond was constructed had been purchased from appellees, and used for the purpose for which it had been

bought, the vendors knowing that purpose, and from the condition of the old dam and previous accumulations of decayed matter, had reason to believe that such accumulations would continue or be increased by reason of the new structure, and they yet sold the ground for that purpose, and consented to the construction, then no action could be maintained at all.”

In the case of *Mahoney Land Co. v. Cayuga Investment Co.*, 88 Wash. 529, 153 Pac. 308 (1915), the Court said:

“The direct encouragement and acquiescence shown here as to an alleged private nuisance is fatal to *equitable as well as legal relief*.” (Italics ours.)

See *Huntington Land Development Co. v. Phoenix Powder Mfg. Co.*, 40 W. Va. 711, 21 S. E. 1037 (1895).

In *Swain v. Semans*, 9 Wall. 254, 19 L. Ed. 554, the Court said:

“Where one tacitly encourages an act he cannot exercise a legal right contrary to such consent to the prejudice of another.”

Now, if such is the rule relative to an encouragement which is merely tacit, then with stronger reason it applies to those in the situation of some of these plaintiffs, who have profited by the industrialization of this particular site, in that they have obtained employment thereon, and have assisted in the building thereof;

have benefited by the sale of animals to it and the purchase of stock feed from it. They should not now be heard to complain that a useful industry is being pursued on this site.

Street, in his work on foundations of legal liability, says:

“And one who has agreed to take part in an operation necessitating the production of fumes injurious to health, has no cause of action in respect of bodily suffering or inconvenience resulting therefrom, though another person residing near to the seat of these operations might well maintain an action if he sustained such injuries from the same cause.”

1 *Street's Foundations of Legal Liability*, p. 162.

Whatever may be said of some plaintiff who took no part in the industrialization of a community, surely no one can believe that another may bring about such an event, and even profit by it, and then complain about it either in an action at law or in a suit in equity. Under such circumstances, with the record in its present con-

dition, it is submitted that plaintiffs cannot recover either jointly or severally. If any plaintiff is free of this defense, then there is certainly a misjoinder of parties.

CONCLUSION

It is respectfully submitted, therefore, that for each of the foregoing reasons, summarized as follows, the judgment of the lower court should be set aside and the action of the plaintiffs dismissed:

1. There is no actionable nuisance either pleaded or proved in law or equity.
2. The defendant's plant is properly located in an industrial district along a railroad section industrialized by plaintiffs themselves and their predecessors in interest.
3. The defendant's plant is surrounded by improvements placed on plaintiffs' lands by plaintiffs for use in industries operated by the plaintiffs, which improvements are included in the damages awarded, in spite of the fact that the defendant's industry is allied to the industries of the plaintiffs and each is necessary to the other.

4. The court erred in retaining jurisdiction and in failing to require the plaintiffs to establish first the existence of a nuisance at law.

5. Plaintiffs' action was brought in equity to invoke injunctive relief. Proof of a nuisance was not clear, convincing or satisfying as required by equity in actions invoking extraordinary equitable relief such as injunction. No equitable cause of action was proved. In spite of the fact that a multiplicity of suits alone forms no basis for equitable relief, and in spite of this failure of proof, the court improperly retained jurisdiction of eleven separate causes of action of eleven misjoined plaintiffs owning in severalty distinct property interests and rendered a common law judgment for damages in their favor.

6. Damages were given to these eleven persons upon the sole basis of an alleged diminution of their several property values. This basis was wrong; a mere diminution in value of property without irreparable mischief will not furnish any foundation for equitable relief. No irreparable mischief is alleged or proved.

7. The only damages pleaded and proved are temporary, although permanent damages are sought in the prayer and granted by the court.

8. If the action were considered as a suit to recover permanent damages it is barred by the Statute of Limitations.

9. Further error in assessing the damages was committed in the following particulars:

(a) Though the only nuisance claimed was an unpleasant odor, the judgment included permanent damages to the following properties of the plaintiffs which for various reasons could not have been damaged by the alleged nuisance: water rights, barns, chicken coops, granaries, pig pens, stock yards, feed yards, corrals, and farm lands without homes or improvements on them.

(b) The judgment rendered included permanent damages to the plaintiffs John Anderson, Edward Ludlow and Margaret D. Hansen, although the evidence showed that title to the lands claimed to be injured was not in these plaintiffs.

(c) The judgment rendered includes permanent damage to plaintiffs who, in varying degrees, acquiesced in, encouraged, assisted in, and benefited by the maintenance of defendant's business from its inception to the date of suit.

(d) The judgment rendered includes permanent damages to the plaintiffs John Anderson, Rufus Ander-

son, Paul E. Swartz, John Angus, and Ed Selene for injury to improvements constructed by these plaintiffs since the operation of defendant's plant.

(e) The judgment rendered was based upon testimony awarding damages for the total difference between the value of plaintiffs' property with and without the defendant's plant, entirely eliminating from consideration the presence of industrial factors such as the brick yards and railroads which would be present if defendant's plant were not operating.

(f) The judgment rendered includes permanent damages to lands industrialized by the plaintiffs themselves and their predecessors in interest, and to improvements placed on the said lands by the plaintiffs for use in the maintenance of these industries.

(g) Plaintiffs neither alleged nor proved damages of a different character special and apart from that which the public in general sustains.

10. Whatever the theory used as a basis for the damages awarded, these damages are excessive.

11. The lower court erred in permitting the misjoinder of eleven plaintiffs and permitting an improper uniting of eleven causes of action. This denied to de-

fendant its constitutional right of trial by jury, there being no basis for equitable relief.

12. The lower court erred in permitting the plaintiffs to split their causes of action:

(a) By the amended complaint into actions in equity for injunctive relief; and

(b) By the supplemental complaint into actions at law for common law permanent damages.

13. The lower court erred in preventing defendant from fully showing by its evidence, expert or otherwise:

(a) The industrial nature of the community;

(b) The values at which these lands were appraised by the State Tax Commission;

(c) The incompetency of the expert witnesses on values offered by plaintiffs;

(d) The entire basis upon which plaintiffs' experts predicated their appraisals.

14. The court's decision is in conflict with the following cases, which should control: *Dahl v. Utah Oil*

Refining Co., 71 Utah 1; *Norback v. Board of Directors*,
84 Utah 506; *Wasatch Oil Ref. Co. v. Wade*, 92 Utah 50.

Respectfully submitted

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