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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 Respondents

Utah Supreme Court

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Elias Hansen; Attorney for Plaintiffs and Respondents;

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298  
No. 6298

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In  
The Supreme Court  
of the  
State of Utah

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THOMAS E. LUDLOW, EARL LUD-  
LOW, Otherwise Known as T. E.  
Ludlow, EDWARD B. SELENE,  
RUFUS ANDERSON, MARGARET  
D. HANSON, Otherwise Known as  
Mrs. Heber Hanson, JOHN ANGUS,  
MAYLAN CARTER, EDWARD M.  
BECK, Otherwise Known as Reed  
Beck, PAUL E. SWARTZ, EDWARD  
LUDLOW, and JOHN ANDERSON,  
Plaintiffs and Respondents,

vs.

COLORADO ANIMAL BY-PRO-  
DUCTS COMPANY, a Corporation,  
Defendant and Appellant.

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Appeal From Fourth Judicial District, Utah County  
Honorable Will L. Hoyt, Judge

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BRIEF OF RESPONDENTS

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ELIAS HANSEN,  
Attorney for Plaintiffs  
and Respondents.

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APR 29 1941

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In  
The Supreme Court  
of the  
State of Utah

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THOMAS E. LUDLOW, EARL LUDLOW, Otherwise Known as T. E. Ludlow, EDWARD B. SELENE, RUFUS ANDERSON, MARGARET D. HANSEN, Otherwise Known as Mrs. Heber Hanson, JOHN ANGUS, MAYLAN CARTER, EDWARD M. BECK, Otherwise Known as Reed Beck, PAUL E. SWARTZ, EDWARD LUDLOW, and JOHN ANDERSON,  
Plaintiffs and Respondents,

vs.

COLORADO ANIMAL BY-PRODUCTS COMPANY, a Corporation,  
Defendant and Appellant.

---

## BRIEF OF RESPONDENTS

The record in this case and appellant's brief filed herein are voluminous, but the controlling facts are neither complicated nor numerous.

The plaintiffs own in severalty lands in a community devoted principally to farming at Benjamin in Utah County, Utah. Most of the plaintiffs have built and reside in homes upon the lands owned by them. In about September, 1933, the defendant Colorado Animal By-Products Company, began the collection of carcasses of dead animals at the prem-

ises at Benjamin for shipment to other rendering plants operated by the defendant. The plant was originally constructed as a place for the collection of hides. In December, 1934 a cooker was placed in the plant to cook the meat and bones of dead animals and to manufacture therefrom fertilizer, bone meal, poultry feed and tallow for soap manufacture. Bones were also collected and placed in a pile at the plant. In about February, 1935 the cookers were put in operation. (Tr. 193-4; Ab. 50).

Dead animals were collected from Utah, Juab, Sanpete and Wasatch Counties and taken to the plant for the manufacture of the above mentioned products. The defendant also occasionally brought aged or crippled animals, bones and scraps from butcher shops for use at the plant.

P. H. Soble, the president of the defendant company thus states the amount of animal products that were cooked at the plant: Forty thousand (40,000) to fifty thousand (50,000) pounds of bone per month; Fifteen thousand (15,000) to twenty thousand (20,000) pounds of meat per month, and ten thousand (10,000) to twelve thousand (12,000) pounds of offal per month. (Tr. 997-9; Ab. 246 to 247). Defendant received and cooked between fifty (50) and seventy-five (75) large animals per month, besides smaller animals such as dead pigs and sheep (Tr. 985; Ab. 243).

On or about April 8, 1937 the plant was destroyed by fire. In about May or June, 1937, the company commenced the erection of a new plant at the site of the old one. Soon after the commencement of the construction of the new plant some or all of the plaintiffs protested to the County Commissioners of Utah County against its erection. P. H. Soble was at one of the meetings with the County Commissioners and assured the commissioners that if per-

mitted to erect and operate a new plant, it would be so operated as not to constitute a nuisance. (Tr. 1002-3; Ab. 247).

This action was commenced on August 18, 1937. A temporary restraining order was issued on August 23, 1937. The trial was commenced on April 3, 1939 and continued for several days. On June 7, 1939, Judge William L. Hoyt, who heard the cause, signed a memorandum of decision in which he gave a brief outline of the evidence and concluded that the defendant had been and was operating a nuisance and that the plaintiffs were entitled to appropriate relief, but that because the defendant had expended a large sum of money before the action was commenced, plaintiffs should not be granted injunctive relief, but that if so advised, plaintiffs might amend their pleading or file a supplementary complaint and be heard as to the damages that they had and would sustain. (Tr. 99).

Thereafter a supplemental complaint was filed and evidence offered as to the damages sustained by plaintiffs, and each of them. The judgment appealed from was entered upon all the evidence. It will be noted that the judgment fixes the damages to which each of the parties is entitled and concludes that unless the aforesaid damages are paid by the defendant within sixty (60) days from date of entry of the decree herein, then plaintiffs are entitled to an injunction restraining defendant from operating said plant until said damages are paid.

In our discussion we shall not attempt to follow the order in which appellants have argued the questions presented, as in our view it will tend to clarify the issues and enable this Court to better follow our argument by taking up first those questions of fact and law which are common to all of the plaintiffs, as was done at the trial.

## THE EVIDENCE SHOWS THAT DEFENDANT'S PLANT IS A NUISANCE

A nuisance is defined by our statutes as follows:

Revised Statutes of Utah, 1933, 104-56-1:

“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.”

There were numerous witnesses who testified in this case as to the nature of defendant's plant, and particularly concerning the obnoxious odors that emanated therefrom; and also that the plant was a breeding place for flies and rats. After most of the plaintiffs' evidence was in, the court, upon the request of defendant visited the plant. (Tr. 526).

The following witnesses called by plaintiffs, in substance testified:

S. I. GREER was employed by defendant from the time the site for the plant was purchased in 1933. As originally constructed the plant was to be used for storing and collecting hides. Cookers were first put into the plant in 1934 and cooking of meat, bones and offal began about February 1, 1935. That when he learned cookers were to be put into the plant he resigned. That when the plant began cooking, horses, cows, pigs and sheep were cooked. That

about sixty (60) horses and cows were cooked per month and were gathered from the counties of Utah, Wasatch, Juab and Sanpete. The animals were taken to the plant and there cut up and skinned on the floor. The blood and refuse was drained into an open sump and there allowed to stand until it seeped away. In addition to the animals that were collected, offal and intestines were gathered from the slaughter yards in the vicinity and taken to the plant and used. That many of the animals brought in were decomposed and very nearly rotten.

The odor from the cooking of these animals goes off into the atmosphere and the sewage goes into the open sump at the plant. That the odors emanating from the plant are very nauseating and extend as far as a mile from the plant. That the distance the odor will travel depends upon the condition of the atmosphere. That flies by the millions collect at the plant. That dry bones were always piled at the plant. That the bone pile was a good breeding place for rats and many rats were in the bone pile and there made nests and raised their young. That such condition always existed at the plant. That at times the plant is operated twenty-four hours per day. That the plant takes care of about a ton of stuff daily. (Tr. 2 to 17). That the odor of the plant gets into one's clothes and hair, and it is very difficult to remove the same. (Tr. 77). That he quit working for the defendant company because of its condition and its effect upon his health. (Tr. 28).

THOMAS E. LUDLOW, one of the plaintiffs, testified that his home is about two hundred (200) rods west and ten north from the plant; that when the wind blows from the east and the cookers are in operation the odor from the plant makes it almost impossible to breathe; that it comes right into the



house and wakes you up; that these odors come to his place when the wind is blowing from the east, and occurs about twice a week; that the smell is hard to describe but it is much the same as decayed meat. (Tr. 101).

FRANK SCOTT testified that he has been on a number of the farms in the neighborhood of the plant and that about three years ago he was working on the roof of Rufus Anderson's home when the smell came; that he was compelled to come off the roof; that it made him vomit; that while at Mr. Selene's farm he could not eat because of the smell; that the smell was terrible, and much like that of rotten dead animals. (Tr. 104-106).

IDA SWARTZ thus described the odor coming from the defendant's plant: This odor is thick; it just doesn't go down; when you try to breathe it chokes you; makes you sick; you can almost chew the stuff; it makes you very sick to your stomach; it is absolutely impossible with that odor to sit down and try to eat a meal; you feel like you are chewing a rotten, decayed animal when you sit down to dinner; it makes you deathly sick; wakes you up at night; wakes the children up at night. (Tr. 134). The odor came from the old and the new plants; the odor comes every day at times; at times we have been compelled to leave our home because of the odor. (Tr. 135). It comes throughout the year, but is worse in the summer. Many flies come from defendant's plant; that since the defendant's plant was constructed they are troubled with rats. (Tr. 136).

JAMES ALBERT WEST testified that whenever the east wind blows the odor comes from the plant to his place; the odor smells like a dead animal in your yard; it comes nearly every day, but is worse some days than others. (Tr. 171). It comes into

the house; it is especially bad in the summer time: the flies at times are so thick you can't see out of the windows; the flies are blue and black blow-flies. (Tr. 172).

EDWARD SELENE thus describes the odor from the plant: It is very rotten. On September 26th it kept us up all night and I couldn't sleep; I have a good stomach but the odor makes me sick; my wife and children were also awakened by the odor; that has occurred on many occasions. (Tr. 182). The odor is there almost constantly. (Tr. 183). The defendant takes decayed meat into the plant all the time. (Tr. 196).

HAZEL ANDERSON, who lives about four hundred (400) rods from the plant described the odor thus: The odor from the plant causes a burning in your throat; wakes you up at night; the smell keeps you awake at night; it is very unpleasant; we have to keep the doors and windows closed to try to keep it out; the odor turns you sick. (Tr. 211). It comes about every day. (Tr. 212). Since the plant came we have had trouble with many big blow-flies.

EDNA SELENE thus described the odor: That rotten smell from the plant has awakened me and my children at nights; that the children have cried and cried at night; they couldn't sleep; that has been the condition since the new plant was constructed. The smell continues about all the time; especially during the summer time. (Tr. 225). You can't open your windows; the odor is the most nauseating I have smelled; at times I am unable to eat my meals because of the smell. (Tr. 225).

JOHN ANGUS testified that at times the odor from defendant's plant was almost unbearable, especially when the wind blows from the east. It is worse in

the summer; that they are awakened by the odors. The odors occur nearly every day and about twice a week during the night time. (Tr. 257-8).

PAUL E. SWARTZ described the smell as being the rottenest smell I have ever smelled; it is thick; you can't breathe; when it comes in at meal times you can't eat; a lot of times the smell brings it all back. (Tr. 317). It sometimes comes for thirty minutes; sometimes two or three hours, sometimes all day; it generally comes every day; it continues throughout the year. (Tr. 318).

JOHN ANDERSON testified that the odor was very rotten; that it is present a part of every day when the cooker is in operation, and the odors come into the house and wake you up at night. It is very nauseating. (Tr. 345-6).

RUFUS ANDERSON described the odor as a sickening smell; it smarts the nostrils and throat; it sometimes comes three or four times a day, then it may miss a day or two. (Tr. 345-6).

HEBER EUGENE HANSEN described it as very nauseating; it is penetrating; it gets in your clothes and your clothes smell for hours after it ceases. (Tr. 415-16). It is present practically every day, but it is somewhat intermittent by a change in the wind. It comes at night and you cannot sleep. (Tr. 416).

JOHN R. LUDLOW testified that at his home, about two hundred rods from the plant, the odors are the rottenest that I have ever come in contact with since they commenced cooking; that the odor is that of dead animals; that the odor comes when the breeze blows from the east; it occurs nearly every day; that the odor is getting worse. (Tr. 444).



LLOYD M. FARNER, a resident physician and surgeon and a deputy State health commissioner testified to being at the plant; that the plant was very unsanitary; that offensive odors came from the plant; that after he had been at the plant a short time and returned to Provo he could still detect the smell; probably from his clothes. (Tr. 544).

P. P. THOMAS, President of the Commercial Bank of Spanish Fork, testified that since the plant was constructed he had frequently passed along the highway and had observed the stink there and it smelled like a dead cow. (Tr. 861).

CHARLES E. HAWKINS, a former county assessor of Utah County, testified that he had been near defendant's plant a number of times, and that the odor that comes from the plant at certain times is practically unbearable to people that are not accustomed to it; that it has driven him away from his work there; that he got sick and could not remain near the plant. (Tr. 940).

THOMAS M. ANDERSON testified that he was familiar with the plant and gave testimony as to the depreciation in the value of plaintiffs' property by reason thereof. (Tr. 1011).

MAYLAN CARTER testified that he owns land near defendant's plant and that it smells like a dead animal; that he couldn't build on his property because of the smell. (Tr. 1043).

LAWRENCE C. JOHNSON describes the odor in the vicinity of the plant as very obnoxious; you can't stay in it. (Tr. 1057).

Nearly all of the witnesses testified that the odor from the plant had not improved after it was claimed by defendant that it attempted to control

the odor by some slight changes in the construction.

In addition to above, see testimony of Rufus Anderson, (Tr. 1121); and that of Hazel Anderson, (Tr. 1113); also Edwin Selene, (Tr. 1118).

Most of the witnesses called by the defendant testified that there were odors in and about the plant, and some of them testified that such odors were very obnoxious. See testimony of Dr. Joseph Hughes, who was called as an expert by the defendant. (Tr. 575, 579, 580). Also defendant's witness John W. Staker, (Tr. 650).

We have heretofore pointed out that the trial judge before whom the case was heard, visited the premises during the trial. In the light of such fact, the rule that the trial judge is in a better position to determine the facts than is a reviewing Court, is especially applicable. The only conclusion permissible is that the trial court upon his visit to the plant found from first hand information, the facts to be as claimed by plaintiffs and as testified to by them and their witnesses.

In the foregoing brief summary of the evidence we have referred to the transcript, using the page number shown in the index and at the top of the page rather than the page numbers written on the bottom of the transcript, which latter numbers are referred to in the abstract. The abstract fails to fully convey the import of plaintiffs' testimony; especially as to the nature, intensity and effect of the odors that emanated from the plant; the condition of the open sump at the plant and the flies and rats that are drawn to and breed at the plant. In light of that fact we earnestly urge, especially on the question of whether or not defendant's plant constitutes a nuisance, that this Court examine the transcript, as reliance on the abstract will not pre-

sent the real picture. Defendant offered some evidence tending to show that other rendering plants were constructed near places where people reside and that no serious objection was made to the same. Such testimony, however, is of little or no value. The fact that a rendering plant is located at the Cudahy Packing Company in North Salt Lake where only fresh meats are handled, and one at Twin Falls where no considerable amount of offensive odors are emitted does not change the fact that defendant's plant at Benjamin is so constructed or operated, or both, that it makes living in its vicinity next to impossible for normal people.

Some evidence was offered touching the construction of the Benjamin plant and that it was similar to the construction of other plants and therefore should not give off the odors complained of, but notwithstanding such evidence, the fact remains that the Benjamin plant, ever since cookers were installed and put into operation, has almost constantly given off these offensive odors and attracted flies and rats, which has seriously affected the comfort, if not the health, of those who are required to reside or work in the vicinity of the plant. That is the conclusion of the trial court and we submit that no other conclusion is permissible under the evidence.

The defendant offered evidence tending to show that some of the plaintiffs had manure in their yards and that one of them, Thomas Ludlow, had part of the remains of dead animals in his yard. Such evidence merely establishes the fact that the area in and about defendant's plant is a farming community, subject to the conditions found generally in such communities. Thomas Ludlow testified that he either buried or burned any animals that may die on his premises within a short time

after they died. (Tr. 831). No such precautions were taken by the defendant.

All of the evidence shows that large quantities, sometimes several tons, of the bones of dead animals were customarily stored at defendant's plant. Defendant also offered in evidence a number of photographs of the premises of some of the plaintiffs. Many of the photographs were taken on April 3rd, when it is quite apparent that the yards had not dried up and the accumulation of winter manure had not yet been removed. It is also apparent that the photographs were taken only of those parts of the premises as were most unsightly. It might be that the surroundings of some of the homes of plaintiffs are not as sightly as could be desired, but they are none the less their homes where they must live, and it ill becomes the defendant to insist that because the surroundings of some of the homes are not as sightly as they might be, defendant is at liberty to so pollute the atmosphere that during both day and night plaintiffs are compelled to suffer the discomfort of breathing the foul air caused by defendant's plant or give up their homes and farms.

So long as defendant merely maintained unsightly premises and stored tons of bones plaintiffs did not complain, but when defendant, by its cooking operation of partially decayed animals and offal, so polluted the air that plaintiffs could not live in their homes in comfort and were confronted with the fact that such conditions would continue indefinitely, they brought this action for injunctive relief, and having been denied that relief they sought damages, the only recourse available to them to redress the wrongs complained of.

Defendant also offered evidence tending to show that at times when animals died they were not

properly burned or otherwise disposed of. The fact that someone was derelict in such particular is no legal justification for defendant maintaining a nuisance, such as is shown by the evidence in this case. Our statutes,

R. S. U. 1933, 103-41-1 provide that:

“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.”

While in this case doctors were called and testified that the odors about defendant's plant were not likely to spread disease germs, none of them had the temerity to testify that such air is pure and wholesome. If, as the evidence shows, the air at times becomes so obnoxious as to cause nausea, make it impossible to eat and retain a meal, and to keep people awake at night, such facts do not require the testimony of a physician to convince a court that such air is both impure and unwholesome, and is calculated to injure the health of one who is compelled to breathe the same. Such facts are matters of common knowledge of which courts will take judicial notice.

Defendant also contended that because the Union Pacific Railroad Company is in close proximity to the plant, the Denver & Rio Grande Railway and a pea vinery are within about a mile, the Utah-Idaho Sugar Company about two miles, and the Columbia Steel Company about ten miles from defendant's



plant; and because defendant's plant is located on a site formerly used for a brick yard, the place where the plant is located is an industrial area and therefore plaintiffs have no legal cause to complain. Particular stress is placed upon the pea vinery located about a mile west of defendant's plant, because unpleasant odors, at some times of the year, emanate from that plant. Even though it be conceded that the pea vinery is a nuisance that is no justification for the defendant maintaining an additional nuisance. Moreover, the clear preponderance of the evidence shows that the odors from the pea vinery do not reach the premises of the plaintiffs.

The dividing line between an industrial area and a residential area, especially in the absence of a zoning ordinance, is of necessity impossible of exact determination, but even though the area where defendant's plant is located can be designated as an industrial area, still such fact does not excuse the defendant from maintaining a nuisance. . One may be guilty of maintaining a nuisance in an industrial area. In the case of

Kinsman, et al, v. Utah Gas & Coke Company, 53 Utah 10; 177 P. 418,

it appears that notwithstanding the defendant company made every effort to prevent offensive odors from escaping from the gas plant, and where periodically and at times continuously offensive and noxious odors were coming from the gas plant and entering upon the premises of the plaintiffs and into their homes, and notwithstanding no serious sickness resulted to the occupants of the adjoining premises, this Court held that it had no doubt but that the plaintiffs were disturbed from the full enjoyment of their rights and were en-

titled to recover because of the acts of the defendant in operating the gas plant.

To the same effect are

Thackery v. Union Portland Cement Company, 64 Utah 437; 231 P. 813.

No other or different doctrine is announced in the case of

Dahl v. Utah Oil Refining Company, 71 Utah 1; 262 P. 269.

In the Dahl case this Court cites with approval a number of cases from other jurisdictions and other authorities. The following doctrine is there quoted with approval:

“The law relating to private nuisances is a law of degree, and usually turns on a question of fact, whether the use is reasonable or not under the circumstances. No hard and fast rule controls the subject, for a use that is reasonable under one set of facts would be unreasonable under another. Whether the use of property to carry on a lawful business, which creates smoke or noxious gases in excessive quantities, amounts to a nuisance, depends on the facts of each particular case. Location, priority of occupation, and the fact that the injury is only occasional, are not conclusive, but are to be considered in connection with all the evidence, and the inference drawn from all the facts proved whether the controlling fact exists that the use is unreasonable. If that fact is found a nuisance is established, and the plaintiff is entitled to relief in some form.”

“Whether the use of property by one person is reasonable, with reference to the

comfortable enjoyment of his own property by another, generally depends upon many and varied facts, such as location, nature of the use, character of the neighborhood, extent and frequency of the injury, the effect on the enjoyment of life, health, and property, and the like.”

“What amount of annoyance or inconvenience caused by others in the lawful use of their property will constitute a nuisance, is largely a question of degree depending on varying circumstances, and is incapable of exact definition. The injury or annoyance must be of a real and substantial nature, and the pertinent inquiry ordinarily is whether the acts or conduct proved are such as materially to interfere ‘with the ordinary comfort, physically, of human existence,’ or are materially detrimental to the reasonable use, or value of the property.”

The authorities generally are to that effect.

The facts in the Dahl case, *supra*, are not comparable to the case in hand. The odors there complained of were the ordinary odor of gas and oil, which is common and usual in many public places. The odor emanating from defendant’s plant is, as described by the witnesses, that of decaying meat, much the same as that which comes from a rotten animal in your yard. It is difficult to conceive of a more offensive odor or one more calculated to destroy the comfort and enjoyment of the life of those who are compelled to endure it. The law-making power of this State has so recognized such to be the fact by making it a nuisance to put the carcasses of any dead animal into any river, lake.



pond, street, alley or public highway, or road in common use; or who attempts to destroy the same by fire within one-fourth of a mile of any city or town.

R. S. U. 1933, 103-41-6.

In the Dahl case the oil refining company was established in 1900, which must have been about a quarter of a century before plaintiff in that case brought her action. The case was decided by this Court on June 20, 1927.

In this case plaintiffs sought the aid of the County Commissioners of Utah County to prevent the rebuilding of defendant's plant very soon after they learned that it was to be reconstructed. Such action on the part of the plaintiffs was doubtless because they had experienced the obnoxious odors during the time the cookers were being operated in the original plant. The president of defendant company assured the County Commissioners that the new plant would be so constructed and operated as to eliminate the odors. That was not done.

Substantially all of the witnesses who testified concerning the odors emanating from the new plant testified that such odors were as strong and offensive as were those which emanated from the original plant. Some testified that the odors emanating from the reconstructed plant were worse than those which came from the old plant and that they were getting worse. Doubtless as defendant extended its business and hauled in and cooked more partially decomposed animals and offal, the odors naturally would be stronger and more continuous.

In the Dahl case the evidence showed that the defendant company had used every known means in the construction and operation of its plant to pre-

vent the escape of fumes, gases or offensive odors from the plant. In this case a feeble attempt was made to show that defendant too had attempted to prevent the escape of odors. A witness was called who was familiar with the Cudahy Packing Company at North Salt Lake and its operation. In the Cudahy plant however only fresh meat is used, while in defendant's plant the carcasses of animals, as the court found, that have been dead at least a day or two were taken into the plant. That such animals, especially during the summer time, would be partially decayed cannot be seriously doubted.

Mr. Greer, a former employee of defendant company, testified that some of the meat used by defendant was rotten when it arrived at the plant. The Cudahy Packing Company has constructed a pipeline for about two miles to carry off the waste materials and odors from the plant. The defendant permits the waste materials from its plant to drain into an open sump next to the plant and there remain until it evaporates or seeps away. More significant than either of these facts is, according to defendant itself, a rendering plant can be constructed and operated so that no appreciable odor will emanate therefrom, and yet the evidence here shows that this plant is not so constructed or operated, as otherwise the obnoxious odors coming from the plant would not be there.

Other cases which support or tend to support the fact that defendant's plant is a nuisance are:

McClury v. Highland Boy Gold Mining Company, 140 Fed. 951.

Green v. Sun Company, 32 Pa. Super. Ct. 521.

Millet v. Minnesota Crushed Stone Company, 144 Minn. 475; 177 N. W. 641;

- 179 N. W. 682; notes in 9 L. R. A. (N. S.) 695.
- 20 L. R. A. (N. S.) 466.
- 31 L. R. A. (N. S.) 899.
- 3 A. L. R. 312.
- Coker v. Berge, 9 Ga. 425; 54 Am. Dec. 347.
- Block v. Batemore, 149 Md. 39; 129 Atl. 887.
- Trowbridge v. Lansing, 237 Mich. 402.
- 50 A. L. R. 1014, 212 N. W. 73.
- Lennon v. Butte, 67 Mont. 101; 214 Pac. 1101.
- Templeton v. Williams, 59 Ore. 160; 36 L. R. A. (N. S.) 468; 116 P. 1062.
- Paris v. Philadelphia, 63 Pa. Sup. Ct. 41; 50 A. L. R. 1020.
- Hall v. Carter, 157 S. W. 461.
- Jacob v. Bingham, 227 S. W. 249.

## PLAINTIFFS' CAUSES OF ACTION ARE NOT BARRED BY THE STATUTE OF LIMITA- TIONS.

We have heretofore pointed out that the site upon which defendant's plant was constructed was purchased in April or May, 1933. In September, 1933, the defendant began using the plant for collecting dead animals to be shipped to other plants owned by the defendant. In December, 1934, the defendant installed rendering equipment and it was not until about February 1, 1935 that the plant began the operation of cooking and rendering the carcasses of dead animals. About April 8, 1937, the original plant burned down and about May or June of 1937 work was commenced on the reconstruction of a new plant on the site of the old plant.

The complaint in this action was filed on August 19, 1937. The defendant pleads in bar of the action R. S. U. 104-2-24 and 104-2-30. The former section provides that an action for trespass upon or injury to real property must be commenced within three years. The latter section provides that any action not otherwise provided for in the code must be commenced within four years. It will be observed that plaintiffs brought their action within three years from the time defendant installed its equipment for the operation of a rendering plant and that the rendering plant was not placed in operation until about February 1, 1935, while the action was commenced on August 19, 1937; that the original plant was destroyed by fire in April, 1937, and the construction of the present plant was barely commenced when this action was filed. The principal cause of the wrongs complained of by these plaintiffs was and is the operation of the rendering plant. Moreover, in any event the pleaded statute of limitations is not available to the defendant under the facts in this case.

Street v. Northport Mining & Smelting Co. (Wash.), 70 P. 266.

Wright and Others v. Ulrich, 40 Colo. 437; 91 P. 43.

Western Union Telegraph Co. v. Moyle, 51 Kans. 203; 32 P. 895.

Sodeburg v. Chicago, etc. Railway Co., 167 Ill. 123; 149 N. W. 82.

Morey v. Essex County, 94 N. J. L. 427, 439; 110 Atl. 905.

Kinsman v. Utah Gas & Coke Co., 53 Utah 10; 177 P. 418.

Thackery v. Union Portland Cement Company, 64 Utah 437; 231 P. 813, and cases there cited.

## THERE IS NO MISJOINDER OF PARTIES PLAINTIFF.

It is said in

Bancroft's Code Practice and Remedies,  
Vol. 2, Page 1081, Section 743, that:

“The general rule in actions of equitable cognizance is that all persons materially interested either legally or beneficially in the subject matter of the suit must be made parties either as plaintiffs or defendants so that a complete decree may be made, binding upon all parties. And it is said that although courts of law require no more parties than those immediately interested in the subject matter, in equity all persons, including those remotely interested therein, may be joined and are often necessary parties.”

In the same volume at Page 1112, Section 760, it is said:

“Where, therefore, there is a community of interest among all of the claimants in the questions of law and fact involved in the general controversy, or in kind and form of relief demanded by or against each individual member of a numerous body, jurisdiction should be exercised although there is no common title or community of right or of interest in the subject matter among the individuals.”

In 14 R. C. L., Page 328, Section 29,  
it is said that:

“Courts of equity have always exercised a sound discretion in determining whether



parties are properly joined in a suit, with the object of the most efficient administration of justice. The joinder therefore as complainants of persons who suffer special injury by reason of the proximity of their properties to a nuisance which it is sought to restrain is proper. In a similar manner owners of separate parcels of real property may unite in a suit to enjoin the repairing or rebuilding of a wooden building within the fire limits of a municipality, whereby their property will be diminished in value, and subjected to increased danger of destruction by fire. Their common danger and common interest in the relief sought authorize them to join in one action."

It will serve no useful purpose to multiply the authorities or cite cases from other jurisdictions because the law is settled in this jurisdiction by the cases of

Kinsman v. Utah Gas & Coke Co., 53 Utah 10; 177 P. 418 and

Wasatch Oil Refining Company v. Wade, 92 Utah 50; 63 P. (2d) 1070.

As we understand counsel for the defendant they are not relying so much on their claim of misjoinder of parties plaintiff so long as they were seeking injunctive relief, but when the court below denied plaintiffs' injunctive relief the case was at an end and the court could not properly proceed to hear or determine the question of damages, if any, sustained by the plaintiffs. The same question was urged and the same argument submitted to this Court (in which one of counsel for the defendant herein participated) and decided against defend-

ant's contention in the Wasatch Oil Refining Company case, supra, after an able and thorough presentation of the question of whether or not in a proper action for injunctive relief damages may be awarded after the injunctive relief has been denied. In the Wasatch Oil Refining Company case, supra, this Court reaffirmed the doctrine announced in the Kinsman case wherein it is said that:

“In an equity action where the prayer is for both specific and general relief the court having acquired jurisdiction of the parties and the subject matter will retain that jurisdiction until justice has been done, although the equitable relief is denied, especially in this State where there is but one form of civil action.”

“Where fifty-nine persons bringing an action to restrain as a nuisance the operation of a gas plant and for general relief, each having separate and individual claims or right of action for damages growing out of the same trespass on the part of the defendant company, the only separate issue being the amount of compensation due each plaintiff, the court should, on denying equitable relief allow the plaintiffs to amend and determine the amount to which each plaintiff is entitled, without requiring them to bring separate actions.”

The foregoing quotations are from the syllabi in the Kinsman case and reflect the opinion of the Court. In the course of that opinion this Court quoted from

Pomeroy Eq. Jur., Page 354, where it is said:

“Whenever the true spirit of the reform procedure has been accepted and followed the courts not only permit legal and equitable causes of action to be joined and legal and equitable remedies to be prayed for and obtained, but will grant purely legal relief of possession, compensate damages, pecuniary recoveries and the like, in addition to or in place of the specific equitable relief denied. In a great variety of cases which would not have come within the scope of the general principle as it was regarded and acted upon by original equity jurisdiction and in which therefore a court of equity would have refrained from exercising such a jurisdiction.”

In the Wasatch Oil Refining Company case v. Wade, *supra*, it is said that the Kinsman case cannot now be disregarded and we have no desire to reverse or qualify any of the principles for which it stands. It has been affirmed and reaffirmed as to one or more of the principles announced therein in the following cases in this Court:

Utah Oil Refining Company v. District Court, 60 Utah 428; 209 P. 624.

Thackery v. Union Portland Cement Company, 64 Utah 437; 231 P. 813.

Madsen v. Bonneville Irrigation Dist., 65 Utah 571; 239 P. 781.

Trenchard v. Reay, 70 Utah 19; 257 P. 1046.

McMonegal v. Fritch Loan & Trust Company, 75 Utah 470; 286 P. 630.

Norback v. Board of Directors of Church Extension Society, 86 Utah 506; 37 P. (2d) 339.



The facts in this case bring it squarely within the law announced in the Kinsman and Wasatch Oil Refining Company cases, *supra*.

At the conclusion of the evidence offered in support of the claim for injunctive relief the court found that the defendant company in the construction and operation of its plant had created and was maintaining a nuisance and that plaintiffs were entitled to appropriate relief. However, in light of the fact that defendant had expended a large sum of money, approximately Thirty Thousand Dollars, according to the president of the company, and the further fact that plaintiffs had not acted promptly in seeking equitable relief, the trial court refused to grant the injunctive relief, but held that plaintiffs were entitled to appropriate relief because of the wrongs complained of, and upon further hearing awarded damages which are clearly in lieu of injunctive relief.

The facts in this case do not bring it within the doctrine of most of the cases cited and relied upon by the defendant, but we shall not undertake the task of reviewing those cases in this brief, as most of them have already been considered by this Court in the Wasatch Oil Refining Company case, *supra*, and a conclusion reached contrary to the contention here made by the defendant. It is clear here that the court below refused the injunction and substituted therefor the damages sustained and to be sustained by the plaintiffs upon the authority of a doctrine repeatedly announced by this Court, and in order to save the defendant from the complete loss of its investment in its plant. It may be conceded that some of the cases cited by the defendant, especially from jurisdictions which have not adopted the reform procedure, are not in accord with the approved procedure in this jurisdiction, but as already indicated, this Court has refused to

follow such doctrine, although the matter has been repeatedly presented to it. Before leaving this phase of the case it may be noted that defendant in its brief has considerable to say about it having been denied a jury trial. A jury trial was not demanded by defendant in the court below, nor did the defendant join in plaintiffs' request for a jury. Had the defendant so requested it may well be that the trial court would not have denied the request made by the plaintiffs.

In the Kinsman case this Court said that "the court may call to its assistance a jury to determine the amount, if any, of such damages as in other equitable proceedings."

In the Wasatch Oil Refining Company case it is said:

"Where however the case is one of equity jurisdiction and the question of damages is before the court, to be granted if proved, either in substitution for or in addition to equitable relief, the denial of a jury trial is not the denial of any legal right. *Weinger v. Metropolitan Life Ins. Co.*, 359 Ill. 584, 195 N. E. 420, 98 A. L. R. 169; *Rhoades v. McNamara*, 135 Mich. 644, 98 N. W. 392; *Jacob v. Schiff* (Sup.), 149 N. Y. S. 273."

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**PLAINTIFFS ARE ENTITLED TO DAMAGES  
IN AN AMOUNT EQUAL TO THE DE-  
PRECIATION IN THE VALUE OF THEIR  
REAL PROPERTY OCCASIONED BY THE  
OPERATION OF DEFENDANT'S PLANT.**

In its brief defendant contends that the trial court did not adopt the proper measure of damages in

that the defendant might discontinue the operation of its plant. So far as this record discloses there is nothing in the evidence to support such a contention. On the contrary, all of the evidence shows that the defendant company intends to continue permanently to operate the plant as it is and has been operated. Notwithstanding defendant, through its president, assured the County Commissioners of Utah County that the plant would be so constructed and operated as not to be a nuisance, the evidence shows that it is a nuisance; and notwithstanding the defendant claims that it is constructed and operated as well as it can be constructed and operated, the fact remains that it is and will continue indefinitely to be a nuisance. The plant is constructed of cement and brick, which would indicate that it is intended to be operated indefinitely. (Tr. 811). The fact that defendant has expended, according to the testimony of its president, the sum of Thirty Thousand Dollars is also an indication that the plant is a permanent establishment. Under such circumstances the authorities teach that the plaintiffs are entitled to recover for permanent damages. In the case of *Thackery v. Union Portland Cement Company* this Court in discussing a similar question quoted with approval the following language from

4 Sutherland Damages (4th Ed.), Section 1046:

“The apparent discrepancies in the American cases on this subject may perhaps be reduced by supposing that where the nuisance consists of a structure of a permanent nature and intended by the defendant to

be so, or of a use or invasion of the plaintiff's property, or a deprivation of some benefit appurtenant to it for an indefinitely long period in the future, the injured party has an option to complain of it as a permanent injury and recover damages for the whole time, estimating its duration according to the defendant's purpose in creating or continuing it, or to treat it as a temporary wrong to be compensated for while it continues; that is, until the act complained of becomes rightful by grant, condemnation of property or ceases by abatement."

In the Thackery case, *supra*, this Court said that

"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. Such would necessarily tend to lessen litigation and once for all determine the respective rights of the parties. Many of the States, as I understand the decisions, permit that to be done. That right was recognized by this Court in *Kinsman v. Gas Co.*, 53 Utah 10, 177 P. 418."

In the *Kinsman* case this Court said:

"The cause is therefore remanded with directions to the District Court to allow amendments to the pleadings if desired and to 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 sep-

arate findings upon such issue of fact and enter judgment or judgments accordingly.”

In 20 R. C. L., Page 465, Section 81,  
it is said that:

“If private nuisance is of such a character that its continuance is necessarily an injury and it is of a permanent character that will continue without change from any cause by human labor and dependent for change in no contingency of which the law can take notice, then the damages are original and according to the weight of authority, a right of action at once exists to recover the entire damage, past and future, and one recovery will be a bar to any subsequent action.”

It may be noted that at the trial after the lower court had announced it would deny injunctive relief but would permit an amendment and receive evidence touching the question of any damages that plaintiffs might establish, the first witness called by the plaintiffs touching such damages was P. P. Thomas, who testified as to the depreciation in the market value of plaintiffs' premises occasioned by the construction and operation of the plant. No objection was made by defendant at the trial to the effect that the proper measure of damages was not the depreciation in the value of plaintiffs' property on account of the construction and operation of the defendant's plant. Plaintiffs' evidence was, after injunctive relief was denied, directed to that issue, as was also the evidence of the defendant. The case having been tried upon such theory and the defendant having acquiesced therein, under the doctrine announced by the Thackery case, *supra*, the defendant may not now be heard to contend that the wrong measure of damages was adopted by the trial court.

If the plaintiffs were to bring an action for any damage sustained by them, or either of them, after the supplementary complaint was filed and trial had thereon, a complete defense to any such action would be that the cause having been tried upon such theory the plaintiffs may not recover any other or additional damages because of the operation of the plant in the manner that it has been operated. The damages caused by the construction and operation of the plant has forever been set at rest by this action. In such particular this case falls squarely within the rule announced in the Thackery case, *supra*. Other cases in this and other jurisdictions which lend support to such view are the following:

Utah Oil Refining Co. v. District Court of  
Salt Lake County, 60 Utah 428; 209 P.  
624.

Mast v. Sapp, 140 N. Car. 533; 53 S. E. 350.  
5 L. R. A. (N. S.) 379.

111 Am. St. Rep. 864.

6 Ann. Cas. 384.

L. R. A. 1916-E, note at Page 1069.

27 A. L. R., note at Page 161.

37 A. L. R. 812.

Sutherland Damages, 4th Ed., Secs. 1046-  
1047, and cases there cited.

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## THERE WAS NO ERROR IN REFUSING TO ADMIT EVIDENCE.

On page 90 of defendant's brief it is urged that the trial court erred in refusing to admit evidence touching the reappraisal of lands and improvements in Utah County, Utah, under the direction of the State Tax Commission of Utah. We are at a loss to understand upon what theory defendant



claims the proffered evidence was competent. It is, so far as we can ascertain, the uniform holding of the courts that the assessed value of land by a public officer for the purpose of taxation is not competent to show market value.

“The assessed value of land when it is made by the assessor without the intervention of the land owner, is not admissible as evidence of market value and no inference can fairly be drawn that it is correct from the failure of the owner to object on the ground that the valuation is too low.”

18 Am. Jur., Page 993, Section 350.

Numerous cases are cited in the foot note which sustain the text. There is of course very good reason why that should be the law. It is a matter of common knowledge that property in this State is in the main assessed at only a fractional part of its market value. If there were any doubt about that being so a comparison of the values which the defendant's witnesses placed upon plaintiffs' land with the values placed thereon under the direction of the State Tax Commission would establish such to be the fact beyond controversy. Moreover, to permit the assessed value of property to be admitted in evidence in the manner sought by the defendant would have been to deprive plaintiffs of their right to cross examine those who made the assessments. To argue that an assessment made under the direction of the State Tax Commission stands on any other or different basis than that of an assessor is without foundation in law or in fact.

Complaint is also made because the trial court did not permit plaintiff Paul Swartz to testify in greater detail as to why he became ill while he was residing on his property near defendant's plant.

Mr. Swartz testified on direct examination that the smell from defendant's plant was the rottenest smell that he had ever smelled; that if the smell comes when he is eating he must stop and many times the smell makes him vomit. On cross examination the defendant inquired about the health of Mr. Swartz and his family. The court permitted defendant, over objection by plaintiffs to go into the question of Mr. Swartz's health and the doctors he employed. (Tr. 324 to 327). If this Court will read the extent to which the court permitted counsel for the defendant to cross examine Mr. Swartz about his health and that of his wife and children, and as to their doctors, we feel confident that it will marvel at the extent to which the court permitted defendant to cross examine Mr. Swartz about matters that were not testified to on direct examination.

On page 93 of defendant's brief complaint is made because, as it is claimed, the trial court refused to permit it to offer evidence to show the sanitary condition of the plant. The difficulty with that contention is that it is contrary to the fact. In none of its rulings did the court deny defendant the right to show the condition of the plant. Mr. Warren E. Rasmussen testified that he is a veterinarian; that he visited the plant once. He did not inform the court as to what he found at the plant, but was asked whether or not the plant was sanitary. The court sustained the objection of plaintiffs to such question but expressly indicated to defendant that he might show the condition of the plant but that the witness Rasmussen was not permitted to give his opinion upon the question that the court must ultimately determine. Whereupon counsel for defendant apparently became peeved and did not attempt to further examine the



witness. It would seem obvious that it is not shown that the witness was competent to testify as an expert, and if he were his testimony would be of no probative value in the absence of a showing of the facts upon which his opinion was founded. If this Court will take the time and have the patience to read the voluminous transcript it will find that the trial court was very liberal and used the utmost care and patience in permitting the parties, especially defendant, to offer all evidence that might bear upon the question presented for determination, and likewise allowed a wide latitude on cross examination. If this Court can find the time and has the patience to read the transcript it cannot well avoid reaching the conclusion that much of the evidence received did not bear upon the issues raised by the pleadings and cannot well find any difficulty in concluding that the facts found by the court below are amply sustained by the evidence.

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### THE EVIDENCE IN THIS CASE SUPPORTS THE DAMAGES AWARDED TO EACH OF THE PLAINTIFFS.

Before taking up a specific discussion of the evidence as it relates to the damages sustained by each of the plaintiffs a few general observations on the amount of damages common to all of the plaintiffs will serve to avoid repetition. On pages 61 and 62 of defendant's brief defendant makes the ingenious statement that plaintiffs' witness depreciated the value of the water rights of the plaintiffs a specified percent of the value thereof. The evidence does not support such contention. Plaintiffs' witness gave the amount of depreciation in the market value of the various properties without attempting to segregate the depreciation of the water from

the land. Indeed, it would be impossible to make the distinction.

While this record is silent as to whether the water is or is not appurtenant to the land, the fact remains that in this semi-arid region land without water is of little or no value. That is a matter of common knowledge, of which courts will take judicial notice. If the water were taken from the lands of the plaintiffs it would result in rendering such land practically valueless, and especially the homes built thereon. Nor is any practical purpose served by fixing the damage to the improvements on the farms of the plaintiffs as distinguished from the land itself. Indeed, in contemplation of law most of the improvements are a part of the land. It is true that as some of the witnesses testified, the improvements could be removed and used elsewhere. Nor is there any sound legal basis for the argument that the owners of lands upon which improvements have not been constructed are not entitled to recover damages.

One who goes upon his farming lands to work is entitled to the right to breathe air which is not polluted with obnoxious odors the same as is one who spends both day and night upon the land. If one desires to build a home on his land or sell it, for someone else to build a home thereon, he may not lawfully be precluded from so doing by one who is maintaining a nuisance which renders his land unfit for a home. In either event he is entitled to either have the nuisance removed or be compensated for the damages sustained by reason of the wrong. Defendant has cited no case or authority holding to the contrary and we seriously doubt that one can be found in the books where any such doctrine is announced. The cases in this jurisdiction heretofore cited are to the contrary.

It is a cardinal principle of law that one who is wrongfully injured is entitled to redress. If the wrong cannot be prevented by injunction the injured person is entitled to money compensation. This case was, as we have heretofore pointed out in this brief, tried and determined on the theory that plaintiffs are entitled to recover the amount that they are damaged by reason of the wrongful acts of the defendant. The measure of damages according to the law announced by this Court in the cases heretofore cited is the depreciation in the market value of plaintiffs' property caused by the wrongful acts of defendant. Indeed, in the absence of injunctive relief there is no other way of redressing the wrong.

These plaintiffs are farmers. Most of them live upon their farms. Those who do not may well conclude to do so were it not for the fact that the nuisance caused and maintained by defendant makes it impossible to live upon the land in comfort. If any of them conclude that they can no longer bear the stench emanating from defendant's plant they may, as they have a right to do, sell their lands and the improvements thereon at such a price as can be obtained, which price by a clear preponderance of the evidence, will be at a very substantial amount less than could be secured if defendant were not maintaining its nuisance. It is not our contention that plaintiffs are entitled to recover unless the evidence shows that defendant is guilty of maintaining a nuisance. We concede that in the absence of a showing that defendant has committed a wrong recognized as such by law, plaintiffs are not entitled to recover, and by the same token, plaintiffs contend that if a wrong, that is, a nuisance has been, now is and will in all probability be maintained by the defendant, the plaintiffs are

entitled to redress. That the defendant having failed and refused to so use its property as not to be a nuisance and insisted on continuing indefinitely to maintain a nuisance and plaintiffs having been denied injunctive relief, they are entitled to redress by the only means open to them, to recover damages for the injuries sustained, the measure of which is the depreciation in the market value of their property occasioned by defendant maintaining the nuisance complained of.

In this connection it may be noted that there is a fundamental distinction between a case where in an action involving a nuisance plaintiffs are denied injunctive relief because a nuisance has not been shown by the evidence, and a case where injunctive relief has been denied because plaintiffs have not acted timely, or where a court of equity deems an injunction will needlessly penalize the wrongdoer without a corresponding benefit to the complainant, and where the complainant may be compensated in damages. It may readily be conceded that if a cause fails because a nuisance has not been shown damages may not be recovered because in such case the defendant has done that which he has a legal right to do. That, however, is not this case. Here the court found, and under the evidence and its own observation it could not well avoid finding that a nuisance has been and will be maintained indefinitely. Defendant having succeeded in escaping injunctive relief, not because of its right to do what has been and will be done, but in spite of the fact that it has and will continue to invade plaintiffs' right, must respond by paying such damages as flow from its wrongful act. That, as we have heretofore pointed out in this brief, is plaintiffs' theory and that is the doctrine announced by this Court in the *Kinsman*, *Thackery*, and other cases heretofore cited.



With these general observations we shall proceed to a specific discussion of the evidence as it affects the various plaintiffs.

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## DAMAGES SUSTAINED BY THOMAS LUDLOW

Mr. P. P. Thomas testified that in his opinion the home of Thomas Ludlow had a value of \$2500.00 in the absence of the maintenance and operation of defendant's plant; that the other improvements had such a value in the sum of \$1156.00 and the land \$8,000.00; that the damage to the home of Mr. Ludlow was \$500.00, to the improvements \$230.00, to the land \$800.00, making a total of \$1530.00. (Tr. 856; Ab. 263).

C. E. Hawkins placed the value of the Thomas Ludlow home at \$3500.00, his barn and lean-to at \$500.00 and his land at \$200.00 an acre. He gave it as his opinion that the odor from defendant's plant depreciated the improvements on the Thomas Ludlow property twenty-five percent, which would amount to \$1,000.00; to the land ten percent. Thomas Ludlow owned forty acres of land, which at \$200.00 an acre would be \$8,000.00, ten percent of which is \$800.00, making a total of \$1800.00 damages to the Thomas Ludlow property, according to Mr. Hawkins. (Tr. 949; Ab. 295-6).

Lawrence E. Johnson placed the value of the Thomas Ludlow land at \$200.00 per acre and its depreciation in value ten percent, which for the forty acres would amount to \$800.00. He did not testify about the improvements.

Thomas M. Anderson placed the appraised value of the Thomas E. Ludlow property with the presence of defendant's plant as follows: The home \$3,000.00; the other improvements \$800.00; the

value of the land \$200.00 per acre. He placed the depreciation of the home and other improvements at twenty percent and the depreciation of the land ten percent, making a total of \$1560.00. Thomas E. Ludlow gave it as his opinion that the fair reasonable value of his farm and improvements at this time is \$10,000.00. He testified at considerable length as to the odors at his home, but gave no testimony as to the amount that his property was depreciated in value on account of defendant's plant.

The trial court awarded damages to Thomas E. Ludlow in the sum of \$1360.

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#### DAMAGES SUSTAINED BY EARL LUDLOW

P. P. Thomas testified that in his opinion the home of Earl Ludlow was of the value of \$2,000.00, his other improvements \$800.00, his land \$200.00 per acre, or \$4,000.00, making a total value of \$6800 without the defendant's plant; that the damage to the home was \$500.00, to the improvements \$160, to the land \$400.00, making total damages of \$960.00. C. E. Hawkins placed the value of the home at \$3,000.00, the other improvements \$800.00 and the land of the value of \$200.00 per acre. Mr. Hawkins placed the depreciation of the improvements at twenty-five percent and the land at ten percent, making as a total of depreciation on account of the maintenance of defendant's plant to the property of Earl Ludlow, \$1350.00.

Thomas M. Anderson placed the value of the Earl Ludlow home at \$3,000, the other improvements at \$600.00 and his land at \$200.00 an acre. He depreciated his home and improvements at twenty percent of their value, or \$900.00, and the land



\$400.00, or a total of \$1300.00. Lawrence E. Johnson placed the value of the land of Earl Ludlow at \$200.00 per acre and that the presence of the plant depreciated it ten percent, or a total of \$400.00.

The trial court awarded damages in the sum of \$920.00.

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### DAMAGE SUSTAINED BY EDWIN B. SELENE

P. P. Thomas testified that he placed the value of the home at \$1500.00, the out buildings at \$805.00, the land at \$200.00 per acre, or \$3538.00, or a total value of the property without the plant at \$5843.00; that the value of the land and home and improvements with the plant is \$2665.00, a total depreciation of \$3,179.00. (Ab. 262).

Charles E. Hawkins testified that the value of Mr. Selene's home without the plant is \$2200; the out-buildings \$800.00, the land \$200.00 per acre; that the plant depreciated the value of the improvements seventy-five percent and the land fifty percent (Ab. 291), thus according to Mr. Hawkins' testimony the property was depreciated because of the plant in the sum of \$4869.00.

Thomas M. Anderson placed the value of the Edwin Selene home without the plant at \$2,000.00 and the other improvements at \$800.00, and the land at \$225 per acre. He testified that the improvements on Mr. Selene's land were depreciated in value one hundred percent on account of defendant's plant and the land thirty percent. Under Mr. Anderson's evidence Mr. Selene was damaged in the total sum of \$3993.77.

Mr. Selene testified the value of his property was \$7,000 (Ab. 70) but did not testify as to the de-

preciation in its value on account of defendant's plant.

Lawrence C. Johnson placed the value of Mr. Selene's land at \$225.00 per acre and that the plant had depreciated its value one-third, or \$1326.42. He did not testify about the improvements. The court awarded Mr. Selene judgment for \$2176.00.

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#### DAMAGES SUSTAINED BY MARGARET D. HANSEN.

P. P. Thomas placed the value of the home of Mrs. Margaret D. Hansen at the sum of \$3,000.00 and the improvements at \$800.00 and the land at \$200.00 per acre, or \$5160.00. He placed the depreciation of the home and other improvements by reason of defendant's plant, at \$760.00 and to the land, \$516.00 (Ab. 263) or a total of \$1276.00.

Charles E. Hawkins placed the value of Mrs. Hansen's home at \$3,000.00 and other buildings at \$800.00 and the land at \$175.00 per acre. He placed the depreciation on account of the plant on her improvements at twenty percent and on the land fifteen percent, (Ab. 294), making a total of \$1437.00.

Thomas M. Anderson placed the value of Mrs. Hansen's home at \$3,000.00 and other improvements at \$800.00 and the land at \$200.00 per acre. He placed the depreciation of the improvements at thirty percent and the land at fifteen percent (Ab. 315), making a total depreciation of \$1554.00.

Lawrence C. Johnson placed the value of Mrs. Hansen's land at \$225 per acre and the depreciation on account of defendant's plant at twenty per-

cent (Ab. 329) making the damage to the land alone \$1161.

Heber Eugene Hansen placed the value of the property at \$10,000. The trial court fixed the damage of Mrs. Hansen at \$1124.00.

During the course of his testimony, Eugene Hansen testified that the home, together with nineteen acres and a fraction stood in Margaret D. Hansen's name and the remaining 16 acres stood in the name of his father, Heber J. Hansen, who is dead. Defendant in its brief at page 51 calls attention to that testimony and then points out that the Hansen property was depreciated less than the property of Earl Ludlow which was twice as far away from the plant and about the same as the Thomas E. Ludlow property which was also nearly twice as far from the plant. It may be that the damage to the Hansen property was considerably greater than that fixed by the court, because of the fact that sixteen acres of that property stood in the name of Heber J. Hansen, deceased.

It also appears that the prevailing wind in the locality of the plant comes from the east and moves towards the west; that the odors are conveyed by the wind. The Ludlow properties are west of the plant while the Hansen property is to the south of the plant. If it be contended that Mrs. Hansen could not maintain an action for damages to the property which stood in her husband's name, such contention must fail. Upon the death of Heber J. Hansen the surviving widow became the owner in her own right of an undivided one-third interest in the same. She thus had a right to maintain the action even as to the property standing in the name of Heber J. Hansen. Moreover, the defendant did not in the court below raise the question of the incapacity of Margaret D. Hansen to maintain the

action as to the property which stood in the name of her deceased husband.

The law is well settled that

“ordinarily defendant waives the objection that plaintiff is not the real party in interest where he fails to raise it or fails to raise it at the proper time, as by demurrer or answer, and instead of objection on this ground answers to the merits. Although there is authority to the contrary, the objection may be waived by conduct indicating express content that the suit proceed.”

46 C. J. 191.

The case of

Cole v. Utah Sugar Company, 35 Utah 148;  
99 P. 681,

supports the view that a defendant claiming that the cause is not prosecuted by the real party in interest can only be taken advantage of by demurrer or answer, and if not so taken is waived.

Page 154 of 35 Utah.

The defendant in this case proceeded with the trial as though Mrs. Hansen were the real and sole party in interest, without in any way indicating that it had any objection on that ground. In such case the defendant waived any objection that it may have had to Mrs. Hansen prosecuting the action.

Cronk v. Crandall, 121 N. Y. S. 805.

Sandee v. Tschider, 205 Fed. 252.

In any event the evidence supports the judgment in favor of Mrs. Hansen without regard to taking into consideration the land that stood in the name of her husband, Heber J. Hansen, deceased.

## DAMAGES SUSTAINED BY JOHN ANGUS

P. P. Thomas testified that the home of John Angus was of the value of \$1200.00 if defendant's plant were not there; his improvements \$740.00 and his land \$200.00 per acre, or \$1564.00; that his home was damaged \$240.00, the other improvements \$150.00 and his land \$350.00 (Ab. 264), making a total of \$740.00.

Charles E. Hawkins testified that the John Angus home has a value of \$1500.00, the other improvements \$750.00, and his land \$175.00 per acre, without the damage of defendant's plant. That the improvements of Mr. Angus were damaged fifty percent on account of the plant and the land was damaged twenty percent. Under Mr. Hawkins' testimony Mr. Angus sustained damages in the total sum of \$1398.70

Thomas M. Anderson placed the value of the home of John Angus at \$1500.00, the other improvements at \$750.00 and the land at \$175.00 per acre. He placed the damage caused by defendant's plant as being forty percent of the improvements and fifteen percent of the land (Ab. 317-18), or a total of \$1205.07.

Lawrence C. Johnson placed the value of the John Angus land at \$200.00 per acre and testified that in his opinion its market value was depreciated twenty percent on account of defendant's plant. (Ab. 330). He did not testify as to the improvements. The depreciation of the land would thus be \$273.70. The court awarded John Angus damages in the sum of \$824.00.



## DAMAGES SUSTAINED BY JOHN ANDERSON

P. P. Thomas testified that except for the injury caused by defendant's plant, the John Anderson home was of the value of \$800.00, the other improvements \$250.00, his land \$200.00 per acre, making a total of \$2050.00; that the damage to the home and improvements is \$800.00; to the land \$250.00 (Ab. 262) making total damage of \$1050.00.

Charles E. Hawkins placed the value, except for the injury caused by defendant's plant, of the home of John Anderson at \$1,000.00, the out building, \$300.00 and the land at \$200.00 per acre. Mr. Hawkins placed the damage to the improvements at seventy-five percent of their value and fifty percent for the land, (Ab. 293) making total damages of \$1475.

Thomas M. Anderson placed the value of the John Anderson home at \$1,000.00, the other improvements \$300.00 and the land \$225.00 per acre, without the injury caused by defendant's plant. He testified that the improvements in his opinion were depreciated one hundred percent and the land thirty percent (Ab. 313). The total injury thus would be \$1637.50.

The court awarded John Anderson judgment for \$1050.00.

Defendant seems to contend that John Anderson is not entitled to a recovery because the title to the property stands in his wife's name. John Anderson did testify that the property stood in his wife's name, but further testified that he owned the property. The complaint alleges and the answer admits that John Anderson is the owner of the property described in the complaint; see paragraph three of defendant's answer (Ab. 24). There was thus no issue as to the ownership of the



John Anderson property. Moreover, what we have heretofore said in this brief about the failure of defendant to raise any question as to Mrs. Hansen being the real party in interest applies to John Anderson. It of course might well be that John Anderson was the owner of the property even though it stood in his wife's name.

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### DAMAGE TO THE PROPERTY OF MAYLAN CARTER.

P. P. Thomas placed the value of the 14.58 acres of land of Maylan Carter at \$200.00 per acre, or a total of \$3,096.00. It was his opinion that the property was damaged in the sum of \$619.20 on account of defendant's plant.

Charles E. Hawkins valued the Maylan Carter property at \$200.00 per acre and that the damage caused by the plant depreciated the land fifty to sixty percent. At fifty percent the damages would amount to \$1548.

Thomas M. Anderson placed the value of the Carter property at \$225.00 per acre and its depreciation on account of the plant at thirty percent (Ab. 314-15), or a total of \$1044.90.

Lawrence C. Johnson placed the value of the Carter property at \$225.00 per acre and its depreciation at thirty-three and one-third percent (Ab. 328) or a total of \$1161.00.

Maylan Carter testified that he paid \$225.00 per acre for his property and in his opinion it was depreciated in value on account of defendant's plant fifty percent, or a total of \$1741.50.

The court fixed the damage to the Carter property at \$646.00.

Defendant makes some point of the fact that the trial court dismissed the action as to Maylan Carter. The action, however, as to Mr. Carter was dismissed without prejudice. In its memorandum of decision dated January 6, 1940, the court states that it permitted the action to be reinstated as to the plaintiffs Maylan Carter and Edward M. Beck, otherwise known as Reed Beck, the case having been previously dismissed as to said plaintiffs without prejudice (Tr. 122). So long as the cause was still before the court, there can be no serious doubt that the court could change its ruling and reinstate the cause as to Maylan Carter. Indeed, in the Kinsman case this Court on its own motion indicated that additional parties should be permitted to join as plaintiffs. It is of course a matter of common practice, if not indeed the duty, of a trial court when it believes its ruling is in error to correct the same while the cause is still pending before it. That is what was done by the trial court in this cause as to Maylan Carter.

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#### DAMAGES SUSTAINED BY EDWARD LUDLOW.

P. P. Thomas testified that without defendant's plant the value of the land of Edward Ludlow is \$225.00 per acre, or \$1833.75, and it is damaged \$611.25 by reason of the plant. (Ab. 263).

Charles E. Hawkins placed the value of the Edward Ludlow land at \$225.00 per acre, and that defendant's plant had depreciated it fifty percent (Ab. 263), or \$916.87.

Thomas M. Anderson placed the value of the land of Edward Ludlow without the plant at \$225.00

per acre, or \$1833.75, and placed the depreciation at thirty percent, or a total of \$550.12.

Lawrence C. Johnson placed the value of the Edward Ludlow land without the plant at \$250.00 per acre or \$2,037.00, and the depreciation on account of the plant at one-third (Ab. 328) or a total of \$679.16.

The court placed the damage at \$427.87.

Defendant attempts to make a point out of the testimony of Edward Ludlow to the effect that the record title is not in him. He did so state, but further testified, however, that he held a deed from his son that had not been recorded (Ab. 137). It is of course elementary that the failure to record a deed can have no bearing on the right of Edward Ludlow to maintain this action.

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### DAMAGES SUSTAINED BY RUFUS ANDERSON.

P. P. Thomas placed the value of the Rufus Anderson home without the plant at \$2250.00, the out buildings \$1,000.00; the land \$250.00 per acre for 19.53 acres, or \$4875; and that the total value of Mr. Anderson's property if the plant were not there would be \$8,132.00; with the plant there \$5157.00, or a total damage to the land of \$975.00 and to the improvements \$2,000, making a total of \$2975.00.

Charles E. Hawkins testified that without defendant's plant the Rufus Anderson home is worth \$3225.00 and the other improvements \$750; and the land \$225.00 per acre; that the home and improve-

ments are depreciated seventy-five percent and the land fifty percent, making a total of \$4607.97.

Thomas M. Anderson placed the value of the Rufus Anderson home at \$2300, the improvements at \$750.00 and the land at \$250.00 per acre, if the plant were not there. He testified that the improvements were reduced one hundred percent and the land about thirty percent, making a total deduction of \$5487.50.

Lawrence E. Johnson placed the value of the Rufus Anderson property at \$250.00 per acre and that it was reduced in value one-third, or \$1628.33. Mr. Johnson did not testify concerning the improvements.

The court awarded damages in the sum of \$2099.30.

It appears that Mr. Anderson remodeled his home in 1935 at a cost of about \$1400.00 (Ab. 120). This was the year when the cookers were placed in defendant's plant. Apparently defendant contends that in any event Mr. Anderson should not be allowed any depreciation to the additional value which he expended in remodeling his home. In other words, as we understand defendant, it takes the position that Mr. Anderson was not permitted to assume that when defendant began cooking the dead carcasses and offal which it collected from various counties, Mr. Anderson was chargeable with foreseeing that the defendant would continue indefinitely to so operate its plant; that it would be impossible to live in his home without continuing to breathe the noxious odors from the plant. It is submitted that Mr. Anderson had a right to remodel his home and that defendant may not be heard to complain if it is required to compensate him for the wrongs complained of.

## DAMAGE SUSTAINED BY PAUL E. SWARTZ

P. P. Thomas placed the value of the Swartz home, without any depreciation caused by defendant's plant, at \$3,000.00, the out buildings at \$2,000.00, and the land consisting of 29.18 acres at \$200.00 per acre, or \$5835.00. He placed the depreciation of the home at \$600.00, the out buildings at \$400.00 and the land at \$583.00, on account of defendant's plant, making a total of \$1583.00.

Charles E. Hawkins placed the value of the Swartz home at \$3000, the outbuildings \$3150 and the value of the land at \$200.00 per acre. He testified the Swartz farm was depreciated in value twenty-five percent and the land twenty percent on account of defendant's plant. The total depreciation of the Swartz property according to Mr Hawkins therefore is \$1917.20

Lawrence C. Johnson valued the Swartz land at \$200.00 per acre and placed its depreciation in value at twenty percent, or a total of \$1167.00.

The court fixed the amount of the damage to the Swartz property at \$1230.00.

It will be noted that in every instance except one the trial court fixed the amount of damages substantially below the lowest figures given by any of plaintiffs' witnesses. The one exception was that of the depreciation in the value of the John Anderson property, in which case the court placed the damage at the same amount as did the witness P. P. Thomas

The defendant called three witnesses, T. H. Heal of Provo, Wm. Parry of Springville, and Henry Jeppson, a contractor who resides at Payson. Heal and Parry are engaged in the real estate busi-



ness. These witnesses collaborated as to the value of plaintiffs' property.

Charles S. Woodward, from Salt Lake City, who is engaged in the real estate business, also testified on behalf of the defendant. Mr. Woodward had been in Chicago and Kansas City and evidently had heard about the stock yards in those cities and had some notion about the effect of the stock yards upon real estate values. Just what bearing that has upon the question here presented is hard to determine. These witnesses, while admitting that obnoxious odors emanated from defendant's plant, testified that the market value of plaintiffs' property was not depreciated in value because of such odors. They all placed the value of the property belonging to plaintiffs somewhat lower than that placed upon the property by plaintiffs' witnesses. Plaintiffs' witnesses all lived within a few miles of the property in question and it appears from the testimony that they were familiar with such property and with the odors that emanated from defendant's plant. P. P. Thomas resided at Spanish Fork. He is connected with the Bank of Spanish Fork, one at Nephi, and the one at Heber City. He is familiar with the lands in question and at one time owned one of the tracts of land. He had appraised and made loans on other tracts and had frequently experienced the odors coming from the plant. Charles E. Hawkins resided at Benjamin and had been County Assessor of Utah County for ten years and also acted as appraiser for the Deseret Savings Bank. Thomas M. Anderson resided at Lake Shore, about three and one-half miles from the land in question. He was an employee of the Spanish Fork Loan Association and had been employed by the Federal Land Bank to appraise property in the vicinity of plaintiffs' property. Lawrence C. Johnson resides at Benjamin about



three-fourths of a mile west and 40 rods south of defendant's plant. He was a farmer by occupation and had experience in appraising lands in the vicinity of plaintiffs' lands. All of the plaintiffs' witnesses had first hand information on the nature and extent of the odors emanating from defendant's plant since its erection.

We have heretofore in this brief given a short summary of the evidence touching the nature and extent of the odors coming from defendant's plant and shall not enlarge upon what we have said, but again urge the Court, if it has the time, to read the transcript. We also again call the attention of the Court to the fact that the judge who tried the cause visited the plant and was invited to visit it as often as he desired, but it does not appear whether he visited the plant and its vicinity more than once. However this Court judicially knows that Judge Hoyt resides at Nephi and is the judge of the Fifth Judicial District Court of this State. The evidence shows that one of the main travelled paved highways from points south of the plant to points north thereof passes near the plant and it is a fair assumption that Judge Hoyt has passed along that highway in coming from his district to points north of the plant. It is not unreasonable to assume that he was familiar with defendant's plant or that upon the invitation of defendant he became familiar therewith before he made his findings of fact, conclusions of law and judgment.

A hypothetical question that might properly be asked of an expert witness as to the effect, if any, on the market value of the property of plaintiffs by the operation and maintenance of defendant's plant (for the purpose of illustration Mr. Edward Selene's property) would be similar to this:

Assuming, Mr. Witness, that a person is the owner of 17.69 acres of irrigated farm land of the value

of \$200.00 per acre, with a home thereon of the value of \$1500.00 and outbuildings of the value of \$805.00, and, at a distance of about thirty rods south of the home a rendering plant is constructed of cement and brick with an open sump into which blood and manure from dead animals drains and is permitted to stand until it seeps away or evaporates, and the carcasses of some fifty to seventy-five horses and cows, which have been dead one or two days, are collected at the plant per month, and in addition to the carcasses of cows and horses, dead pigs, sheep, offal and bones are collected at such plant and cooked for the purpose of manufacturing bone meal, fertilizers, poultry feed and tallow; and assuming there is also collected and stored at the plant from one to several tons of bones in which rats make their nest, and assuming that the odor from the cooking of the dead animals draws flies in great numbers to the plant and such home, and assuming that odors emanate from the plant intermittently every day and frequently at nights, and such odors smell like rotten meat; and assuming that such odors sometimes continue for an hour and other times almost continuously and are so intense at times that it sickens the entire family and keeps them awake all night and the children cry because of the odors; and assuming at times these odors continue all day and night and in the summer time the smell is stronger than in the winter; and assuming that when the odors come at meal times the people living in the home are unable to eat, and not infrequently the smell causes them to vomit; and assuming that such odors at times burn your throat and are so thick that it is difficult to breathe the air and the air chokes you and is so strong that you can almost chew the stuff;

and assuming that the smell is so strong at times that horses become frightened and it is difficult to control them; and assuming that the odors emanating from the plant bring swarms of blow flies to the house; and assuming that when one's clothes have been exposed to the odor, the smell remains in such clothes for hours thereafter, and assuming that these odors are not improving, notwithstanding the owner of the plant claims that he has done all he can to do away with the odors, and assuming that the owner of the plant cannot be enjoined from continuing the operation of the plant, and assuming that the plant is so constructed as to indicate it will be operated permanently or for an indefinite time; under these facts, Mr. Expert Witness, have you an opinion as to whether or not the maintenance and operation of such a plant will affect the market value of the land and home above mentioned? If the answer is yes, then this question might follow: Will the operation and maintenance of such a plant, under such circumstances, enhance or diminish the value of such a home and farm so located, and, if so, how much?

Similar hypothetical questions might properly be asked as to the homes and farm lands of the other plaintiffs.

Defendant's witnesses would have us believe that the property here brought in question would not be depreciated in value under such circumstances, and at least one of them would seem to be of the opinion that the homes and farms might be enhanced in value because notwithstanding only about two men are employed at the plant, the operation of such a plant might create an industrial area. We pause to observe that it is not likely that an indus-

trial plant will seek a location where it is impossible to live in comfort.

Plaintiffs' witnesses testified that these facts result in a substantial depreciation in the market value of the property and gave the amount of such depreciation. Defendant would have this Court answer the question as did defendant's witnesses, notwithstanding the trial court who saw the witnesses, heard them testify and who examined the plant, believed that in the main plaintiffs' witnesses spoke the truth. It is submitted that the trial court was right when he believed plaintiffs and their witnesses. But as we understand defendant it contends that even though plaintiffs are entitled to recover some damages, the award of the trial court is so large as to show that the damages were awarded as result of bias or prejudice on the part of the finder of the facts. Attention is again called to the fact that the trial judge substantially reduced the amount of the awards that were fixed by plaintiffs' witnesses.

If the odors emanating from defendant's plant and entering the homes and outbuildings of these plaintiffs who live near the plant are of such character, intensity and frequency as shown by the evidence, it is not difficult to understand why Mr. Anderson placed the damage to the improvements on some of the homes at one hundred percent and Mr. Hawkins placed such damage as high as seventy-five percent. Is it not more likely that one who had sufficient funds to purchase a farm and a home would not be interested at all in the purchase of such a home, or would not be willing to pay anything like a normal value for a farm so situated and so infested with odors, rats and flies? Not in-

frequently attractive scenery very materially adds to the value of a home or a farm, and it is but reasonable to believe that the presence or absence of pure air is of vital concern to one who would purchase a home or a farm. Men and women do not live by bread alone. They demand and are willing to pay more for property where they can enjoy the comforts of life. They may not lawfully be deprived of pure air and be rendered miserable by a plant such as that which the evidence shows has been, is and, as defendant insists, will be permanently maintained and operated, without regard to the discomfort or injury that it causes these plaintiffs.

We submit that the judgment should be affirmed with costs.

Respectfully submitted,

ELIAS HANSEN,  
Attorney for Plaintiffs  
and Respondents.