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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 :
Petition of Defendant and Appellant for Rehearing,
and Brief in Support Thereof

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, JOHN ANGUS, MAY-
LAN CARTER, EDWARD M. BECK,
otherwise known as REED BECK,
PAUL E. SWARTZ, EDWARD LUD-
LOW, and JOHN ANDERSON,

Plaintiffs and Respondents,

vs.

COLORADO ANIMAL BY-PRODUCTS
COMPANY, a corporation,

Defendant and Appellant.

Case
No. 6298

PETITION OF DEFENDANT AND APPELLANT
FOR REHEARING, AND BRIEF IN
SUPPORT THEREOF

MOYLE, RICHARDS AND MCKAY,
Attorneys for Defendant and Appellant.

FILED

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IN THE
SUPREME COURT
OF THE
STATE OF UTAH

THOMAS E. LUDLOW, et al., <i>Plaintiffs and Respondents,</i>	} No. 6298 DEFENDANT'S AND APPELLANT'S PETITION FOR REHEARING
vs.	
COLORADO ANIMAL BY-PRODUCTS COMPANY, <i>Defendant and Appellant.</i>	

Comes now the defendant and appellant and petitions the above entitled Court for a rehearing in the above entitled cause upon the following grounds, to-wit:

1. This Court failed to recognize the distinction in the law of nuisances between permanent and temporary damages, and adopted the wrong measure of damages.

2. This Court has ignored the doctrine of *Dahl v. Utah Oil Refining Company*.

3. The Court erred in assuming in its opinion that the defendant waived a jury trial.

MOYLE, RICHARDS & McKAY,
Attorneys for Defendant and Appellant.

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BRIEF OF DEFENDANT AND APPELLANT IN
SUPPORT OF PETITION FOR REHEARING

I.

This Court failed to recognize the distinction in the law of nuisances between permanent and temporary damages, and adopted the wrong measure of damages.

In its opinion in the principal case this Court said that “the trial court properly held that the nuisance was a recurring rather than a continuing one.” Furthermore, “it appears that the trial court based depreciation on the frequent recurrence of stench, not on any assumption that the building and other physical structures of appellant as located constituted a nuisance.”

Also: “There can be no doubt about the fact that the operation of defendant’s plant, by reason of the nauseating odors and stench thereby produced, constituted an intermittent but frequently recurring nuisance within the meaning of our statutes.”

And: “Furthermore, the trial court properly held that the nuisance was a recurring rather than a continuing one, and therefore very properly held that the statutes of limitations were inapplicable.”

Clearly this Court adopted the view that the nuisance was recurrent. Yet it adopted the measure of damages used by the lower court—the depreciation of market value of plaintiffs’ property, which is almost universally recognized as an unfair measure except for a permanent nuisance, and which has not been adopted by this Court until this case even for permanent nuisances, except by consent of the litigants. The opinion cites *Thackery v. Union Portland Cement Co.*, 64 Utah 437, 231 P. 813, and *Lewis v. Pingree National Bank*, 47 Utah 35, 151 P. 558, L. R. A. 1916 C. 1260, as the authorities for the use of depreciation of market value for a recurrent nuisance and for permanent uninterrupted nuisances. Neither case, however, so holds. The *Lewis* case holds that the proper measure is the depreciation in the value of the use of the premises; the *Thackery* case, that the parties may acquiesce in the use of the market value as a measure.

Lewis v. Pingree Natl. Bank, supra, involved a permanent damage caused by the encroachment of pillars of a bank on the property of the plaintiff and by the projection of the pillars and steps of the bank into the sidewalk in such a manner as to injure the business of the plaintiff’s jewelry store.

The court said:

“When, as here, however, the court does not

deem it just and equitable to order the thing which causes the impairment of the value as aforesaid to be removed, then the plaintiff must in one action recover his damages for all time, and the defendant, unless he chooses to remove the offending structure, must pay all the damages suffered by the plaintiff both past and prospective. Under such circumstances the measure of damages, as stated by Mr. Sutherland, is, 'How much the value of the plaintiff's use of the premises affected has been lessened by the defendant's wrongdoing'? We thus see that in cases like the one at bar plaintiff's property is not directly affected or depreciated by physical injury, but the value of its use for business purposes only is affected, and may to some extent be depreciated. If it were thus shown that the obstruction lessened or reduced the rental value of plaintiff's store-room, it would depreciate the value of the use of such room. The plaintiff is entitled, therefore, to recover in one action the full depreciation of the value of his property as just stated. To illustrate: Assuming that the pillars complained of reduced or lessened the rent of plaintiff's store to the extent of \$33.33 per month, then his property would be damaged in a sum which, if invested at the legal rate of interest, would produce that amount. What is that sum? Under our legal rate of interest, it would be \$5,000, since \$5,000, invested at 8 per cent. interest, would yield \$400 a year, or an equivalent of \$33.33 per month. If the rent of plaintiff's store, therefore, is reduced to the amount of \$33.33 per month, he should be awarded \$5,000, and no more. The foregoing illustration is offered merely as a guide in deter-

mining the measure of damages, where, as here, the whole damages must be recovered in one action, and in doing so we do not intimate that the plaintiff suffered that or any other sum or amount of damages. The foregoing measure of damages is also approved in Joyce, Law of Nuisances, section 259, and in 3 Joyce on Damages, section 2150.”

In the *Thackery* case the parties had stipulated and agreed upon the measure of damages. The court said:

“The only error argued by appellant is the ruling of the court in holding that the cause of action is not barred by the statute of limitations. At the oral argument counsel for the appellant stated that, if this court is of the opinion that the action is not barred by the statute of limitations, he did not ask a reversal of the judgment.”

Directly on the point of damages the court further said:

“It is suggested in the argument that, the injury being a recurring invasion of respondent’s rights, the court could not permit recovery of full compensation in one action as for a permanent injury. In other words, that the respondent’s causes of action were founded upon a recurring nuisance, and that, the nuisance being in its nature abatable either by act of the parties or by judicial decree, the only power the court had was to permit recovery of such damages as had been sustained within the period of limitation prior to the institu-

tion or trial of the action. The court in this case is dealing with private parties. The appellant is neither a public nor a quasi public corporation. However necessary or beneficial the products manufactured by appellant may be for the community in constructing public roads and in general building operations, nevertheless it is distinctly a private enterprise. *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 and 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.” (*Italics ours.*)

In the case at bar there has been no acquiescence and no agreement that this measure could be used in this case. Objections were raised at all proceedings to the irrelevance, incompetency, and immateriality of questions based on this measure. (Trans. 1127, Abs. 288; Trans. 1129, Abs. 290; Trans. 1209, Abs. 308; Trans. 1214, Abs. 310; Trans. 1234, Abs. 321; Trans. 1235, Abs. 322; Trans. 1250, Abs. 325; Trans. 1251, Abs. 326.) The evidence, of course, is uncontradicted to the effect that the odors are recurring and intermittent and do no damage whatever to the crops or the productivity of the land.

Under the decision as it is now phrased, the plaintiffs will have recovered the full difference between the

value of the land as it would be without the presence of the plant and as it is with the plant in operation. The evidence shows that there are many other neighbors in the community and living at distances less than those of some of the plaintiffs who have not participated in this law suit (Abs. 192, Tr. 830). Any one of these neighbors, or anyone succeeding to the interest of any of these neighbors who have not participated, can now come in and possibly under a different showing of facts obtain an injunction. The plant in that event will be forced to close down. These plaintiffs' properties will then be restored to their original value, but the plaintiffs will have nevertheless received these damages computed upon the permanent existence and operation of the plant. Obviously, this is inequitable and alone should be grounds for granting a rehearing for further investigation by this Court into the law regarding permanent and temporary nuisances.

In 39 American Jurisprudence 131, 132 and 135 (pages 391-397), it is said:

“§ 131. *Distinction between Permanent and Recurrent Injuries:* . . . In order to give a cause of action for original and permanent damages, the injury must be constant and continuous, not occasional, intermittent, or recurrent.” . . .

“§ 132. *Abatable Character of Nuisance as Test:* To make the cause of the injury permanent in the legal sense of the term, there must be, in

force or operation, a legal right to maintain it. According to many of the authorities a nuisance is temporary or continuing where it is remediable, removable, or abatable, as where it may be abated by the defendant, or by legal process at the instance of the injured party, against the will of the person creating it. For this reason it has been said that the element of permanency of a cause of injury is generally lacking in cases of public and private nuisances, and that almost every pure nuisance is regarded in law as being continuous. So, it has been held that except in the case of public or quasi-public corporation, a nuisance resulting from a business conducted or a structure or works erected and maintained by a person on his own property is a continuing one, as, for example, a nuisance consisting of smoke, fumes, or odors. . . .”

“§ 135. *Depreciation in Value of Property:* . . . If the nuisance is of an occasional or temporary character, the measure of damage is the difference in the rental or usable value of the premises before and after the injury, or, it has been held, where the property is rented, the difference in its rental value during the term of the lease. The diminution in the value of the fee in the land is not a proper test in such case.”

In *Robb v. Carnegie Bros. & Co.*, 145 (Pa.) 324, 22 Atl. 649, plaintiff brought an action to recover damages for injuries to his farm by reason of the smoke and gas from defendant's coke ovens erected on adjoining lands. The lower court granted damages by permitting testi-

mony regarding the productivity of the farm if the smoke were absent. The Supreme Court asked, "What then is the measure of damages?" and answered the question by saying:

"If the result is to show a permanent injury to the soil which impairs its productiveness to an appreciable degree, the extent of the loss in the value of the farm can be readily computed. If such permanent impairment is not made to appear, this part of plaintiff's claim should be rejected altogether. The fact that the plaintiff may regard his home as less desirable than before because of the proximity of an undesirable business or of undesirable neighbors, or the further fact that its selling value has been reduced by reason of such proximity, affords no ground for a recovery. The location of a livery stable, a restaurant, a distillery, and many other kinds of business close to one's home might diminish its comfort and its market value, but the owner would be without legal redress, so far as the effect of mere proximity is concerned.

"If, however, the business was so conducted as to affect the use of adjoining property or the health of its occupants, these tangible and substantial injuries capable of measurement by a pecuniary standard might sustain an action for damages. *The ordinary rule for the ascertainment of damages, where land has been entered and appropriated under the right of eminent domain, does not furnish a measure of the plaintiff's right to recover in this case, for the reason already given. Where an entry and seizure has been made,*

the effect of the seizure and appropriation of part of the land of the owner to a particular use is to be considered, as well as the value of what is taken. This can be best adjusted by ascertaining the selling value of the whole property before the entry, and after it has been made. The difference, if any, shows the actual loss which the owner has suffered. But in this case there has been no entry upon or appropriation of the plaintiff's land. What he alleges is that the prosecution of the business of making coke by the defendants on their own land has hurt his crops and injured his soil. They have the right to make coke. If the establishment of that business near the plaintiff affects the selling value of his farm, he can no more recover for that than he could recover against the saloon-keeper or the livery-man because the location of their business near him had made his property unsalable. The nature of the business is therefore to be left out of view. The sole question is, what harm had been done by the plaintiff by, or as the direct result of, the prosecution of the defendant's business at a place where they had a legal right to carry it on? The plaintiff might honestly think, and his neighbors might be willing to testify, that the mere location of the ovens on adjoining land reduced the value of his farm 30 or 50 per cent, or more, and a comparison by them of the value before and after the building of these ovens would include this element, for which there can be no recovery.'" (*Italics ours.*)

The difference between temporary, recurrent damage, like that caused by the fluctuating odors of the Colorado Animal plant, and permanent physical damages to

realty, is shown the case of *Mid-Continent Petroleum Corp vs. Fisher*, 183 Okla. 638, 84 Pac. (2d) 22. That case involved permanent damage. The defendant drilled several oil wells and the salt water and oil from these wells polluted a creek, and overflowing the plaintiff's lands, destroyed the fertility of his soil and killed a number of pecan trees. The defendant contended that the proper measure of damage was the loss of use or rental value sustained by the plaintiff to the date of filing because the nuisance was abatable, and because a temporary injurious condition will not support a judgment for permanent damage to realty.

The court held that this damage was permanent and said:

“The rule of damages stated by the defendant is a correct rule when applied to the proper factual situation and has been followed by this court when the damage suffered was temporary and susceptible of being remedied by the expenditure of money or labor. *City of Cushing v. High*, 73 Okl. 151, 175 P. 229; *City of Ardmore v. Orr*, 35 Okl. 305, 129 P. 867. But in the instant case the plaintiff sought to recover compensation for permanent damage to his realty. Either the damage or the cause of the damage can be permanent, in the legal sense, or temporary, but the rule of damages applicable in a given case is determined by whether the damage suffered is permanent or temporary rather than whether the cause of the damage is permanent or temporary and susceptible of being remedied and abated.”

Racine v. Catholic Bishop of Chicago, 290 Ill. App. 284, 8 NE. (2d) 210, involved foul odors from sewage. The court said:

“It has been said, as to nuisances which may be removed at any time or abated at the instance of a party aggrieved thereby, that the depreciation in the market of selling value of the premises affected was not the measure of damages, and evidence of such depreciation not proper. *Fairbank Co. v. Nicolai*, 167 Ill. 242, 246, 47 N. E. 360. If the property alleged to be damaged is rental property, then in case of injury from such nuisance, the damages would be measured by the loss in rental value; and if the plaintiff occupies the premises himself, the damages would be measured by his discomfort and the deprivation of the use and comforts of his home. In the case now before us, the plaintiff neither lived upon the premises nor used the same for rental purposes. He alleged that a total loss had been sustained by him with respect to the market value of the unsold lots in said subdivision. It has been said that the pollution of a stream by sewage is a continuing nuisance, and that, ‘when a nuisance is regarded as a continuing, rather than a permanent, one, judgments of law are held to afford compensation only for the injury sustained to the time of such judgment, and a continuance of the nuisance is a grievance for which subsequent actions may be maintained.’ . . .

“After an examination of the record, we fail to find where appellant’s evidence tended to show any item of damage which could be considered

proper under the rules applicable to this action. The record fails to disclose any evidence tending to show what damages appellant claims to have sustained or the extent thereof, except his claim that the appellee, by admitting sewage to the creek, has destroyed the entire market value of the unsold lots in said subdivision, to the damage of appellant of \$105,000. Such was not a proper element of damages in this case. . . .”

In *City of Nashville v. Comer*, 88 Tenn. 418, 12 S.W. 1027, an action was brought to recover damages resulting in the discharge, in times of unusual freshet, of sewage water on the premises owned by the plaintiffs. The trial judge charged the jury that if they found from the evidence “that the market value of the plaintiffs’ property has been permanently impaired by the construction of the sewer, its proximity and liability to back up surface water, and discharge offensive sewage matter upon his premises, he would be entitled to recover the difference in the market value of the property before and since the building of the sewer.” The Supreme Court held this instruction to be error, saying:

“The moment an action has been commenced, shall the defendant, in such a case, be precluded from remedying its wrong? Shall it be so precluded after a recovery against it? Does it establish the right to continue to be a wrong-doer forever by the payment of a recovery against it? Shall it have no benefit by discontinuing the wrong? And shall it not be left the option to discontinue it? 101 N.Y. 125, 4 N.E. Rep. 552.

This assumption that a wrong-doer is to be presumed from the mere character of the work to intend to continue in his wrong, and that he will not remedy his defective or unskilled work, is repudiated in the majority of American cases. . . .

“The weight of authority and the weight of reason alike condemn, as contrary to a true public policy, any rule by which a wrong-doer may thus procure a license to continue his misconduct. Such a rule would in many instances operate as a method by which private property would be condemned to private use against the will of the owner. It seems to us that the true rule deducible from the authorities is that the law will not presume the continuance of a wrong, nor allow a license to continue a wrong, where the causing the injury is of such a nature as to be abatable either by the expenditure of labor or money; and that, where the cause of the injury is one not presumed to continue, the damages recoverable from the wrong-doer are only such as have accrued before action brought, and that successive actions may be brought for the subsequent continuance of the wrong or nuisance.

“It follows that it was error to admit proof as to the effect of the overflowing sewer upon the market value of Comer’s property, and error to charge the jury that they could assess the damages upon any assumption that the wrong of the city would be perpetuated.”

The cases involving odors from raw sewage are particularly analogous to the case at bar. *Conestee Mills*

v. Greenville, 160 S.C. 10, 158 S.E. 113, 75 A.L.R. 519, was another such case. One of the defenses presented was that the plaintiff had purchased his land after the installation of the sewage system. The judgment of the lower court dismissing the complaint was reversed by the Supreme Court, which said:

“And by the better rule, the determination of the question of one right or successive rights in turn depends chiefly upon whether the cause of injury is permanent or temporary.

“The distinction is well made in *Harman v. R. Co.*, 87 Tenn 614, 11 S.W. 703, 704: ‘There is a broad distinction between those injuries occasioned by causes permanent in their character, and which are likely to continue with no right in plaintiff to abate them, and those which arise from nuisances which may be discontinued. In respect to the former, the entire damages, past and prospective, can be estimated, and the cause of action cannot be split up; while as to the latter it is not to be presumed that the wrongs will be continued, and it would be unjust to defendant to allow plaintiff to recover damages estimated upon such an assumption. On the other hand, it would be equally wrong to permit defendant to insist upon such a rule of compensation, and thus become vested with a perpetual license to commit a nuisance, to the injury of plaintiff and over his protest.’

“It should be borne in mind that the cause of the injury is not necessarily permanent because

the structure through which it operates is of a permanent nature. Indeed, the physical character of the structure itself may have little or no bearing upon the permanency of the cause of the injury, as to which the principal question, according to the sounder view and as indicated in the case just cited, is whether the nuisance is legally abatable. Without attempting an exhaustive discussion of the subject, it is sufficient for the purposes of this case to say that successive injuries caused by the negligent operation of an enterprise authorized by law give rise to successive rights of action, on the theory that, while the enterprise itself is not abatable, the negligent manner of operating it is illegal and abatable. That the nuisance here complained of was abatable will hardly be denied, as the record shows that, after the institution of this suit, the city of Greenville installed a huge sewerage system, including a disposal plant for treating the sewage, thereby effecting an actual abatement.”

Oklahoma City v. McAllister, 174 Okl. 208, 50 Pac. (2d) 361, was an action brought against Oklahoma City for damages for inadequate facilities and improper treatment of sewage causing the fouling of the waters crossing the plaintiff's lands.

Judgment for the plaintiff was reversed on the ground that personal injury and the injury to the property had not been separated and no proof adduced of the amount of injury.

The court said:

“Where a nuisance causes a permanent injury to property, the measure of damages is the depreciated value of the property; that is, the difference between its value before and after the injury. If, however, as in the present case, the injury is not a permanent one, but only temporary or removable, the measure of damages is the depreciation in the rental or usable value of the property during the time of its maintenance, limited by the statute of limitation.”

In *Phillips Petroleum v. Ruble* (Okla.), 126 Pac. (2) 526, the plaintiff brought suit for damages for an alleged permanent injury to his real property and for damages for personal inconvenience, annoyance and discomfort, caused by the maintenance and operation of a power plant by the defendant.

The court said:

“The standard suggested by the defendant as applied to this particular case is the depreciation in rental value of the property occasioned by the maintenance of the nuisance. In order to make the standard legally appropriate, the defendant urges that we should classify the injury sustained by the occupant of the property, through annoyance, inconvenience and discomfort, as a property injury rather than a personal injury, thus departing from our former views as expressed in the above cited cases.

“Modern judicial thoughts seek to avoid fictions. We cannot make a manila rope into a rubber automobile tire by calling it such. Neither can we change an injury to the person into one to property by so denominating it. The fact that the property owner in this type of case is using his property at or during the time he receives the injury does not change the character or type of injury received. A broken arm would not be called an injury to personal property because it was fractured in an automobile collision when the injured person was using his own automobile.”

In *United Verde Extension Mining Co. v. Ralston*, 37 Ariz. 554, 296 Pac. 262, the Arizona court expressed the rule as follows:

“The owners being prevented by the poisonous fumes from either farming or leasing their lands in 1926 and 1927, were entitled to the fair rental or usable value thereof for these years. 17 C. J. 883; *Eno v. Christ*, 25 Misc. Rep. 24, 54 N.Y.S. 400; *Ewing, et ux. v. City of Louisville*, 140 Ky. 726, 131 S.W. 1016, 31 L.R.A. (N.S.) 612; *Ponca Refining Co. v. Smith*, 73 Okl. 6, 175 P. 268; *Lipscomb v. South Bend R. Co.*, 65 S.C. 148, 43 S.E. 388; *Baltimore, etc., R.R. Co. v. Boyd*, 67 Md. 32, 10 A. 315, 1 Am. St. Rep. 362; *Barclay v. Grove*, 9 Sadler, 153, 11 A. 888. In *Sedgwick on Damages*, § 184 (9th Ed.) is found this language:

‘Where an owner of land is wrongfully prevented from occupying it, the measure of his damages is the value of the use of the land—that is, its rental value. So where the

plaintiff's farming land was wrongfully overflowed by the defendant, the measure of damages is the use of the land, not the value of the crops that might have been raised on it.'

"The plaintiffs and their assignors were, under the allegations of the complaint, just as effectively prevented by the fumes from occupying and enjoying their lands as though they had been overflowed by water or otherwise. The gas and smoke did not evict them, it is true, but did deprive them of the beneficial use thereof and nothing further was required because the manner in which this use was interfered with, whether by fumes, water or otherwise, was immaterial."

In *Idaho Gold Dredging Corp v. Boise Payette Lumber Co.*, 52 Idaho 766, 22 Pac. (2) 147, plaintiff recovered damages from the defendant upon the theory that the measure of damages was the difference between the value of the placer mining ground, owned and operated by the plaintiff, after the waters had become polluted with grease and oil from the defendant's operation and its value as it would have been had such pollution not occurred. The lower court granted a new trial. In granting this motion the court concluded that the grease and oil which caused the loss of gold constituted a temporary nuisance and that therefore damages measured by the result in depreciation in value of the mining ground could not be recovered. The court said:

“There are a great many cases wherein the rule is stated to the effect that, if defendant has damaged plaintiff’s property by means of a temporary nuisance, or one which can be abated, recovery for temporary injury only can be had, and the difference in the value of the property before and after the injury is not the proper measure of damages. This rule is based on the theory that abatement of the cause of injury will abate the injury, and it should be applied only in cases wherein this is true. After all, it is the character of the injury, whether temporary or permanent, and not the character of the cause of it, which controls.

“In *Oklahoma City v. Page*, 153 Okl. 285, 6 P. (2d) 1033, 1034, the Supreme Court of Oklahoma said:

‘Although in an action for a temporary nuisance there can be no assessment of damages upon the theory that the nuisance is permanent, because that would permit a recovery for what has not been done and what it cannot be considered will be done, it does not follow that if permanent damage has actually been sustained from a temporary nuisance and is not conditioned upon future conduct, recovery for it can be denied. * * *

‘It is true that for a permanent nuisance the measure of compensation is one sum for all damage, and the allowance is whatever difference in market value results from a consideration of all of the damage, but it does not follow that a difference in market

value cannot be a proper measure of recovery for damage done by a temporary nuisance, so far as such a difference has actually resulted, solely from what has already been done, and is not required to be at all conditional upon a further continuance of the tortious conduct. While for a temporary nuisance there can only be a recovery for the wrong already committed, that in no manner denies recovery for damage that has resulted in depreciation in value not dependent upon prospective cause.' ''

McGill v. Pintsch Compressing Company, (Iowa), 118 N.W. 786, was an action to enjoin defendant from manufacturing compressed gas and for damages.

The court said:

“Even though there was a nuisance, it does not follow that damages were proven. The dwelling was occupied as a tenant, and depreciation in the value of the premises because of the injury, as it was not permanent but subject to abatement, was not the measure of damages . . . (citing cases). In such a case, in the absence of injury to the property itself, the measure of damages is the diminution of the rental value caused by the maintenance of the nuisance. This depreciation must result from interference with the comfortable enjoyment of the premises, and not from the mere prejudice against the property in consequence of its proximity to the plant, for the latter depreciation cannot be said to have been caused by the injury. 4 *Sutherland on Damages*, § 1048; *Rust v. Victoria Graving Dock Co.*, 36 Ch. Div.

113, 131; *Robb v. Carnegie Bros. & Co.*, 145 Pa. 324, 22 Atl. 649, 14 L.R.A. 329, 27 Am. St. Rep. 694; *City of San Antonio v. Estate of Mackey*, 22 Tex. Civ. App. 145, 54 S.W. 33.'

Shively v. Cedar Rapids, I. F. & N. Ry. Co., (Iowa), 37 N. W. 133, was an action brought to recover damages caused by a nuisance created by the construction and operation of a stockyard and hog lot. The declaration charged that defendant kept almost continuously a large number of hogs in this lot, by reason whereof the said lot became foul and loathsome, and was a nuisance, emitting foul, unsavory, and unhealthful smells, so as to render plaintiff's house almost uninhabitable, and almost totally destroying its value, greatly inconveniencing plaintiff, and endangering the health of plaintiff and his family.

The lower court charged the jury as follows:

"... If you find for plaintiff, then you will proceed to assess and determine from the evidence the amount of damages he is entitled to recover in this action; the measure of which will be the loss or diminution of the fair rental value of the property in question from the time you find such nuisance was established up to the commencement of this suit, and find for the plaintiff in such sum. . . ."

Although the plaintiff objected that the diminution of the fair rental value was an improper measure, the

court approved it, because, like the case at bar, the nuisance was not necessarily a permanent one, saying:

“The appellants insist that the paragraph of the charge quoted did not properly instruct the jury as to the measure of the plaintiff’s damages. The alleged nuisance is not necessarily a permanent one, but may be abated at any time by the defendants. Plaintiff would not have been entitled to recover the full value of his property even though he had shown that it was valueless while the nuisance existed, because it might prove to be but temporary, hence the depreciation in rental value under the facts in this case was the proper measure of plaintiff’s recovery.”

Other cases out of the many which hold that the measure of damages used by the lower court and approved in this Court’s opinion is improper, have already been quoted in appellant’s main brief, and we merely refer to them here:

Vogt v. City of Grinnel, 98 N.W. 782, (quoted in main brief on page 105) ;

Bartless v. Gresselle Chemical Co., 92 W. Va. 445, 115 S.E. 451, 27 A.L.R. 54 (quoted on page 106 of the main brief) ;

Theisen v. Pitwin’s & Dean Co., 162 N.W. 76 (quoted on page 111 of the brief) ;

Ehlert v. Galveston H. & S. A. Railroad Company, 274 S.W. 172 (quoted on page III of brief) ;

Cross v. Texas Military College, 65 S.W. (2d) 794
(quoted on page 114 of brief);

Oates v. Algedon Mfg. Co., 217 N. C. 488, 8 S. E.
(2d) 605 (quoted on page 116 of brief);

City of Ada v. Melberg, 160 N.W. 257 (quoted on
page 117 of brief);

City of San Antonio v. Mackey's Estate, 54 S.W.
33 (quoted on page 119 of the brief).

In contrast to this general rule of law, this Court, unless it grants a rehearing, will go on record as approving the following doctrine expressed in its opinion in the principal case:

“The findings and conclusions of the court indicate that in assessing damages the trial judge used the proper criterion—the difference in market value of each tract with its improvements without the stench nuisance existing, as compared with the value as affected by such odors.”

We submit that it is inequitable for this Court to lay down at this late date a standard like the above for ascertaining temporary damages. It opens the way for unjust enrichment of the plaintiffs. It violates principles of fairness and ignores entirely the possibility of any improvement or abatement made by the defendant, of voluntary discontinuance of business, or of an injunction action successfully brought by other neighbors. Already in the record (Trans. 891, 1035; Abs. 241,

258) there is testimony of improvements in the fire box and in the manner of controlling the gases. Who can say that further adjustments or the addition of a new invention may not in this year or next eliminate the odors entirely? The measure of damages adopted by this Court not only discourages the elimination of the nuisances by making the defendant pay as for a permanent nuisance but it rewards the plaintiffs for a permanent injury which they have not suffered and may never suffer.

II.

This Court has ignored the doctrine of Dahl v. Utah Oil Refining Company.

On the question of the operation of plants emitting odors in industrial areas the principal case holds directly contrary to the case of *Dahl v. Utah Oil Refining Company*, 71 Utah 1, 262 Pacific 269.

In the principal case the court said:

“The mere fact that an area is not incorporated in a city or town with zoning regulations, does not warrant establishment of commercial institutions which emit the described stench in such region where life thereby will be rendered unpleasant to the residents thereof. Nor does the fact that an industry may serve a useful purpose

or produce commercial commodities warrant its location at a place which merely suits the convenience of the owner or operator, in utter disregard for the effect it has on the value or enjoyment of other properties.

“ . . . When an industry is of such a character that it produces foul odors, those who are responsible for its operation have the duty to place it where it will not result in injury to the property of others. The mere fact that there may already exist in the area a condition which may be obnoxious to some persons, does not create a license for establishment of other more offensive conditions.”

In the *Dahl* case the contrary law was established; the court saying:

“The right to recover damages for injuries occasioned by fumes, gases, dust, smoke, foul air, etc., being cast upon one’s property by another, in proper cases, is well established. But the rule of liability is not absolute and the law does not afford redress for every such discomfort or annoyance. Extreme rights in this regard cannot be enforced. Of necessity some degree of inconvenience and annoyance must be endured or community and social life would be impossible. It thus follows that what constitutes in law an actionable nuisance is always a question of degree. The cases cited and relied on by the plaintiff are instances where, under all the circumstances, the use of the property complained of was held unreasonable. Here, where the facts and circum-

stances, both with respect to the origin and nature of the thing complained of and the degree of its offense, differ essentially from those of the cases cited, we have an entirely different legal question.

While a nuisance, in the ordinary sense in which the word is used, is anything that produces an annoyance—anything that disturbs one or is offensive—in legal phraseology it is applied to that class of wrongs that arise from the unreasonable, unwarrantable, or unlawful use by a person of his property. Every person has the right to the reasonable enjoyment of his property. As to what is a reasonable use of one's property must necessarily depend upon the circumstances of each case, for a use for a particular purpose and in a particular way, in one locality, that would be lawful and reasonable might be unlawful and a nuisance in another. 1 Wood on Nuisances (3rd Ed.) §§ 1, 2. The test of whether the use of the property constitutes a nuisance is the reasonableness of the use complained of in the particular locality and in the manner and under the circumstances of the case. 29 Cyc. 1156. A business which might be perfectly proper in a business or manufacturing neighborhood may be a nuisance when carried on in a residential district; and, conversely, a business which with its incidents might be considered a nuisance in a residential district may be proof against complaint where conducted in a business or manufacturing locality, although an extraordinary use of property introducing a serious annoyance which directly and substantially damages the property of another or causes unnecessary annoyance to persons in the vicinity

is not justified by the fact that the place is a manufacturing locality. 29 Cyc. 1157, 1158.”

The following further quotation from the *Dahl* case applies to the case at bar :

“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.”

One error of this Court in the case at bar consisted mainly in its failure to recognize that the defendant’s plant is established in the neighborhood and surroundings most appropriate for its establishment. If we recognize the law to be that the whole question of nuisance is one of reasonableness, as the *Dahl* case sets forth, then we should look again at the surroundings and ask ourselves whether the plant could have been established in any place more suitable than the one chosen. It is built

(1) upon a plot of ground where a brick manufacturing plant had been operated for many years; (2) it was built on the railroad and particularly on the spur of that railroad not far from a second railroad, and (3) near a sugar factory, pea vinery, flour mill, alfalfa mill, cattle feed yards, stock loading yard, beet storage and loading chutes, and wool loading platforms.

This Court has found on its opinion—we submit wrongly—that the area in which the plant is established is not industrial, and in so doing it has failed to recognize the essential element behind the doctrine of the *Dahl* case and the law of nuisance, to-wit: “that an establishment is not a nuisance when it is reasonably constructed and operated in an area to which it is adapted.”

This Court points out that the sugar factory, pea vinery, mills, feed yards and loading yards are essential to the marketing of the agricultural products and live stock. So we submit: given the defendant’s plant, which removes the dead carcasses from the neighborhood, provides an outlet for waste matter and furnishes feed and fertilizer to the farmers—where could a more appropriate place for its operations be found than on an old brick-yard near the railroad, in the outskirts of the community furnishing the material for its existence? While we believe the court erred when it said that the plant is not in an industrial area, the point we wish to make is this: that the reasonableness of the location and opera-

tion of this plant does not depend upon whether the area is industrial or not. As this Court said:

“The test of whether the use of the property constitutes a nuisance is the reasonableness of the use complained of in the particular locality and in the manner and under the circumstances of the case.” *Dahl v. Utah Oil Refining Company*, supra.

This Court in its opinion in the case at bar has failed to note that the distinction is not the simple difference between an industrial area and a residential area. There is an infinite number of gradations between the two. To find that the area is not industrial does not necessarily mean that it is residential. The opinion disregards the cattle, sheep and hogs, the barnyards with their filth, the pea viner, the sugar factory, and the stock loading chutes on the railroad, together with the fact that the defendant's plant is on an old brick yard on the outskirts of a sparsely settled community, and treats the area in the same manner that it would treat the most rigidly zoned, thickly populated, strictly residential area in a city. The absence of zoning restrictions does not warrant the establishment of such institutions, says the opinion. Neither, we submit, should the presence of a few homes in a sparsely settled farming community prevent the growth of industry already well established along a railroad.

The very wording of the opinion requires further clarification in the light of the various types of areas which might be found appropriate for the establishment of an industry:

“The fact that a region actually may be industrial does not justify the creation with impunity of odors or stench to an *excessive* degree which *unreasonably* annoy others in the legitimate use of their properties or in their occupation, especially when such conditions depreciate the value of other properties in such area.” (Italics ours.)

What is an *excessive* degree? When do odors or stench *unreasonably* annoy others? Unless some standard is set, we are subject to individual caprices and opinion of the presiding judge, more elastic than the length of the chancellor’s foot so often criticized. No standard is set in this case. No finding is made by either court of any unreasonable operation by the defendant, or even that its location is unreasonable.

The *Dahl* case has set a standard. And we submit that when that standard is applied, it necessarily follows that the Colorado Animal plant is located and is operated in an area to which it is reasonably adapted.

III.

The Court erred in assuming in its opinion that the defendant waived a jury trial.

The defendant wanted a jury trial and contended that it had a right to a jury trial for each of the separate claims of the eleven individual plaintiffs against the defendant. It has long been recognized that the jury system is especially adapted to a decision on specific and simple issues, and common law pleading and procedure are directed toward the framing of definite issues which the jury or laymen can grasp and decide. It is equally recognized that a multiplicity of issues coupled with a multiplicity of parties is a burden far too heavy to place on a jury of laymen for its decision. The defendant, we repeat, demanded a separation of the causes of action so that each of the simple issues could be tried before a jury on its own merits. So long as the issues remained conglomerate—so long as they involved the finding of damage for eleven different plaintiffs residing in eleven different directions from the plant at eleven distances who were being affected by winds blowing in different directions at different times, some of whom had worked at the plant and contributed to the nuisance, while others had not, and some of whom increased the value of their

property after the plant had begun operation—as long as all of these plaintiffs were united in one action, of course, the defendant could not properly demand a jury. Surely it is unfair to the defendant to claim that it waived a jury under such circumstances.

The opinion of the court, however, says that not only did the defendant fail to demand a jury trial but the minutes show that on October 2, 1939, when plaintiffs demanded a jury for determination of the question of damages the defendant resisted such demand. The defendant opposed a jury at this time for the same reason that it did not demand a jury trial. The lower court had overruled both defendant's demurrer to the original complaint and its demurrer to the supplemental complaint on the grounds of misjoinder of causes of action and misjoinder of parties. The defendant then was in a position where if it did not resist its demand for jury it would have all the issues and all of the various situations of the plaintiffs jumbled together and placed before a jury of laymen. We submit that to resist such a demand is in no way equivalent to resisting or waiving a jury to try separately each of the twelve different issues in this case.

This incident of the demand for jury trial is a simple illustration of the fallacy of the claim that when there is such a joinder of parties and issues the legal rights of the defendants are retained.

In its opinion herein this Court said: "If the defendant had not waived a jury trial, it would have been proper to have had damages determined by a jury," citing *Wasatch Oil Refining Co. v. Wade*, 92 Utah 50, 63 P. (2nd) 1070. But *Wasatch Oil Refining Co. v. Wade* held:

"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."

Does this mean, then, that the *Kinsman* case is to be modified to the extent that one party demanding a jury in an equity case involving a multiplicity of parties and issues may have that jury as a matter of right, and that the other party will be subjected to a verdict of laymen on this diversity of issues, without right of protest? Or does it mean, on the other hand, that there is no right to a jury at all, and all these issues must be found by the trial judge, sitting as an equity court? Mr. Justice Frick, concurring in the *Kinsman* case (*Kinsman v. Utah Gas & Coke Co.*, 53 Utah 10, 177 Pac. 418), said that the joined parties would have a right to separate appeals:

"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."

Is not this the time to clarify the whole confusion raised by the varied interpretations of the *Kinsman* case and state the law to be what it should be, to-wit, that when there is a legal question of damages involved, the defendant should have a right to a separation of the parties and issues for the benefit of a jury trial?

CONCLUSION

For these three principal reasons, therefore, we request a rehearing of this case. Other matters, such as the manner of justifying the lower court's excessive computation of damage, could be urged. We feel, however, that the matter of this Court's approving a measure of damages that can be applicable only in the event of a permanent damage, is so serious that it alone warrants a rehearing of this matter, and includes the errors of computation.

The second ground of the petition is the fact that the Court overlooked entirely the basis of the *Dahl* case—that the use of the plant must be unreasonable in its location to be a nuisance. This, we submit, warrants a rehearing.

The third basis is the accusation of the Court that

the defendant waived a jury trial. In fact, in view of the lower court's refusal to separate the causes of action, and of this Court's statement to the law of joinder, the defendant never had the privilege or the right to waive a jury trial of a straight-forward issue between it and any one of its plaintiffs.

Respectfully submitted,

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