

1951

Pherrel Draper and Nell Fairbanks Draper et al v. J. B. and R. E. Walker, Inc. : Brief of Defendant and Appellant

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Franklin Riter; Fred L. Finlinson; Attorneys for Defendant and Appellant;

Mulliner, Prince & Mulliner; Irwin Clawson; Attorneys for Plaintiffs and Appellants;

Recommended Citation

Brief of Appellant, *Draper v. Walker*, No. 7685 (Utah Supreme Court, 1951).

https://digitalcommons.law.byu.edu/uofu_sc1/1496

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

**IN THE SUPREME COURT
of the
STATE OF UTAH**

**PPERREL DRAPER and NELL FAIRBANKS
DRAPER, his wife, J. B. DUNN and JULIET
CRISMAN DUNN, his wife, JACK C. DUNN
and GLADYS WILEY DUNN, his wife, GLEN
DRAPER and LORNA F. DRAPER, his wife,
R. L. REINSIMAR and MARGARET DRA-
PER REINSIMAR, his wife, ERNEST J.
PEDLER and VIRGINIA A. PEDLER, his
wife, HENRY L. BUTLER and VIVIENNE
DRAPER BUTLER, his wife, and CHARLES
P. RUDD and GLADYS M. RUDD, his wife,**

Plaintiffs and Appellees

— vs. —

J. B. and R. E. WALKER, INC., a corporation,

Defendant and Appellant.

Case No.
7685

BRIEF OF DEFENDANT AND APPELLANT

FRANKLIN RITER

FRED L. FINLINSON

*Attorneys for Defendant and
Appellant.*

**MULLINER, PRINCE & MULLINER,
IRWIN CLAWSON,**

*Attorneys for Plaintiffs
and Appellees*

TABLE OF CONTENTS

	Page
STATEMENTS OF FACTS.....	1
STATEMENT OF POINTS:	
POINT I. THE COURT COMMITTED PREJUDICIAL ERROR WHICH VITALLY AFFECTS DEFENDANT'S RIGHTS BY ITS (1) DENIAL OF DEFENDANT'S MOTION TO STRIKE ALL EVIDENCE RELATING TO THE ALLEGED RIGHTS OF WAY OVER LAND OF WHICH DEFENDANT WAS IN POSSESSION; (2) OVERRULING OF DEFENDANT'S OBJECTIONS TO THE ADMISSION OF EVIDENCE AS TO THE CREATION, EXISTENCE AND OBSTRUCTION OF SUCH RIGHT OF WAY; (3) FINDING THAT A RIGHT OF WAY BY NECESSITY WAS CREATED AND EXISTED FOR THE BENEFIT OF LAND OWNED BY THE PLAINTIFFS RUDD; AND (4) ADJUDICATING THAT PLAINTIFFS RUDD ACQUIRED A RIGHT OF WAY OF NECESSITY FOR THE BENEFIT OF THEIR SAID LAND.....	27
1. The pleadings in this action did not raise issues as to the creation of a right of way of necessity over and across land of which defendant was in possession for the benefit of land owned by plaintiffs Rudd. Consequently, evidence as to the operation of said right of way and its existence was inadmissible and without the issues of the action. The finding of the court as to the creation and existence of said right of way and the provision of the judgment awarding such right of way for the benefit of the land owned by plaintiffs Rudd are erroneous in that they are not based upon supporting allegations of the pleadings.....	38
2. There can be no valid adjudication as to the existence of a way of necessity without having before the court the actual owner of the estate over and upon which such way is imposed. Mary Goff Walker, the fee title owner of the land upon which said burden was imposed by the court's judgment was and is not a party to this action. Consequently, the adjudication of the court that such way of necessity was created and exists is erroneous.....	54
3. Where there is a reasonable doubt as to the right or title of the applicant for an injunction to protect property, equity will not interfere in the absence of an emergency until after the right or title has been established at law.....	58
4. The writ of injunction cannot be used to try title to real estate or an interest therein. It is not the province of an injunction to effect a final adjudication of an alleged right	

TABLE OF CONTENTS—(*Continued*)

	Page
based on a disputed title. It cannot be used to oust one party from possession of realty and place another person in possession thereof.....	67
5. A right of way of necessity exists only so long as the necessity exists. When the necessity ceases, the way terminates. Under the state of the pleadings and trial procedure followed in this case, the issue concerning the existence of a present necessity with respect to the Rudd property could not be properly presented to the court. Its finding on this issue is not supported by pleading which raised this issue and is therefore a finding without the issues of the case. Defendant and appellant never agreed to the trial of such issue, but objected to and protested against not only the admission of evidence on this issue, but also of the trial of such issue.....	71
POINT II. THE COURT COMMITTED ERROR IN ALLOWING PLAINTIFFS TO SERVE AND FILE AN AMENDMENT TO THEIR COMPLAINT WHICH INCLUDED ALLEGATIONS CHARGING DEFENDANT WITH MAINTAINING A NUISANCE ATTRACTIVE TO CHILDREN, AND ALSO COMMITTED ERROR IN OVERRULING DEFENDANT'S OBJECTIONS TO THE ADMISSION OF EVIDENCE IN PROOF OF SUCH ALLEGATIONS	74
1. The doctrine of attractive nuisance is part of the law of negligence and defines the duty of the owner or occupant of real property to guard against the existence or maintenance on his property of instrumentalities or conditions which are attractive to trespassing or meddling children of tender age. The doctrine has no application in the present action which is to enjoin or restrain the operations of a lawful business on the ground that said operations create a condition which annoys plaintiffs and interferes with their rightful use of their property.....	74
POINT III. THE BUSINESS OF EXCAVATING ROCK, GRAVEL, AND SAND BY THE OWNER OR OCCUPANTS OF LANDS BELONGING TO HIM OR IN HIS OCCUPANCY IS A LAWFUL AND USEFUL OCCUPATION. IT IS NOT A NUISANCE PER SE. A JUDGMENT ENJOINING AND RESTRAINING THE OPERATION OF SUCH BUSINESS SHOULD GO NO FURTHER THAN TO CONTROL THOSE PARTICULAR FEATURES OF THE OPERATIONS WHICH MIGHT RESULT IN SUBSTANTIAL INJURY TO ADJOINING PROPERTY OR TO	

TABLE OF CONTENTS—(Continued)

	Page
PERSONS RESIDING OR OWNING PROPERTY IN THE NEAR VICINITY OF THE LAND UPON WHICH THE OPERA- TIONS ARE BEING CONDUCTED.....	86
1. The prohibitory provisions of the judgment do not specify with particularity the parts of the operations of defendant and appellant which are prohibited and restrained and as a consequence, defendant and appellant cannot deter- mine except by trial and error method the specific meth- ods of operations which must be corrected in order to comply with the court's order.....	97
2. It was the duty of the court to establish a maximum tolerance for the contamination and pollution of the air by dust particles and the absence of such provision in the judgment exposes the defendant and appellant to charges of violating the injunction regard'less of its good faith and honest purpose. Defendant and appellant is entitled to receive from the court a specific mandate that the atmosphere shall not contain at anytime more than a maximum quantity of dust and foreign particles.....	105
CONCLUSIONS	109

INDEX OF CASES CITED

	Page
Adams v. Kalamazoo Ice & Fuel Co., 245 Mich. 261, 222 N.W. 86, 87	95
Baird v. Upper Canal Irrigation Co., 70 Utah 527, 257 Pac. 1060.....	109
Barrett v. Southern Pacific Company, 91 Cal. 296, 27 Pac. 666.....	76
Barrios v. Pleasant Valley, etc. Co., 17 Pac. (2d) (Colo.) 301.....	68
Blinn v. Hutterische Society, 58 Mont. 542, 194 Pac. 140, 142.....	68
Bradham v. Johnson, 195 Okla. 275, 156 Pac. (2d) 806, 808.....	69
Brown v. Salt Lake City, 33 Utah 222, 93 Pac. 570, 14 L.R.A. (N.S.) 619, 626.....	77
Byers v. Colonial Irrigation Co., 134 Cal. 553, 555, 66 Pac. 732.....	90
Campbell v. Flannery, et al., 32 Montana 119, 79 Pac. 702-704.....	56
Cassin v. Cole, 153 Cal. 677, 96 Pac. 277, 278.....	71
Cauhape v. Bank, 127 Cal 197, 202, 59 Pac. 589.....	63
Collins v. Wayne Iron Work, 227 Pa. 326, 76 A. 24, 20 R.C.L. 482....	93
Corea v Higuera, 153 Cal. 451, 95 Pac. 882, 17 LRA (N.S.) 1018.....	46
Dahl v. Cayias, 110 Utah 398, 174 Pac. (2d) 430.....	109
Dahl v. Utah Oil Refining Co., 71 Utah 1, 262 Pac. 269, 272, 273.....	93
Dahnken v. George Romney & Sons Co., 111 Utah 471, 184 Pac. (2d) 211, 215.....	61
Ex Parte Kelso, 147 Cal. 609; 82 Pac. 241, 242.....	89
Farmer v. Bright, 183 N.C. 655, 112 S.E. 420.....	62
Farr v. Wheelwright Construction Company, 49 Utah 274, 163 Pac. 256, 257	45
Farrell v. City of Ontario, 39 Cal. App. 351, 178 Pac. 740-742.....	64
Ferguson v. Ferguson, 106 Kan. 823, 189 Pac. 925.....	61
Fidelity Laboratories, Inc. v. Oklahoma City, 190 Okla. 488, 125 Pac. 2d 757-759.....	95
Fox v. Paul, 148 Atl. (Md.) 809, 68 ALR 520-527.....	44
Franklin v. Southern Pacific Company, 40 Cal. App. 31, 180 Pac. 76..	64
Gray vs. Magee, 133 Cal. App. 653, 24 Pac. (2d) 948.....	49
Hart v. Leonard, 42 N.J. Eq. 416, 7 Atl. 865.....	60
Hofstetter et al. v. George M. Myers, Inc. 170 Kan. 564, 228 Pac. (2d) 522, 526	91
Howell Co. v. Charles Pope Glucose Co., 171 Ill. 350, 49 N.E. 497.....	61
In re Smith, 143 Cal. 368, 371, 77 Pac. 180.....	90
Judson v. Los Angeles Suburban Gas Company, 157 Cal. 168, 106 Pac. 581	99
Koppikus v. State Capitol Commissioners, 16 Cal. 248, 253.....	63
Martin v. Superior Court (Sup.) 168 Pac. 135, 136, LRA 1918B, 313..	63

INDEX OF CASES CITED—(Continued)

	Page
Mason v. Ross, 77 N.J. Eq. 527; 77 Atl. 44.....	59
McGregor v. Silver King Mining Co., 14 Utah 47, 45 Pac. 1091.....	61
McIlquham v. Anthony Wilkinson Live Stock Co., 18 Wyo. 53, 104 Pac. 20, 21.....	45
McIntosh v. Brimmer, 68 Cal. App. 770, 230 Pac. 203, 207.....	93
Montgomery v. Coleman-Nelson Gasoline Co., 130 Okl. 14 264 Pac. 895	69
Newport, etc., Turnpike Road Co. v. Fitzsimmons, 9 Ky. L. Rep. 937, 8 S.W. 201.....	60
Norback v. Board of Directors, 84 Utah 506, 37 Pac. (2d) 339, 344, 345	62
Pacific Western Oil Co. v. Bern Oil Co., 13 Cal. App. (2d) 60, 87 Pac. (2d) 1045-1050.....	64
Parks v. Parks, 121 Me. 580, 119 Atl. 533.....	60
People v. Hawley, et al., 207 Cal. 395; 279 Pac. 137, 144.....	88
Peryer v. Pennock, 115 Atl. (Bt.) 105, 17 A.L.R. 863-865.....	57
Peters v. Bowman, 115 Cal. 356, 40 Pac. 599, 14 LRA (N.S.) 626.....	76
Polson v. Ingram, 22 S.C. 541.....	62
Robins v. Roberts, 80 Utah 409, 15 Pac. (2d) 340-341.....	46
Rohan v. Detroit Racing Asso., 314 Mich. 326, 22 NW 2d, 433, 166 ALR 1246, 1262, 1263.....	97
Rose v. Denn, 188 Ore. 1, 212 Pac. (2d) 1077; 213 Pac. (2d) 810.....	50
Salina Creek Irrigation Co. v. Salina Stock Company, 7 Utah 456, 27 Pac. 578.....	109
Schwer v. Martin, 29 Ky. Law Rep. 1221, 97 SW 12.....	57
Smith v. Gardner, 12 Ore. 221, 6 Pac. 771, 53 Am. Rep. 342.....	68
Tomasini v. Taylor, 43 Ore. 4, 72 Pac. 324.....	68
Transoceanic Oil Corp. v. City of Santa Barbara, 85 Cal. App. 2d, 776, 789, 194 Pac. 2d 148.....	89
Tripp v. Bagley, 74 Utah 57, 276 Pac. 913.....	109
Vallejo, etc. R.R. Co. v. Reed Orchard Co., 169 Cal. 545, 556, 147 Pac. 238	63
Valley Mortuary v. Fairbanks, Utah, 225 Pac. (2d) 739, 750	66
Vowinkel v. N. Clark & Sons, 216 Cal. 156, 162, 13 Pac. 2d 733.....	90
Waal v. Sakagi, 27 Haw. 609, 636.....	61
Wauben Beach Assoc. vs. Wilson, Mich., 265 NW 474, 103 ALR 983-989	72
Wheeler v. Gregg, 90 Cal. App. 2d 348, 203 Pac. 2d 37, 48, 49, 50, 51	91
Whittaker vs. Ferguson, 16 Utah 240, 51 Pac. 980.....	109
Williams v. Bluebird Laundry Company, 85 Cal. App. 388, 259 Pac. 484	98
Woods v. Selber, C.A. 5th, 1949, 171 Fed. (2d) 900.....	53

INDEX OF TEXTS CITED

	Page
Am. Jur., Vol. 17, Sec. 48, P. 959-961; Vol. 39, Secs. 171, 172, P. 443, 444, 445, Vol. 32, Sec. 77, P. 90.....	42, 57, 72
A.L.R., Vol. 103, Pages 983-989.....	72
Baron & Holtzoff, Federal Practice and Procedure, Vol. 1, Sec. 141, P. 266; Vol. 3, Sec. 1436, P. 314-315.....	59, 88
Corpus Juris, Vol. 19, Sec. 266, P. 1000-1001; Vol. 32, Sec. 178 (3), P. 134; Vol. 45, Sec. 155, P. 758.....	44, 67, 72, 78, 85
Corpus Juris Secundum, Vol. 66, Sec. 23, P. 777.....	91
Cyc., Vol. 29, P. 1156.....	92
Hillyer's Annotated Forms of Pleadings & Practice, (1938 ed.) Vol. IV, P. 32-48.....	49
Pomeroy's Equity Juris., 2d Ed., Sec. 1945, 1948.....	90
Ruling Case Law, Vol. 9, Page 815, 816.....	71
Thompson on Real Property, Perm. Ed., Vol. 2, Sec. 538-539, P. 132-134	41
United States Const. Art. 1, Sec. 7.....	63
Utah Code Annotated, 1943, Secs. 104-56-1, 104-41-7, 103-41-1.....	85
Utah Constitution, Art. VIII, Sec. 9.....	109
Wood on Nuisances (3rd Ed.) Sec. 1, 2, Vol. 1.....	92

UTAH RULES OF CIVIL PROCEDURE

Rule No. 15 (b).....	51, 66
Rule No. 19 (b).....	57
Rule No. 2.....	58
Rule No. 8 (e) (2).....	59
Rule No. 38.....	59
Rule 65A (d).....	87
Rule 33	28

IN THE SUPREME COURT of the STATE OF UTAH

PHERREL DRAPER and NELL FAIRBANKS
DRAPER, his wife, J. B. DUNN and JULIET
CRISMAN DUNN, his wife, JACK C. DUNN
and GLADYS WILEY DUNN, his wife, GLEN
DRAPER and LORNA F. DRAPER, his wife,
R. L. REINSIMAR and MARGARET DRA-
PER REINSIMAR, his wife, ERNEST J.
PEDLER and VIRGINIA A. PEDLER, his
wife, HENRY L. BUTLER and VIVIENNE
DRAPER BUTLER, his wife, and CHARLES
P. RUDD and GLADYS M. RUDD, his wife,

Plaintiffs and Appellees

— vs. —

J. B. and R. E. WALKER, INC., a corporation,

Defendant and Appellant.

Case No.
7685

BRIEF OF DEFENDANT AND APPELLANT

STATEMENT OF FACTS

The entrance to Big Cottonwood Canyon in the Wasatch Mountains is approximately eighteen miles south of the city limits of Salt Lake City. As a result of prehistoric geological processes and the action of ancient Lake Bonneville, there was deposited at the entrance of the Canyon, an enormous amount of sand, gravel and other sedimentary soils. This deposit has been cut trans-

versly by Big Cottonwood Creek, and thereby a defile through the deposit was formed. This action concerns that part of the deposit which is situate north of the defile, and will be hereinafter referred to as "Walker Deposit" (Ex. 1, R. 90; R. 821).

Big Cottonwood Creek as it debouchs from the canyon gorge in the immediate vicinity of the Walker Deposit runs in a northerly and westerly direction (Ex. 1, R. 90).

The defendant is now and was at all times hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the State of Utah (R. 62, 821). One, Mary Goff Walker, is the fee simple owner of the Walker deposit and adjacent land (Ex. NNN, R. 951). Under an arrangement with Mary Goff Walker, which is only indirectly involved in this action (R. 951), the defendant was in possession of said deposit and land in the year 1946 and since that time has been continuously in possession of the same (R. 822). The Walker deposit is an immensely valuable source of sand and gravel for the manufacture of concrete and for the production of aggregate for use in the construction of roads and highways (R. 830, 831, 952). The material is considered the best and most effective produced in the western section of the United States (R. 950). The sand, gravel and road aggregate yielded by the Walker deposit enters into the economy of Salt Lake City and surrounding areas as necessary material in the construction industry (R. 952). It is of a highly desirable quality, and since the installation of its processing plant hereinafter

particularly described, defendant has been one of the major producers of sand and gravel products of the Salt Lake City area (R. 952).

The defendant is not the only operator and producer of sand and gravel products from the major deposits at the mouth of Big Cottonwood Canyon. There were on the date of the commencement of this action and for a considerable period of time prior thereto, nine other operations in this area (Ex. 25, R. 941; Ex. B, R. 323, 324). The following is a tabulation of these neighboring operations.

	<i>Name of Operation</i>	<i>Established</i>	<i>Distance from Walker Operations</i>
R 943	Huber and Davis	1930	2,000 ft.—air line
R 944	Elmo England	1950	2,500 ft.—air line
R 945	Salt Lake County	1946-47	3,000 ft.—air line
R 945-6	Cook and Osborne	1946	3,000 ft.—air line
R 946	Sims	1920	3,500 to 4,000 ft. —air line
R 947	Harper	1920	4,000 to 5,000 ft. —air line
R 948	Utah Sand & Gravel Co.	1950	6,000 ft.—air line
R 948	Barton	1949	Butlerville Hill
R 947	Abandoned		4,000 ft.—air line

In the month of June, 1946, defendant commenced the construction of its sand and gravel processing plant upon the Walker deposit and on the adjacent land (R. 97, 822). At time of trial it represented an investment of \$308,659.00 (R. 954). The plant is modern in every respect and was designed by a competent engineer (R. 895,

1263-1265). Installed therein are efficient mechanical devices which were new at the time they were acquired by the defendant (R. 1265). The method of handling and processing the raw material after it has been excavated from the mountainside involves the use of an extensive conveyor system which reduces dust (R. 1268). The type, construction and lay-out of the plant are well shown on Exhibit A, R. 96; Exhibit B, R. 98; and Exhibits 26, 27 and 28, R. 960. The machinery composing the plant are feeders (Exhibit 15, R. 870), jaw crushers (Exhibit 16, R. 871), vibrating screens (Exhibit 17, R. 872), roller crushers (Exhibit 18, R. 874) and the conveyors.

Wasatch Boulevard is a public highway extending along the base of the Wasatch Mountains in a general north and south direction. At the point where the defendant's plant is located the sand and gravel deposit is situate east of Wasatch Boulevard (Exhibit 1, R. 90). Wasatch Boulevard, in the immediate proximity of the defendant's plant, had been covered with an oil mat, but due to its deterioration was scarified in the year 1946 (R. 925). Work commenced to rebuild the boulevard in February, 1949 (R. 926). By August 1, 1950, the boulevard had been reconstructed and had been finished with a black top to a point immediately east of the Walker plant. There is evidence that prior to the black topping of this road that it produced a great amount of dust (R. 927).

The production of sand, gravel and road aggregate after the raw material has been excavated from the Walker deposit, requires the transportation of the mate-

rial to the rollers and crushers. Thereafter when the material is reduced to the required sizes through the process of crushing, segregation is effected by passing the material through screens of different meshes (Ex. 17, R. 872). Reference to Exhibits A, B, 26, 27, and 28, supra, will indicate to the reader exactly the location and function of the machinery and appliances above mentioned. At the time involved in this action the raw material was immediately removed from the Walker deposit by means of a drag line and was placed on a conveyor belt which carried it to an elevated point east of Wasatch Boulevard and at the edge of the vehicular surface thereof (R. 828, 852). At that point it was dropped perpendicularly through a cylinder or "elephant trunk" to a "grizzly" or screen located on the east side of the hard surfaced area of the boulevard (R. 828, 829). It passed through a "grizzly" and dropped onto a moving belt which is located in a tunnel constructed transversly under Wasatch Boulevard. This tunnel containing the conveyor belt was constructed by permission of the Board of County Commissioners of Salt Lake County (R. 822). Material dropping on to this subterranean belt was carried through the tunnel under Wasatch Boulevard into the jaw crusher (R. 829), where it was crushed and ground to reduced sizes (R. 877). Thereafter by passage through a series of roller crushers and screens, the material is sorted and automatically finds it way on to conveyor belts. These conveyor belts operate within steel

channels or tracks and serve to convey the material to the exterior limits of the conveyors where it is dropped to the stock piles above mentioned (Ex. 1, R. 849, 850).

It will be noticed by reference to the exhibits above mentioned, that the Walker deposit itself, Wasatch Boulevard and the jaw crusher are located at an elevation fixed by various witnesses at approximately 75 feet (R. 849), above the level of the pit floor (R. 850).

There are two types of crushers in use at this plant. The first is the jaw crusher which stands on the west side of Wasatch Boulevard and is a prominent object in the aforesaid exhibits (R. 871). The second type is known as the roller crusher (R. 874). This roller crusher weighs about 15,000 pounds (R. 888) and is composed of two rollers (R. 881). One of them is of smooth surface and its twin is heavily corrugated. The corrugations are pyramidal in shape (R. 879). Material is run between the corrugated and smooth surface roller which rapidly revolve each in opposite direction and the material is thereby crushed (R. 881). The corrugations on the rough surface roller become flattened or worn from the friction of material against it in the process of crushing (R. 881). It is therefore necessary to "build up" these corrugations and this is effected by welding metallic substances thereto (R. 881-883). During this welding process the plant must necessarily cease operations and as a consequence welding has been done principally at night (R. 887). It is an electric process whereby the added metallic substance is reduced to a molten state by a current of electricity passing through it which melts it and affixes it

to the roller (R. 882-884). This welding process necessarily produces flashes of light when the electrified metallic substance makes contact with the roller to which it is to be welded (R. 886). The flash is but momentary (R. 886). In adding the molten material to the roller there are formed "beads" on the roller (R. 890). The "slag" on the face of these "beads" must be knocked off before other molten material is added (R. 890). The "slag" is an oxidization of certain of the material included in the molten welding rod which form, like "dross" on a lead pot when lead is being melted. Before contact can be established with the newly welded material this "dross" or "slag" must be knocked off with a small hammer (Exhibit 14, R. 891). The noise produced by this pounding is limited (R. 892), and merely involves the knocking off of the "slag" (R. 892). The smooth roller as a result of the friction created by its action on the raw material becomes worn and uneven and must also be built up by a similar process (R. 882).

The defendant in its welding operations used two types of welders. One is a gasoline welder which is powered through a gas engine. It is a portable machine which can be used about the plant (R. 888). The second type of welder is an electric welder which is merely a set of rectifiers to change the power from AC to DC, with a fan to circulate air through it. The noise produced by this welder is similar to that of an electric fan (R. 887).

The finished product consisting of sand, gravel and road base material is stocked in separate piles, conical in shape, as shown on the exhibits to which reference is

above made. It is from these stock piles that the completed product is taken for transportation and sale. The transportation is by means of motor trucks which are driven to the immediate vicinity of the stock piles and there loaded. The road base material is loaded by means of a drag line (Ex. 22, R. 906). On Exhibit 1 (R. 905) is shown an underground tunnel approximately 460 feet long marked "S-T". The stock piles of concrete aggregate are accumulated on top of this tunnel. Within the tunnel is a conveyor belt and the concrete aggregate is introduced from the stock piles into the tunnel and onto the conveyor belt where it is transported to the northeasterly end of the tunnel. At that point the material drops onto a loading belt which conveys it into the trucks (R. 904, 905, 906).

In October 1948, excavation for the Deer Creek Aqueduct of the Metropolitan Water District commenced in the area of defendant's plant (R. 919, 921). The nature of this excavation is graphically shown in the following photographs: Exhibit 2 (R. 911), Exhibit 3 (R. 911), Exhibit 4 (R. 912), Exhibit 5 (R. 914), Exhibit 6 (R. 914) and Exhibit 7 (R. 918). The conduit excavation or trench in which the concrete aqueduct was placed varied from fifteen to thirty feet in depth (R. 919). The bottom of the trench was approximately twelve by fourteen feet in width and the top was about fifty feet wide (R. 920). The material removed from the trench was piled along its sides and this spilled material attained a considerable height and breadth (R. 920). The excavation of the part of the trench extending from Wasatch Boulevard

southwesterly through defendant's pit floor and up to the Butlerville Hill commenced on June 27th, 1949. Prior to that time, the work was conducted northeast of Wasatch Boulevard and southeast of Butlerville Hill road. From June 27, 1949 until the latter part of November, 1949, the work of excavating the trench and constructing the aqueduct continued through the land in possession of defendant (R. 921). Heavy machinery and equipment were used in effecting this excavation (R. 921, 922), and as a consequence a tremendous amount of dust was created. There was a cloud of dust over the area during the entire time that the equipment was in operation (R. 922). In excavating this aqueduct trench, it was necessary to build two "shoofly" roads. One of them extended from the top of Butlerville Hill down its slope to permit construction equipment to reach the aqueduct right of way (R. 923; Exhibit 24; R. 924; R. 925), and the other was a bypass on the county road on Butlerville Hill. During the time of this construction, the natural vegetation along the line of the aqueduct trench and the temporary roads was destroyed and the removal of such vegetation allowed sudden gusts of wind to pick up dust from the devastated areas and carry it into the air (R. 923, Exhibit 24; R. 929).

Big Cottonwood Highway, a public road which has existed for a number of years, runs adjacent to the pit floor. It had been previously an improved highway, but in 1946, it had so deteriorated that the top had been scarified and in fact became a gravel highway. It remained in that condition until approximately September 1st,

1947. During the construction of Deer Creek Aqueduct, it was again torn up where it passed adjacent to defendant's pit floor. From June 27th, 1949, to the time that the work on the aqueduct on Butlerville Hill was completed, this road was in a dilapidated condition and remained so until November of 1949 (R. 932). It produced a great amount of dust (R. 934).

The plaintiffs were at the time of the commencement of this action, and for several years prior thereto, the owners of residences situate adjacent to the land of which defendant was in possession. The location of these homesites with reference to defendant's operations is shown upon Exhibit NNN (R. 566), which is a plat of this area reproduced from the Salt Lake County deed records. The plaintiffs acquired these properties at the approximate times shown on the following schedule:

<i>Name of Plaintiff</i>	<i>Date of Acquisition of Property</i>
Pherrel Draper and Nell Fairbanks Draper (R. 91)	1936 or 1937
J. B. Dunn and Juliet Crisman Dunn, (R. 412)	1933
Jack C. Dunn and Gladys Wiley Dunn Glen Draper and Lorna F. Draper,	Dec., 1947
R. L. Reinsimar and Margaret Draper Reinsimar, (R. 327 and R. 431)	May, 1937
Ernest J. Pedler and Virinia A. Pedler (R. 448, R. 562)	July, 1944
Henry L. Butler and Vivienne Draper Butler (R. 567)	1937
Charels P. Rudd and Gladys M. Rudd (R. 567)	1924

The plaintiffs Butler, sold and conveyed their residential property in August, 1950, (R. 523), which was after the date of the commencement of this action, to-wit: October 18, 1949, (R. 6).

The aerial photographs introduced in evidence, Exhibit A (R. 96), Exhibit B (R. 98), Exhibits ZZZ and Exhibits YYY (R. 1569), will reveal an area south and west of defendant's plant which is tree planted. This is the area within which the plaintiffs' residences are situate. These aerial photographs may be sychronized with Exhibit 1 (R. 90 and R. 665-673), which is a map upon which is delineated and marked these respective homes. The plaintiff Draper owns three houses marked respectively, PD1, PD2 and PD3, on Exhibit 1 (R. 95 and 96). The houses of the other plaintiffs are appropriately marked on Exhibit 1 so that same may be identified.

This action was commenced and prosecuted by the plaintiffs against the defendant for the purpose of securing an injunction restraining defendant "from maintaining or using said gravel pit or processing plant" on the ground that the operation of the same constituted a nuisance by reason of the fact that defendant in the removal of the sand and gravel and the processing of the same as hereinbefore described "causes considerable dust to rise and settle upon the lands and homes of plaintiffs, and by the movement of such rocks and dirt and the stockpiling of the resulting sand and gravel, the roads, lanes, and creek located upon the lands of plaintiffs, and in the vicinity thereof, have become obstructed" (R. 2). Further the plaintiffs alleged "that the operation of

said gravel pit and processing plant as aforesaid, in the manner operated by the defendant, is injurious to the health of plaintiffs, and offensive to their senses and an obstruction to the free use of and access to their property, so as to interfere with their comfortable enjoyment of life, and their property, contrary to the laws and statutes of the State of Utah * * *."

The plaintiffs particularize and describe of the alleged nuisance by alleging:

(a) That dust is deposited on the natural vegetation on plaintiffs' land, which is detrimental thereto, and the natural beauty of said homes and lands is thereby destroyed.

(b) That dust from the plant infiltrates into the homes of the plaintiffs and is deposited upon the furniture and household effects and food.

(c) The operation of defendant's plant results in loud noises which disturb plaintiffs in their sleep and normal affairs of life.

(d) That the operation of the welding machines produces light and noise prohibiting rest and sleep (R. 4).

Of particular concern in this action are certain allegations contained in the complaint with respect to the alleged obstruction of roads and lanes. The following pertinent excerpts are therefore set out:

"That in the operation of said gravel plant aforesaid, defendant causes huge rocks and boulders to be rolled down the mountainside, and

moves great quantities of dirt * * * and by the movement of such rocks and dirt, and the stockpiling of the resulting sand and gravel, the roads, lanes, and creek located upon the lands of plaintiffs, and in the vicinity thereof, have become obstructed."

(Par. 6 Complaint, R. 2).

"That in the operation of said gravel plant aforesaid, defendant has caused rocks, boulders, and dirt to be rolled down the mountainside and has changed the terrain from its original state, and has dug away the roads and placed huge stockpiles of sand and gravel, so that defendant has blocked and made parts of plaintiffs' property inaccessible, by obstructing right-of-ways, paths, and other means of ingress and egress to the property of plaintiffs, thereby damaging the same, and rendering said properties of no value as homes, or for any purpose."

(Par. 7, Complaint, R. 3).

"That the operation of said gravel pit and processing plant, as aforesaid, in the manner operated by defendant is * * *, an obstruction to the free use of and access to their property."

(Par. 8, Complaint, R. 3).

During the trial the plaintiffs were permitted to serve and file an amendment to their complaint (R. 35), which alleged:

"c. Without limiting the generality of the nuisance here complained of, as defined by 104-56-1 U.C.A. 1943, plaintiffs alleged:

"That the various operations, as described, and the piling and the piles of sand and gravel constitute an attraction and attractive nuisance, and the loading and caving in are a serious danger

to children who are attracted thereto, which interferes with the safe and comfortable enjoyment of plaintiffs' properties, and lessens the personal enjoyment thereof by plaintiffs, or others, residing therein.

"That the conditions caused, and as in this paragraph 8 referred to, are offensive to the senses and injurious to the health of the occupants of the properties of plaintiffs, as herein involved and described."

Defendant answers the complaint and the foregoing amendment by denial (R. 20, 21, 49) and pleaded the defense of acquiescence by the plaintiffs in the construction and erection of defendant's sand and gravel plant and alleged that plaintiffs by their conduct were estopped from asserting and claiming the operation of said plant is a nuisance (R. 50). Plaintiffs, by their reply denied the affirmative defense of defendant (R. 51).

At the conclusion of the trial, the court made, entered and filed its findings of fact and conclusions of law. For the convenience of the Appellate Court, the appellant inserts herein the pertinent and material parts of the Findings of Fact, Conclusions of Law, and the Judgment.

"FINDINGS OF FACT

1. That plaintiffs are all residents of Salt Lake County, State of Utah, and that defendant is a corporation organized under the laws of the State of Utah, and duly qualified to do business in said State.

2. That defendant, a Utah corporation, owns, and, in the course of its business, engages in the operation of what is commonly known and described as a gravel pit and sand and gravel processing plant. That said gravel pit and business, conducted thereat, is located at the mouth of Big Cottonwood Canyon in Salt Lake County, Utah, in the vicinity of the common section corner to Sections 23, 24, 25 and 26, Township 2 South, Range 1 East.

3. That defendant, by use of heavy machinery and equipment, removes rocks, sand, dirt, and gravel from the mountainside North and West of premises owned and occupied by plaintiffs, and processes the same through the use of crushers, graders, conveyor belts, screens, and other heavy machinery, into sand, gravel, and similar products for commerical use. That said sand and gravel is conveyed, crushed, sorted, and stocked into huge piles on the premises, until sold or removed by defendant, in the due course of its business.

4. That, in its removal, processing, and storage of sand and gravel, there is emitted into the atmosphere large quantities of dust, dirt, and sediment which are carried intermittently by the prevailing natural air currents from the plant and premises occupied by the defendant corporation, aforesaid, and deposited upon the land, homes, and effects of plaintiffs.

5. That, in the processing of sand and gravel, as aforesaid, large crushers, screens, motors, shovels, welding machines, trucks, conveyor belts, caterpillars, and

other heavy and noisome equipment is used, both in the daytime and night-time, and that said equipment, so used, results in loud and disturbing sounds, noises, and vibrations.

6. That plaintiffs have owned and occupied homes located in the mouth of Big Cottonwood Canyon for many years, and that said homes were built and occupied in an area remote from commercial or other industrial enterprises, except as shown by the exhibits and evidence, on account of the clear air and attractive scenic view, and for the purpose of quiet enjoyment. That the sites for said homes were chosen for the natural beauty, shade, and foliage existing thereat. That said homes, owned and occupied by plaintiffs, were established many years prior to the acts complained of, and prior to the construction of defendant's sand and gravel operation, but are presently in close proximity to the gravel pit and processing plant, on the South and East thereof. That the operation of said gravel pit and processing plant, as aforesaid, by defendant is injurious to the health of plaintiffs, and offensive to their senses, and an obstruction to the free use of their property, so as to interfere with their comfortable enjoyment of life and their property, contrary to the laws and to the statutes of the State of Utah, in the following particulars:

a. That dust and sand is deposited upon the shrubs, flowers, and foliage located on the lands of plaintiffs, and is detrimental thereto, and the natural beauty of said homes and lands of plaintiffs is thereby destroyed.

b. That dust and sand is carried from the plant, storage piles, and premises occupied by defendant into the homes of plaintiffs, and deposited on furniture, fixtures, household effects, and clothing, and is deposited upon the food kept and consumed therein, and is deliterious thereto, and pollutes the air in said homes.

c. That the operation of the heavy equipment by defendant, as aforesaid, results in noise so loud as to render it impossible, while such machinery is so operated, to hear ordinary conversation, or sleep, or otherwise conduct the normal affairs of plaintiffs. That said noise is of such volume that it is impossible to summon or properly control the small children of plaintiffs, while outside their respective houses, and substantially interferes with the play and recreation of such children; and, further, that noise so produced by defendant is of such volume that cries or pleas of distress of such children are inaudible to their parents, or persons charged with their custody and control. That such noise, so produced by defendant as aforesaid, destroys and renders very difficult any outdoor activity or recreation by plaintiffs and their children, or visitors, in or on their premises while said plant is in operation.

d. As a necessary and continuing part of said operation, welding machines are operated at nights and on Sundays, from which there issues an annoying light and pounding noise, which makes normal rest or sleep difficult in the homes of plaintiffs, during the pit operations or said welding operations.

7. That the property owned and occupied by plaintiffs herein and subjected to said nuisance, as aforesaid, is located substantially within the limits of the following described real property:

Beginning at a point where the East line of Section 26, Township 2 South, Range 1 East, intersects Big Cottonwood Creek, which is approximately 475 feet South from the Northeast corner of said Section; thence Northwesterly along the center of said Creek 340 feet, more or less, to the West line of the Pherrel Draper property; thence South $9^{\circ} 21'$ West 350 Feet, more or less, to Big Cottonwood Road; thence Southeasterly along said road 375 feet, more or less, to the East line of said Section 26; thence North along said Section line 180 feet more or less; thence South $71^{\circ} 40'$ East 250 feet, more or less, to East Line of Jack C. Dunn property; thence North 17° East 204 feet, more or less, to center of Big Cottonwood Creek; thence Northwesterly along the center line of said Creek 400 feet, more or less, to beginning.

ALSO: Commencing South $27^{\circ} 39'$ East 246.18 feet from the Northwest corner of Section 25, Township 2 South, Range 1 East, Salt Lake Meridian; thence South $49^{\circ} 25'$ East 242.13 feet; thence South $29^{\circ} 41'$ West 219 feet to center of Big Cottonwood Creek; thence along Creek Northwesterly about 273 feet, more or less; thence North $39^{\circ} 13'$ East 268 feet, to beginning.

ALSO: Commencing at a point which is South $57^{\circ} 39'$ East 228 feet and South $50^{\circ} 47'$ East 200 feet and South $67^{\circ} 54'$ East 200 feet from the Northwest corner of Section 25, Township 2 South, Range 1 East, Salt Lake Meridian, and running thence South $48^{\circ} 10'$ West 290 feet; thence South

61° 47' East along center of Big Cottonwood Creek 170½ feet; thence North 34° 7' East 250 feet; thence North 47° 57' West 100 feet, to beginning.

8. That the maintenance and operation of said gravel pit and processing plant is a nuisance, and, if continued, will result in substantial and permanent damage to the lands, homes, personal property, and health of plaintiffs, and result further in a substantial depreciation of their said properties, and prevents the use and enjoyment thereof, and destroys the rental and market value thereof.

9. a. That plaintiffs Charles P. Rudd and Gladys M. Rudd, his wife, and their predecessors in interest, are the owners of the following described real property located in Salt Lake County, State of Utah, and more particularly described as follows:

Commencing at a point which is South 57° 39' East 228 feet and South 50° 47' East 200 feet and South 67° 54' East 200 feet from the Northwest corner of Section 25, Township 2 South, Range 1 East, Salt Lake Meridian, and running thence South 48° 10' West 290 feet; thence South 61° 47' East along center of Big Cottonwood Creek 170½ feet; thence North 34° 7' East 250 feet; thence North 47° 57' West 100 feet, to beginning. Containing 0.8 acre.

b. That said Rudd, plaintiffs, and their predecessors in interest have built and maintained a summer home and recreational facilities upon said premises, and used the same since the year 1924. That the only means of access to said premises above described was over a road or right-of-

way which extended along the Creek bottoms and roughly parallel to Cottonwood Creek from Cottonwood Highway across the parking lot of the Old Mill Club, and along the North and East side of Cottonwood Creek to said Rudd premises, said road extending over the property heretofore and subsequently used by defendant corporation. That prior to the acquisition of the premises described in paragraph 9(a) by plaintiffs Rudd, and their predecessors in interest, their said premises, together with the Old Mill Property, and the premises upon which the plant operations of defendant are located, and over which all of said road passed, were owned by the same party, Emerette C. Smith. That, thereafter, the said Emerette C. Smith conveyed the premises above described to the predecessors in title of plaintiffs Rudd, retaining the balance of said property generally described above, and on which the road, used from the cottonwood highway through the parking lot of the Old Mill Club to the Rudd property, extended. That said road, aforesaid, until it was destroyed subsequent to 1946, was the only means of ingress and egress to the property of plaintiffs Rudd, and there is presently no means of access to said property; that plaintiffs Rudd had acquired and have a right-of-way and easement of necessity over said road described above in this paragraph 9(b), for this purpose. That, in the operation of said gravel plant, as aforesaid, defendant has caused rocks, boulders, and dirt to be rolled down the mountainside, and has changed the terrain from its original state, and has destroyed said road, so that defendant has blocked and made plaintiffs' Rudd property inaccessible, by obstructing said road, and said means of ingress and egress, thereby damaging the same,

and rendering the property described in paragraph 9(a) of no value as a home, or for any purpose.

c. That plaintiffs Charles P. Rudd and Gladys M. Rudd, his wife, and Ernest J. Pedler and Virginia A. Pedler, his wife, and their predecessors in title, have used and maintained the road above referred to in paragraph 9(b) for over 20 years, prior to its destruction by defendant, and such use has been open and notorious, and under a claim of right. That said road runs through woodland or unimproved and unfenced property.

10. That the operation of said gravel pit extends throughout the spring, summer, and fall of the year, generally, and is subject, generally, to weather conditions; so that said plant is not operated when the ground is covered with snow, or during the presence of excessive rain and moisture. That said plant commenced operation in June of 1948, and that, during the year 1948, its operation was intermittent and sporadic. That the operation of the plant during the year 1949 was more steady than in the previous year, and that its operation, during 1950, has been daily, when weather conditions permitted.

11. That substantial deposits of sand and gravel exist on both sides of Cottonwood Creek at the entrance to Cottonwood Canyon.

12. That plaintiffs have not been guilty of laches, nor have they acquiesced in the construction and operation of said gravel plant, nor have they been estopped from prosecuting this action, as alleged by defendant, or at all.

13. That, unless restrained, defendant intends to and will continue such operation, and

perpetuate the foregoing conditions, resulting in the annoyance and damage to plaintiffs, as aforesaid.

14. That pursuant to the pre-trial order made herein on or about October 6, 1950, the question of damages suffered by plaintiffs as the result of the operation of said gravel plant, as aforesaid, both past and prospective, are reserved until the final determination by this court, or the Supreme Court of the State of Utah, on the issues presented for trial herein on the question as to whether or not defendant has been guilty of operating and maintaining an actionable nuisance. And, in the event the foregoing findings are sustained, the respective actions for damages, past and prospective, by each plaintiff, shall be further prosecuted by said parties, with jury if requested, by filing further pleadings and proceedings thereupon.

From the foregoing findings of fact, the court derives and makes the following

CONCLUSIONS OF LAW

1. That plaintiffs, and each of them, are entitled to a decree and order of this court promptly restraining, by injunction, the defendant, its officers, servants, agents, or assigns, from maintaining, using, or operating said gravel pit, processing plant, and sand, gravel and aggregate storage piles used in connection therewith, so as to create a nuisance, or permitting such use or operation, so as to create a nuisance on the lands and premises of plaintiffs, as hereinabove described in said findings of fact.

2. That plaintiffs Rudd are entitled to a decree of this court requiring defendant to provide a right-of-way from a public highway to

the premises of plaintiffs Rudd, as hereinabove described in paragraph 9; said right-of-way to be of such size, condition, and extent as to be suitable for use by motor vehicles. And, in this connection, that an order restraining defendants, its officers, servants, agents, and assigns, from interfering with or obstructing said right-of-way.

3. That plaintiffs are entitled to an order of this court, which order shall provide that this court shall retain jurisdiction of this action for the purpose of determining, by further pleadings and conducting further hearings, with jury if requested, the issue of damages, past and prospective; such issue to be determined upon the final determination of the question of whether or not an actionable nuisance has been maintained by defendant in the manner alleged and contained in the foregoing findings of fact.

4. Plaintiffs are entitled to their taxable costs herein incurred.

JUDGMENT AND DECREE

1. That defendant J. B. and R. E. Walker, Inc., its officers, servants, agents, and assigns be and hereby are forever enjoined and restrained from maintaining, using, or operating, or permitting the use or operation of a gravel pit and processing plant used in connection therewith for the processing of sand and gravel, including the storing or stockpiling of sand and gravel thereat and the operation of heavy equipment upon said premises, in the vicinity of the common section corner to Sections 23, 24, 25 and 26, Township 2 South, Range 1 East, Salt Lake Base and Meridian, so as to create a nuisance affecting plaintiffs, their lands, homes, premises, and use thereof, arising from objectionable noise, dust, and flash-

ing lights as found by the court and in the manner and as more particularly set out and described in the findings of fact on file herein. That said lands and premises of plaintiffs are located in Salt Lake County, State of Utah, and substantially within the limits of the following described real property:

Beginning at a point where the East line of Section 26, Township 2 South, Range 1 East intersects Big Cottonwood Creek, which is approximately 475 feet South from the Northeast corner of said Section; thence Northwesterly along the center of said Creek 340 feet, more or less, to the West line of the Pherrel Draper property; thence South $9^{\circ} 21'$ West 350 feet, more or less, to Big Cottonwood Road; thence Southeasterly along said road 375 feet, more or less to the East line of said Section 26; thence North along said Section line 180 feet, more or less; thence South $71^{\circ} 40'$ East 250 feet, more or less, to East line of Jack C. Dunn property; thence North 17° East 204 feet, more or less, to center of Big Cottonwood Creek; thence Northwesterly along the center line of said Creek 400 feet, more or less, to beginning.

ALSO: Commencing South $27^{\circ} 39'$ East 246.18 feet from the Northwest corner of Section 25, Township 2 South, Range 1 East, Salt Lake Meridian; thence South $49^{\circ} 25'$ East 242.13 feet; thence South $29^{\circ} 41'$ West 219 feet to center of Big Cottonwood Creek; thence along Creek North-

westerly about 273 feet, more or less; thence North 39° 13' East 268 feet, to beginning.

ALSO: Commencing at a point which is South 57° 39' East 228 feet and South 50° 47' East 200 feet and South 67° 54' East 200 feet from the Northwest corner of Section 25, Township 2 South, Range 1 East, Salt Lake Meridian, and running thence South 48° 10' West 290 feet; thence South 61° 47' East along center of Big Cottonwood Creek 170½ feet; thence North 34° 7' East 250 feet; thence North 47° 57' West 100 feet, to beginning.

This decree shall inure to the benefit of plaintiffs' successors and assigns.

2. That Charles P. Rudd and Gladys M. Rudd, his wife, are hereby granted a right-of-way, as against this defendant, to the hereinafter described premises from a public highway. Said right-of-way is to be of such size, condition, and extent as to be suitable for use by motor vehicles. And defendant, its officers, servants, agents, and assigns are hereby enjoined from interfering with or obstructing said right-of-way.

That the property owned by Charles P. Rudd and Gladys M. Rudd, his wife, above referred to, is located in Salt Lake County, State of Utah, and more particularly described as follows:

Commencing at a point which is South 57° 39' East 228 feet and South 50° 47' East 200 feet and South 67° 54' East 200 feet from the Northwest corner of Section 25, Township 2 South, Range 1 East, Salt Lake Meridian, and running thence South 48° 10' West 290 feet; thence South 61°

47' East along center of Big Cottonwood Creek 170½ feet; thence North 34° 7' East 250 feet; thence North 47° 57' West 100 feet, to beginning. Containing 0.8 acre.

3. That defendant, its officers, servants, agents, and assigns are hereby ordered to restore or provide a right-of-way, as above described, immediately.

4. That this court shall retain jurisdiction of this action for the purpose of determining, by further pleadings and conducting further hearings, with jury if demanded, the issue of damages, past and prospective; such issue to be determined upon the final determination of the question of whether or not an actionable nuisance has been maintained by defendant, in the manner set out in the findings of fact on file herein.

5. The effective date of this decree shall be five days from its signing.

6. Plaintiffs are hereby granted and awarded their taxable costs herein incurred."

The foregoing Findings of Fact, Conclusions of Law, and Judgment were signed and filed on March 9, 1951 (R. 60, 69). Within the time allowed by the Rules of Civil Procedure, to-wit, on March 17, 1951, the defendant served and filed its motion for a new trial and to amend the Judgment (R. 71, 72). On April 5, 1951, the Court denied defendant's motions (R. 75). On March 9, 1951, defendant served and filed its notice of appeal (R. 76), and on said date deposited with the Clerk of the trial court the sum of \$300.00 in cash funds legal tender of the United States of America in lieu of the undertaking for damages and costs required by Section

104-41-7, Utah Code Annotated 1943 (R. 77, 84). The Supreme Court on June 5, 1951, entered its order extending time to file record on appeal in the Supreme Court to August 2, 1951 (R. 82, 83). On July 31, 1951, the record on appeal was filed in the office of the Clerk of the Supreme Court (R. 84).

ARGUMENT

I.

THE COURT COMMITTED PREJUDICIAL ERROR WHICH VITALLY AFFECTS DEFENDANT'S RIGHTS BY ITS (1) DENIAL OF DEFENDANT'S MOTION TO STRIKE ALL EVIDENCE RELATING TO THE ALLEGED RIGHT OF WAY OVER LAND OF WHICH DEFENDANT WAS IN POSSESSION; (2) OVER-RULING OF DEFENDANT'S OBJECTIONS TO THE ADMISSION OF EVIDENCE AS TO THE CREATION, EXISTENCE AND OBSTRUCTION OF SUCH RIGHT OF WAY; (3) FINDING THAT A RIGHT OF WAY BY NECESSITY WAS CREATED AND EXISTED FOR THE BENEFIT OF LAND OWNED BY THE PLAINTIFFS RUDD, AND (4) ADJUDICATING THAT PLAINTIFFS RUDD ACQUIRED A RIGHT OF WAY OF NECESSITY FOR THE BENEFIT OF THEIR SAID LAND.

There has been set forth at pages 12 and 13 hereof certain allegations contained in plaintiffs' complaint with respect to alleged obstruction by defendant of roads and lanes, which it is alleged, afford ingress and egress to the

property of plaintiffs. These allegations are of particular importance in the discussion which follows in support of Point I of defendant's argument.

In connection with these allegations, note should be made of the fact that defendant, prior to answering plaintiffs' complaint moved the Court for an order requiring plaintiffs to make their complaint more definite and certain with respect to the exact location of the rights of way, paths and other means of ingress and egress to the property of plaintiffs which they alleged were obstructed and blocked by defendant's action as alleged in Paragraph 7 of the complaint and also set forth the exact location of the obstructions or impediments to the use of said rights of way and means of ingress and egress (R. 12). By order of Court, dated March 10, 1950, defendant's motion was denied (R. 19). Simultaneously with the serving and filing of its answer (R. 20, 21) defendant pursuant to and under the authority of Rule 33 of the Utah Rules of Civil Procedure, propounded to the plaintiffs certain interrogatories among which were the following:

"4. Will the plaintiffs set forth the exact location of the rights of way, paths and other means of ingress and egress to the property of plaintiffs which they allege in Paragraph 7 of their said complaint to have been obstructed and blocked by defendant's action?" (R. 23).

"5. Will the plaintiffs set forth the exact location of the obstructions and impediments to the use of said rights of way and means of ingress

and egress which they allege in their said complaint to have been erected or constructed by the defendant?" (R. 23).

All of the plaintiffs, except plaintiffs Rudd, made answer to Interrogatories 4 and 5 above set forth in this language:

"4. Answering Interrogatories 4 and 5 these plaintiffs state that the right of ways involved belong mainly to plaintiffs Rudd, who have heretofore answered and Plaintiffs Pedler adopt the answers of plaintiffs Rudd." (R. 28).

The plaintiffs, Rudd, answered the foregoing Interrogatories 4 and 5 as follows:

"4. Answering the fourth Interrogatory, the plaintiff states that the exact location of the said right of way cannot be accurately stated because the ground over which it passed has been excavated but that the said right of way passed from the southerly end of the old mill property in a southwesterly direction until it joined with the part of the road which still remains and such right of way northwesterly from the plaintiff's property, and that said right of way at all times was easterly and northerly from the Big Cottonwood Creek and ran somewhat parallel to the same although at varying distances to the eastward and northward from the said Creek." (R. 26).

"5. Answering the fifth interrogatory, this plaintiff states that the stockpiles which covered the ground to the north and east of the said Creek but below the hill were part of the obstruction and the uneven ground left after excavating where the road ran, was one of the impediments." (R. 26).

On September 6, 1951, a pre-trial was conducted by the trial judge and resultant thereon on said date he made, entered and filed his pre-trial statement and order (R. 30, 31). The pertinent part of said pre-trial order follows:

“I.

It was stipulated; and the Court also determined:

- (1) That the Court find and determine whether the operations of the defendant constitute or result in a nuisance, and if so,
 - (a) Whether there should be a complete injunction preventing the defendant from continuing its operations; and in the event the Court finds that the defendant should not be enjoined from continuing its operations, then,
 - (1) What limitations, if any, should be imposed upon the defendant to eliminate the nuisance or reduce it to a minimum and thus permit the defendant to continue its operations;
 - (2) The Court to determine what changes and adjustments should be made in the defendant's operations to reduce the nuisance factor and permit the defendant to continue its operations.
- (2) The question of damages to be reserved for subsequent pleadings and hearings upon which damages, past and prospective, will be determined in the event there is a nuisance.

II.

It was stipulated between the parties that the Court strike from the complaint the following language contained in the last line of Paragraph 2 thereof:

“and is maintained on land owned by Mary Goff Walker”

and said portion was ordered stricken by the Court.

III.

It was stipulated and ordered pursuant thereto, by the Court, that the defendant have access to the plaintiffs' property for purposes of making a survey, and that the plaintiff may use the survey for evidence and may also use the survey for reference ten days prior to the trial of this case.”

Attention is invited to Exhibit 1 (R. 90, 821) and Exhibit NNN (R. 566) for information as to the location of the property owned by the Plaintiffs Rudd and Pedler respectively. These properties are identified on these plats and maps with respect not only as to their exact location, but also with respect to their proximity to the Walker deposit and adjacent land of which defendant is and was in possession. It is also believed that Exhibit CCCC (R. 452), which shows the location of the stock piles of sand and gravel will be helpful in understanding the facts involved in the present discussion.

It is to be noted that only the plaintiffs, Rudd and Pedler, are immediately concerned with the matters here involved, which pertain to the alleged obstruction and

blocking by the defendant of an alleged existing road affording ingress and egress to the properties of these plaintiffs to and from the Big Cottonwood Highway. The general location of this public highway is shown upon the exhibits to which immediate reference has been made.

A substantial part of the evidence received by the trial court on behalf of both plaintiffs and defendant pertained to this matter. For convenience of the appellate court, the defendant and appellant believes it desirable to here set forth the page references of the record on appeal where this evidence will be discovered. Insofar as possible, the identity of the witnesses presenting testimony on this issue is set forth:

Plaintiffs' Evidence

<i>Name of Witness</i>	<i>Record Reference</i>
Pherrel Draper	R. 209, 211, 213, 646, 647, 1620, 1701, 1702.
R. L. Reinsimar	R. 341-343, 354-357, 359.
J. B. Dunn	R. 372, 388.
Henry L. Butler	R. 520-523, 527, 530-539.
Walter R. Hansen	R. 542-545.
Jack C. Dunn	R. 545, 551-553, 557.
Charles P. Rudd	R. 565, 580, 649, 653-657, 660-662, 1541-1554.
Glen Rudd	R. 582, 585.
Ernest J. Pedler	R. 594-603, 620, 1560-1570.
Juliet Crisman Dunn	R. 1419, 1428.
Evelyn P. Shelton	R. 1431-1438.
Keith Brown	R. 1518-1535.
William G. Shelton	R. 1536-1539.

Defendant's Evidence

John R. Stewart	R. 673-693.
J. B. Walker	R. 1042-1067, 1074-1084, 1093-1129, 1142-1147, 1198-1216, 1220-1226, 1710-1713, 1717-1723.
William Allgier	R. 962-1019.
Milton Pedler	R. 1246-1257, 1262.
Arthur P. Lakin	R. 1355-1357.

The plaintiffs and defendant entered into a stipulation (R. 729) covering the chain of title of the tract and parcel of land owned by plaintiffs Rudd as delineated and set forth on Exhibit NNN. Said stipulation appears in the record of trial as Exhibit VVV. For an understanding of the facts stated in the stipulation, it is necessary to refer to the abstract of title, which was introduced in evidence (R. 1206) as Exhibit QQQ. Below is set forth the pertinent part of said stipulation to which has been added in the extreme right hand column the reference to the entries in the abstract, Exhibit QQQ.

“STIPULATION

1. The plaintiffs, Charles P. Rudd and Gladys M. Rudd, obtained their title through the following instruments recorded in the office of the Salt Lake County Recorder, as follows:

<i>Grantor</i>	<i>Grantee</i>	<i>Date of Deed Date Ack. Date Re- corded</i>	<i>Recording Data—Bk. and Page</i>	<i>Abstract Reference Ex. QQQ</i>
Utah Light & Traction	Emerette C. Smith	12-28-26 1-27-27 5-28-27	31-81	Abst. No. 1 Entry No. 76
Emerette C. Smith	Fannie Horsley Gladys M. Rudd Anne F. Rudd	9-24-24 4-25-27 11-26-27	31-264	Abst. No. 1 Entry No. 63
Fannie A. Horsley	Chas. P. Rudd	11-15-45 5-20-47	540-313	Abst. No. 1 Entry No. 74
Annia Foulger Rudd	Gladys M. Rudd	5-29-47		

2. That all of the land in the Big Cottonwood Creek Bottoms between the Creek and the hill below the Wasatch Boulevard and between the Old Mill and the Rudd Property was conveyed as follows:

<i>Grantor</i>	<i>Grantee</i>	<i>Date of Deed Date Ack. Date Re- corded</i>	<i>Recording Date—Bk. and Page</i>	<i>Abstract Reference Ex. QQQ</i>
Utah Light & Traction Co.	Emerette C. Smith	12-28-26 1-27-27 5-28-27	31-81	Abst. No. 1 Entry No. 94
Emerette C. Smith	Old Mill Tavern, Inc.	5-20-27 5-21-27 5-28-27	31-82	Abst. No. 1 Entry No. 97
Old Mill Tavern, Inc. (By Execu- tion Sale)	Willard Smith	3-24-33 3-24-33 3-27-33	108-546	Abst. No. 1 Entry No. 138 Same as No. 303 in Abst. No. 2
Willard Smith	Mary Goff Walker	8-5-33 8-5-33 8-10-33	119-211	Abst. No. 1 Entry No. 142
Old Mill Tavern, Inc. (By Execu- tion Sale)	S. N. Jacob- sen	3-22-38 3-22-38 3-23-38	206-577	Abst. No. 1 Entry No. 165 Same as 313 in Abst. No. 2
S. N. Jacob- sen	Mary Goff Walker	7-15-38 7-15-38 7-16-38	212-564	Abst. No. 1 Entry No. 173

3. That Mary Goff Walker is the wife of the president, one of the principal stockholders of the Plaintiff Corporation."

Early in the trial it became obvious that plaintiffs, Pedlers and Rudds in order to sustain the charge that the defendant through its operations had obstructed roads and lanes and was thereby committing a nuisance, endeavored to quiet title to an alleged right of way over

lands in the occupancy of defendant. The evidence to which defendant and appellant has referred on pages of this brief had the objective of establishing a right of way for the benefit of the Rudds' land and the Pedlers' land either by (a) proving that a prescriptive right had accrued, or (b) that a right of way of necessity had been created. In order for the plaintiffs to succeed on the nuisance aspect of the alleged obstruction of roads and lanes, they undertook first to secure from the Court a decree establishing the right of way which they claimed had been obstructed by defendant, and thereby created a nuisance. The defendant and appellant, when it became apparent that the plaintiffs were claiming that defendant had obstructed a right of way which had no acknowledged or admitted *legal* existence, and were first endeavoring to establish the legal existence of a right of way upon which to base the charge of nuisance, entered its objection to this proceeding and this type and kind of evidence (R. 211). The following colloquy occurred:

"Q. (By Mr. J. Richard Mulliner) Is that roadway in existence at the present time, Mr. Draper?

A. Well, the gravel fill is used there up as far as the stock piles.

Q. By gravel fill do you mean J. B. and R. E. Walker, Incorporated?

A. Yes, but from there on it is obstructed.

Q. And how is it obstructed?

A. Well, these stock piles obstruct it in the beginning.

GENERAL RITER: Now if the Court please, I wanted this interrogation to get along that far to give me a chance to make my record and objection. There is no evidence here to show that Pedler or any of the plaintiffs had any right to use that roadway.

THE COURT: There is no evidence showing there is a right of way.

GENERAL RITER: No evidence showing there is a right-of-way.

THE COURT: The Court will grant that.

GENERAL RITER: I move to strike this entire evidence at this time because there must be evidence to show their right to use it, and the records, as they now stand, show there has been no right, no title.

MR. J. RICHARD MULLINER: I expect to tie that up, your Honor.

THE COURT: The motion will be taken under advisement. The Court will determine whether or not there is any evidence on the subject before ruling on it." (R. 211).

Thereafter defendant and appellant moved the court for an order striking all evidence having for its purpose the establishment of this right of way and at the same time defendant and appellant objected to the admission of any evidence pertaining to the establishment of a right of way either by prescription or of necessity (R. 651, 652, 653). The court denied this motion and overruled the objection (R. 653). But the court ordered that:

"The record may show the defendant's objection to all this whole line of testimony, even though the specific objection isn't made to each

question and answer. The objection is overruled. Go ahead." (R. 653).

During the entire course of the trial the defendant objected to the admission of evidence of this nature. At the conclusion of the trial defendant and appellant renewed its motion to strike this entire line of testimony and evidence (R. 1738, 1739, 1740, 1744, 1745). By minute order of the court dated January 23, 1951, this motion was denied (R. 54). In its motion for a new trial and to amend judgment, defendant and appellant specifically asked the court to strike Paragraph 9 of the Findings of Fact, Paragraph 2 of the Conclusions of Law and Paragraph 2 of the Judgment (R. 71). Pursuant to Rule 75 (d) and (p), Utah Rules of Civil Procedure, the defendant and appellant does hereby assign as error the inclusion in the judgment of Paragraph 2 thereof awarding the plaintiffs Rudds a right of way of necessity over and across land of which defendant was in possession (R. 59), and does also assign as error the inclusion in the Findings of Fact of Paragraph 9 thereof wherein the court found in favor of the plaintiffs Rudd on the question of the existence of a right of way of necessity (R. 65). Attention is specifically invited to the fact that the Court refused to make a finding that a prescriptive right of way had been acquired (R. 54). The finding above mentioned pertains to a right of way of necessity only. Therefore, the question of a prescriptive right of way is not under consideration on this appeal because the plaintiffs did not cross appeal on this issue. It is manifest from the foregoing that defendant and appel-

lant preserved during the course of the trial, its right on appeal to assign as error the various actions of the court in connection with the matter of a right of way over the land which defendant occupied.

1. The pleadings in this action did not raise issues as to the creation of a right of way of necessity over and across land of which defendant was in possession for the benefit of land owned by Plaintiffs Rudd. Consequently, evidence as to the operation of said right of way and its existence was inadmissible and without the issues of the action. The Finding of the Court as to the creation and existence of said right of way and the provision of the judgment awarding such right of way for the benefit of the land owned by plaintiffs Rudd are erroneous in that they are not based upon supporting allegations of the pleadings.

There is quoted above the allegations of the complaint which the trial court apparently considered were sufficient to raise the issue as to the legal existence of this right of way. There is also quoted above the responses of plaintiffs to the interrogatories propounded by defendant and appellant as to the location of said right of way and the nature of its obstruction. It is the contention of defendant and appellant that the allegations of the complaint, when considered with the responses to the interrogatories, cannot raise this issue, and that the injection of it into the case under the status of the pleadings is an error of such weight and importance as to vitiate plaintiffs' judgment. The quantum of the evidence presented at the trial by the plaintiffs on this subversively raised issue predominated the proceed-

ing. A reading of the testimony and a study of the evidence is highly convincing that this evidence largely entered into the court's ultimate decision not only on the question of legal existence of this alleged right of way, but as to the overall question of the maintenance of the nuisance through the operation of defendant's plant.

In this connection it is most interesting and probably determinative to note that in the court's pre-trial statement and order to which all counsel agreed, and particularly counsel for the Rudds, that there is neither a suggestion nor an implication that the issues to be tried included one as to the legal existence of a right of way over the land occupied by defendant and appellant. A fair and just consideration of this pretrial statement and order compels the conclusion that the introduction of this issue into the case came as an afterthought. The pretrial order and statement easily mislead counsel for defendant and appellant and as soon as the purpose and direction of evidence as to the right of way became apparent, he commenced his vigorous objections thereto.

In an action to establish a right of way of necessity plaintiff must allege in his complaint the following vital facts:

- (a) Conveyance of a described parcel of land to him by the defendant or prior owner;
- (b) That defendant or prior owner at time of conveyance owned adjacent land;
- (c) That at time of grant to plaintiff, plaintiff did not have, and still has no access from his property to a public highway;

(d) That plaintiff's access to his land, and his egress therefrom is wholly and completely cut off to his irreparable damage; and

(e) That plaintiff is entitled to a right of way of necessity over lands of defendant to the public road.

The fundamental rules governing the creation of a right of way of necessity and the practice, procedure and proof required to establish the same in court, is indicated by the following quotations from acknowledged authorities:

"Every way of necessity is founded on a presumed or implied grant. *The necessity does not in any case create the right. It is only a circumstance resorted to for the purpose of showing the intention of the parties, and raising an implication of a grant.* The right is created by the change of ownership of a portion of an estate, the portion granted having attached to it, by construction as an incident, a right of way over the portion not granted. 'Such a way is not created by a mere necessity, but always originates in some grant or change of ownership, to which it is attached, by construction as a necessary incident, presumed to have been intended by the parties.

* * * A way of necessary can not legally exist, where neither the party claiming the way, nor the owner of the land over which it is claimed, nor any one under whom they or either of them claim, was ever seized of both tracts of lands at the same time; and the way can only be created when one of the tracts is conveyed, or the ownership changed by operation of law.' *Prior unity of ownership of the alleged dominant and servient estates is necessary.* The implication arises when

one grants a piece of land in the midst of his own. The grant of a way to reach it is presumed. Moreover, the grantor can not by a subsequent conveyance deprive the grantee of the way. The fact that there would have been a way of necessity in the absence of a grant does not deprive a granted right of way of its incidents as a grant." (*Italics supplied*). (Thompson on Real Property, Perm. Ed., Volume 2, Section 538, page 132).

"The foundation of the rule whereby a right of way of necessity is held to have been impliedly granted or reserved in deeds is, *that it was the intention of the parties to the deed that the grantor should convey*, and that the grantee should acquire, the means of enjoying the land conveyed, and, therefore, that he should have access to it over other land of the grantor, if the grantee had no other means of reaching it. * * *." (*Italics supplied*). (Thompson on Real Property, Perm. Ed., Volume 2, Section 539, page 134).

"* * * A privity of estate must exist between the claimant of the way and the owner of the land over which the way is claimed. There must have been at some prior time a unity of ownership of the two estates which have been severed and a way of necessity over one created in favor of the other. * * *." (Thompson on Real Property, Perm. Ed., Volume 2, Section 545, page 143).

"A way of necessity is an easement arising from an implied grant or implied reservation; it is the result of the application of the principle that whenever a party conveys property, he conveys whatever is necessary for the beneficial use of that property and retains whatever is necessary for the beneficial use of land he still possesses. A way of necessity usually arises where there is a conveyance of a part of a tract of land

of such nature and extent that either the part conveyed or the part retained is entirely surrounded by the land from which it is severed or by this land and the land of strangers. It is a universally established principle that where a tract of land is conveyed which is separated from the highway by other lands of the grantor or surrounded by his lands or by his and those of third persons, there arises, by implication, in favor of the grantee, a way of necessity across the premises of the grantor to the highway. In other words, if one grants a piece of land in the midst of his own, he thereby impliedly grants a way to reach it. A rule of sound public policy—namely, that lands should not be rendered unfit for occupancy or successful cultivation—supports the implied grant or reservation of ways of necessity. These ways are of common-law origin.

“The fact of the necessity of a way is of great importance in determining whether an easement of way should be implied. The courts do not agree on the degree of necessity requisite to an implied grant of a way of necessity. The basis of the implied easement is the presumption of a grant arising from the circumstances of the case. Necessity does not of itself create a right of way, but it is said to furnish evidence of the grantor’s intention to convey a right of way and, therefore, raises an implication of grant. This presumption of a grant, however, is one of fact and whether a grant should be implied depends upon the terms of the deed and the facts in each particular case. * * *” (17 Am. Jur. Easements, Section 48, pp. 959-961).

“The courts are not in complete harmony as to the degree of necessity that is required to authorize an implied grant or reservation of a way

of necessity. There is abundant authority in support of the proposition that ways of necessity are ways of strict necessity as distinguished from ways of mere convenience and that the degree of necessity requisite to support such a way is absolute necessity, for which inconvenience without more does not suffice. * * *." (17 Am. Jur. Easements, Section 50, pp. 963, 964).

"A way by necessity is a temporary right in the sense that it continues only so long as the necessity exists, varies as the necessity varies, and ceases to exist upon the termination of the necessity which gave rise to it. The necessity ceases within this rule upon the acquisition by the owner of such right of way of another mode of passage to the highway—as, for example, when a new public highway is opened to his land or when he acquires another way to the highway through the purchase of other lands. It has been held, however, a right of way by necessity is not extinguished by the acquisition of another private way of equal convenience." (17 Am. Jur. Easements, Section 51, p. 965).

"The rule is that one who claims a way of necessity has the burden of proof of the facts requisite to an implied grant of an easement of this kind—such as the necessity of the way and the absence of another way or means of access to the property—which he must sustain by competent and sufficient evidence if his claim is to be upheld." (17 Am. Jur. Easements, Section 54, p. 967).

"The burden of proving the essential elements entitling a plaintiff to a way of necessity is upon him; that is, to show that the lands conveyed to him are surrounded by the lands of the grantor, or by the lands of the grantor and others,

and that he has no way to reach the public highway or road, except through the lands of the grantor." (Fox vs. Paul, 158 Maryland 359, 148 Atl. 809, 68 A.L.R. 520, 524).

"In an action for injuring or interfering with an easement the complaint must allege plaintiff's ownership of the easement in question. According to some decisions it is necessary to set out the particular manner, whether by prescription, grant, or otherwise by which the title was acquired, although the weight of authority is to the contrary, in the absence of some special statutory requirement, it being held sufficient to allege generally plaintiff's right to the easement and a violation of this right by defendant. * * *. If the complaint is based on the theory that a way in controversy is one of strict necessity, the complaint must show that plaintiff has no access to his land from a public highway without going over defendant's lands * * *." (19 C.J. Easements, Section 266, p. 1000-1001).

"It is not alleged in the petition that the plaintiff has not access to his lands from a county or public road or highway, and we cannot assume that he has not such access in the absence of some allegation to that effect. The allegation that he cannot reach either of the county roads mentioned in the petition without going through the defendant's fences is not equivalent to an allegation that he has no other means of access to a public highway from his lands * * *. It is at least well settled that where a party has one way by which he can reach a public highway, and which affords him reasonable facilities for possessing, using and enjoying his own premises, he is not entitled to another way as a way of necessity * * *. The facts stated in the amended petition being insuffi-

cient to entitle the plaintiff to a way of necessity for the purpose of ingress to and egress from his lands to a highway, the demurrer was properly sustained as to that phase of the case." (McIlquham vs. Anthony Wilkinson Live Stock Company, 18 Wyo. 53, 104 Pac. 20, 21).

"It is elementary doctrine that a party who bases his right upon either adverse user or upon dedication by the owner must plead the facts constituting such right or claim * * *. It should require no argument, however to show that where one claims an easement over real property he should set forth his claim in apt terms in his pleading. In our judgment the allegations in the complaint are clearly insufficient to constitute a right to the use of the strip of ground in question under the claim of dedication * * *. By again referring to the allegations of the complaint hereinbefore set forth it will be seen that it is not alleged that the alleged use was adverse and under a claim of right * * *. It is equally clear, therefore, that the facts pleaded are insufficient to constitute a right of way by adverse user. The court therefore erred in overruling the demurrer to the complaint." (Farr vs. Wheelwright Construction Company, 49 Utah 274, 163 Pac. 256, 257).

"In a suit to quiet title to an easement, it is sufficient to allege ownership generally, and it is not necessary to show the particular manner in which title was acquired * * *. An allegation that plaintiff is the owner of specific real property is the averment of an ultimate fact and not a conclusion of law * * *. So, likewise, is the allegation one of ultimate fact that 'defendant and his predecessors in interest have long since established a right of easement in the land of the plaintiff'

specifically describing the channel bed of Kay's Creek and the adjacent land which it is claimed was overflowed and to which defendant claims an easement * * *. While this is not a model of pleading, there are sufficient allegations to withstand attack for the first time on appeal * * *." (Robins vs. Roberts, 80 Utah 409, 15 Pac. (2d) 340-341).

"* * * and we see no reason why an allegation that the plaintiff is the owner of a described right of way or other easement over defendant's land, and that such easement is appurtenant to plaintiff's land, should not be regarded as a sufficient statement of the ultimate facts to be established * * *." (Corea vs. Higuera, 153 Cal. 451, 95 Pac. 882, 17 L.R.A. (NS) 1018).

The most casual reading of the excerpts from paragraphs 6, 7 and 8 of plaintiffs' complaint, heretofore quoted at pages 12 and 13 of this brief, will show that the pleader had no intention of raising an issue concerning the *legal* existence of a right of way over the land occupied by defendant. This statement finds affirmation in the prayers of the complaint which read as follows:

"WHEREFORE, plaintiffs pray that the defendant, its officers, servants, and agents be permanently restrained, by injunction, from maintaining, using, or operating said gravel pit and processing plant, and that defendant be required and ordered by the court to restore all right-of-ways, paths, and other means of ingress and egress to their premises heretofore destroyed by defendant, and be further ordered to restore the channel of Cottonwood Creek, to the condition that existed prior to defendant's operation of said gravel pit, together with damages heretofore

incurred thereby. And plaintiffs further pray that if, upon the trial of this cause, an order of abatement and affirmative injunction is not granted by the court, that the damage of each plaintiff be assessed by the court, and judgment rendered by the court in favor of each plaintiff for the depreciated value or loss in value of the property of each plaintiff herein, and for such other and further relief in the premises as the court shall deem just and proper." (R. 4-5).

It is manifest from the foregoing that plaintiffs were only seeking relief from the alleged nuisance created by the operations of defendant's sand and gravel plant. When reference is made to the Pre-trial Statement and Order (R. 30, 31), the foregoing conclusion secures further confirmation. The allegations of the complaint and the Pre-trial Order proceed on the basic assumption that defendant was obstructing roads and lanes appurtenant to the plaintiffs' properties, concerning which there was no question as to their legal existence. There is not even an implication that plaintiffs were giving notice they intended in this action to litigate any question concerning the legal existence of a right of way, road or lane. The responses to defendant's interrogatories did not in any respect set forth any fact which would inform the defendant that plaintiffs proposed to claim and prove a right to use the alleged road described in the response of the plaintiffs Rudds by either grant, prescription or necessity. The response simply described a road and the alleged obstructions thereof. It is a response based on the premise of the complaint, and that is, that defend-

ant was guilty of obstructing *legally established* roads of which plaintiffs were entitled to the free, unobstructed use thereof.

When the responses to the interrogatories are read in connection with the allegations of the complaint it is obvious that plaintiff wholly failed to allege any cause of action of the nature litigated over defendant's objections. The first defect in these allegations is they wholly fail to allege that plaintiffs are the owners of a described right of way or other easement over the land of which defendant was in possession. This pertinent, ultimate fact as required by *Robins vs. Roberts*, supra, and *Corea vs. Higuera*, supra, is entirely lacking, even though the response to the interrogatories is considered as part of the complaint. The absence of this mandatory allegation of ownership of a right of way or easement necessarily and conclusively implied that the road described in the interrogatory was a public road and not one of a private nature appurtenant to plaintiffs' land. The absence of this allegation demonstrates clearly the premises upon which plaintiffs' complaint was drafted and rendered findings of fact and the judgment as the same pertains to this right of way wholly nugatory and void.

There exists another fatal defect in plaintiffs' pleadings which must be overcome if the finding of the right of way of necessity and the judgment thereon are to be sustained. Defendant and appellant repeats that the court rejected the idea that a right of way by prescription had ripened. In its Minute Order of January 23, 1951 (R. 54), the court concluded that the use "was

permissive and that no easement ripened by adverse use." The findings and judgment show on their face that the court adjudicated that *a right of way of necessity existed*.

The authorities above quoted demonstrate beyond doubt that to entitle a plaintiff to a way of necessity he must allege and prove that he has not access to his lands from a county, public road or highway. *McIlquham vs. Livestock Company*, supra, teaches that the absence of such allegation is fatal. Such allegation is not contained in plaintiffs' complaint nor in the responses of plaintiffs, and therefore the court's Finding and judgment are based upon a fatally defective pleading. In this connection defendant and appellant repeats that as soon as the purpose and direction of plaintiffs' evidence as to the road or right of way, became apparent, it objected to the admission of such evidence and throughout the trial it persistently made objection to the court's procedure with respect to this matter.

It is highly illuminating to refer to Hillyer's "Annotated Forms of Pleadings and Practice" (1938 edition). In Volume IV. at pages 32-48, is the form of complaint (No. 4025) to establish a way of necessity over lands of plaintiff's grantor to connect with a public road. This form is based upon the case of *Gray vs. Magee*, 133 Cal. App. 653, 24 Pac. (2d) 948. In this case the court said:

"A second contention is that the complaint is fatally defective because of a misjoinder of parties and actions. In this connection it is

claimed that an action against Hugh Magee for a way of necessity over his land is improperly joined with an action against the other defendants to establish the existence of a public road over their lands. *In order to establish a way of necessity over the lands of Hugh Magee, it was necessary for the plaintiff to establish that such a way would give him access to a public road. He could do this only by alleging and proving that a public road existed over the estate lands which came to the line of Hugh Magee's land. Only one cause of action is alleged, and all defendants were proper parties.*" (Italics supplied). (24 Pac. (2d) p. 951).

Reference is also made to the 1951 Pocket Supplement to Hillyer's accompanying Volume IV. thereof. At page 46 of the Supplement (No. 4024-5) is the form of a complaint for interference with easement and way of necessity. This form is based upon *Rose vs. Denn*, 188 Ore. 1, 212 Pac. (2d) 1077; 213 Pac. (2d) 810. This case distinguishes between an easement in the form of a way of necessity and an implied easement. In the case of the former it is absolutely essential for the owner of the dominant tenement to allege and prove that such way is necessary to afford his lands access to a public road. In the absence of such allegation and proof, he cannot succeed in establishing a way of necessity.

When comparison is made of the complaint in this action in connection with the responses of plaintiffs to the defendant's interrogatories, with the pleadings in the *Gray and Rose cases, supra*, the defects in plaintiffs' pleadings in this action become glaring. It is submitted

that plaintiffs' pleadings are fatally defective because of the absence of the required allegations hereinabove discussed.

The situation therefore presents two different aspects. In the event it should be concluded that the complaint and responses present an issue as to the existence of a way of necessity, they are fatally defective in that they fail to allege: (1) That plaintiffs are owners of an easement or right of way and (2) That they have no other means of access to a public highway from their lands. However, defendant and appellant submits that the issue as to the existence of a way of necessity was never raised by the complaint and response, and that as a result that part of the findings and judgment applicable thereto are wholly without any issue framed by the pleadings. It is apparent that the plaintiffs face a forked road, either branch of which leads to the same destination. If the pleadings include an issue as to the existence of a way of necessity, the complaint and responses utterly fail to state facts sufficient to constitute a claim, and as a consequence the pertinent finding and judgment are void. If the pleadings do not raise such an issue, the pertinent finding and judgment are without supporting pleadings. In either event Finding No. 9, and Paragraph 2 of the Judgment are erroneous and without legal effect, and should be so declared.

Of relevancy to this discussion is the provision of Rule 15 (b), Utah Rules of Civil Procedure, reading as follows:

“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court shall grant a continuance, if necessary, to enable the objecting party to meet such evidence.”

Continuously through the trial the defendant and appellant objected to the admission of evidence pertaining to the creation or existence of the alleged right of way. Furthermore, defendant and appellant moved to strike this evidence both during the trial and at the conclusion thereof. In addition, on its motion for a new trial and for order amending findings and judgment, it again attacked the admission of this evidence and the trial of any issue involving said right of way. Beyond all peradventure, the record on appeal shows that the defendant and appellant neither expressly nor impliedly consented to the trial of this issue *which had not been raised by the pleadings or if raised by the complaint and responses was defectively stated*. Conversely the

plaintiffs insisted that the issue was within the pleadings and that the pleadings declared a claim on the pretended issue. At no time did the plaintiffs request an amendment to their complaint as the same pertained to the right of way in question. There is presented to the appellate court for consideration a situation (a) where an issue was tried which was "not raised by the pleadings"; (b) where the defendant and appellant neither expressly nor impliedly consented to the trial of this issue; (c) where plaintiffs and appellees made no offer or request to amend their complaint so as to present this issue; (d) where the complaint clearly fails to set forth a statement of claim to quiet title to a right of way of necessity; (e) where the defendant and appellant continuously objected to the trial of such issue and the admission of evidence thereon; and (f) where the action of the trial court in forcing defendant and appellant to trial upon an issue not within the pleadings, or if within the pleadings was defectively stated, clearly prejudiced it in maintaining its defense. (Cf. Woods vs. Selber, C.A. 5th, 1949, 171 Fed. (2d) 900.

Defendant and appellant emphatically insists that the trial court committed prejudicial error in its action on this aspect of the case. Under no circumstances can it be upheld under the provisions of Rule 15 (b) above quoted. If the complaint together with the responses to the interrogatories, be construed as raising the issue as to the creation and existence of a right of way of necessity, plaintiffs must fail because the complaint thus construed fails to set forth facts entitling them to relief.

If, however, the complaint is construed as defendant and appellant believes it should be construed, the court tried an issue not within the pleadings and to which the defendant and appellant continuously objected. A fatal error was therefore committed prejudicing the entire defense of defendant and appellant.

2. There can be no valid adjudication as to the existence of a way of necessity without having before the court the actual owner of the estate over and upon which such way is imposed. Mary Goff Walker, the fee title owner of the land upon which said burden was imposed by the court's judgment was and is not a party to this action. Consequently, the adjudication of the court that such way of necessity was created and exists is erroneous.

It was admitted throughout the trial that the defendant and appellant was not the fee simple title owner of the land over which plaintiffs' claim a right of way of necessity, and further, by virtue of the stipulation, Exhibit VVV, as read in connection with the abstract of title (Exhibit QQQ), it clearly appears that Mary Goff Walker was at the time of the commencement of this action, during the trial, and at the time of entry of judgment, the fee simple owner of the servient tenement. The defendant was in possession thereof under an arrangement with Mary Goff Walker, the terms and conditions of which were not revealed at the trial. In its pretrial order and statement, the court struck from Paragraph 2 of the complaint the following phrase: "and

is maintaining on land owned by Mary Goff Walker” (R. 31). The plaintiffs consented to the elimination of this phrase.

In an action to determine the existence of a right of way of necessity both the owner of the dominant estate and the owner of the servient estate are necessary parties thereto and there can be no adjudication as to the existence of a right of way of necessity without bringing before the court the owner of both the dominant and servient estates. The reason for this rule is that a right of way of necessity can only exist where there was a prior unity of ownership. In such action the lessee or tenant of the owner of the servient estate cannot represent the fee owner thereof. In this case, Mary Goff Walker, is the servient owner and the defendant corporation is either her lessee or tenant. The determination of the issue as to whether the prior owner of the Rudd Pedler and the Mary Goff Walker properties (Emerette C. Smith) intended by her conveyance to Pedlers’ and Rudds’ predecessors in title to convey a right of ingress and egress over the land retained by her (now the Mary Goff Walker property) can only be adjudicated when the Rudds and Pedlers and the mesne grantee of Emerette C. Smith (Mary Goff Walker) are before the court. Mary Goff Walker was not served with process in this action and did not appear therein.

“It appears from the evidence that one Toohey owns the Toohey lands, *in possession of defendants*, upon which plaintiff claims an easement; that is, the right to have the flood waters

run over the said lands in the Flannery ditch. As to find for the plaintiff it would be necessary for the court to conclude that there was such a burden upon the said lands, it is apparent that such an easement may not be adjudged in a suit to which Toohey is not a party." (Italics supplied).

Campbell v. Flannery, et al., 32 Montana 119, 79 Pac. 702-704.

"* * * The answer sets forth and the agreed statement of facts shows that the 'other premises' of the defendants, across which the plaintiff, by the terms of the contract, 'is to have the right of way,' were, after the execution of the said contract, conveyed by defendants to one C. D. Goodrich, without an express reservation of the plaintiff's right of way across them. Whether Goodrich was put upon inquiry respecting such right of way in season to be affected thereby in taking his deed from defendants does not appear. Defendants' answer states that the plaintiff 'has been at all times and is now permitted to enjoy a right of way across these premises at reasonable and proper times.' The intended meaning of this statement is not clear. If Goodrich was put upon inquiry respecting such right of way, then in equity he stands no better with reference to it than would the defendants, had they retained the legal title to the premises * * *. But Goodrich is not a party to this suit, as he essentially should be if the decree is to have effective force on all concerned. On remand of this case, the court of chancery should refuse to proceed to make a decree until Goodrich is made a party defendant and given an opportunity to be heard. Story, Eq. Pl., Sec. 75. For upon the result of such a hearing

and determination depends the rights of the plaintiff as to a right of way according to the terms of his contract with defendants, and consequently as to his right to damages against them for failure to perform the contract to the full extent * * *."

Peryer v. Pennock, 115 Atl. (Bt.) 105, 17 A.L.R. 863-865.

"Where the jurisdiction of equity is invoked to determine the right to a way of necessity and to locate it if it is found to exist, all persons whose rights may be affected by the decision of the question raised should be made parties."

Syllabus, Fox v. Paul, 148 Atl. (Md.) 809, 68 A.L.R. 520-527.

"In an action against defendants for obstructing an easement on lands in their possession, the owner of the land is a necessary party where the existence of the easement is in issue, since an easement on land may not be adjudged in a suit to which the owner of the land is not a party."

19 C.J., page 1000, Sec. 264.

"It is the well recognized general rule that a tenant has no inherent power to bind the landlord or the reversion by any act or contract on his part."

32 Am. Jur. Landlord and Tenant, Sec. 77, P. 90. (See also Schwer vs. Martin, 29 Ky. Law Rep. 1221, 97 S.W. 12, 7 L.R.A. (NS) 614, 616).

Manifestly, the judgment is not binding on Mary Goff Walker. She was never before the court and insofar as she is concerned, the judgment is a nullity as the same pertains to her land title. (Rule 19 (b), Utah Rules of

Civil Procedure). It is no answer to this proposition that plaintiffs are satisfied with an adjudication against the defendant and appellant that a way of necessity exists, because the defendant and appellant was never in a legal position to contest the vital issues involved. Only Mary Goff Walker can raise the question as to prior unity of ownership; the effect of conveyances by Emerette C. Smith to predecessors in title of the plaintiffs Rudd and Pedler, and of Mary Goff Walker; the question whether said plaintiffs have another access to public roads and highways; and whether the necessity existed at the time of trial. Insofar as these questions are involved, there is no privity between the defendant and appellant and Mary Goff Walker which will allow the court to pass upon the inherent problems involved in adjudicating the existence of a way of necessity. Therefore, on this ground, defendant and appellant submits that the court acted erroneously and such erroneous actions contributed to the confusion of issues and resulted in substantial prejudice to defendant's and appellant's defense.

3. Where there is reasonable doubt as to the right or title of the applicant for an injunction to protect property, equity will not interfere in the absence of an emergency until after the right or title has been established at law.

In considering the above proposition, consideration should be given to Rule 2, Utah Rules of Civil Procedure, which reads as follows:

“There shall be one form of action to be known as ‘civil action.’”

and to Rule 8 (e) (2), Utah Rules of Civil Procedure, which reads as follows :

“A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he has regardless of consistency and whether based on legal or on equitable grounds or on both. All statements shall be made subject to the obligations set forth in Rule 11.”

Under these rules a plaintiff may allege in his complaint as many separate claims as he has whether based on legal or equitable grounds or both. (Baron and Holtzoff, Federal Practice and Procedure, Vol. 1, Sec. 141, Page 266.)

However, the foregoing rules do not destroy the right of trial by jury (Rule 38, Utah Rules of Procedure), and the distinction between legal rights and equitable rights remain.

“The question whether a right of way over the lands of one person exists in favor of another is purely a legal one, and where the existence of such an easement is in dispute, the proper tribunal in which to settle it is a court of law.” (Mason v. Ross, 77 N.J. Eq. 527 ; 77 Atl. 44)

"The action is in nature to quiet title. The remedy sought is by injunction, and summary. The party seeking such relief must show a clear right. The exact extent and location of the appellant's right of way, as well as its extent of possession, when this action was instituted, is left in doubt by the conflicting testimony. Upon this record the relative rights of the parties to this contention are in doubt. At least, the case is not clear for the appellant. It is not, therefore, one for summary equitable intervention." (Newport, etc., Turnpike Road Co. v. Fitzsimmons, 9 Ky. L. Rep. 937, 8 S.W. 201).

"Where, in an action to restrain the obstruction of a right of way claimed by grant, the defendant not only denied that the plaintiff had a legal right of way, for the alleged reason that the deed to the plaintiff's grantor did not convey in express terms any interest therein, but denied as well the allegation as to obstructing the way and consequent damage, and it did not appear that the interferences complained of were continuous or irreparable, the plaintiff was required first to establish his right in an action at law." (Parks v. Parks, 121 Me. 580, 119 Atl. 533).

"In a suit praying for a judgment that the plaintiff was entitled to a right of way from his land over that of the defendant to a public highway and for an injunction to remove obstructions, alleging title by adverse user for the prescriptive period, and where the answer denied the plaintiff's right and defendant's evidence tended to show the user was not adverse, the plaintiff must first establish the existence of the right of way in a court of law." (Hart v. Leonard, 42 N.J. Eq. 416, 7 Atl. 865.)

“* * * The issue between the parties was purely one as to the title to the easement and * * * although in form this is a suit in equity it is in reality an action of ejectment to secure the removal of the respondents and their building from the alleged way. The complainant in her bill alleges that she is the owner of this right of way and that she acquired it by adverse user for more than ten years. The respondents in their answer deny that there is any such easement appurtenant to her land and that the complainant ever acquired one by adverse user. * * * The only issue left was as to the title to the easement. The court of equity had no jurisdiction to try this issue and the respondents are entitled to have it tried at law before a jury.” (Waal v. Sakagi, 27 Haw. 609, 636.)

See also *Ferguson v. Ferguson*, 106 Kan. 823, 189 Pac. 925;

Howell Co. v. Charles Pope Glucose Co., 171 Ill. 350, 49 N.E. 497;

Dahnken v. George Romney & Sons Co., 111 Utah 471, 184 Pac. (2d) 211, 215;

McGregor v. Silver King Mining Co., 14 Ut. 47, 45 Pac. 1091.

“The primary purpose of the instant case is establishment of an easement based upon an alleged prescriptive user. If plaintiff fails in this, his cause of action falls. The right of injunctive relief cannot come into existence until the easement has been established. This issue the plaintiff was entitled to have tried to a jury. The court may grant or refuse the auxiliary relief of restraining interference therewith after the easement has been found to exist. Should the jury find no easement, under proper instructions of the court, insofar as plaintiff is concerned, both in-

junctive relief and damages cease to be of any consequence. The determination of the issue as to whether or not plaintiff has a prescriptive easement over the lands, the title to which is conceded to be in defendants, is one based on fact. The question of whether or not the way in question has been used for more than 20 years, whether or not the use has been open, adverse, continuous, visible, notorious, and under claim of right with knowledge and acquiescence, and not merely permissive or by license, are the basic facts to be established, and the plaintiff had a right to have them submitted to a jury. 19 C.J. 965, Sec. 199; Polson v. Ingram, 22 S.C. 541; Farmer v. Bright, 183 N.C. 655, 112 S.E. 420 * * *. Whether or not the law courts and the esuity courts were separate courts, the analogy of the situation is pertinent to the issues in the instant case. The necessity of establishing the easement at law before equity principles or 'equity Jurisprudence,' as distinguished by Pomeroy, may be applied to injunctive relief, is apparent, although under our procedure both may be accomplished in the same action * * *. The mere fact that a suit is one to quiet title to real property is not controlling. Generally, a suit to quiet title to real property is regarded as an equitable proceeding; but because it is so regarded does not determine the nature of the issue or deprive a party of his right to a trial by jury. If the only question involved is that of title, the issue is generally legal. A suit to establish an easement is legal." (Norback v. Board of Directors, 84 Utah 506, 37 Pac. (2d) 344, 345).

"By analogy, then, it would seem that where, as under our procedure, parties are permitted to submit both their legal rights and their equitable rights to the same tribunal for adjudication at the

same time, the right to a jury trial with respect to the former, which was adequately safeguarded under the old system, should be equally respected under the new. That would seem to be the effect of our constitutional guaranty. Article 1, § 7. The right to trial by jury thus guaranteed was the right as it existed at common law. *Koppikus v. State Capitol Commissioners*, 16 Cal. 248, 253; *Cauhape v. Bank*, 127 Cal. 197, 202, 59 Pac. 589. The purpose of the amendment of 1874 to section 592 of the Code of Civil Procedure was to make it conform thereto. *Vallejo, etc., R.R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 556, 147 Pac 238. It follows, therefore, that the common-law rule respecting the right to trial by jury as it existed in 1850 is the rule of decision in this state. *Pol. Code*, § 4468; *Martin v. Superior Court (Sup.)* 168 Pac. 135, 136 L.R.A. 1918B, 313. * * *

“So far as we have been able to ascertain, there was no statutory enactments in England between 1850 and 1858 affecting the right of trial by jury in connection with suits to abate nuisances. These decisions may be taken then as determinative of the proposition that, under the English common law as it stood in 1850, at the time it was adopted as the rule of decision in this state, ‘If a plaintiff applies for an injunction to restrain a violation of a common-law right, if either the existence of the right or the fact of the violation be disputed, he must establish that right at law’; or, in other words, by a jury, if one be demanded. We conclude, therefore, that the parties here were entitled to a jury trial upon the issues as to damages, and that the verdict of the jury thereon was binding. We do not regard the provision of section 731 of the Code of Civil Procedure as in any way affecting that right. If the jurisdictions in

law and equity were here separately vested, it might well be held that the plaintiff, by filing in equity a complaint such as is here presented, had thereby elected to submit all the issues for determination by the court, and thereby waived his right to a jury trial on the legal issues; but where, as here, all such issues may be tried in the one action, no reason for such holding appears." (Farrell v. City of Ontario, 39 Cal. App. 351, 178 Pac. 740-742.)

"The decision in Farrell v. City of Ontario, supra, was followed and approved only a few weeks later by the case of Franklin v. Southern Pacific Company, 40 Cal. App. 31, 180 P. 76, in which likewise the judgment of the trial court was reversed. The decision in this later case was by the same court which rendered the decision in the case of Farrell v. City of Ontario, supra. A petition for a hearing after said decision was denied by the Supreme Court. It is interesting to note that the author of the opinion in the first of these two cases, was the trial judge in the later case. * * * In our opinion, the argument and presentation of authorities cited by Judge Myers in his opinion rendered in the Farrell case, are unanswerable and the rule therein announced should be followed by the courts of this state in actions wherein both legal and equitable remedies are the subject of the action." (Pacific Western Oil Co. v. Bern Oil Co., 13 Cal. App. (2d) 60, 87 Pac. (2d) 1045-1050.)

"Thus we conclude that the court below erred in not according to the defendant, upon his demand, a jury trial on the issue of damages. As has been seen, the trial judge denied the defendant the right to a jury trial on any and all issues on the ground that the paramount object of the

plaintiff's action was to secure an injunction and that the claim for damages was but incidental to the injunctive relief sought. In so ruling, the court apparently relied upon *Norback v. Board of Directors of Church Extension Society*, 84 Utah 506, 37 P. 2d 339, 345, where the rule was laid down that 'if the issues are legal or the major issue legal, either party is entitled upon proper demand to a jury trial; but, if the issues are equitable or the major issues to be resolved by an application of equity, the legal issues being merely subsidiary, the action should be regarded as equitable and the rules of equity apply.' In that case suit was brought by the plaintiff to establish a claimed easement based upon an alleged prescriptive user, for an order enjoining the defendant from asserting a claim as against the plaintiff thereto, and for damages. The court held that the primary purpose of the suit was to establish an easement; that a suit to establish an easement by prescription is legal; that the right of injunctive relief could not come into existence until the easement had been established; that the court could grant or refuse to grant the auxiliary relief of restraining interference with the easement after the easement had been found to exist; and that therefore the parties were entitled to have the matter of whether he had acquired an easement by prescription submitted to a jury.

"Appraised in light of the California rule, [*Farrell* and *Pacific Western* cases, *supra*] the *Norberg* case is apparently correct in result, but the rule there laid down as to when litigants are entitled to a trial by jury, which we have quoted above, cannot be reconciled with the California rule which we have approved and adopted in this opinion. There may be certain types of cases, al-

though none occur to us now, in which the issues of fact in the legal cause of action are so intertwined with the issues of fact in the equitable cause of action that they cannot be separated for the purpose of trial by jury. Only then would it seem that the court should determine whether the major issue or issues are legal or equitable and grant or deny a jury trial accordingly. Otherwise the parties should be entitled to a jury trial on the issues of fact in the legal cause of action." (Valley Mortuary v. Fairbanks, Utah, 225 Pac. (2d) 739, 750.)

The trial proceedings in this case deprived the defendant of *the right to demand a trial by jury* of the legal issue as to the existence of the right of way of necessity. It is true that defendant did not demand a trial by jury on this issue but the reason for such lack of demand becomes obvious when consideration is given to the position which defendant was compelled to take at the trial. Had defendant demanded a jury trial on this issue, it would have impliedly consented to the trial of a non-pleaded issue, under Rule 15 (b) Utah Rules of Civil Procedure. When the Court overruled its objections to the admission of evidence concerning the right of way and denied its motions to strike such evidence, it was not only committing error with respect to procedural and evidentiary measures but also by its ruling it denied the defendant *its constitutional right to demand a jury trial on the legal issue*. Stated otherwise, if defendant and appellant had demanded a jury trial it would have done so at the cost of waiving its contention that the issue concerning the way of necessity had not been pleaded.

It was in truth compelled to surrender its right of jury trial in order to preserve its contention that it was being forced to trial on a non-pleaded issue. Defendant contends that its rights were radically and seriously prejudiced when it was forced to make this election, and that the errors of the court with respect to defendant's objections and motions penetrated deeply into defendant's defense of all issues involved in the case. It is impossible in a post-examination of the record to determine what the results would have been had the defendant been accorded its free election to try the legal issues before a jury upon a complaint which contained proper allegations as to the creation and existence as to the way of necessity.

4. The writ of injunction cannot be used to try title to real estate or an interest there'n. It is not the province of an injunction to effect a final adjudication of an alleged right based on a disputed title. It cannot be used to oust one party from possession of realty and place another person in possession thereof.

“Since ordinarily an injunction will not lie as an original and independent proceeding to determine the title to land and is not a proper substitute for an action of ejectment or forcible entry and detainer, in the absence of some statutory provision to the contrary, the rule is that an injunction will not issue, the effect of which will be to take land out of possession of one party and put it in possession of another, at least until complainant's title has been established at law. * * *.” (32 C.J. Sec. 178 (3), page 134.)

“Upon the facts found, this case was presented to the lower court. The plaintiffs, purchas-

ers, never were in the actual or exclusive possession of the lands to be covered by the lease. The society, the vendor, was in actual and exclusive possession when it planted the crops in controversy and continued in possession of the lands upon which those crops were growing until the injunction was issued and served. The practical effect of the injunction as issued was to oust the society from its possession and install the plaintiffs in possession, and for such a purpose injunction is not an available remedy." (194 Pac. p. 142) (Blinn v. Hutterische Society, 58 Mont. 542, 194 Pac. 140, 142).

"The purpose of this action is not to maintain a status quo while rights are litigated. Its sole purpose is to finally adjudicate an alleged right based upon a doubtful and disputed title. This is not the province of injunction. 32 C.J. p. 35, Sec. 15. In fact, its true purpose is to try title. Where such is the main object of a suit, injunction is not the proper remedy. Tomasini v. Taylor, et al., 42 Or. 576, 72 P. 324." (Barrios v. Pleasant Valley, etc., Co., 17 Pac. (2d) (Colo.) 301.)

"This case in our opinion is on all fours with Smith v. Gardner, 12 Or. 221, 6 Pac. 771, 53 Am. Rep. 342, which was a suit to enjoin a trespass upon real property, wherein the defendant justified on the ground that the place where the trespass was committed was a public highway. The court held that the manifest object of the suit was to determine whether a highway existed across the lands of the plaintiff, and that equity did not have jurisdiction to try and determine that question, but plaintiff's remedy was at law. The same question is presented here, and it is a matter of no consequence that in the case cited the highway was claimed by dedication, and in this by

prescription. The decree of the court below is therefore affirmed." (Tomasini v. Taylor, 43 Ore. 4, 72 Pac. 324.)

"The law is well settled that a court of equity will not interfere by injunction with the possession of a party for the purpose of transferring the possession to another." (Montgomery v. Coleman-Nelson Gasoline Co., 130 Okl. 14, 264 P. 895; Bradham v. Johnson, 195 Okl. 275, 156 Pac. (2d) 806, 808.)

Paragraph 2 of the judgment beyond doubt places the plaintiffs Rudds in possession of part of the land of which defendant held possession. The court "granted" a right of way as against this defendant to the Rudd premises from a public highway; said right of way is to be of such size, condition and extent as to be suitable for use by motor vehicles. The defendant, its officers, servants, agents and assignees are enjoined from interfering with or obstructing said right of way (R. 59).

Defendant requotes for purposes of emphasis the statement of the Utah Supreme Court contained in the *Valley Mortuary v. Fairbanks*, supra; wherein the court was considering *Norback v. Board of Directors*, supra. It said:

"The court held that the primary purpose of the suit was to establish an easement; that a suit to establish an easement by prescription is legal. That the right of injunctive relief could not come into existence until the easement had been established; that the court could grant and refuse to grant auxiliary relief of restraining interference

with the easement after the easement had been found to exist; and that therefore, the parties were entitled to have the matter of whether he had acquired an easement by prescription submitted to a jury." (225 Pac. (2d) 750.)

The complaint in this action sought an injunction restraining defendants from obstructing roads and lanes. On that facet of the case it was purely equitable because the complaint utterly failed to make any allegations of the plaintiff's ownership of a way of necessity. As previously stated the premise of the complaint is that defendant was obstructing roads and lanes which had both legal and factual existence, and which required no court action to establish or vindicate. The plaintiffs asked the court to protect their legal right to have legally established roads and lanes kept open to free use by them. The case made by the complaint and responses to the interrogatories stops at that point. The effect however of Paragraph 2 of the judgment is to "*grant*" plaintiffs, Rudds, a way of necessity over lands of which defendant held possession. This provision of the judgment is a certain and clear violation of the rule that the writ of injunction is a preventative remedy only and cannot be used to try title. The plaintiffs devoted days of trial to proving the *legal* right of the plaintiffs to a right of way when they came into court only asking it to enjoin defendant from obstructing legally established roads and lanes. It is difficult to conceive of a more violent case of "government by injunction" than this one. It has all the evils against which the courts and legal profession have

protested in connection with the use of the writ of injunction. On this basis the provisions of Paragraph 2 of the judgment are erroneous and should be so declared.

5. A right of way of necessity exists only so long as the necessity exists. When the necessity ceases, the way terminates. Under the state of the pleadings and trial procedure followed in this case, the issue concerning the existence of a present necessity with respect to the Rudd property could not be properly presented to the court. Its finding on this issue is not supported by pleading which raised this issue and is therefore a finding without the issues of the case. Defendant and appellant never agreed to the trial of such issue, but objected to and protested against not only the admission of evidence on this issue, but also of the trial of such issue.

A right of way of necessity over another's land to a public highway ceases with the necessity which gave rise to it.

“A way of necessity arises from necessity alone and continues only while the necessity exists. Unquestionably appellant had a way of necessity across his grantor's ranch until a road was dedicated to his use; but when that was done his right to a way of necessity ceased and it matters not that the old road was more convenient for his purposes. When it ceased to be indispensable, the right ceased.” (Cassin v. Cole, 153 Cal. 677, 96 Pac. 277, 278.)

“A way created by necessity cannot endure longer than the cause which calls it into being, and it is consequently extinguished on the acquisition of another mode of passage although far less convenient.” (9 R.C.L. 815, 816.)

“No implications of a grant of a right of way can arise from proof that the land granted cannot be conveniently occupied without it; its foundation rests in necessity, not in convenience. A party cannot have a way of necessity through the land of another when the necessary way to the highway can be obtained through his own land, however convenient and useful another way might be * * *” (19 C.J. 115, P. 922.)

“A way by necessity is a temporary right in the sense that it continues only so long as the necessity exists, varies as the necessity varies, and ceases to exist upon the termination of the necessity which gave rise to it.” (17 Am. Jur. Easements, Sec. 51, P. 965.)

“A right of way which exists by necessity is based upon an implied grant, and a way of necessity is provisionally brought into existence by the necessities of the estate granted. And, if the grantee has a new way to the estate previously reached by the way of necessity, the way of necessity is thereby extinguished. * * * A right of way of necessity is not a perpetual right. It ceases to exist when the necessity for its continuance ceases.” (Waubun Beach Assoc. v. Wilson, (Mich.), 265 N.W. 474, 103 A.L.R. 983-989.)

A complete annotation covering the question of cessation of easement of way by necessity upon cessation of necessity appears in 103 A.L.R., page 993.

If plaintiffs Rudds ever had a way of necessity upon or over the lands of which defendant and appellant was in possession, the question as to whether the necessity for such way had ceased was never properly presented to the court because of the lack of appropriate pleadings

covering the question as to a way of necessity. Defendant and appellant has hereinbefore shown the status of the pleadings and has demonstrated that they were wholly inadequate to allow the court to pass upon this question. The immediate quotations above support the proposition that one of the vital elements in a case involving a way of necessity is not only the issue as to the existence of the necessity when the way was created, but the continuance of the necessity at the time of trial and at the date of the judgment decreeing the same. Without pleadings which definitely raised all issues of fact inherent in such litigation, it was impossible for the defendant to present an adequate defense on this issue. A reading of the evidence as the same pertains to the right of way makes it clear that the plaintiffs were primarily concerned with establishing a right of way by prescription (which effort wholly failed) and the question of the existence of a way of necessity came as an afterthought because of the court's rulings which defendant and appellant continuously controverted. Regardless of the evidence submitted, the defendant and appellant was prejudiciously handicapped in making its defense that a necessity no longer existed for the right of way. Without an accurate issue on this question of the continuance of the necessity, the evidence is utterly lacking in probative force to sustain the finding of a present necessity. The evidence pertaining to present necessity is uncohesive, scattered, and lacks definiteness. Such condition of the evidence is resultant upon the lack of a definite issue. Defendant and appellant submits that it was not only

handicapped in presenting the defense of lack of present necessity, but also that this lack of definiteness on this issue served to prejudice its entire defense in the principal cause.

II.

THE COURT COMMITTED ERROR IN ALLOWING PLAINTIFFS TO SERVE AND FILE AN AMENDMENT TO THEIR COMPLAINT WHICH INCLUDED ALLEGATIONS CHARGING DEFENDANT WITH MAINTAINING A NUISANCE ATTRACTIVE TO CHILDREN, AND ALSO COMMITTED ERROR IN OVERRULING DEFENDANT'S OBJECTIONS TO THE ADMISSION OF EVIDENCE IN PROOF OF SUCH ALLEGATIONS.

1. The doctrine of attractive nuisance is part of the law of negligence and defines the duty of the owner or occupant of real property to guard against the existence or maintenance on his property of instrumentalities or conditions which are attractive to trespassing or meddling children of tender age. The doctrine has no application in the present action which is to enjoin or restrain the operations of a lawful business on the the ground that said operations create a condition which annoys plaintiffs and interferes with their rightful use of their property.

The doctrine of "attractive nuisance" is elucidated by the following authorities.

"The appellant contends that it was not guilty of negligence in thus maintaining upon its own premises, for necessary use in conducting its busi-

ness, the turn-table in question, and which was fastened in the usual and customary manner of fastening such tables; that the plaintiff was wrongfully upon its premises, and therefore a trespasser, to whom the defendant did not owe the duty of protection from the injury received, and that the court should have so declared, and non-suited the plaintiff * * *. It is a maxim of the law that one must so use and enjoy his property as to interfere with the comfort and safety of others as little as possible consistently with its proper use. This rule, which only imposes a just restriction upon the owner of property, seems not to have been given due consideration in the case referred to. But this principle, as a standard of conduct, is of universal application, and the failure to observe it is, in respect to those who have a right to invoke its protection, a breach of duty, and in a legal sense, constitutes negligence * * *. If defendant ought reasonably to have anticipated that, leaving this turn-table unguarded and exposed, an injury, such as plaintiff suffered, was likely to occur, then it must be held to have anticipated it, and was guilty of negligence in thus maintaining it in its exposed position. It is no answer to this to say that the child was a trespasser, and if it had not intermeddled with defendant's property it would not have been hurt, and that the law imposes no duty upon the defendant to make its premises a safe playing ground for children. In the forum of law, as well as of common sense, a child of immature years is expected to exercise only such care and self-restraint as belongs to childhood, and a reasonable man must be presumed to know this, and the law requires him to govern his actions accordingly. It is a matter of common experience that children of tender years are guided in their actions by

childish instincts, and are lacking in that discretion which, in those of more mature years, is ordinarily sufficient to enable them to appreciate and avoid danger; and in proportion to this lack of judgment on their part, the care which must be observed towards them by others is increased; and it has been held in numerous cases to be an act of negligence to leave unguarded and exposed to the observation of little children dangerous and attractive machinery, which they would naturally be tempted to go about or upon, and against the danger of which action their immature judgment interposes no warning or defense." (Barrett v. Southern Pacific Company, 91 Cal. 296, 27 Pac. 666).

"The owner of a thing dangerous and attractive to children is not always and universally liable for an injury to a child tempted by the attraction. His liability bears a relation to the character of the thing, whether natural and common, or artificial and uncommon, to the comparative ease or difficulty of preventing the danger without destroying or impairing the usefulness of the thing, and, in short, to the reasonableness and propriety of his own conduct, in view of all surrounding circumstances and conditions. As to common dangers existing in the order of nature, it is the duty of parents to guard and warn their children, and, failing to do so, they should not expect to hold others responsible for their own want of care. But, with respect to dangers specially created by the act of the owner, novel in character, attractive and dangerous to children, easily guarded and rendered safe, the rule is, as it ought to be, different." (Peters v. Bowman, 115 Cal. 356, 47 Pac. 599, 14 L.R.A. (NS) 626).

"We have already pointed out that, as to adults or children who may come upon another's premises either by express or implied invitation, the law imposes the duty upon the owner to exercise reasonable care for their safety. If, therefore, the owner places something upon his premises which is easily accessible to children, and which is alluring and attractive to their childish propensities, and excites their curiosity and desire for play, it, in effect, amounts to an implied invitation to them to come upon the premises. If, in connection with the attractiveness, the thing is inherently dangerous to a child of immature judgment, it may well be that the owner of premises may, under particular circumstances, be held liable for his neglect of duty to the child going thereon by reason of such allurements." (*Brown v. Salt Lake City*, 33 Utah 222, 93 Pac. 570, 14 L.R.A. (N.S.) 619, 626).

"In a number of jurisdictions the rule of non-liability to infant trespassers is subject to a well recognized exception, consisting of a doctrine variously termed the 'attractive nuisance,' 'attractive agencies,' 'attractive instrumentalities' or 'turntable' doctrine, or the doctrine of the 'turntable cases,' or of the 'torpedo cases.' This doctrine imposes liability for injuries to children, even though they are technical trespassers, where such injuries are the result of the failure of the owner or person in charge to take proper precautions to prevent injuries to children by instrumentalities or conditions which he should, in the exercise of ordinary judgment and prudence know would naturally attract them into unsuspected danger. The doctrine originated in an English case in which one who left a horse and cart unattended on the street was held liable for an injury

received by a child while playing on the cart, but has since been extended far beyond the strict legal principles involved in that case. In the United States the doctrine is designated the 'turntable' doctrine or the doctrine of the 'turntable cases,' because the leading American case on the subject, in which the doctrine was first recognized by the supreme court of the United States, involved an injury to a child playing about a railroad turntable." (45 C.J., Sec. 155, Page 758).

The "attractive nuisance" idea was introduced by the plaintiffs into this case upon the direct examination of the witness Pherrel Draper, one of the plaintiffs. The following is an excerpt from the proceedings:

Q. (By Mr. J. Richard Mulliner) I will ask you, Mr. Draper, if you have seen children in and around and about this plant?

A. Yes.

GENERAL RITER: Now, I move—I object to that. That is immaterial, it is an immaterial thing in this issue certainly whether there are children in and around and about the plant. He is not standing here as a Juvenile Court protecting children.

MR. J. RICHARD MULLINER: I would like to be heard.

THE COURT: Do you claim an attractiveness?

MR. J. RICHARD MULLINER: That is one feature.

GENERAL RITER: You haven't pleaded it, and it is in violation of the cases—

MR. J. RICHARD MULLINER: This is my theory on it.

(Arguments of Counsel).

MR. J. RICHARD MULLINER: I will tie this in with other witnesses.

THE COURT: I think you ought to plead it if you do.

MR. J. RICHARD MULLINER: I will ask to amend if it isn't pleaded.

GENERAL RITER: What is the theory, it is an attractive nuisance for children? You can't raise that.

MR. J. RICHARD MULLINER: I expect to show the people involved in this neighborhood have children, and there will be other children, too, who play in and about these sand piles and conveyors which present a very dangerous situation which has upset the parents of these children living there, and an attractive nuisance is a nuisance in and of itself.

GENERAL RITER: The attractive nuisance doctrine has no place in this case. That was a doctrine which was introduced purely on a personal injury claim between an injured child and a dead child and the defendant. It certainly has no business in a private nuisance case.

MR. J. RICHARD MULLINER: The possibility of this nuisance and attraction I would like to raise here if it hasn't been raised.

THE COURT: Can you file your amendment tomorrow?

MR. J. RICHARD MULLINER: I think so. I will file it before we recess.

THE COURT: I think you ought to file it early. I don't like to try cases without issues. Suppose you take until Wednesday. The plaintiffs are granted until Wednesday morning to file an amendment with reference to the attractive nuisance feature.

GENERAL RITER: May the record show that on the assumption it is filed, I move to strike it on the ground it is an irrelevant and immaterial allegation in this type of action and object to any allegation based on that type of allegation.

THE COURT: Objection overruled.

MR. J. RICHARD MULLINER: In connection with this, rather than recopy the whole complaint can I add a paragraph numbered according to the grounds in that general paragraph?

THE COURT: The last question please.

(The last question was read by the Reporter).

THE COURT: The objection to the question is overruled and the answer may stand.

Q. (By Mr. J. Richard Mulliner) How often generally would you say you had seen them?

A. I can't say just how often I have seen them there playing out on the ends of those high conveyors, and also two or three times I have taken the little children off of those sand piles all over that large underground conveyor and warned them of the danger there would be if they would ever slip into that cone. It would mean certain death. I have taken them off two or three different times.

GENERAL RITER: That is a highly prejudicial line of testimony, and I object to it, if the Court please, what this witness did (R. 206-209).

Pursuant to the permission of the court as set forth in the above quoted excerpt, the plaintiffs served and filed (R. 312) an amendment to their complaint reading in part as follows:

“That the various operations as described and the piling and the piles of sand and gravel constitute an attraction and attractive nuisance and the loading and caving in are a serious danger to children who are attracted thereto, which interferes with the safe and comfortable enjoyment of plaintiffs’ properties and lessen the personal enjoyment thereof by plaintiffs or others residing therein. That the conditions caused and as in this Paragraph 8 referred to are offensive to the senses and injurious to the health of the occupants of the properties of plaintiffs as herein described and involved (R. 35-36).

Defendant objected to the filing of this amendment to plaintiffs’ complaint (R. 312-313). The court overruled the objection (R. 313) and the defendant served and filed its answer to this amendment wherein it denied the allegations thereof (R. 49-50).

Thereafter during the course of the trial the plaintiffs persisted in the introduction over defendants objection of evidence in support of this attractive nuisance theory. Upon the direct examination of Virginia Pedler, one of plaintiffs’ witnesses, the following episode occurred:

Q. Have you observed children playing on these conveyors and sand piles on the Walker property?

GENERAL RITER: Consistent with my previous objection, I object to that question.

THE COURT: The record may show an objection to the entire line of attractive nuisance questions, and the objection is overruled.

A. Yes, I have seen them.

Q. (By Mr. J. Richard Mulliner) On more than one occasion?

A. Yes.

Q. And over what period, Mrs. Pedler?

A. I don't remember exactly. I have seen them several times. I couldn't say at just what times. They were usually there on a Sunday afternoon.

Q. Has it been from 1948, did you observe children out there in that year?

A. Yes. I brought my own children back from there that year.

Q. And in 1949?

A. Yes.

Q. And in 1950?

A. Yes.

Q. Has there been more than one occasion in each of these periods you have seen children out there?

A. Yes, I have seen boys out on the end of the conveyors, and I have also seen children on the piles of material.

Q. And on occasion you have seen your own children over there?

A. Yes, the first year in particular it was quite an attraction for them down there; and when-

ever they were missing, that was the first place we would head by. We have swings in our place since then to avoid this (R. 489-490).

When the witness Jack C. Dunn, also a plaintiff, was on the stand, the following examination ensued:

Q. Have you ever observed children playing on these sand piles and conveyors at this Walker plant?

A. Yes, I have, particularly my own observation, which I called at times to my father to come—

GENERAL RITER: Now if the Court please, here comes this attractive nuisance question again.

THE COURT: You may have your objection. It is overruled.

MR. J. RICHARD MULLINER: Would you read as far as he has gone.

(The last answer was read by the Reporter).

THE COURT: Don't tell the conversation, but just tell what you saw.

A. (Continuing) I happened to see some youngsters that I would judge from where I was standing they were about eight to ten years of age, at the end of the longest conveyor. One of them was standing, I should say, well, I won't give the details. But they were looking, the youngster was looking over at the cone of dirt below, and there was another youngster, I should say, half way out of the conveyor back of it. At that time I did ask a question on the fact there should be a night watchman or a day watchman there to keep youngsters off of it.

GENERAL RITER: I move to strike that out.

THE COURT: The motion is granted. The answer is stricken.

Q. (By Mr. J. Richard Mulliner) Do you have children?

A. Yes, I have one boy (R. 550-551).

Ernest J. Pedler, one of the plaintiffs was permitted over defendant's objections to testify as follows:

Q. (By Mr. J. Richard Mulliner) Have you ever seen children playing on the Walker piles and equipment?

A. Yes, sir; I have.

GENERAL RITER: Now I would like my objection that I have had right from the beginning to that type of question.

THE COURT: The record may show you have your objection to this line of testimony. Objection overruled.

THE WITNESS: On two occasions I have gone over and pulled my youngest girl from the closest pile of sand there.

Q. (By Mr. J. Richard Mulliner) And on other occasions have you seen other children playing?

A. I have witnessed older boys, perhaps fourteen or fifteen years of age, and I am guessing some on that, but I have witnessed them out on the end of the conveyors on a Sunday (R. 620-621).

The doctrine of attractive nuisance operates under the law of negligence. It is a legal fiction invented by the courts to reach a situation where immature children

enter upon property of the defendant and are either injured or killed. The children in such instances are technical trespassers, but the hardship of visiting upon them the rule which is applicable to adults and mature persons is obvious. Consequently, the courts conceived the idea that if a property owner knowingly and intentionally created on his premises a situation which usually attracts children to come upon the premises and play, the property owner had really invited them to come on his premises. This allowed the courts to consider the children as invitees and not trespassers and thereby mitigated the operation of the rule that:

“* * * no duty exists toward a trespasser except to refrain from willfully or wantonly injuring him, and the owner or person in charge of property is not under any duty to protect trespassers thereon from injury or to prevent them from getting into a place or situation of danger. Accordingly, under ordinary circumstances, there is no liability for injury to a trespasser of whose presence the person whose act or omission caused the injury, was unaware.” (45 C.J., Sec. 132, P. 742-744).

The term “attractive nuisance” is a misnomer. It is not a term of legal art. More correctly the doctrine should be denominated as that pertaining to “attractive agencies” or “attractive instrumentalities” (45 C.J., Sec. 155, P. 758). The doctrine is not part of the law of nuisance under Sections 103-41-1 and 104-56-1, Utah Code, 1943. Therefore the admission of this evidence constitutes an error.

While the court made no specific finding covering this proposition, the filing of plaintiffs' amendment to their complaint and the introduction of evidence based on this amendment, with the court's full approbation and approval, must have influenced the court in making the finding:

"That the maintenance and operation of said gravel pit and processing plant is a nuisance, and, if continued, will result in substantial and permanent damage to the lands, homes, personal properties and health of plaintiffs and result further in the substantial depreciation of their said properties and prevents the use and enjoyment thereof and destroys the rental and market value thereof." (Finding; R. 65).

Considering the fact that on the principal issue of the case, there was a sharp conflict in the evidence and the duty was thereby cast upon the court to resolve this conflict, the admission of this evidence was extremely harmful to the defendant and on appeal should be taken into consideration in measuring the court's findings of fact and provisions of its judgment relevant to the charge that defendant's operation of its gravel plant constitutes a nuisance.

III.

THE BUSINESS OF EXCAVATING ROCK, GRAVEL, AND SAND BY THE OWNER OR OCCUPANTS OF LANDS BELONGING TO HIM OR IN HIS OCCUPANCY IS A LAWFUL AND USEFUL OCCUPATION. IT IS NOT A NUISANCE PER SE. A JUDGMENT ENJOINING AND RESTRAINING

THE OPERATION OF SUCH BUSINESS SHOULD GO NO FURTHER THAN TO CONTROL THOSE PARTICULAR FEATURES OF THE OPERATIONS WHICH MIGHT RESULT IN SUBSTANTIAL INJURY TO ADJOINING PROPERTY OR TO PERSONS RESIDING OR OWNING PROPERTY IN THE NEAR VICINITY OF THE LAND UPON WHICH THE OPERATIONS ARE BEING CONDUCTED.

As a preliminary to the discussion of the above point, defendant submits relevant and appropriate excerpts from decisions and textbooks as to the function and duty of the trial court in promulgating its judgment wherein and whereby the operations of a business are restrained or restricted in cases where the plaintiffs assert such operations constitute a private nuisance.

“(d) Every order granting an injunction and every restraining order shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.” (Rule 65A(d) Utah Rules of Civil Procedure).

“Rule 65(d), prescribing the form and scope of an injunction or restraining order, is mandatory, and emergency conditions do not warrant a departure from its express requirements. However, a violation of these provisions will not invariably render an order absolutely void.

If Rule 65 is obeyed, the court may grant an injunction in broad terms, especially if the public interest is involved. In such a case, it has even been held that the violations of law not alleged may be enjoined although this should be done only in exceptional circumstances.

“Reasons for granting an injunction must be stated, and the acts enjoined must also be specified. It is insufficient to enjoin a defendant from violations ‘as charged in the complaint.’ It is also insufficient merely to incorporate long and verbose findings; since the order should furnish the defendant with a direct and succinct statement of his alleged wrongful acts.” (Sec. 1436, P. 314-315, Barron and Holtzoff, Federal Practice and Procedure, Vol. 3).

“* * * No authority is required to support the proposition that the business of excavating rock and gravel by the owner from lands belonging to him is a lawful and useful occupation, and cannot be prohibited by legislation except in cases where the enactment of such legislation may be found necessary for the protection of the legal rights of others.” (People v. Hawley, et al., 207 Cal. 395; 279 Pac. 137, 144).

“* * * Applying these well-recognized principles to the ordinance before us, we are unable to perceive any ground upon which it may be sustained as a legitimate exercise of the police power. It is in no sense a mere regulation as to the manner in which rock or stone may be removed from the land by the owner thereof, but is an absolute prohibition of any such removal. However valuable the rock or stone may be if removed, and however valueless if not removed, the owner must allow it to remain in its place of deposit. Such a prohibition might be justified,

if the removal could not be effected without improperly invading the rights of others; but it cannot be doubted that rock and stone may, under some circumstances, be so severed from the land and removed as not in the slightest degree to inflict any injury which the law will recognize. So far as such use of one's property may be had without injury to others, it is a lawful use, which cannot be absolutely prohibited by the legislative department under the guise of the exercise of the police power." (Ex Parte Kelso, 147 Cal. 609; 82 Pac. 241, 242).

"* * * And the reasonableness of the zoning as applied to certain lines of commercial zoning must be distinguished from the reasonableness of zoning regulations prohibiting the development of natural resources. The exclusion of ordinary business enterprises does not destroy any inherent property right, and, if not discriminatory, will be held reasonable and valid. Most such businesses can be conducted at any other designated place. But rock and gravel, like any other natural resource, can be obtained only in those particular areas where the deposit has been lodged by nature. Therefore, it follows that to absolutely prohibit the removal of rock, sand, and gravel from one's own land in an instance where such land is primarily valuable only by reason of the existence of rock, sand and gravel, might be regarded as an unreasonable exercise of the police power. Trans-Oceanic Oil Corp. v. City of Santa Barbara, 85 Cal. App. 2d, 776, 789, 194 P. 2d 148. * * * As affecting the challenged reasonableness of the action of the City Council in granting respondent Gregg a Conditional Use Permit, there was testimony that his property is located in an area which has long been a rock and gravel producing section. That within a radius of a mile and a quarter

from the subject property are located fifteen gravel pits, some active and others idle. That there is a public need for the rock and sand located on this particular property, and that it would be compatible with the greatest public service and the least private injury to expand the M-3 or unrestricted use zone to include all of the land in an area in which the Gregg property is located * * *.

“Where, as here, the operations in question could not be characterized as a nuisance per se, the court was justified in following a well established rule of law which provides that under such circumstances the decree should not enjoin more than the specific thing which might constitute a nuisance, as appears from the requirements of the particular case. Pomeroy’s Equity Juris., 2d Ed., secs. 1945, 1948. It is now established law in this state that the business of excavating rock and gravel by the owner from land belonging to him is a lawful and useful occupation, and the regulation thereof should go no further than to control those particular features of the operations which might result in substantial injury to adjoining property or to persons residing or owning property in the near vicinity of the land upon which the operations are being conducted. People v. Hawley, 207 Cal. 395, 412, 279 P. 136; In re Smith, 143 Cal. 368, 371, 77 P. 180; In re Kelso, 147 Cal. 609, 613, 82 P. 241, 2 L.R.A., N.S., 796, 109 Am. St. Rep. 178; Byers v. Colonial Irrigation Co., 134 Cal. 553, 555, 66 P. 732; Vowinkel v. N. Clark & Sons, 216 Cal. 156, 162, 13 P. 2d 733 * * *.

“The court was therefore justified in giving heed to the aforesaid rule, that in proper cases it will not enjoin the conduct of a defendant’s

entire business where such business is not a nuisance per se if less measure of restriction will afford plaintiffs the relief to which they may be entitled * * *. (Wheeler v. Gregg, 90 Cal. App. 2d 348, 203 Pac. 2d 37, 48, 49, 50, 51).

“* * * As a general proposition it may be said that dust which substantially interferes with the comfortable enjoyment of adjacent premises constitutes a nuisance, provided it is sufficient to cause perceptible injury to persons or property. On the other hand, a reasonable amount of dust in a manufacturing community or industrial district does not necessarily constitute a nuisance even though it may cause some annoyance, and this is particularly true where the dust caused by the operation of a business is only occasional and the resultant injury slight. In other words, a given amount of dust in one locality well might be considered and held to be a nuisance, and not so in others, all depending upon the particular facts and circumstances. 39 Am. Jur., Nuisances, Sec. 57, pp. 339, 340; 66 C.J.S., Nuisances, Sec. 23, p. 777. See annotations in 3 A.L.R. 312; 11 A.L.R. 1401; and 8 A.L.R. 2d 419 * * *.” (Hofstetter et al. v. George M. Myers, Inc., 170 Kansas 564; 228 Pac. 2d, 522, 526).

“* * * 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 circumstances, 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 (3d Ed.) Secs. 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 * * *." (Dahl v. Utah Oil Refining Co., 71 Utah 1, 262 Pac. 269, 272, 273).

"* * * Where the injury complained of results from a business which is not per se a nuisance, it being caused only by reason of the manner in which the business is conducted or by the surrounding circumstances, it is always proper for the court so to frame its decree that defendant's business will not be absolutely prohibited, if this can be done and still give to plaintiff the relief to which he is entitled. Collins v. Wayne Iron Work, 227 Pa. 326, 76 A. 24; 20 R.C.L. p. 482 * * *." (McIntosh v. Brimmer, 68 Cal. App. 770, 230 Pac. 203, 207).

"* * * In accordance with general rules elsewhere stated, a decree enjoining a nuisance should specifically point out the things which the defendant is required to do and to refrain from doing in order to abate the nuisance which is found to exist. It should be as definite, clear, and precise in its terms as possible, so that there may be no reason or excuse for misunderstanding or disobeying it, and, when practicable, it should plainly indicate to the defendant all the acts which he is restrained from doing, without calling upon him for inferences or conclusions about which persons may well differ * * *.

"* * * In those instances in which injunction lies to prevent conduct amounting to a nuisance abatable by such remedy, it is limited to unlawful acts, and is not available as a means of prevention of lawful acts. Only so much of such conduct as is unlawful can be restrained. The decree should not enjoin more than that which constitutes the

nuisance, and should never go beyond the requirements of the particular case. Where the injury complained of results from acts that are not a nuisance per se, but only such by reason of the manner in which they are done or the surrounding circumstances, the court will not grant an injunction in such form as absolutely to prohibit the defendant's use of his property, if it is possible to frame a decree which in another form will give the plaintiff the relief to which he is entitled.

“The operation of a legitimate business or industrial plant which constitutes a private nuisance may be enjoined, where it clearly appears that there is no other complete remedy for the injury done. But this should never be done if it is possible to avoid it while still giving the plaintiff the relief to which he is entitled. In such cases, the courts will go no further than is absolutely necessary to protect the rights of the complaining parties, and, if the business or plant can be so conducted as not to constitute a nuisance, the injunction should be limited to prohibiting the acts complained of which constitute the nuisance, leaving the defendant free to operate it in a proper manner. It has been held that a distinction may properly be drawn between cases involving a nuisance caused by a factory or business which may be removed to another location, and those involving one caused by the operation of mines, quarries, and other enterprises for the development of the natural resources of land, which must be conducted at a fixed place, and that an injunction should not be granted as readily in the latter as in the former class of cases. But this distinction is sound only in so far as it relates to things which are reasonably essential to the

proper operation of the mine or quarry * * *.” (39 Am. Jur., Nuisances, Secs. 171, 172, pages 443-444, 445).

“* * * We are committed to the rule in this jurisdiction that where a lawful business is conducted in such manner as to constitute a private nuisance, such nuisance may be enjoined and abated, but the injunction ordinarily should be limited not to the business itself, but to the usage that creates the nuisance, leaving the right to carry on the business in a proper and lawful manner and that it is only where such business cannot be conducted in any manner at the place where situated without constituting a substantial injury to adjoining property owners that the injunction shall absolutely prohibit the operation of such business * * *.” (Fidelity Laboratories, Inc. v. Oklahoma City, 190 Okla. 488, 125 Pac. 2d, 757-759).

“* * * While a race track is not a nuisance, per se, the record is convincing that the track and barns have been operated in such a manner as to subject plaintiffs to a common or private nuisance which should be abated. The rule applicable to the present situation was well stated in Adams v. Kalamazoo Ice & Fuel Co., 245 Mich. 261, 222 NW 86, 87, as follows: ‘While the court of equity has power to abate nuisance in protection of property rights, and to conserve the enjoyment, health, comfort, and welfare of individuals, it moves with caution, deciding each case upon its particular facts, and accords protection against injury only in cases where an action at law would afford no adequate redress. If a nuisance is private and arises out of a particular manner of operating a legitimate business,

the court will do no more than point to the nuisance and decree adoption of methods calculated to eliminate the injurious features * * *.'

"The trial court's decree, which permanently enjoined defendants from further operation of the race track, would destroy the business of defendant racing association, which business the legislature has seen fit to legitimize by the adoption of Act No. 199. Our de novo review of the record convinces us that this decree did not equitably determine the rights of the parties. The common or private nuisance complained of by plaintiffs arose, at least in part, from the apparently rather negligent manner in which the racing association operated its track and horse barns. We believe that it could adopt methods which would largely eliminate the nuisance complained of * * *.

"* * * We conclude that the decree of the trial court should be vacated and set aside and that a decree should be entered in this court in accordance with this opinion. The decree should among other things, determine * * * (5) that the method of operation of the race track and the horse barns created a private nuisance which, insofar as is reasonably possible, should be abated. The decree should further provide that defendant racing association shall enclose all manure receptacles; disinfect these receptacles and remove all manure from the premises every 24 hours; that it shall police and supervise the race track premises and horse barns so as to eliminate, insofar as possible, all fire hazards, obnoxious noises, disturbances, and improper conduct; and that it shall from time to time do such other acts and things as it can reasonably be required to do to abate the private nuisance complained of. The decree should further provide for remanding this

case to the trial court for enforcement and for such further action as may from time to time be deemed necessary and advisable * * *." (Rohan v. Detroit Racing Association, 314 Mich. 326, 22 NW 2d, 433; 166 A.L.R. 1246, 1262, 1263).

* * * And in any event, the restraint imposed by the decree should be no more extensive than is reasonably required to protect the interests of the party in whose favor it was given * * *." (32 C.J., Injunctions, Sec. 645, Page 378).

1. The prohibitory provisions of the judgment do not specify with particularity the parts of the operations of defendant and appellant which are prohibited and restrained and as a consequence, defendant and appellant cannot determine except by trial and error method the specific methods of operations which must be corrected in order to comply with the court's order.

It is clear that the court in its judgment was cognizant of the fact that it was beyond his power and authority to prohibit defendant and appellant from operating its plant. Stated otherwise, the court did not intend to shut down completely the operations of the plant. A fair reading of the prohibitory features of the judgment compels the conclusion that the court intended only to prohibit and restrain those features of the operations which created the nuisance. The problem therefore confronting the defendant and appellant since the entry of this judgment has been to determine what aspect of the operations must be changed and corrected in order for it to eliminate the cause or causes of the nuisance. It is submitted that under the authorities above cited it was entitled to receive from the court a *specific* mandate as to

what it must or must not do to eliminate the nuisance. The question, therefore, is whether or not the injunctive phases of the judgment are so broad and general in their scope that defendant and appellant must either cease its operations entirely or continue its operations at the peril of being charged with contempt. In view of the fact that court has exercised its injunctive power of regulating defendant's and appellant's operation, it is the contention of defendant that it was the duty of the court to specify with particularity the nuisance causing agencies and direct either that the defendant and appellant cease the operations of these agencies or in lieu thereof correct the same so as to eliminate the cause of nuisance.

In considering this aspect of the judgment defendant and appellant directs the court's attention to the following precedents which are exceedingly pertinent. The case of *Williams v. Bluebird Laundry Company*, 85 Cal. App. 388, 259 Pac. 484, involves a nuisance created by the operation of a steam laundry in the City of Los Angeles. It was contended.

“* * * that because the judgment merely restrains the defendant from so conducting its plants as to cause loud noises, offensive odors, black smoke and soot, it is so indefinite as to render it ineffective and that it must be reversed; that it is impossible to determine what degree of noise or degree of odors, etc. would constitute a violation of the injunction; and that the defendant may be subjected to citations for contempt at any time that one of the plaintiffs may deem any noise, odors, or smoke objectionable to himself. * * *” (259 Pac. 486).

The court answered this contention :

“* * * However, the judgment plainly states that the laundry or laundries shall be so operated as to avoid causing loud noises, offensive odors, black smoke, or soot or in any other such manner as to be deleterious to the health of the plaintiff. We think the entire judgment when read together is sufficiently definite in this regard. * * * If the operation of defendant's plant shall be deemed by the plaintiffs to create such noises or pollution of the atmosphere as to be deleterious to their health or offensive to their senses, and should they produce competent and satisfactory evidence that any or all of these objectionable features were injuring or destroying their health, we think they would be entitled to relief under the terms of the judgment, otherwise, not. * * *” (259 Pac. 486-487).

Cited in the *Bluebird* case is *Judson v. Los Angeles Suburban Gas Company*, 157 Cal. 168, 106 Pac. 581. The judgment in that case enjoined the defendant from operating gas works in such a manner as to cause or permit smoke, gas or offensive smells or fumes to be emitted therefrom or to be precipitated upon the property of plaintiff. The Supreme Court said :

“The appellants are enjoined from maintaining the same sort of nuisance that has caused the annoyance to the plaintiff.”

The third case which should be considered is *Vowinkel v. N. Clark and Sons*, 216 Cal. 156, 13 Pac. (2d) 733). In this case the court enjoined the defendant.

“* * * from operating the four southerly kilns and furnaces on the westerly side of its property and from operating the remaining kilns and furnaces on the westerly side of its property and

northerly of said four southerly furnaces, unless and until it shall erect between the northerly furnaces and the property of the plaintiffs a substantial fire proof wall or fence at least fifteen feet in height." (13 Pac. (2d) 735).

The Supreme Court in passing upon this feature of the injunction wrote as follows:

"* * * In the present case the court appears to have given due consideration to the situation of the defendant. This is apparent from the fact that it refused to abate entirely the defendant's operations and granted the relief sought to the extent necessary to preserve the rights of both parties. In other words the court in the exercise of its equity powers, has compared consequences and has considered the injuries resulting to each party, on the one hand if the injunction be wholly denied, and on the other if it be granted. The court, from the evidence presented, gave heed to the rule that in a proper case it will not enjoin the conduct of the defendant's entire business, where such business is not a nuisance per se, if a less measure of restriction will afford to the plaintiff the relief to which he may be entitled. * * *

"The defendant contends that all of the infringements upon the plaintiff's rights can be eliminated by the erection of a fireproof sound-absorbing wall enclosing also the four kilns ordered abated. An offer to construct such a wall, with sliding doors to permit loading, was made upon the defendant's motion for a new trial; and testimony of engineers and samples of materials proposed to be used were produced on the hearing of the motion. The trial court, however, declined the offer and denied the motion for a new trial.

This ruling is claimed to be prejudicial error and we are urged to reverse or modify the judgment on the ground that the proposed wall will give to the plaintiff all the relief to which he is entitled. But we are not persuaded that the court abused its discretion in denying the motion. The court itself viewed the premises, and although it may have been shown that the wall might tend to reduce the fire hazard and flares, nevertheless the denial of the motion is persuasive that the court remained unconvinced that either the vibrations or noise would be diminished or eliminated. The character of the property abated, and its location with respect to the plaintiff's dwelling, together with the finding that its operation causes great vibration and noise disturbing to the plaintiff and his household, is conclusive against the showing attempted to be made by the defendant. The record shows that the trial court was justified in abating a portion of the defendant's factory on the ground that to control only the manner of its conduct would be inadequate relief to the plaintiff from the nuisance thereby maintained * * *." 13 Pac. (2d) 736-737).

The first two cited cases appear upon first reading to support the form of the injunction in the instant case. However, a careful study of the factors involved in these cases indicates that the situation confronting the defendant and appellant with respect to the present judgment is entirely different from the situations involved in the said two cases.

According to the court's findings in this case the constituent elements of the nuisance are (a) dust which is precipitated upon the plaintiffs' properties; (b) noise

created by the operations of the plant and repair of rollers, and (c) light flashes created by welding operations. The evidence was sharply conflicting on each of these issues, but resultant therefrom is proof of the methods of operation of defendant's and appellant's plant which require the use of many different kinds of machinery and equipment (R. 70-880, Exhibits 15, 16, 17, 18, 19); of the operations involved in the excavating of the raw materials and its transportation from the point of excavation to the crushers (R. 828, 850); of the actual processing operations of crushing and grinding (R. 871, 877-879); of the transportation of the completed material to the stock piles (Ex. 6, 22); of the loading of the finished product from the stock piles into trucks for transportation to market (R. 905, 906); and of the methods and means of maintenance and repair of the plant (R. 882-894). The processing operations therefore are complicated and varied, but not all of the operations create a nuisance. The evidence before the court was exhaustive and covered the entire field of operations. The court had before it a great number of photographs presented by both plaintiffs and defendant which reveal the complexity of the operation and the great variance among the different phases of processing the raw materials to the end that the finished product is available. The operations of the steam laundry involved in the *Bluebird* case, *supra*, and the gas plant in the *Judson* case, *supra*, are simple, and the broad, general prohibitions in the injunctions in these cases, would protect the respective plaintiffs and inform the defendants as to causes and allow them to take direct corrective meas-

ures. Not so in the present case because of the variables involved in the processing operations. It was the duty of the court in its findings and judgment to select the specific causes and direct that the previous operations giving rise to these causes should either cease or be corrected. Without specific and particular mandates directed at specific and particular causes, the judgment becomes one of general prohibition against the operation of defendant's plant and thereby nullifies the intention of the court to reach only the nuisance causing agencies. The prohibitory features of the judgment are so broad effectually to shut down the operations of the plant unless defendant and appellant takes upon itself the peril of determining which of the causes contribute to the violation of the injunction. The law does not cast this burden upon the defendant and appellant. The authorities cited above clearly instruct the court to specify the particular operations which are enjoined to the end that the defendant's attention is directed to same so that it may eliminate the causes of complaint.

Rule 65A (d), Utah Rules of Civil Procedure, specifically prescribes that:

"Every order granting an injunction and every restraining order shall be specific in terms; shall describe in reasonable detail *and not by reference to the complaint or other document*, the act or acts sought to be restrained * * *." (Emphasis supplied).

The judgment in this case violates this rule and creates the confusion and uncertainty above delineated. Para-

graph one of the judgment enjoins the defendant from maintaining, using, or operating its gravel pit and processing plant

“so as to create a nuisance affecting plaintiffs, their lands, homes, premises, and use thereof, arising from objectionable noise, dust, and flashing lights *as found by the Court and in the same manner and as more particularly set out and described in the findings of fact on file herein.*” (Emphasis supplied).

Here is a direct violation of the rule above cited. The judgment in contravention of the rule refers to the findings of fact which is the “other document” denounced by the rule. The rule is intended to prevent exactly what has occurred in this case. As Barron and Holtzoff state

“It is insufficient to enjoin a defendant from violations ‘as charged in the complaint.’ It is also insufficient merely to incorporate long and verbose findings; since the order should furnish the defendant with a direct and succinct statement of his alleged wrongful acts.”

Reference is made to the form of the judgment in the *Vowinkel* case, *supra* wherein the court specifically enjoined the defendant

“from operating the four southern kilns and furnaces on the westerly side of its property and from operating the remaining kilns and furnaces on the westerly side of its property and northerly of said four southerly furnaces unless and until it shall erect between said northerly furnaces and the property of the plaintiff a substantial fire-proof wall or fence at least fifteen feet in height.”

Here is an example of a court giving due consideration to the specific cause of nuisance and interdicting the same or causing corrective measures to be taken by the defendant. The *modus operandi* of the injunction in the *Vowinckel* case is applicable to the instant case and shows what the court should have done in controlling the nuisance causing factors in the gravel plant operations. It is respectfully submitted that the present judgment is erroneous in that it fails to follow the mandate of rule 65A (b).

2. It was the duty of the court to establish a maximum tolerance for the contamination and pollution of the air by dust particles and the absence of such provision in the judgment exposes the defendant and appellant to charges of violating the injunction regardless of its good faith and honest purpose. Defendant and appellant is entitled to receive from the court a specific mandate that the atmosphere shall not contain at anytime more than a maximum quantity of dust and foreign particles.

It was proved at the trial that the area in which defendant and appellant conducts its operations contains a valuable deposit of sand and gravel (R. 830, 831, 952) and that the material is considered the best and most effective produced in the western section of the United States (R. 950). It was shown that the sand, gravel and road aggregate yielded not only by the Walker Deposit, but by the surrounding area, enters into the economy of Salt Lake City and is a highly necessary material in the construction industry (R. 952). Further the evidence shows that there are nine other gravel and sand producing operations within a radius of six thou-

sand feet from the Walker Deposit and defendant's operations (R. 943-947). The evidence is conclusive that these nine other operations cause dust and foreign particles to impregnate the atmosphere (R. 941-942, 954, Ex. 25). There is also evidence that in spite of the black topping of Wasatch Boulevard, the Big Cottonwood road and the Butlerville Hill road, that passing vehicles cause a great amount of dust to arise therefrom (R. 927, 934). It is therefore apparent that even though the operations of defendant's plant entirely ceased that the atmosphere of the area in which plaintiffs' homes are located would carry a certain amount of foreign particles arising from these nine other gravel and sand operations and the public highways. It certainly will not be contended that defendant is responsible in any degree for the dust contributed to the atmosphere by these other operations. Attention is invited to the case of *Hofstetter v. Geo. M. Myer, Inc.* supra, wherein it was stated "that the dust produced by the plant is the same dust common to the community and especially the road passing the plant and the homes of plaintiffs, and that plaintiffs have some dust, smoke and odors throughout the year from the dirt and gravel road, adjacent railroad lines, and from the city refuge dump. * * *" (228 P. (2d) 526).

The evidence in this case shows that there exists in the area of the plaintiffs' properties an atmospheric condition over which the defendant and appellant has no control. This condition is produced by the other sand and gravel operations in the vicinity and the public highways. The evidence not only permits, but also com-

pels the conclusion that even if defendant's and appellant's plant entirely ceased operations, that the atmosphere at the mouth of Big Cottonwood Canyon and in the vicinity of plaintiffs' properties would be impregnated with dust arising from these other operations and use of the public highways. This is not a situation where defendant operates its plant in a district which is free from atmospheric contamination caused by industrial activities, but conversely, is a situation where defendant's operations are conducted in an area which already possesses contaminated atmosphere arising from industrial causes.

Under the authorities cited, supra, it was the duty of the trial court in framing its judgment to have taken into consideration the fact that the atmosphere surrounding and over plaintiffs' properties was not a dust free atmosphere, but independent of defendant's operations, it normally carries a substantial burden of foreign particles. A finding that defendant was guilty of creating and maintaining a dust nuisance must of necessity be premised on the hypothesis that defendants' operations increased the normal dust laden content of the atmosphere to a point which would be characterized a legal nuisance. The defendant is not chargeable with the responsibility for the normal atmospheric conditions; and therefore, the court should have determined:

(1) The normal dust fall in the vicinity independent of defendant's operations; and

(2) The amount of foreign particles which could be added to the atmosphere by defendant's operation without inflicting injury upon the plaintiffs and their properties.

There was adequate evidence before the court to have permitted and authorized it to make such findings. Reference is made to the testimony of the expert, F. E. Netzeband (R. 1336, 1337, 1340, 1343-1347, 1354, 1359); and to the testimony of the expert, Daniel J. Jones (R. 1461, 1474) for evidence upon which such findings and provision of the judgment might have been founded. In this connection, the court would have been authorized to require the installation of certain methods of determining on a day to day basis the dust fall in the plant area.

Defendant and appellant respectfully submits that it is entitled to this guide rule in its operations to the end that it will not be constantly exposed to litigation and charges of violating the court's decree. The evidence shows that there is a degree of tolerance between the normal atmospheric contamination of plaintiffs' neighborhood and the maximum amount of atmospheric contamination which becomes a nuisance. The defendant is entitled to the benefit of this tolerance in its operations and the court in its judgment should have established this maximum tolerance for the contamination of the air by dust particles. It was entitled to receive from the court a specific mandate designating the maximum quan-

tity of dust and foreign particles in the atmosphere which would be permitted before a charge of violating the judgment could be successfully laid against it.

CONCLUSIONS

1. Under Article VIII, Section 9 of the Utah Constitution, the Supreme Court in this equity case has the power and authority,

“* * * to go behind the findings and decree of the trial court, consider all the evidence, decide on which side the preponderance thereof is, ascertain whether or not the proof justifies the findings and decree, and enter or direct such findings and decree to be entered as the evidence, in the judgment of the appellate tribunal, may justify.” (Whittaker vs. Ferguson, 16 Utah 240, 51 P. 980; Tripp v. Bagley, 74 Utah 57, 276 P. 913; Baird v. Upper Canal Irrigation Co., 70 Utah 527, 257 P. 1060; Dahl vs. Cayias, 110 Utah 398, 174 P. (2d) 430).

Further, the court is authorized to remand this case to the trial court with directions to modify the judgment and findings so as to conform to the opinion of the appellate tribunal. (Salina Creek Irrigation Co. vs. Salina Stock Company, 7 Utah 456; 27 P. 578. Affirmed 163 U. S. 109, 41 L. Ed. 90, 16 S. Ct. 1036).

2. In view of the authority vested in the Supreme Court, defendant and appellant respectfully urges that the judgment in this action should be set aside and the case remanded to the trial court with directions: (1) that findings of fact 9, Conclusions of Law 2, and Para-

graph 2 of the Judgment (as the same pertains to the Rudd right of way) be stricken in their entirety; (2) That the findings and judgment (after the right of way elements are eliminated) should be reformed so as (a) to specify the particular method, instrumentality, or agency which causes the dust and noise to arise and to confine the prohibitory features of the judgment to these particularly defined methods, instruments and agencies, and (b) to determine the normal dust fall in the area of plaintiffs' properties and to define the maximum tolerance of dust fall which will be permitted without violation of the provisions of the judgment as reformed.

Respectfully submitted,

FRANKLIN RITER

FRED L. FINLINSON

*Attorneys for Defendant and
Appellant.*

Received copies of the within Brief of
Appellant this day of December, 1951.

*Attorneys for Plaintiffs
and Appellees*