

1968

# Monroe City v. Charles L. Arnold, Norris K. Arnold and John R. Arnold D/B/A Arnold Hog Ranch : Brief of Respondent

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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MONROE CITY,

Plaintiff and Respondent,

vs.

CHARLES L. ARNOLD, NORRIS K.  
ARNOLD, and JON R. ARNOLD,  
d/b/a ARNOLD HOG RANCH,

Defendants and Appellants.

Case No.  
11,300

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## BRIEF OF RESPONDENT

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### STATEMENT OF CASE

Action brought by a third class city to restrain and abate operation of a commercial piggery within the city limits and within a residential area as a public nuisance.

### DISPOSITION OF LOWER COURT

District Court found the operation by the Defendants of a commercial piggery within a residential area of Monroe City to be a nuisance and ordered the operation abated and restrained.

### RELIEF SOUGHT ON APPEAL

Plaintiff, Respondent here, seeks to have affirmed the judgment and order of the District Court.

## STATEMENT OF FACTS

This action was filed by the Plaintiff in its capacity as a third class city of the State of Utah to enjoin the operation of a commercial piggery within the residential area of Monroe City. The piggery is operated on approximately two and one half city lots, one block from main street (T. 24, Line 9)<sup>1</sup>, and located in a residential area (T. 19, Line 2). Up to 250 hogs are kept on the premises by the Defendants at one time and in the calendar year of 1966 the Defendants sold 253 pigs for market (T. 124, Line 21). The operation is commercial and "to make money" (T. 99, Line 14). The size of the piggery was increased substantially over a period of three years prior to the filing of the complaint. It was explained that the operation was expanded to provide the complete support for Charles L. Arnold after he had left other employment (T. 8, Line 28).

The Defendants maintain a complete hog breeding and feeding operation. The operation requires them to clean pig pens and pile manure for some periods of time (T. 7, Line through 4). In winter months the manure is piled until spring when it can be taken out and put on a patch of alfalfa which is on the same two and one half city lots (T. 102, Line 23). The operation requires the Defendants to take measures to kill and collect dead flies by the wheelbarrow load (T. 12, Line 16, T. 18, Line 16, through 21). The flies, together with the afterbirth taken from the farrowing pigs and the smaller dead pigs and other refuse is stored and burned in a large barrel on the lot (T. 9, Line 7 through 16; T. 9, Line 26 through 30; T. 12, Line 16; T. 18, Line 16 through 21). The hog farrowing pens used by the sows have cement floors which are washed down periodically and all of the manure, urine, and other debris is soaked down and washed from the pens on to the lot (T. 22, Line 11; T. 23, Line 3 through 6).

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<sup>1</sup>Citations are to Reporter's Transcript pages.

Witnesses in the residential area describe the odors coming from the piggery as obnoxious and nauseating. Neighbors testified that it made it impossible for them to go out doors for any length of time and the condition is exceedingly embarrassing for them on occasions when friends or relatives visit their homes (T. 27, Line 15 through 24; T. 28, Line 8; T. 30, Line 9; T. 39, Line 20; T. 54, Line 7 through 9; T. 54, Line 27 through 28, and etc.). Neighbors testified that the noise from the piggery and from the squealing hogs caused them to be awakened several times each night (T. 28, Line 21; T. 47, Line 22 through 30). The manure, and on some occasions dead pigs buried in the manure pile, was offensive to sight (T. 31, Line 5 through 12).

The Defendant Charles L. Arnold was called as the first witness and examined. He acknowledged the commercial nature of the piggery and admitted that it was solely for his support (T. 8, Line 28); that the piggery operation had increased substantially over the past three years (T. 8, Line 9 through 30). He also stated that he was the sole operator and in charge of running the complete operation (T. 13, Line 24 through 27). On cross examination, Counsel for the Defendant offered Defendant's Exhibit "A", a Warranty Deed, showing the conveyance of the property from Charles L. Arnold to his sons, Norris K. Arnold and Jon R. Arnold. Objection was made to the immateriality of the exhibit (T. 13, Line 12 through 30). Counsel for Defendant then raised the question of "who was the real party in interest" (T. 14, Line 4 through 15). The objection to the exhibit was sustained and Mr. Barker made a proffer of proof (T. 15, Line 19). He stated that the property had been transferred to the sons in the year of 1967, the year of the filing of the complaint. The Court took a recess and discussed the matter with counsel in Chambers. It was acknowledged by Mr. Barker, Attorney for the Defendants, and by Defendant, Norris K. Arnold, that he had been employed by Norris K. Arnold and Jon R. Arnold to defend the matter (T. 135, Line 19 through 28). It was also acknowledged in Chambers by

Mr. Barker that his defense would be substantially the same if the additional parties were joined and that his preparation and exhibits would be the same (Findings of Fact No. 2 and 3). Upon motion of the Plaintiff, the Court ordered Norris K. Arnold and Jon R. Arnold added as Defendants in their partnership capacity as Arnold Hog Ranch. Both Defendants were present in Court.

## ARGUMENT

### POINT I

#### MONROE CITY HAS THE POWER AND OBLIGATION TO ABATE OR ENJOIN A NUISANCE.

Monroe City is a city of third class in the State of Utah. It derives its powers as a subdivision of the State of Utah by specific legislative enactment. The legislature has adopted the following two statutes which have granted Monroe City the power to abate a nuisance:

“Section 10-8-60, Utah Code Annotated, 1953:

They may declare what shall be a nuisance, and abate the same, and impose fines upon persons who may create, continue or suffer nuisances to exist.

Section 10-8-67, Utah Code Annotated, 1953:

Pigsties, privies—Prohibiting establishment. They may prohibit any offensive, unwholesome business or establishment in and within one mile of the limits of the corporation, compel the owner of any pigsty, privy, barn, corral, sewer, or other unwholesome or nauseous house or place to cleanse, abate or remove the same, and may regulate the location thereof.”

The foregoing emphasis by underlining has been added by us.

The general rule concerning whether a municipal corporation may be a party plaintiff seeking injunctive relief has been stated in Section 281, Municipal Corporations, in Vol-

ume 62 of Corpus Juris Secundum, at Page 632. It is as follows:

“As a general rule a municipal corporation may maintain an equitable action or a proceedings in the nature thereof to aid in compelling the abatement of a nuisance. A municipality may sue in equity to compel the abatement of a nuisance affecting matters confided to it in its governmental capacity although it has suffered no special damages therefor and equitable relief may also be obtained in the name of the municipal corporation because of special injury, either to property owned by the corporation or to property to which it stands in a trust relation for the benefit of the public.”

It is clearly apparent from the cited legislation found in Title 10 of Utah Code Annotated, 1953, that municipalities of the state are given the obligation and authority to take some action to regulate nuisances and also to “abate the same”. A city has the alternative of providing by ordinance a system of regulation and fines in criminal proceedings. It also has the right to seek the powers of a court for a more complete relief<sup>2</sup>.

The need for equitable relief in the present case is clear. The City could proceed against one or more of the Defendants and charge them with maintaining a nuisance and im-

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<sup>2</sup>CJS. Injunctions, Sec. 124, Vol. 43, p. 671:

“Acts which are a menace to the public health or safety, or, as sometimes stated in greater detail, acts which are dangerous to human life, detrimental to public health, and the occasion of great public inconvenience and damage, may be enjoined. The power to issue an injunction in these circumstances belongs to the general powers possessed by courts of equity, and is also conferred by some statutes applicable to various situations or matters, and a municipality is authorized to sue for an injunction to prevent or restrain the violation of municipal police and sanitary regulations by a constitutional provision authorizing municipalities to enforce such regulations.



pose a fine on them. This relief would be temporary and possibly arbitrary. The City is in need of an adjudication as to whether or not the condition complained of is a nuisance and also an injunction which will relieve the inhabitants of the problem.

In an action brought in the State of California for injunctive relief against the keeping of 5 hogs as a public nuisance, People vs. Johnson, 277 P2d 45, the Court reaffirmed the language in the case of the City of Stockton vs. Frisbey and Latta, 93 C. A. 277, 270 P 270, it was held that where the personal welfare and property rights of a large number of the inhabitants of a city or town would be detrimentally affected by the violation of a police or sanitary regulation, whether the ordinance provides other means for its enforcement or not, such city or town may itself appeal to a court of equity by means of the forceful and singularly effective Writ of Injunction to restrain such violation or to cause the wrongful effect thereof to be removed.

We believe the reasoning of the California cases cited as well as cases from many other jurisdictions where cities have brought actions to enjoin a nuisance is not only persuasive but controlling. Some additional cases from other jurisdictions where cities have maintained actions for injunctive relief are: Colorado—Echove vs. Grants Junction, 193 P2d 277; Kansas City Brewery vs. Kansas City, 193 P 523; New Mexico—Town of Gallop vs. Constant, 11 P2d 962.

The evidence appears to be overwhelming and undisputed that the piggery maintained by the Arnold Hog Ranch personnel does constitute a public nuisance. It affects residents of Monroe City for a considerable distance from the hog ranch. In addition, it affects and is repulsive to persons traveling or walking on public streets near the piggery. The stench coming from the hog farm was characterized as "sour", "nauseating", "terrible", "sickening", and on occasions so bad that it was impossible to get out of doors in areas near the piggery.

Utah Statutes define a public nuisance. Although the statutes are criminal in nature, they do set a minimum standard which has been imposed by the Utah Legislature for the conduct of persons within the state. They are applicable here and in the same manner violations of the motor vehicles are applicable to show that a motorist has breached the standard of duty he owes to the public when a violation of one of the statutes is found.

Under Section 78-38-1, Utah Code Annotated, 1953, —  
“Nuisance” Defined — Right of Action for — Judgment:

“Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by nuisance; and by the judgment the nuisance may be enjoined or abated, and damages may also be recovered.” (emphasis added).

It is seen that a right of action is granted against any person who maintains a condition which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property.

The offense complained of against the Arnold piggery clearly falls within this definition. It is classified as a nuisance which the city has an obligation to abate or prohibit.

The legislature then has enacted Section 76-43-3, “Public Nuisance” defined:

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

- (1) Annoys, injures or endangers the comfort, repose, health, or safety of three or more persons; or
- (2) Offends public decency; or

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

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

We think no additional argument is needed concerning the definition of public nuisance since the statutes cited generally follow the common law and citations from cases from other jurisdictions concerning common law nuisances would not be helpful to the Court. An informative annotation is found under title “Nuisance—Keeping Pigs” in 2 ALR3d 933. Some of the cases cited have found keeping of pigs in a city to be a nuisance per se.

## POINT II

### THE COURT CORRECTLY ADDED ADDITIONAL PARTIES DURING THE COURSE OF TRIAL.

The complaint of the Plaintiff was filed against Charles L. Arnold charging him with maintaining a public nuisance and seeking an injunction against its continued operation. He was called as Plaintiff’s first witness. He testified that he had lived on the property where the piggery is maintained for forty years (T. 5, Line 5); that he had been raising some pigs on the property for 26 or 27 years; that his operation had increased over the past few years over what it had been at earlier times (T. 5, Line 9 through 17); that the operation was also solely for his benefit and “there is nobody else benefits by it whatsoever, only me” (T. 8, Line 28). Upon cross examination, Mr. Baker attempted to identify Defendant’s proposed Exhibit “A”, which was a Warranty Deed dated in the year 1967, conveying title to the real property upon which the piggery is operated, to his sons Norris K. Arnold and Jon R. Arnold. An objection to the proposed exhibit was sustained on grounds that it was not material (T. 14).

Mr. Barker then made a proffer of proof that the Defendants Norris K. Arnold and Jon R. Arnold were in fact the operators of the piggery, and that they were the real parties in interest. Thereupon the Court recessed the matter for five minutes and requested that Counsel consult with him in Chambers. Since the matter of parties had not been specifically raised, the Court discussed with Counsel the following items: (1) If the two sons who claim to be in a partnership and actually operate the piggery were present in Court. Mr. Barker informed the Court they were. (2) If the two sons had employed the services of Mr. Barker and assisted in the defense. Mr. Barker informed the Court that this was the case. (3) Whether Mr. Barker's defense would be the same or substantially the same and the witnesses would be the same if the two Defendants were in the case. Mr. Barker answered this question in the affirmative. The Court's attention is invited to Findings of Fact No. 2 and 3, to which no objection has been taken.

The Court reconvened and a motion was made to join Defendants Norris K. Arnold and Jon R. Arnold as additional parties. Mr. Barker objected to any joinder at this stage in the proceedings (T. 16, Line 21). The Court requested that Mr. Barker show him whereby he would be prejudiced (T. 16, Line 26). Mr. Barker offered no showing that his clients would be prejudiced in any manner and requested only that his objection be noted. Thereupon, the motion to join the additional parties was granted (T. 17, Line 1 through 15). In the proceedings Norris K. Arnold, one of the added Defendants, testified that he and his brother, Jon R. Arnold, were the ones who engaged counsel to defend the action (T. 135, Line 23 through 25), and also that he had been contacted as soon as the complaint had been served (T. 15, Line 27). He acknowledged assisting the preparation of the exhibits which were introduced or attempted to be introduced, (T. 97 and 98). He and presumably his brother, Jon, had visited various spots in Monroe City and taken pictures of all of them in preparing the defense to be

asserted and introduced in proposed Exhibit "F" (T. 98, Line 9).

The Defendants were not prejudiced by the order joining additional parties. The very purpose of Rule 21, Utah Rules of Civil Procedure was served and all of the issues were clearly before the Court.

It is seen that the added Defendants personally appeared in the action and took part in the proceedings after the Court had ruled that they were to be added as a party. In this manner they voluntarily submitted to the jurisdiction of the Court. The permitted joinder of the additional parties allowed the Defendants to introduce into evidence the Warranty Deed covering the property involved; the income tax returns for prior years showing the investment which was made in the property by the added Defendants. If the Court had refused to join the additional parties, these items would have been immaterial and the Defendant Charles L. Arnold would have been prohibited from showing any investment in the property or resulting damage to him if the Court enjoined him from maintaining a public nuisance and entered an order requiring him to abate it. However, the added Defendants voluntarily continued with the cause and argued to the Court that their investment should be considered to mitigate a permanent injunction.

Objection has been made to the jurisdiction of the Court over the added Defendants. Summons and complaint were not served upon the added Defendants but they were joined by amendment at the time of trial. There may have been some basis for the Defendants' argument had the added Defendants then not proceeded with the defense thereby submitting to the jurisdiction of the Court. The only possible prejudice which could have come to the added Defendants would have been the possibility of lack of time to prepare a defense. This was not asserted at any time and was in fact negated by the defense which was presented at the hearing. No request was ever made for a continuance for this purpose.

The granting of a motion to bring in additional parties to an action is not a matter of right but rather one of discretion and the order should not be disturbed unless abuse of discretion is shown.<sup>3</sup>

### POINT III

#### ABATEMENT OF THE HOG RANCH AND AN INJUNCTION AGAINST ITS OPERATION WAS AN AUTHORIZED AND NEEDED REMEDY.

We agree that injunctive relief is proper only to restrain the inflicting of substantial, serious and irreparable damages, and where there is no adequate remedy at law.

The facts of this case dramatize the need for that injunction. All of the testimony show that the relief granted by the District Court was the only practical solution to the problem of the inhabitants of Monroe City. The condition created and maintained by the Defendants was causing the neighbors in the residential area serious losses of the use of their own properties.

The odors were described as sour-sickening, nauseating and embarrassing (T. 87; 27-30; 39; 54; 62; 77; and 79). Travelers passing on city streets adjacent to the hog ranch were required to roll up their windows. Residents could not enjoy their homes and it became impossible to use their yards for recreational purposes and particularly for eating or picnicking. One young girl found it exceedingly embarrassing if she had boyfriends call at her home (T. 72). The noise prevented some neighbors from sleeping at night and the residents were exposed to constant health hazards from flies and dead animals. The sight of the manure piles, dead pigs, burning of flies and afterbirth were repulsive to the sense of sight.

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<sup>3</sup>Barron and Holtzoff, Federal Practice and Procedure  
Vol. 2, Page 223

A review of these facts leave only one practical solution and that solution was reached by the District Court.

The Defendants attempted to have admitted evidence concerning other conditions in Monroe City which may have constituted a nuisance.

The District Court correctly excluded that evidence and particularly part of Exhibit "E" and the explanation thereof and the slide photographs and Exhibit "F" with a holding that the possibility of other nuisances existing in Monroe City would not excuse and authorize the Defendants to continue a nuisance.<sup>1</sup>

No foundation was laid to show that any of the odors, sights or sounds could have been coming from the areas proposed to be shown to the Court from the slides contained in Exhibit "F". No foundation was offered to connect the location sought to be shown to the problem before the Court. The evidence was overwhelming that the nuisance complained of was extreme and could not be tolerated in any setting.

The Defendants argue that the injunction order of the Court is too harsh and that the Court should have considered some other remedy which would in fact reduce the nuisance. This matter was argued before the Court and I am certain considered. The Court's view of the premises and consideration of the facts appeared to leave only one practical solution. It was shown that the sanitary method proposed by the Defendants of adding additional cement flooring in an entire corral was considered when the Court observed that the farrowing pens are now covered with cement. The cement actually contributes to and increases the obnoxious condition rather than abates it. Urine is able

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<sup>1</sup>See Ludlow et al. vs. Colo. Animal By-Products Co., 104 U 22; 137 P2d 347. Mere fact that condition may already exist which may be obnoxious to some persons does not create a license for establishment of other more offensive conditions.

to accumulate on the cement and is required to evaporate rather than be taken into the soil or into a gravel surface. The manure and other accumulation are then required to be washed periodically. The water soaks up the material and washes it on to ground adjacent to the cement floor (T. 22, 23). It would be reasonable to find that the cemented condition actually increases the nuisance problem, although it may have some salutory effects so far as hog raising is concerned.

The District Judge has had before him income tax returns and depreciation schedules which showed the investment and operation of the Defendants. He heard the testimony of Norris K. Arnold that the total investment of the Defendants was approximately \$20,000.00 in the pig breeding operation. He observed that the majority of the investment was in pigs and breeding stock which could be readily moved. An additional portion of the investment was also in chattels which could be readily moved. The financial loss, if any results, to the Defendants for moving the hogs would be nominal compared to the damage being caused daily to residents of Monroe City.

### CONCLUSION

We respectfully submit the judgment and order of the trial Court should be affirmed on appeal.

OLSEN AND CHAMBERLAIN

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