(873)

MARGUERITA HENRY and CHARLES A. HENRY, Complainants, vs. WILLIAM J. H. GOETZ, CHRISTINE E. GOETZ, W. C. BEEBE and H. M. HALL, individually and as partners composing the firm of Beebe & Hall, Respondents.	IN THE CIRCUIT COURT-EQUITY SIDE STATE OF ALABAMA BALDWIN COUNTY. NO. 913

TO THE HONORABLE THE CIRCUIT COURT, EQUITY SIDE, STATE OF ALABAMA, BALDWIN COUNTY, AND THE HON. FRANCIS W. HARE, JUDGE THEREOF, SITTING IN EQUITY:

Come your Complainants and exhibit this their Bill of Complaint against William J. H. Goetz, Christine E. Goetz, and W.C. Beebe and H. M. Hall, individually and as partners composing the firm of Beebe & Hall, and humbly complaining show unto your Honor and unto this Honorable Court as follows:

FIRST:

That each of your Complainants is over the age of twenty-one years and is a bona fide resident of Baldwin County, Alabama, residing at Foley, Alabama.

SECOND:

That of the respondents above named, William J. H. Goetz and Christine E. Goetz are each over the age of twenty-one years and are non-residents of the State of Alabama, residing at Orange, California; that W. C. Beebe and H. M. Hall are each over the age of twenty-one years, are residents of the State of Alabama, residing at Bay Minette, and are partners composing the firm of Beebe & Hall.

THIRD:

That on heretofore, to-wit, February 8, 1927, your Complainants purchased from the respondents, William J. H. Goetz and Christine E. Goetz, the following described real property in Baldwin County, Alabama, viz.:-

Farm Number Seven (7), being the Southwest quarter of the Northeast quarter of Section twenty-eight (28), Township seven (7) South, Range four (4) East, except four (4) acres described as follows: Commencing at the Southwest corner of the Northeast quarter of Section 28, Township 7 South of Range 4 East, run North 600 feet; thence, East 300 feet, thence, South 600 feet, thence, West 300 feet, to the place of beginning;

and the said Respondents, William J. H. Goetz and Christine E. Goetz, made, executed and delivered to your Complainants a deed describing and conveying said real estate, said deed being dated February 8, 1927, and stands of record in the office of the Judge of Probate of Baldwin County, Alabama, in Deed Book Number 42 N.S., pages 249-50, a copy thereof being hereto attached, marked "Exhibit A" and made a part of this Bill of Complaint as though fully incorporated therein, with leave of reference thereto as often as may be necessary.

FOURTH:

That the consideration and purchase price for said properties was the sum of Nine Thousand Five Hundred Dollars ($9,500.00) of which your Complainants paid the sum of Five Thousand Dollars ($5,000.00) in cash, and the balance of said purchase price, namely, Four Thousand Five Hundred Dollars ($4,500.00) your Complainants agreed to pay according to the tenor of five (5) promissory notes executed by them of even date with said deed, the first four (4) in the sum of One Thousand Dollars ($1,000.00) each and the fifth (5th) in the sum of Seven Hundred Fifty Dollars ($750.00), said notes being payable one each year beginning February 8, 1928, and bearing interest at six per cent. (6%) per annum from date, interest payable annually; the first of said notes bears a credit of Two Hundred Fifty Dollars ($250.00) out of the Five Thousand Dollars ($5,000.00) cash payment, and said unpaid balance was secured by Vendor's Lien reserved to and by the said William J. H. Goetz and Christine E. Goetz in said deed, said consideration, purchase price, terms of payment of balance and Vendor's Lien so reserved fully appearing in and by the terms of said deed hereto attached as "Exhibit A", reference to which is hereby had.

FIFTH:

That on account of the fraud and deceit practised and imposed on your Complainants by the said respondents, William J. H. Goetz and Christine E. Goetz, in the sale of said property by the said respondents to your Complainants, all as hereinafter complained of, your Complainants allege and aver that they have been damaged thereby greatly in excess of said balance due under and secured by said Vendor's Lien, and therefore do not owe and have not paid same, but that notwithstanding the existence of such fraud and deceit, the damages suffered by your Complainants and the notices by them given to and demands by them made on the said respondents, William J. H. Goetz and Christine E. Goetz, said respondents have failed and refused to pay to your Complainants the amount of said damages or any part thereof, or to cancel said indebtedness, or to even credit same with any part of said damages, but have undertaken and are now proceeding to sell said property under and through a foreclosure of said Vendor's Lien; that the respondents, William J. H. Goetz and Christine E. Goetz, through their attorneys, the above named respondents, W. C. Beebe and H. M. Hall, as partners composing the firm of Beebe & Hall, are advertising said property for sale and giving notice that said properties will be foreclosed and sold at 12 o'clock noon on the 10th day of February, 1930, in front of the Court House door of Baldwin County, Alabama, at public outcry, for cash, to the highest bidder, as will more fully appear from a copy of said notice which appeared in the January 9th, 1930, issue of the Foley Onlooker, a newspaper published and of general circulation in Baldwin County, Alabama, a copy of which is hereto attached, marked "Exhibit B" and made a part hereof, as though fully incorporated herein, with leave of reference thereto as often as may be necessary.

SIXTH:

Your Complainants further allege that on account of the respondents, William J. H. Goetz and Christine E. Goetz, being non-

residents of the State of Alabama and beyond the jurisdiction of this Court with respect to the service of personal writs on them, and that by reason of the said Respondents, W. C. Beebe and H. M. Hall, as partners composing the firm of Beebe & Hall, being the attorneys for the other Respondents and as such vested with authority to hold said sale, foreclose said Vendor's Lien and sell said property in accordance with said notice and under said deed as effectually as the said William J. H. Goetz and Christine E. Goetz might or could do if personally present, the said W. C. Beebe and H. M. Hall, as partners composing the firm of Beebe & Hall, are therefore not only proper but necessary parties defendant to this cause, and on account of these facts and relationships your Complainants make them such parties defendant.

SEVENTH:

That in connection with the purchase of said property by your Complainants from the Respondents, William J. H. Goetz and Christine E. Goetz, your Complainants, never having resided in this County or State, came from the State of Illinois around February 1st, 1927, to Foley, Alabama, met the Respondents, William J.H. Goetz and Christine E. Goetz, who entered into negotiations with your Complainants for the sale of said property knowing that your Complainants were strangers in the community where said property was located and that your Complainants had no knowledge of the true facts and conditions with respect to said community or the property; that unknown to your Complainants, who were then carrying on such negotiations for the purchase of said property, there was at the time of their entering into the agreement to purchase and at the time of purchasing said property from the Respondents, William J. H. Goetz and Christine E. Goetz, a Septic Tank constructed, located and in operation immediately adjoining said property on the West; that at the time of looking at said property with a view of purchasing same, which fact was known to the Respondents, William J. H. Goetz and Christine E. Goetz, your Complainant, Charles A. Henry, acting for himself and the other

Complainant, Marguerita Henry, who was at that time and is now his wife, saw or noticed just off the West line of said property the end or wall of said Septic Tank structure, and not knowing, your Complainant, Charles A. Henry, inquired of the Respondent, William J. H. Goetz, as to the nature and purpose of said structure, whereupon the Respondent, William J. H. Goetz, who was then and there and throughout the entire negotiations acting for himself and the other Respondent, Christine E. Goetz, who was at that time and is now the wife of William J. H. Goetz, in negotiating for the sale of said property to your Complainants, not only fraudulently and with the intent to deceive concealed the real facts as to the nature and use of said structure after inquiry made, but, fraudulently and with the intent to mislead and deceive your Complainants, falsely stated and represented that the said structure so inquired about was the abutment of a concrete bridge or culvert across the creek, the location of said creek being as is hereinafter more specifically described; that a strip of land had been deeded for street purposes along said West line of the property and that a sewer line had been laid along said street and across the creek at that point up to next intersecting street from the Town of Foley, which point so indicated was as far or beyond the Northwest corner of said property, and your Complainants, as they had a right to do, relied upon such representations which were material representations relating to the quality and condition of and privileges connected with the possession, use and enjoyment of said property for the purchase of which Complainants were then negotiating as aforesaid.

EIGHTH:

That said representations were false and were by the said William J. H. Goetz known to be false at the time of making same, for in truth and in fact said structure was not an abutment of a concrete bridge or culvert across a creek, but was a sewerage Septic Tank forming a part of and receiving the entire flow or discharge from the sanitary sewer system of the Town of Foley, a town of several hundred inhabitants, which adjoins said prop-

erty on the West, and said sewer line had not been laid to the point of intersection of said indicated strip with the next street coming from Town, did not cross said creek, but in reality ended at and in said Septic Tank at that point.

NINTH:

That said property so purchased by your Complainants consisted of approximately thirty-six (36) acres, all fenced, about ten (10) acres of which was cleared, upon which there were erected and in use by the Respondents, William J. H. Goetz and Christine E. Goetz, a dwelling house, garage and other buildings, and, save and except for the matters hereinafter complained of, said property was so situated and improved and said buildings thereon so constructed as to make same suitable for, adapted to, and desirable as residence property, to which use the Respondents, William J. H. Goetz and Christine E. Koetz, were then putting same and to the uses to which your Complainants attempted to put same.

TENTH:

That the end of said sewer line, through which flowed the discharge of all the main and lateral lines of the entire system, and the said Septic Tank into which the said sewage from the entire town emptied, were and are located on a stream or creek called Wolf Creek and at a point to the West of and about fifteen (15) feet from the West line of said property and at a distance of approximately 800 feet from said dwelling house; that the bed of said stream is ordinarily about three feet wide, seldom filled with water but subject to overflows with every heavy rain or freshet and flowed past and from said point where said sewer line ended and Septic Tank was located in a Southeasterly direction over and entirely across said property, passing within about 500 feet of the dwelling house thereon and leaving said property at a point on the East line thereof about 800 feet from said dwelling house; that most of the uncleared part of said property lies North and Northeast of said creek, while the cleared portion is South and Southwest thereof.

ELEVENTH:

That on account and by reason of said sewer system ending and discharging and the said Septic Tank being located and functioning or failing to properly function at said point hereinabove described, said property was and is not substantially as represented to your Complainants by the Respondents, William J. H. Goetz and Christine E. Goetz, not desirable as and unsuited for residence property, not reasonably adapted for the purposes and uses for which sold and intended, and was and is rendered far less valuable than it would have been had it been as represented, in this:- That there flows from said sewer line and into said Septic Tank all the waste water, garbage, human excreta, refuse and other waste matter and filth common to sewers serving, as this does, homes, stores, offices and other buildings and businesses in a town; that said sewage flowed from said tank into the creek, there to be carried on, upon and over said property, oftimes in a raw state, and giving off foul, disagreeable, obnoxious and nauseous gasses, odors and stenches, or, when said creek was swollen or the waters therein high, to be carried out from the creek banks upon the land on each side thereof, caught by roots and branches and there to remain until completely decomposed or washed back into said creek by rain; that from time to time and in this manner toilet paper and undissolved sewage was cast over and on said property up from the creek banks and thereby forming disgusting and unsightly conditions, all to the annoyance and discomfort of your Complainants and other persons who might be there on said premises; that the waters of said creek are continually polluted and discolored by said flow; that the intensity and extent of said odors and foul gasses depend upon the temperature and humidity of the weather or atmosphere, the prevalence of winds or breezes and the direction thereof.

TWELFTH:

That with the purchase of said property on, to-wit, February 8, 1927, your Complainants moved on and into the same and

proceeded to live thereon, and to occupy the buildings; that the first intimation which your Complainants or either of them had that there was a Septic Tank located anywhere near said premises was on, to-wit, May 13, 1927, when the respondent, William J. H. Goetz, called upon your Complainants and handed to them copy of a notice or letter which the said William J. H. Goetz had theretofore sent to or served on the authorities of the Town of Foley, copy of said paper so handed your Complainants being hereto attached, marked "Exhibit C" and made a part hereof as though fully incorporated herein, with leave of reference thereto as often as may be necessary; that your Complainants requested the Respondent, William J. H. Goetz, at the time he so delivered said paper, to accompany them down to and point out the location of said Septic Tank, the exact nature, size or purpose of which your Complainants did not know at that time, but this the Respondent, William J. H. Goetz, declined to do and gave as his reason that he did not have the time; that not until on, to-wit, August 1st, 1927, did your Complainants learn or have notice of the real nature and location of said Septic Tank, for on that date your Complainant, Charles A. Henry, was informed by Dr. L. M. Boyd, who was at the time a practising physician in the Town of Foley, Alabama, that the Town sewerage was being dumped upon, over and across said property, whereupon your Complainants proceeded to investigate and ascertained for the first time the true location of said Septic Tank and the true facts with respect to said sewer outlet which ended and emptied into the same, but your Complainants did not and could not know the nature and extent of the conditions that would be created when the same was put to the uses intended, for that up to, to-wit, during the month of September, 1927, there was no water works system available to the inhabitants of or in operation in said Town of Foley, but the installation of such a system was completed during the said month of September, 1927, whereupon, through connections made therewith, said sewer system came into general use and the conditions herein complained of were created, your Complainants not having detected or noticed any disagreeable odors and

were not put to any discomfort in connection with said sewer line and Septic Tank prior thereto, except that during the month of August, 1927, while the American Legion Convention was in session in said town, foul odors did emanate from said sewer line, septic tank and the creek flowing past same, and were noticeable to and noticed by your Complainants.

THIRTEENTH:

That your Complainants, upon purchasing said property and relying upon the representations as made and being misled by the concealment of true conditions, all as herein set out, proceeded, in accordance with the purposes for which your Complainants purchased said property, and being purposes for which said property would have been reasonably adapted had it been as represented, and spent large sums of money in the construction of improvements on said property, the purchase of dairy cattle and securing equipment and paraphernalia necessary and useful in the proper conduct of a dairy farm, all being done before your Complainants ascertained or learned of the true facts and conditions and of the falsity of said representations and concealments, and your Complainants, although they so invested large sums of money for said purposes and made every reasonable effort to carry on said dairy farm and business, were unable to continue same on account of such conditions arising from said sewer line and Septic Tank, which rendered the milk from the cows pastured on said lands either unsafe in fact, or, by reason of the general public, which had knowledge of the location of said line and tank, believing such to be the case, and the customers of your Complainants ceased to purchase the dairy products and your Complainants were unable to acquire new customers or to find a sale for such products.

FOURTEENTH:

That for the damages suffered and injuries sustained on account of the fraud and deceit practised upon your Complainants, by the Respondents, William J. H. Goetz and Christine E. Goetz, they do not and cannot have an adequate remedy at law for both

William J. H. Goetz and Christine E. Goetz are non-residents of the State of Alabama, their residences being as above alleged, and no suit or proceeding at law could be adjudicated and the rights of your Complainants ascertained and fixed before February 10, 1930, the date for the foreclosure sale under said Vendor's Lien, when said property will be foreclosed and the Respondents, William J. H. Goetz and Christine E. Goetz, will be enabled to convey or otherwise handle or dispose of same, so that your Complainants would be forced to sue in another State or be without any remedies for such wrongs, and further that your Complainants' damages, by reason of the matters and facts herein alleged, are not of easy ascertainment, and your Complainants, in order that they and their property rights be protected in a manner commensurate with the wrongs suffered by them, must and do look to this a court of equity for redress, and allege and aver that, in order that there be a full, fair and equitable adjudication, jurisdiction be assumed by a court of equity and the foreclosure of said Vendor's Lien and the sale of said properties thereunder be restrained and enjoined until this cause be adjudicated.

FIFTEENTH:

That by reason of such fraud and deceit, your Complainants have elected and do hereby elect to rescind and have rescinded and do hereby rescind the contract for the purchase of said property as evidenced by said Deed, and hereby tender into Court a reconveyance of said property to the Respondents, William J. H. Goetz and Christine E. Goetz, and hereby offer to deliver up to the said Respondents, William J. H. Goetz and Christine E. Goetz, the possession of said property, having heretofore offered to give up such possession and tendered such reconveyance to the Respondents, W. C. Beebe and H. M. Hall, as partners composing the firm of Beebe & Hall, as attorneys for the Respondents, William J. H. Goetz and Christine E. Goetz, with a demand that the said Vendor's Lien be cancelled and released and the notes evidencing the debt secured thereby be cancelled and delivered up, the money paid be

E. Goetz, were abroad, traveling in Europe, so that your Complainants could not and did not notify them at that time, but upon said Respondents, William J. H. Goetz and Christine E. Goetz, returning to Foley on, to-wit, during the month of November, 1927, your Complainants forthwith notified them, requested they take the property back and return the monies paid with cost of improvements made. Said Respondents refused, but requested your Complainants to follow up the negotiations which your Complainants were then and had been for sometime carrying on, in person and through attorneys, with the Town authorities of Foley looking to a correction of the conditions herein complained of, the said Respondents, William J. H. Goetz and Christine E. Goetz, promising and leading your Complainants to believe that, upon the termination of such negotiations or, in event no correction by Town, any suit which might be brought by your Complainants, as owners of said land, to abate such nuisance, they, the said William J. H. Goetz and Christine E. Goetz would adjust the matter, the said William J. H. Goetz and Christine E. Goetz further agreeing that during said period, which your Complainants and said William J. H. Goetz and Christine E. Goetz then estimated would not extend over one year, Complainants need only pay the interest on balance due on said property and the note and Vendor's Lien would be extended for such one year period, which was done, your Complainants paying said interest and William J. H. Goetz and Christine E. Goetz extending said note under said arrangement. Complainants further aver that said negotiations with the Town were not successful, suit was filed against the Town to abate said nuisance, but said negotiations and litigation continued for more than the estimated one year, suit being filed March 15, 1928, and final decree rendered August 29, 1929. That immediately upon the termination of said suit your Complainants notified the Respondents, William J. H. Goetz and Christine E. Goetz, as to the outcome thereof, being adverse to your Complainants, and demanded a settlement and adjustment of the matter, requesting the said Complainants, who had become non-residents of the State in the meantime,

returned and your Complainants' damages paid, which tender was refused, and Complainants'allege and aver that by reason of the fraud and deceit aforesaid there is no indebtedness due by them under said Vendor's Lien or the notes evidencing said indebtedness, and that the same should and in equity and good conscience ought to be cancelled and delivered up, and that the Respondents, William J. H. Goetz and Christine E. Goetz, pay or refund to your Complainants the said sum of Five Thousand Dollars ($5,000.00), the cash payment on the purchase of said property, together with interest from date of payment, and the further sum of Five Thousand Dollars ($5,000.00) as damages for the reasonable value of improvements constructed and labor done by your Complainants on said property and materials and equipment purchased for said dairy business, all in reliance upon said representations and before ascertaining the falsity thereof.

SIXTEENTH:

That on heretofore, to-wit, March 23, 1928, your Complainants executed a mortgage on said property to Nic Krump to secure an indebtedness in the sum of Twenty-five Hundred Dollars ($2500.00), said mortgage being of that date and of record in the office of the Judge of Probate of Baldwin County, Alabama, in Mortgage Book 42, page 408, but in connection therewith the said Nic Krump, the mortgagee named in and the owner of said mortgage and of the note and debt secured thereby, executed and delivered to your Complainants a full release thereof, a copy thereof being hereto attached, marked "Exhibit D" and made a part hereof, with leave of reference thereto as often as may be necessary, which release along with said original mortgage and the note evidencing the debt secured thereby, was tendered to the said W. C. Beebe and H. M. Hall, as attorneys aforesaid, along with said deed, but said tender was likewise refused by them.

SEVENTEENTH:

That at the time of the discovery by your Complainants of the fraud and deceit herein complained of and of the true nature, condition, location, extent and purpose of said Septic Tank and sewer line, the Respondents, William J. H. Goetz and Christine

to come to Foley to that end and upon Respondents refusing to do so made, in person and through their attorneys, repeated demands upon the said Respondents, direct and through their attorneys, to settle and adjust the matter, all to no avail.

EIGHTEENTH:

Your Complainants hereby in all things offer and stand ready to do equity, offering and being ready and willing to do all things necessary to place the Respondents, William J. H. Goetz and Christine E. Goetz, in status quo ante with respect to said property.

PRAYER FOR PROCESS AND RELIEF.

WHEREFORE, the premises considered, your Complainants pray that the said William J. H. Goetz, Christine E. Goetz and W. C. Beebe and H. M. Hall, individually and as partners composing the firm of Beebe & Hall, may be made parties defendant to this Bill of Complaint and required to appear and plead, answer or demur within the time required by law and the rules of this Court.

Further, that your Honor grant forthwith a preliminary or temporary Writ of Injunction pendente lite, directed to the said Respondents and each of them, restraining them and all of them and each of them from foreclosing or attempting to foreclose, causing to be foreclosed or proceeding, directly or indirectly, with the exercise of any powers of sale contained in the Vendor's Lien to and in favor of William J. H. Goetz and Christine E. Goetz in, by and under that certain Deed from William J. H. Goetz and Christine E. Goetz to Marguerita Henry and Charles A. Henry, of date February 8, 1927, of record in the office of the Judge of Probate of Baldwin County, Alabama, in Record Book Number 42 N.S., pages 249-50, and covering the following described land situated in Baldwin County, Alabama, to-wit:-

> Farm Number Seven (7), being the Southwest quarter of the Northeast quarter of Section twenty-eight (28), Township seven (7) South, Range four (4) East, except four (4) acres described as follows: Commencing at the Southwest corner of the Northeast quarter of Section 28, Township 7 South of Range 4 East, run North 600 feet; thence, East 300 feet, thence, South 600 feet, thence, West 300 feet, to the place of beginning;

and from doing anything whatever to change the statu quo now existing with reference to the said Vendor's Lien and in pending foreclosure thereof; such injunction to remain in force until the further orders of this Court.

That upon the final hearing of this cause said temporary or preliminary Writ of Injunction be made final and perpetual against said Respondents and each of them and all of them, and that your Honor will render, adjudge and decree that all indebtedness described in and secured by said Vendor's Lien, together with the notes evidencing the same, are no longer due or constitute any

indebtedness due by or claim or demand against your Complainants or either of them, and that the rescission of the purchase of said property by your Complainants be confirmed; that there be rendered a judgment in favor of your Complainants and against the Respondents, William J. H. Goetz and Christine E. Goetz, for the Five Thousand Dollars ($5,000.00) cash payment on said purchase and said interest payment, together with interest thereon from dates of payment, and such further and additional sum as will fairly and equitably compensate your Complainants for the damages suffered and sustained by them; that in event your Complainants be mistaken in their right to rescind said contract, then that your Honor will abate the purchase price of said properties by an amount which will fairly and equitably represent the difference between the value thereof as it really existed at the time of purchase as distinguished from what its value would have been at the date of purchase had said property been as represented, and such additional amount as will fairly and equitably compensate your Complainants for the damages suffered and sustained by them; and that by whatever amount said sums so decreed in favor of your Complainants exceeds the balance due on said purchase price, that a judgment therefor be rendered in favor of your Complainants and against the Respondents, William J. H. Goetz and Christine E. Goetz, and a lien be fixed against said property for payment thereof, or in event the amount so decreed does not equal the balance due on the purchase price of said premises, that the same be credited thereon, and that there be ascertained, determined and fixed through the usual proceedings of this Court the amounts to be paid by your Complainants to discharge said Vendor's Lien and the notes evidencing the debt secured thereby, your Complainants standing ready and willing to abide by any decree rendered in this cause, hereby offering to do equity in such manner and to every extent deemed by the Court proper and meet in the premises.

And that your Honor will grant unto your Complainants such other and/or further and/or different relief as to your Honor may seem right, just, meet and proper in the premises.

And, as in duty bound, your Complainants will ever pray, etc.

Complainant.

Complainant.

NORBORNE STONE,

Solicitor for Complainants.

FOOT NOTE: The Respondents separately and severally are required to answer each and every paragraph of the foregoing Bill of Complaint from FIRST to EIGHTEENTH, both inclusive, but answer under oath is hereby expressly waived.

NORBORNE STONE,

As Solicitor for Complainants.

STATE OF ALABAMA.

BALDWIN COUNTY,

Before me, the undersigned authority in and for said County in said State, personally appeared MARGUERITA HENRY and CHARLES A. HENRY, who are known to me and who, after being by me first duly and legally sworn, doth depose and say under oath as follows:

That their names are respectively Marguerita Henry and Charles A. Henry; that they are the same persons whose names are signed as Complainants to the foregoing and annexed Bill of Complaint; that they are acquainted with all of the matters and facts therein alleged, and that the same are true.

Marguerita Henry

Charles A. Henry

Sworn to and subscribed before me, a Notary Public whose seal is hereto affixed, this 5th day of February, 1930.

Ida M. Turnbull

Notary Public, Baldwin County, State of Alabama.

STATE OF ALABAMA,

BALDWIN COUNTY.

KNOW ALL MEN BY THESE PRESENTS, That for and in consideration of the sum of Nine Thousand Five Hundred & 00/100 ($9,500.00) Dollars, Four Thousand Seven Hundred Fifty & 00/100 ($4,750.00) Dollars cash, and the balance to be paid as herein specified, to us in hand paid by MARGUERITA HENRY and CHARLES A. HENRY, her husband, receipt whereof is hereby acknowledged, we do GRANT, BARGAIN, SELL and CONVEY unto the said Marguerita Henry and Charles A. Henry, the following described land situated in Baldwin County, Alabama, to-wit:-

Farm Number Seven (7), being the Southwest quarter of the Northeast quarter of Section Twenty-eight (28), Township Seven (7) South, Range Four (4) East, except four (4) acres described as follows:- Commencing at the Southwest corner of the Northeast quarter of Section 28, Township 7 South of Range 4 East, run North 600 feet; thence East 300 feet, thence South 600 feet, thence West 300 feet, to the place of beginning,

A Vendor's Lien on the property herein conveyed is reserved to secure the payment of the balance of the purchase price of Four Thousand Seven Hundred Fifty ($4,750.00) Dollars, as evidenced by five notes of even date herewith, one in the sum of One Thousand & 00/100 ($1,000.00) Dollars, due and payable February 8th, 1928, with 6% interest from date, interest payable annually; One in the sum of One Thousand & 00/100 ($1,000.00) Dollars, due and payable February 8th, 1929, with 6% interest, from date, interest payable annually; one in the sum of One Thousand & 00/100 ($1,000.00) Dollars, due and payable February 8th, 1930, with 6% interest from date, interest payable annually; One in the sum of One Thousand & 00/100 ($1,000.00) Dollars, due and payable February 8th, 1931, with 6% interest from date, interest payable annually; one in the sum of Seven Hundred Fifty & 00/100 ($750.00) Dollars, due and payable February 8th, 1932, with 6% interest from date, interest payable annually.

It is agreed by and between the parties hereto that should the said Marguerita Henry and Charles A. Henry fail or refuse to pay any one, part of one or all of the said notes at maturity, the same Wm. J. H. Goetz, or Christine E. Goetz, their heirs or assigns, at their option, may declare the entire indebtedness due and sell all of the right, title and interest of the said Marguerita Henry and Charles A. Henry, in front of the Court House Door in the town of Bay Minette, Baldwin County, Alabama, during the legal hours of sale in and to the property herein described after giving 20 days notice by publication in a newspaper published in Baldwin County, Alabama, the proceeds of said sale to apply, first, towards the payment of the expenses of the said sale and the balance, if any, after paying notes and all expenses necessary thereto, including a reasonable attorney's fee, shall be returned to the said Marguerita Henry and Charles A. Henry.

TO HAVE AND TO HOLD to the said Marguerita Henry and Charles A. Henry, their heirs and assigns, forever. And we do covenant with the said Marguerita Henry and Charles A. Henry that we are seized in fee of the above described premises; that we have the right to sell and convey the same; that the said premises are free from all encumbrances; and that we will, and our heirs, executors, and administrators shall forever WARRANT AND DEFEND the same to the said Marguerita Henry and Charles A. Henry, their heirs and assigns, against the lawful claims of all persons whomsoever.

EXHIBIT A- (p.1)

WITNESS our hands and seal this the 8th, day of February, 1927.

William J. H. Goetz (SEAL)

Christine E. Goetz (SEAL)

STATE OF ALABAMA,

BALDWIN COUNTY.

I, Henry D. Moorer, a Notary Public in and for said County in said State, hereby certify that Wm. J. H. Goetz and Christine E. Goetz, his wife, whose names are signed to the foregoing conveyance, and who are known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, they executed the same voluntarily on the day the same bears date.

Given under my hand and official seal this the 8th day of February, 1927.

Henry D. Moorer, Notary Public, Baldwin County, Ala.

STATE OF ALABAMA,

BALDWIN COUNTY.

I, Henry D. Moorer, a Notary Public in and for said County in said State, do hereby certify that on the 8th day of February, 1927, came before me the within named Christine E. Goetz, known to me to be the wife of the within named Wm. J. H. Goetz, who being examined separate and apart from the husband, touching her signature to the within conveyance, acknowledged that she signed the same of her own free will and accord and without fear, constraint or threats on the part of the husband.

Given under my hand and official seal this the 8th day of February, 1927.

Henry D. Moorer, Notary Public, Baldwin Co., Ala.

EXHIBIT A-(P. 2)

WCK
RCK

NOTICE OF FORECLOSURE OF VENDOR'S LIEN.

Default having been made and continuing in the payment of the indebtedness due and owing under that certain vendor's lien reserved to William J. H. Goetz and Christine E. Goetz in that certain deed executed by them to Marguerita Henry and Charles A. Henry, dated February 8, 1927, and recorded in the office of the Judge of Probate of Baldwin County, Alabama, in Deed Book 42 N. S., pages 249-50, the undersigned, under and by virtue of the powers contained in the said instrument and under and by virtue of the powers of the statute made and provided, will, at twelve o'clock noon on the 10th day of February, 1930, in front of the court house door of Baldwin County, Alabama, sell at public outcry for cash to the highest bidder the property described in and conveyed by the said deed, to-wit:

> Farm Number Seven (7), being the Southwest quarter of the Northeast quarter of Section twenty-eight (28), Township seven (7) South, Range four (4) East, except four (4) acres described as follows: Commencing at the Southwest corner of the Northeast quarter of Section 28, Township 7 South of Range 4 East, run North 600 feet; thence East 300 feet, thence South 600 feet, thence West 300 feet, to the place of beginning.

And the proceeds to apply as specified in the said deed.

William J. H. Goetz

Christine E. Goetz.

Beebe & Hall,
Attorneys for Vendors.

1-9-4t.

EXHIBIT "B"

EXHIBIT "C".

March 7, 1925.

Mr. George Holk, Mayor,

Foley, Ala.

Dear Sir:

I understand that the town authorities propose to construct a sewer on a public street in the town of Foley with the outlet into a creek near my residence and in close proximity to my property and which creek flows through my property. I understand further, that the town proposes to let the sewer empty into this creek without any provision being made to keep the foul sewer water from contaminating the waters of the creek and overflow my lands and polluting the air with foul odors and making an extremely unsanitary condition all in the immediate proximity to my dwelling and on my lands. This is a special injury to me and I now give notice in advance that if any nuisance created by the town authorities in the construction of this sewer by which I suffer injury, that I will get out an injunction to put a stop to the nuisance.

I am not giving this notice to interfer with the public welfare laws of the town, but in order to protect myself against a threatened nuisance and to let you know in advance, that I will seek for my protection the strong arm of the Law.

I trust that the town will see fit to so construct its sewer system as to avoid the conditions that are certain to occur if the plans entered upon are carried out without modification or change.

Yours very truly,

RELEASE OF MORTGAGE.

EXHIBIT "D".

STATE OF ALABAMA,)
)
COUNTY OF BALDWIN.)

KNOW ALL MEN BY THESE PRESENTS, That I, Nic Krump, the mortgagee in that certain mortgage given by Marguerita Henry and Charles A. Henry on March 23, 1928, for Twenty-five Hundred Dollars, and recorded in the office of the Judge of Probate of Baldwin County, Alabama, on the 26th day of March, 1928, in Record Book No. 42 Mortgages, Page 408, which conveyed the following described real estate in Baldwin County, Alabama, to-wit:

> Farm number 7, being the southwest quarter (SW¼) of the northeast quarter (NE¼) of Section 28, Township 7 South, Range 4 East except 4 acres described as follows: Commencing at the southwest corner of the northeast quarter of said Section 28, run north 600 feet thence east 300 feet, thence south 600 feet and thence west 300 feet to the place of beginning;

do hereby acknowledge that said mortgage is paid and fully satisfied and the same is hereby released and discharged.

Witness my hand and seal this 4th day of February, 1930.

Nic Krump.

STATE OF ALABAMA,)

COUNTY OF BALDWIN.)

I, Lloyd A. Magney, a Notary Public in and for said county and state do hereby certify that Nic Krump, whose name is signed to the foregoing release of mortgage and who is known to me, acknowledged before me on this day that, being informed of the contents of the conveyance, he executed the same voluntarily on the day the same bears date.

IN WITNESS WHEREOF, I have hereunto set my hand and official seal, this 4th day of February, 1930.

Lloyd A. Magney,
Notary Public.

(AFFIX SEAL)

C. A. HENRY, ET AL, Complainants,	(	IN THE CIRCUIT COURT OF
vs	)	BALDWIN COUNTY, ALABAMA.
W. J. H. GOETZ, ET AL, Defendants.	(	IN EQUITY.

BRIEF OF DEFENDANTS ON MOTION TO DISSOLVE FOR WANT OF JURISDICTION.

The bill alleges that the Defendants sold to the Complainants a certain tract of land; and in response to a question of Complainant, C. A. Henry, Defendant, W. J. H. Goetz, stated that a septic tank was the abutement to a bridge; that the sale took place February 8, 1927; that the Complainants paid five thousand dollars and gave their notes for forty-seven hundred and fifty dollars; that the Complainants in May following were advised of the true nature of the septic tank; that Complainants made no investigation; that in August 1927 the septic tank became offensive; that in November, 1927, Complainants notified Defendants of the offensiveness of the septic tank and requested them to take the property back and return their money with the cost of improvements and that the Defendants refused; that subsequent to that time they paid interest on the indebtedness and mortgaged the property and continued to use and occupy the same and treat the property as

their own, they allege that by virtue of the alleged misrepresentation they were damaged and seek to cancel the contract and to recover back the money paid, together with certain damages for improvements. The Defendants W. J. H. Goetz and Christine E. Goetz are non-residents and personal service cannot be hand on them.

Defendants W. J. H. Goetz and Christine E. Goetz appear specially and move the Court to dismiss the bill for want of jurisdictic Defendants Beebe & Hall appear and move the dissolve the injunction for want of equity in the bill.

Under the allegations of the bill it is clearly shown that the Complainants have ratified the contract and cannot now be heard on their petition to rescind. Their ratification consists in holding the property and treating the same as their own. After they ascertained the true facts they treated the property as their own by holding possession of the same and by making payments thereon and by mortgaging the property. See 90 Alabama, page 155-7; 113 Alabama, page 467; 99 Alabama, page 566; 123 Alabama, page 439; 173 Alabama, page 267; 115 Alabama, page 418; 95 Alabama, pages 391-2.

The allegations of the bill also show that the facts were open to both the parties and that the Complainants, upon reasonable inquiry, could have ascertained the true facts. Rescission cannot be granted under said circumstances. See 150 Alabama, page 227; 66 Alabama, page 590.

Complainants allege that they had knowledge of the condition of the premises in September 1927 and in November, 1927, demanded a recision; that Defendants refused and that they continued thereafter to treat the property as their own, but attempt to avoid the consequence of such acts by alleging promises by the Defendant. The bill thus shows a complete ratification of the contract. See Capital Security Company vs Holland, 60 Southern, page 495.

It appearing therefore that the Court could not enter a decree rescinding the contract. The only decree that could be rendered would be a monetary judgment against the Defendants or the property. To render a monetary judgment it is essential that the Court have jurisdiction of the parties against whom the judgment is to render or that it have jurisdiction of the property that it might render a monetary judgment against the property. In the present case it has no jurisdiction of the persons, the Defendants being non-residents; and it cannot acquire jurisdiction of them unless they voluntarily appear. Nor has the Court jurisdiction of the property in the present status of the cause. Jurisdiction of the property could only be acquired by attachment or the levy of some equitable writ on the property inself.

The prayer in the bill for a rescission of the contract and a cancellation of the mortgage is merely incidental to the main purposes of the suit. The main purposes of the suit being the recovery in the form of a monetary judgment for the purchase price of the property and for damages. Especially is thie true in view of the of the fact that the bill shows on its face that the Complainants are not entitled to a rescission of the contract.

See 180 Alabama, page 296; 122 Alabama, page 316.

A bill against a non-resident to subject lands to the debt of the Plaintiff not yet reduced to judgment cannot be maintained without personal service or without bringing the property into court by the levy of an equitable attachment. See cases cited above, and also 11 Mississippi, page 641.

Under authority of the cases cited above we respectfully submit that the Court has not jurisdiction of the case made by the bill of complaint and that Defendants motion to dismiss the bill for want of jurisdiction should be sustained.

The Defendants Beebe & Hall also respectfully submit that their motion to dissolve the injunction for want of equity in the bill should be granted. The bill is clearly without equity under the cases cited above with reference to rescission.

The bill is also without equity in that it shows that the Complainants have ratified the contract and could not now recover a monetary judgment nor rescind the contract. Their act in treating the property as their own in mortgaging it and in paying a part of the purchase money, namely, interest, not only waived their right to rescind but ratified the contract, thereby barring them from an action at law or in equity, either to rescend or to recover a money judgment for the alleged deceit. See 113 Alabama, page 467; 19 Alabama, page 252 (pages 258-9).

The Defendants Beebe & Hall have the right to be heard on

their motion to dissolve the injunction, they being parties to the proceeding and having a material interest in the proceeding, their interest being to perform their contract with the Defendants W. J. H. Goetz and Christine E. Goetz to foreclose the mortgage. See Injunction Section 699, 32 Corpus Juris, pages 408-9.

Respectfully submitted this 31 day of March, 1930.

Burke & Hall

Copy this Brief handed Marianne Stowe Esq Attorney for Complainants, this March 31, 1930

Burke Hall

MARGUERITA HENRY and CHARLES A. HENRY,

Complainants,

-vs-

WILLIAM J. H. GOETZ, CHRISTINE E. GOETZ, W. C. BEEBE and H. M. HALL, individually and as partners composing the firm of Beebe & Hall,

Respondents.

IN THE CIRCUIT COURT-

EQUITY SIDE

STATE OF ALABAMA

BALDWIN COUNTY.

No. 673.

- - - -

DEPOSITIONS OF

WILLIAM J. H. GOETZ and CHRISTINE E. GOETZ

DIRECT EXAMINATION

BY MR. DONALD D. HARWOOD, Attorney at Law, Santa Ana, California:

Q Will you state your name please?

A My name is William J. H. Goetz.

Q Where do you reside, Mr. Goetz?

A At Orange, California.

Q You are one of the Respondents in this case, are you not?

A Yes sir.

Q And your wife is one of the Respondents in this case?

A Yes sir.

Q Together with Mr. Beebe and Mr. Hall?

A Yes sir.

Q Are you acquainted with Marguerita Henry and Charles A. Henry?

A Yes.

Q Mr. Goetz, at one time you owned property in the State of Alabama, in Baldwin County, near the City of Foley, is that not correct?

A Yes sir.

Q What was the occasion of your acquaintance with Mr. and Mrs. Henry?

A Well, one day Mr. and Mrs. Henry, Mr. and Mrs. Barchard and C. A. Olson come to my place for the purpose of buying my property.

Q Do you recall what date that was, Mr. Goetz?

A I think as near as I know, it was the 7th of February, 1927.

Q 1927?

A 1927.

Q What you referred to as "my place", was the thirty six acres that you owned at Foley?

A It is the thirty six acres, yes sir, near Foley.

Q And upon which you were living February 7th, 1927?

A Yes sir, I was living there.

Q Did you have a conversation with Mr. Charles Henry on

February 7th, 1927, on your property in the presence of the parties whom you have named here?

A Well, I had a conversation with Mr. Earchard and Mr. Olson, Mr. Henry and myself, four of us.

Q Will you state as near as you can, the substance of that conversation?

A Well, Mr. Henry come out there for the purpose of buying my place.

Q What was said by the parties?

A Well, when he asked me about buying the place, I told him "yes, I would sell it to him", and he asked me my price, and so I asked him to come along and we would walk over the place, look at it, and Mr. Henry said "no, it wouldn't be necessary for him to go over and look at it". He says "my wife, she is stuck on the place, she wants it, you can see that", he told me. I told Mr. Henry "I wasn't satisfied, I wouldn't sell him the place unless we go over it and look at it", and well, so we all decided to walk over it and look at it, so we started out from back of our house to go north towards the Wolf Creek, and when we got to the Wolf Creek----

Q Just a moment, Mr. Goetz, will you explain to the Commissioner the location of what you refer to as "Wolf Creek?"

A Well, Wolf Creek, that is located about, I should say, about two blocks from the Foley-Pensacola Road.

Q And the Foley-Pensacola Road, where is that located with reference to the thirty six acres?

A The Pensacola Road runs in front of those thirty six acres. Those thirty six acres adjoin the Pensacola Road.

Q On what side?

A South side.

Q The Creek that you referred to, was about two blocks north of the south line of the property?

A Yes.

Q You may proceed?

A Well, when we got to the creek, we walked over the creek, the Wolf Creek, and there we kept standing for a little while, and we talked about the property and about different things, and we went on further. Then we went on further and walked, circled the whole place, went over the whole thirty six acres and come around on to the road and come home again.

Q Now, it is my understanding, Mr. Goetz, from the testimony that has already been offered in this case, that facing on Wolf Creek and at a point either on or somewhere near the west line of your property, was a concrete wall or concrete face. Can you explain the location and general appearance of this wall?

A Well, the location was--- Well, it was in the middle of the street there. It would be about fifteen or twenty feet from the line, my west line, and the concrete wall there where the pipe line entered into the creek, and well, say, about oh, some eight or ten feet high.

Q And on which bank of the creek was the wall located?

A On the south side.

Q And was that wall visible and apparent from thepoint at which you testified you stopped after you had crossed the creek?

A Yes sir, we were only about one hundred feet or one hundred and fifty feet away and it could be seen plain.

Q It could be seen from that point?

A Yes sir, plain.

Q Was there any conversation had at that time between you and Mr. Henry relative to that concrete wall as to its purpose or its use?

A No, not any.

Q Did Mr. Charles Henry inquire of you the purpose of the wall?

A No sir, he never inquired.

Q Did you at that time, or any other time, prior to the 8th day of February, 1927, state to Mr. Henry that the wall was an abutment for a bridge that was to be built across Wolf Creek?

A No sir.

Q Now, do you know of your own knowledge the purpose and use of that wall?

A Well, I do not. The City of Foley put it there, and there is a sewer line running through there which runs through which this is built on top of, and I don't know for

what purpose they built it there, I couldn't say.

Q As I understand it, from the testimony that has already been offered in this case, the sewer line ends at this wall, is that not correct?

A That ends there.

Q At this wall?

A Yes sir.

Q Do you know the source or derivation of this sewer line?

A Will you please explain that?

Q From what point does this sewer line, which ends at this concrete wall, begin?

A That comes from the septic plant, about a block away or something like that.

Q About a block away in which direction?

A South, towards the Pensacola Road.

Q Was any part of this tank, to which you refer, the sewer line, or the wall located on this property?

A No sir, this septic tank is located alongside of the cemetery. Now, the thirty six acres, or the four acres that goes off of the forty acres, that is a cemetery, and this septic tank is built alongside the cemetery.

Q How far was the tank from the west line of your property?

A Well, from the west line, the cemetery is four hundred feet wide, so it is four hundred feet from my line.

Q In other words, the cemetery, being four hundred feet wide, stood between the septic tank and the west end of your property?

A On the west end of my property, yes sir.

Q Now this road you spoke about. Where was it located with reference to your property?

A Well, that road goes alongside the cemetery and also alongside of my property.

Q Is this a completed road?

A No, the road was not worked.

Q At that time?

A At that time. It may be now, but I don't know.

Q In which direction did this road run?

A Well, it runs from the Pensacola Road north.

Q And when it reached the creek, was there a bridge across it or not?

A No sir.

Q This concrete wall, where was it located with reference to the road?

A Well, it was located in the center of the road.

Q Now, on February 7th, 1927, was any conversation had between yourself and Mr. Charles Henry relative to this road?

A No sir.

Q By whom was the land which was used for this road dedicated to the public?

A By the Magnolia Springs Land Company, where I bought

the thirty six acres from.

Q Did you, at any particular time, ever own that particular property used as the road?

A No sir.

Q Did you at any time state to Charles A. Henry that you had dedicated a twenty foot strip of land for road purposes, and that the concrete wall was an abutment for a bridge to be built on completion of the road?

A No sir.

Q Now, on February 7th, 1927, was any conversation had between yourself and Charles A. Henry with reference to the sale of the property to him and his purchase of the property?

A Yes, when we come back after we had walked over the place and looked at it, then we come back and we went in the house, and Mr. Henry and myself went into the living room and we talked about the price and the terms and things, and he bought the place and he paid me five hundred dollars down.

Q Mr. Goetz, you agreed to sell the property to Mr. Henry, and he agreed to buy it from you. What was the price agreed upon which he was to pay you, the amount which he was to pay you for the property?

A Ninety five hundred dollars.

Q And what amount of that sum was paid in cash?

A One-half cash and the balance in notes on a lien.

Q Did you receive the cash?

A Yes sir.

Q How much was it?

A Forty five hundred dollars.

Q And the balance you referred to, is represented by the notes which have been offered in evidence here?

A Yes sir.

Q Thereafter, was any agreement had, written agreement had, with reference to the sale of the property?

A Well, that is something I can't remember any more whether we did or not.

Q Mr. Goetz, I now show you what purports to be a Grant Deed of certain property in Alabama, signed by William J. H. Goetz and Christine E. Goetz, conveying the same to Marguerita Henry and Charles A. Henry, with the reservation of a vendor's lien. Do you recall this instrument?

A Yes sir.

Q Will you state what that is?

A That is a lien, a deed.

Q Is that your signature?

A Yes sir.

Q And is that the signature of your wife, Christine Goetz?

A Yes sir.

Q You had her place her signature there?

A Yes sir.

MR. HARWOOD (To Commissioner): This document is offered

as Respondents' Identification.

THE COMMISSIONER: It will be admitted and marked Respondents' Identification "A".

Q I now show you what purports to be a promissory note signed by Charles A. Henry and Marguerite Henry, payable to William J. H. Goetz, dated February 8th, 1927, in the amount of one thousand dollars. Do you recognize this instrument, Mr. Goetz?

A Yes sir.

Q Will you state what that is?

A That is a note of one thousand dollars.

Q Given to you by Mr. Henry and Mrs. Henry?

A Yes sir.

Q On the back thereof, is certain written information, or items purporting to show the payment of two hundred and fifty dollars on this note?

A That's right.

Q And the information there is true and correct, is it?

A Yes sir, that's correct, and the interest for one year.

Q Were any payments of principal and interest made on this note, other than those shown on the back thereof?

A No sir.

MR. HARWOOD (To Commissioner): This instrument is offered as Respondents' Identification.

COMMISSIONER: It will be received and marked Respondents'

Identification "B".

Q I now show you a second instrument which purports to be a promissory note, signed by Charles A. Henry and Marguerita Henry, payable to William J. H. Goetz, in the amount of one thousand dollars, dated Februmry 8th, 1927. Do you recognize this instrument?

A Yes sir.

Q What is it?

A That is Mr. Henry's and Mrs. Henry's signatures.

Q And what does the instrument represent?

A A note.

Q Given by Mr. Henry?

A Given by Mr. and Mrs. Henry.

Q To yourself?

A To myself, yes sir.

Q Have any payments of interest or principal been made?

A Interest has been paid for one year.

Q Interest has been paid up to what date?

A It should have been paid on February 8th, but it has been paid on April 5th, 1928.

Q Have any payments of principal or interest been made on this note, other than as reported here?

A No sir.

MR. HARWOOD (To Commissioner): This is offered as Respondents' Identification "C".

COMMISSIONER: It will be admitted and marked Respondents'

Identification "C".

Q I show you here what purports to be a promissory note signed by Charles A. Henry and Marguerita Henry, payable to William J. H. Goetz, dated February 7th, 1927, in the amount of one thousand dollars. Do you recognize this instrument?

A Yes sir, that is a note which Charles A. Henry and Marguerita Henry gave to me for one thousand dollars.

Q Have any payments of principal or interest been made on this note?

A Only the interest for one year, paid on April 5th, 1928.

Q Have any payments of principal or interest been made?

A No sir, no principal or no other interest has been paid on there.

Q Other than what is shown here?

A Other than what is shown on the back of the note.

MR. HARWOOD (To Commissioner): This instrument is offered as Respondents' Identification "D".

COMMISSIONER: It will be admitted and so marked, Respondents' Identification "D".

Q I show you here what purports to be a promissory note, signed by Charles A. Henry and Marguerita Henry, dated February 8th, 1927, payable to William J. H. Goetz, in the amount of one thousand dollars. Do you recognize this instrument?

A Yes sir, Mr. Charles A. Henry and Marguerita Henry signed that and handed me that note for one thousand dollars.

Q Have any payments of principal or interest been made thereon?

A There is only one years interest paid on there, up to April 5th, 1928.

Q Interest has been paid up to April 5th, 1928?

A Not up to April, but has been paid April 5th.

Q And is paid up to what date?

A Well, the payment would have been due February 8th, 1928, but they didn't pay it on time so I gave him a little more time and he paid it on April 5th, 1928.

MR. HARWOOD (To Commissioner): This instrument is offered as Respondents' Identification "E".

COMMISSIONER: It will be received and so marked, Respondents' Identification "E".

Q I show you what purports to be a promissory note signed by Charles A. Henry and Marguerita Henry, dated February 8th, 1927, payable to William J. H. Goetz, in the amount of seven hundred and fifty dollars. Do you recognize this instrument?

A Yes sir, Mr. Charles A. Henry and Marguerita Henry have signed it and gave the note to me for seven hundred and fifty dollars.

Q Have any payments of principal or interest been made on this note?

A Not any, other than what is signed on the back of it.

Q Was any interest paid on it?

A One year. The interest has been paid on April 5th, 1928.

Q Up to what date?

A It ought to have been paid February 8th, 1928, but it was paid April 5th.

Q No payments of interest or principal were made other than is shown hereon?

A No sir.

MR. HARWOOD (To Commissioner): This instrument is offered as Respondents' Identification "F".

COMMISSIONER: It will be received and so marked, Respondents' Identification "F".

Q Now, referring to Respondents' Identifications "B", "C", "D", "E" and "F", which are a group of notes, will you state for what purpose those notes were given?

A Those notes were given as a lien on the property, a mortgage as I call it, and those notes go with the mortgage. They were given in part payment for the property, for the thirty six acres.

Q Now Mr. Goetz, when was the septic tank and the wall, to which we have referred heretofore, constructed?

A In 1926.

Q What part of the year?

A Well, that is something I cannot just tell, but as

near as I know, it was constructed in the summertime.

Q When was the septic tank put into operation?

A That is something I don't know.

Q Do you know whether or not it was in operation on February 7th, 1927?

A No sir.

Q You mean you don't know when it was actually in operation?

A No sir, I don't.

Q From the time it was built, to the time you sold the property on February 8th, 1927, what facts came to you which would indicate to you that the tank and sewer was, or would become a nuisance?

A Well, as much as I knew, or my opinion is that on account of the city building a cesspool there, or the septic tank, everything was O.K.

Q In other words, there was nothing which came to your attention, which would indicate to you that it was, or would become a nuisance?

A No sir.

Q Was there anything to indicate to you that the septic tank did not or would not operate properly?

A No sir.

Q Was there anything to indicate to you that the property was deteriorating in value and usefulness because of the tank and its operation?

A No sir.

Q Up to the time the property was sold to Mr. Henry, had your use of the land been injured or impaired by reason of any foul or disagreeable odors emitting from the creek?

A I never seen any or never noticed any.

Q At the time you sold the property to the Henrys, did you anticipate for any reason that the sewer would not function properly?

A No sir.

Q It is my understanding, Mr. Goetz, according to the testimony of Mr. Henry, that the first information he acquired to the fact of the location of the septic tank and the sewer, was when you handed him a copy of a Notice of Responsibility, which you stated you had served on the City of Foley. Do you recall that Notice?

A Yes, I do.

Q What was the purpose of that notice, Mr. Goetz?

A Well, I served that on the City of Foley so as to protect myself.

Q Do you recall what date you served it on the city?

A No sir.

Q Did you at that time believe that any difficulties would be encountered with the sewer and the septic tank?

A No sir.

Q What were the circumstances of your handing the Notice to Mr. Henry, and at whose request did you do so?

A Well, Mr. Henry asked me for the Notice, and I think he came to me the first day when we came back from Detroit to live in Foley, and I couldn't find the Notice then and he come later on and asked me again and I handed the Notice to him.

Q Now, do you recall what date this Notice was delivered to Mr. Henry?

A No sir, I do not.

Q Can you give the approximate date?

A Well, as near as I can get to it, it was about the first part of November.

Q In what year?

A In 1928. I think that's right.

Q In what year did you go to Europe?

A That was 1927, in November, 1927, as near as I can get to it. Isn't that the year?

MR. HARWOOD: Well, I am asking you.

A Yes.

Q That was the time you handed the Notice to Mr. Henry?

A Yes, it either was the latter part of October or the first part of November.

Q Of 1927?

A 1927, yes sir.

Q Now, referring to the five promissory notes which have been offered as Respondents' Identifications "B", "C", "D" "E" and "F", what was the date, or dates, of the interest

payments made on these notes?

A Well, the interest had been paid on April 5th, 1928.

Q Mr. Goetz, have you ever had any negotiations with Mr. Henry relative to a cash settlement of the notes, herein offered, and the release of the vendor's lien offered herein?

A Well, Mr. Henry sent me a telegram, I think it was about October 1st, or November 1st, 1928, I think it was, and offered to pay me two thousand dollars cash for the mortgage, or for the notes, in full payment of everything, and I answered him back by letter that I wouldn't take nothing less than thirty five hundred dollars cash, and give him time to pay it until November 10th.

Q Do you know where that telegram is now, Mr. Goetz?

A I think Mr. Beebe has it.

Q Now, Mr. Goetz, did Mr. Henry ever request that you release your lien on that Foley property for any purpose or any reason at all?

A Yes, one day Mr. Henry came to me with a man from Robertsdale, from a loan association of Robertsdale, and they wanted me to surrender my first mortgage or lien, as you may call it, and wanted me to take a second lien for my interest in the property, and they wanted to pay me three thousand dollars, and for the balance, I should take a second lien, but I did not accept it.

Q Do you recall when that was?

A That was either December, 1927, or January, 1928. At

the time, I was up on the roof shingling my new house that I built in Foley. That's when it was.

Q Did Mr. Henry state to you at that time that he desired you to take the property back, because he felt that it had been misrepresented?

A No sir.

Q Did Mr. Henry at that time, or at any other time, offer to rescind the sale on the ground of fraud, or upon any ground?

A No sir.

Q Did he at any time, or at any time subsequent to that time, state to you directly that he felt that the property had been misrepresented?

A No sir.

Q And that he desired you to take the property back?

A No sir.

Q It is my understanding that Mr. Henry filed suits against the City of Foley, charging improper functionning of the septic tank in the sewer. Were you a party to or in any manner connected with those suits?

A No sir, I was no party to that suit. It was Mr. Henry's own suit. I had nothing to do with it.

Q In that connection, did you ever have a conversation with Mr. Henry relative to the extension of the due dates of the notes, which have been offered here, which was to depend on the outcome of the suit against the city?

A No sir.

Q Did you at any time tell Mr. Henry that you would extend those notes if he lost his case against the city?

A No sir.

Q Did you at any time state to Mr. Henry that an adjustment of his obligation would be made pending the outcome of his suit against the City of Foley?

A No sir, never.

Q Mr. Goetz, do you have any letters, or communications in your possession which you have received from Mr. Henry?

A No sir, Mr. Beebe has them.

Q To the best of your recollection , Mr. Goetz, when was the first time that you found out Mr. Henry was claiming that the property had been misrepresented and that you had sold it to him in a fraudulent manner?

A He never told me about that, to my best recollection.

Q When did you first find out, and how did you find out that Mr. Henry was claiming that the property had been misrepresented?

A Well, when I had foreclosed the lien and he filed suit against me.

Q Mr. Goetz, are you acquainted with Mr. Gus Reimer?

A Yes, I am acquainted with him.

Q Was Mr. Reimer a resident of Foley at the time you sold the property to the Henrys?

A No, he was a resident of Elberta, Alabama.

Q Do you recall having a conversation with Mr. Reimer after you sold the property to the Henrys?

A Yes, later on, after I sold the property to Henry, I remember telling him that I sold the property to Mr. Henry and I was glad to get away from there on account of my sickness, on account of my bronchitis, and from there I went to Texas.

Q Do you recall the date that was, Mr. Goetz?

A No sir, I do not.

Q Did you at that time, or any other time, state to Mr. Reimer that you were glad to get rid of the property, and that the Henrys did not know that the sewer was there, and that you did not tell them it was there?

A I don't remember of ever making such a remark.

Q Did you at any time ever tell Mr. Reimer that the sewer was in plain sight and that Mr. Henry should have seen it, and if he did not, it was his own fault?

A I don't remember ever making such a remark.

William J. H. Goetz

MRS. CHRISTINE E. GOETZ

DIRECT EXAMINATION

BY MR. DONALD D. HARWOOD, Attorney at Law, Santa Ana, California:

Q Mrs. Goetz, where do you reside?

A In Orange.

Q And are you one of the Respondents in this case?

A Yes sir.

Q Now, it is my understanding, Mr. Goetz, that after your property in Foley had been sold to Mr. and Mrs. Henry, you and your husband went to Europe, and returned to Foley in November, 1927. Is that correct?

A Yes sir.

Q Do you recall a conversation at Foley, in November, 1927, at the Henry place, at which time you talked with Mrs. Henry?

A Yes sir, I think she told me to come out and help to bake cookies, and I did go out there, but I never seen the sewerage or anything. I never saw it with them.

Q Can you state the substance of the conversation you had with Mrs. Henry at that time?

A Yes sir.

Q Will you state what it was?

A I can't remember what it was we were talking about. We were talking about this and about that.

Q It is my understanding, Mrs. Goetz, that Mrs. Henry has testified that you stated to her that you knew that Mr. Goetz had lied about the sewer when he sold the property to Mr. and Mrs. Henry, and that you stated at that time that you would not attempt to collect any money because of that if anything should ever happen to Mr. Goetz?

A No sir.

Q Did you make any such statement at that time?

A No sir.

Q Did you at that time, or at any other time, make any such statement to Mrs. Henry?

A No sir.

Q Mrs. Goetz, were you present at any of the conversations to which Mr. Goetz has testified having had with Mr. Henry?

A No sir, I wasn't at any conversation, only when they came in the kitchen and they said "that they loved the place", and that was all.

Q Do you recall what date that was?

A No, I can't recall it.

Christine E Goetz

C. A. HENRY and MARGUERITA HENRY, Complainants, -vs- THE TOWN OF FOLEY, Respondent.	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA IN EQUITY.

BRIEF OF COMPLAINANTS ON MOTION TO SET ASIDE SUBMISSION...

Under the facts in this case, it is admitted in the answer and all through the evidence that at the time the bill was filed, the Town of Foley was creating a nuisance by its sewage being deposited on the complainant's land in the creek, and polluting the waters of the creek all as alleged in the bill of complaint.

This being true, the complainant is entitled to an injunction against this nuisance and pollution.

In Thompson vs Behrmann, 37 New Jersey Equity, 345, in a Shooting Gallery nuisance case, the court being satisfied that when the bill was filed, the shooting in the range was a nuisance, it was of such a character as to warrant the application to the court of Chancery. To quote further from this case:-

> "Since that time it appears that there has been much less annoyance. The defendant insists that there is none at all. Perhaps the shooting can be so conducted as not to annoy the neighbors. There is a conflict of testimony as to whether it is so conducted

now. Being satisfied that there was ground for an injunction when the bill was filed, it is my duty, under the circumstances, to grant the writ. The defendant has not stopped the shooting, but is now using a rifle of a smaller calibre. Had he ceased altogether there would have been no need of an injunction, but he has not, and he may again conduct the business in such a way as to be a nuisance, if he does not do so now. The complainants have a right to protection. There will, therefore, be an injunction restraining the defendant from so using the shooting-gallery or rifle range, or permitting it to be used, as in any way to annoy the complainants or their families, or tenants occupying their respective premises, by the noise of the shooting or the smoke therefrom."

The same principle was held in the case of Carlisle vs. Cooper, 21 N. J. Equity, 576, in which a nuisance was created by a milldam causing water to overflow complainant's lands. The defendant claimed he had remedied the nuisance, but there was evidence to the contrary and the court held Complainant entitled to the writ.

As throwing light on this question of abatement pending suit see the case of Peck vs. Elder, 5 N. Y. Sup. Ct., (3 Sandf) 126, where it is held even where the nuisance is abated pending suit, the complainant may be entitled to a perpetual injunction.

The voluntary abatement of a nuisance after action commenced, does not prejudice the rights of a deligent plaintiff. Heather vs. Hearn (Sup) 5 N. Y. Supp., 85: Sheaver vs Hodgson, 3 Rawle 211. (Pa. Case)

No one has a right to create a nuisance by a privy or any devise or scheme whereby the human excreta is brought offensively near the premises of another. Town of Vernon vs

Edgworth, 148 Ala., 490.

The injuries suffered by the complainants as proved by the uncontradicted evidence, show the right to an abatement of the nuisance. Stouts Mountain Coal & Coke Company vs Tedder, 189 Ala., 637-642.

The pollution of the water in the creek on complainant's land is a nuisance and should be abated. Pratt Con. Coal vs Pierce, 12 Ala. App., 431.

It is argued by the respondent that it has abated the nuisance. This argument is refuted by not only the evidence of Complainant, but by that of respondent as well.

The respondent admits it has a two compartment septic tank there to retard the sewage and rid it of some of its impurities. It does not even claim that this rids the effluent of all nor any great part of its impurities. Quoting from one of the latest and most approved seientific works on the subject, "Preventive Medicine and Hygene", by Rosenau, we find:-

"RELATIVE BACTERIAL EFFICIENCY OF DIFFERENT PROCESSES.-

By way of recapitulation the following figures are given to show the relative sanitary efficiency of various processes employed in sewage treatment:

PROCESS	PERCENTAGE REMOVAL OF BACTERIA
Coarse screens	0 to 5
Fine screens	10 to 20
Grit chambers	10 to 25
Sedimentation	25 to 75
Septic sedimentation	25 to 75
Chemical precipitation	40 to 80
Contact beds	80 to 80
Trickling filters	90 to 95
Activated sludge process	90 to 98
Intermittent sand filters	95 to 98

Broad irrigation	97	to	99
Disinfection of raw or settled seqage ..	90	to	95
Disinfection of filter effluents	98	to	99

These figures are mere approximations, but they serve to show how some forms of treatment, very desirable from many points of view, have a low hygienic efficiency. Septic treatment, for example, does not greatly reduce the number of bacteria in sewage; in fact, if the period of detention of the sewage in the tank is long the number of bacteria in the effluent may be greater than those in the raw sewage." Page1113. Therefore, eight processes of sewerage disposal better than Respondent's.

I think these facts,figures and authorities establish complainant's case and their right to a perpetual injunction. If the court is in doubt, I refer it to the case of Martin Building Co. vs. Imperial Laundry Co, decided June 27th, 1929, by the Supreme court of Alabama, in Manuscript, a certified copy of the opinion being herewith enclosed with this brief. If the court wishes more light on the subject, let it adopt the course suggested by Justice Gardner in this above cited case. That course is stated as follows:

"In English v. Progress Elec. Co., this Court approved the suggestion that in some cases it is well to direct a reference to ascertain if the evil complained of may be remedied by approved appliances or scientific alterations and that the register report thereon. We again approve this method as most advantageous. The order of reference to the register should provide a wide range of investigation as to any practical method for remedying the evil complained of, as it should not be confined merely to those herein discussed.

It results as our conclusion that the decree dismissing the bill is error. It is therefore reversed and the cause remanded."

Now, as to comparative inconvenience, this doctrine

only can be invoked when there is a real necessity for inconvenience on one or both of the parties. But where it is apparent from the evidence that, if respondent would adopt reasonably efficient means of sewage disposal, no one would suffer, this doctrine does not apply.

It is clear from the testimony of the witnesses for both complainant and respondent, and from the very nature of this tank itself, that complainants are being burdened with a nuisance created by the respondent. It is also clear that there are many better methods of sewage disposal which respondent could adopt, but which it is shown resolutely to refuse to adopt. It is proved that the land on which the foul and polluted effluent flows is the land of complainants for which respondent has paid nothing, a pure appropriation of complainant's property for which no compensation has been made. This is not right. Argue all respondents may, the injustice and hardship, wholely unnecessary on complainant, remains. There is a way to stop this and as it is clear the respondent, has not stopped it, and does not intend to do so, this court is called on to find a way to compel the thing to be done that ought to be done.

If the submission is set aside, the court may have more evidence brought in. It it is not set aside, a reference to the Register can be had to bring in a report as to the facts of the evil and the best way to remedy same.

In conclusion, it is insisted:

FIRST: That on the admitted facts, notwithstanding the

makeshift of septic tank, the nuisance alleged in the bill and admitted in the answer, is there as alleged, and should be abated by a proper decree of this court.

SECOND: That if this court is in doubt about the extent of the relief to be granted, let a reference to the Register be ordered and the facts reported, with suggestions as to approved appliances and scientific alterations that may readily remedy the evil complained of as held in Martin Building Co., vs Imperial Laundry Co., supra.

This JULY 31st 1929.

R. O. Roach.
SOLICITOR FOR COMPLAINANTS.

I hereby certify that I am this day mailing a copy of this brief to Lloyd A. Magney, Esquire, Solicitor for Respondent.

This JULY 31st, 1929.

R. O. Roach.
SOLICITOR FOR COMPLAINANTS.

STATE OF ALABAMA.

BALDWIN COUNTY.

KNOW ALL MEN BY THESE PRESENTS: That for and in consideration of the cancellation, release and discharge of Marguerita Henry and Charles A. Henry of any and all indebtedness described in, due under or secured by that certain Vendor's Lien reserved to and by William J. H. Goetz and Christine E. Goetz in, by and under that certain Deed from William J. H. Goetz and Christine E. Goetz to Marguerita Henry and Charles A. Henry, of date February 8, 1927, of record in the office of the Judge of Probate of Baldwin County, Alabama, in Record Book Number 42 N.S., pages 249-50, and conveying and covering the property hereinafter described, together with the notes evidencing said indebtedness, and other good and valuable consideration this day cash in hand paid to Marguerita Henry and Charles A. Henry, receipt whereof is hereby acknowledged, the said Marguerita Henry and Charles A. Henry, her husband, have and by these presents do hereby GRANT, BARGAIN, SELL AND CONVEY unto the said William J. H. Goetz and Christine E. Goetz the following described lands situated in Baldwin County, Alabama, to-wit:

> Farm Number Seven (7), being the Southwest quarter of the Northeast quarter of Section Twenty-eight (28), Township Seven (7) South, Range Four (4) East, except four (4) acres described as follows:- Commencing at the Southwest corner of the Northeast quarter of Section 28, Township 7 South of Range 4 East, run North 600 feet; thence, East 300 feet, thence, South 600 feet, thence, West 300 feet, to the place of beginning.
>
> Intending to describe, cover and convey and the said Marguerita Henry and Charles A. Henry do hereby convey the same property as described in and covered by the Deed hereinabove described.

TO HAVE AND TO HOLD unto the said William J. H. Goetz and Christine E. Goetz, their heirs and assigns, FOREVER. And the said Marguerita Henry and Charles A. Henry do covenant with the said William J. H. Goetz and Christine E. Goetz that they are seized in fee simple of the above described premises; that they have the right to sell and convey the same; that the said premises are free from all encumbrances and that they will and their heirs,

executors and administrators shall forever warrant and defend the same to the said William J. H. Goetz and Christine E. Goetz, their heirs and assigns, against the lawful claims of all persons whomsoever.

WITNESS the hands and seals of the said Marguerita Henry and Charles A. Henry, her husband, this 5th day of February, 1930.

Marguerita Henry SEAL

Charles A. Henry SEAL

STATE OF ALABAMA.

BALDWIN COUNTY.

I, Ida M. Turnbull, a Notary Public in and for said County in said State, hereby certify that Marguerita Henry and Charles A. Henry, her husband, whose names are signed to the foregoing instrument and who are known to me, acknowledged before me on this day that, being informed of the contents of the instrument, they executed the same voluntarily on the day the same bears date.

Given under my hand and Notarial Seal hereto affixed by me, this 5th day of February, 1930.

Ida M. Turnbull
Notary Public, Baldwin County,
State of Alabama.

(affix seal)

STATE OF ALABAMA.

BALDWIN COUNTY.

I, Ida M. Turnbull, a Notary Public in and for said County in said State, hereby certify that on the 5th day of February, 1930, came before me the within named Marguerita Henry, known to me to be the wife of the within named Charles A. Henry, who, being examined separate and apart from the husband touching her signature to the within instrument, acknowledged that she signed the same of her own free will and accord and without fear, constraints or threats on the part of the husband.

Given under my hand and Notarial Seal hereto affixed by me, this 5th day of February, 1930.

Ida M. Turnbull
Notary Public, Baldwin County,
State of Alabama.

(affix seal)

MARGUERITA HENRY and
CHARLES A. HENRY,

Complainants,

vs.

WILLIAM J. H. GOETZ, CHRISTINE E. GOETZ, W. C. BEEBE and H. M. HALL, individually and as partners composing the firm of Beebe & Hall,

Respondents.

IN THE CIRCUIT COURT-EQUITY SIDE

STATE OF ALABAMA

BALDWIN COUNTY.

NO._____

TO ANY SHERIFF OF THE STATE OF ALABAMA, GREETING:-

We command you that without delay you execute this Writ and due return thereof make to us how you have executed same on the first Monday in March, 1930.

WITNESS my hand and seal as Register of the Circuit Court, Equity-Side, Baldwin County, Alabama, this February 5th, 1930.

D. M. Richardson

Register of the Circuit Court, Equity Side, Baldwin County, Alabama.

TO WILLIAM J. H. GOETZ, CHRISTINE E. GOETZ, and W. C. BEEBE and H. M. HALL, individually and as partners composing the firm of Beebe & Hall:

WHEREAS, Marguerita Henry and Charles A. Henry did on the 5th day of February, 1930, file their Bill of Complaint in the Circuit Court, Equity Side, of Baldwin County, Alabama, against William J. H. Goetz, Christine E. Goetz, and W. C. Beebe and H. M. Hall, individually and as partners composing the firm of Beebe & Hall, praying among other things that a preliminary or temporary Writ of Injunction issue against William J. H. Goetz, Christine E. Goetz and W. C. Beebe and H. M. Hall, individually and as partners composing the firm of Beebe & Hall, restraining and enjoining them and all of them from foreclosing or attempting to foreclose, causing to be foreclosed or proceeding, directly or indirectly, with the exercise of any powers of sale contained in the Vendor's Lien to and in fav-

or of William J. H. Goetz and Christine E. Goetz in, by and under that certain Deed from William J. H. Goetz and Christine E. Goetz to Marguerita Henry and Charles A. Henry, of date February 8, 1927, of record in the office of the Judge of Probate of Baldwin County, Alabama, in Record Book Number 42 N.S., pages 249-50, and covering the following described land situated in Baldwin County, Alabama, to-wit:-

> Farm Number Seven (7), being the Southwest quarter of the Northeast quarter of Section twenty-eight (28), Township seven (7) South, Range four (4) East, except four (4) acres described as follows: Commencing at the Southwest corner of the Northeast quarter of Section 28, Township 7 South of Range 4 East, run North 600 feet; thence, East 300 feet, thence, South 600 feet, thence, West 300 feet, to the place of beginning;

and from doing anything whatever to change the statu quo now existing with reference to the said Vendor's Lien and in pending foreclosure thereof;

AND WHEREAS, on the said Bill being exhibited to the Hon. Francis W. Hare, Judge of said Court, on the day of the filing thereof, he did order that upon Complainants entering into Bond with sureties in the sum of Seven hundred fifty Dollars ($750.00), approved by the Register of this Court and payable and conditioned according to law, a Writ of Injunction issue out of said Court according to the prayer of said Bill;

AND WHEREAS, Bond has been given as required by said fiat;

THESE, THEREFORE, are to command and strictly enjoin you and each and all of you from foreclosing or attempting to foreclose, causing to be foreclosed or proceeding, directly or indirectly, with the exercise of any powers of sale contained in the Vendor's Lien to and in favor of William J. H. Goetz and Christine E. Goetz in, by and under that certain Deed from William J. H. Goetz and Christine E. Goetz to Marguerita Henry and Charles A. Henry, of date February 8, 1927, of record in the office of the Judge of Probate of Baldwin County, Alabama, in Record Book Number 42 N.S., pages 249-50, and covering the following described land situated in Baldwin County, Alabama, to-wit:-

Farm Number Seven (7), being the Southwest quarter of the Northeast quarter of Section twenty-eight (28), Township seven (7) South, Range four (4) East, except four (4) acres described as follows: Commencing at the Southwest corner of the Northeast quarter of Section 28, Township 7 South of Range 4 East, run North 600 feet; thence, East 300 feet, thence, South 600 feet, thence, West 300 feet, to the place of beginning;

and from doing anything whatever to change the statu quo now existing with reference to the said Vendor's Lien and in pending foreclosure thereof, until further orders from this Court; and this Writ of Injunction you will comply with and obey under penalty.

Issued this February 5th, 1930.

T. N. Nicrosmore

As Register of the Circuit Court,
Equity Side, Baldwin County, Alabama.

STATE OF ALABAMA.
BALDWIN COUNTY.

MARGUERITA HENRY and CHARLES A. HENRY,
Complainants,

vs.

WILLIAM J. H. GOETZ, CHRISTINE GOETZ, W. C. BEEBE and H. M. HALL, individually and as partners composing the firm of Beebe and Hall,
Respondents.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
IN CHANCERY.
NO. 875.

The Respondents, William J. H. Goetz and Christine Goetz, by their solicitors, Beebe & Hall, request the oral examination of the following named witnesses, on behalf of the respondents, viz.:

William J. H. Goetz

Christine Goetz

said witnesses reside in the County of Orange, State of California.

William J. White, a Notary Public of 319 Hall of Records, Santa Ana, California, is suggested as a suitable person to be appointed Commissioner to take the oral deposition of said witnesses on such oral examination.

Beebe & Hall
Solicitors for Respondents.

MARGUERITA HENRY and CHARLES A. HENRY,
Complainants,

vs.

WILLIAM J. H. GOETZ and CHRISTINE E. GOETZ, and W. C. BEEBE and H. M. HALL, individually and as partners composing the firm of Beebe & Hall,
Respondents.

IN THE CIRCUIT COURT-EQUITY SIDE.

STATE OF ALABAMA.

BALDWIN COUNTY.

NO. 873.

ORDER OF PUBLICATION AS TO NON-RESIDENT DEFENDANTS.

It being shown and made to appear by the Bill of Complaint in this cause, said Bill of Complaint being sworn to, that the defendants, William J. H. Goetz and Christine E. Goetz, are non-residents of the State of Alabama, residing at Orange, in the State of California, and that said defendants and each of them are over the age of twenty-one years; it is, therefore,

ORDERED that the defendants, William J. H. Goetz and Christine E. Goetz, and each of them be and they and each of them hereby are required to answer or demur to said Bill before the 17th day of March, 1930; it is further,

ORDERED that this Order of Publication be published in The Baldwin Times, a newspaper published at Bay Minette, Alabama, printed in the English language and of general circulation in Baldwin County, Alabama, the County where published, once a week for four consecutive weeks, that a copy of this Order be posted up at the door of the Court House of Baldwin County, Alabama, and that another copy thereof be sent by mail to each of sadd defendants addressed to Orange, California, which copies shall be posted up and sent by mail within twenty (20) days from the making of this Order.

IN WITNESS WHEREOF, the said T. W. Richersonhereunto sets his hand as Register and affixes the Seal of said Court, on this the 10th day of February, 1930.

T. W. Richerson
Register.

NORBORNE STONE,
Solicitor for Complainants.

MARGUERITA HENRY and CHARLES A. HENRY, Complainants, vs. WILLIAM J. H. GOETZ, CHRISTINE E. GOETZ, W. C. BEEBE and H. M. HALL, individually and as partners composing the firm of Beebe & Hall, Respondents.	IN THE CIRCUIT COURT-EQUITY SIDE STATE OF ALABAMA BALDWIN COUNTY. NO._____

KNOW ALL MEN BY THESE PRESENTS: That we, Marguerita Henry and Charles A. Henry, as Principals, and the undersigned as Sureties, are held and firmly bound unto T. W. Richerson, Register of the Circuit Court, Equity Side, of Baldwin County, State of Alabama, and his successors in office, in the sum of Seven hundred fifty ——— 00/100 Dollars ($750.00), for the payment of which to the said Register, or his successors, we bind ourselves, our and each of our executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this the 5th day of February, 1930.

WHEREAS, the above bound Principals have filed their Bill of Complaint in the said Circuit Court, Equity Side, of Baldwin County, Alabama, and have obtained thereon an Order for the issuance of an Injunction from the Hon. Francis W. Hare, Judge, to restrain and enjoin William J. H. Goetz, Christine E. Goetz, and W. C. Beebe and H. M. Hall, individually and as partners composing the firm of Beebe & Hall, from foreclosing or attempting to foreclose, causing to be foreclosed or proceeding, directly or indirectly, with the exercise of any powers of sale contained in the Vendor's Lien to and in favor of William J. H. Goetz and Christine E. Goetz in, by and under that certain Deed from William J. H. Goetz and Christine E. Goetz to Marguerita Henry and Charles A. Henry, of date February 8, 1927, of record in the office of the Judge of Probate of Baldwin County, Alabama, in Record Book Number 42 N.S., pages 249-50, and covering the following described land situated

in Baldwin County, Alabama, to-wit:-

> Farm Number Seven (7), being the Southwest quarter of the Northeast quarter of Section twenty-eight (28), Township seven (7) South, Range four (4) East, except four (4) acres described as follows: Commencing at the Southwest corner of the Northeast quarter of Section 28, Township 7 South of Range 4 East, run North 600 feet; thence, East 300 feet, thence, South 600 feet, thence, West 300 feet, to the place of beginning;

and from doing anything whatever to change the statu quo now existing with reference to the said Vendor's Lien and in pending foreclosure thereof;

NOW, THEREFORE, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH: That if the said above bound Principals, their heirs, executors or administrators, or any of them, shall pay or cause to be paid all damages which any person may sustain by the suing out of said Injunction, if the same is dissolved by the said Circuit Court Equity Side on the Bill filed by the said above bound Principals, then the obligation to be void, otherwise to remain in full force and effect.

WITNESS our hands and seals on the day and year first above written.

Marguerite Stacey SEAL

Charles A. Stacey SEAL

Jules C. Valentine SEAL

Nic Krump SEAL

By Lloyd W. Magnus
As his attorney in fact.

Taken and approved this
February 3-rd, 1930.

T. R. Runnon
Register.

POWER OF ATTORNEY.

STATE OF ALABAMA,)
)
County of Baldwin.)

KNOW ALL MEN BY THESE PRESENTS, that I, Nic Krump, of said county and state, do hereby make, constitute and appoint Lloyd A. Magney, of Foley, Baldwin County, Alabama, my agent and attorney in fact for the purpose of making and executing, in my name and stead any and all bonds, indemnity or other security for Charles A. Henry and Marguerita Henry in the action wherein they are plaintiffs and William J. H. Goetz/~~is~~ et al are defendant. And I do hereby acknowledge myself to be bound by any such bond, indemnity or security as may be executed by my said attorney, hereby ratifying any and all acts by him performed.

IN WITNESS WHEREOF I have hereunto set my hand and seal this 4th day of February, 1930.

Nic Krump

STATE OF ALABAMA,)
)
County of Baldwin.)

I, E Frank Sanders, a notary public in and for said county and state do hereby certify that Nic Krump, whose name is signed to the foregoing power of attorney and who is known to me, acknowledged before me on this day that, being informed of the contents of the said power of attorney, he signed and executed the same voluntarily on the day the same bears date.

GIVEN under my hand and officialseal this 4th day of February, 1930.

E Frank Sanders
Notary Public.
My Commission Expires Sept. 30, 1930

MARGUERITA HENRY and CHARLES A. HENRY, Complainants, vs. WILLIAM J. H. GOETZ, CHRISTINE E. GOETZ, W. C. BEEBE and H. M. HALL, individually and as partners composing the firm of BEEBE & HALL, Defendants.	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN EQUITY.

And now come the defendants and demur to the Complainants' bill of complaint, and as grounds thereof say:

FIRST:

There is no equity in the bill.

SECOND:

The complaint alleges a payment of Two Hundred Fifty Dollars ($250.00), but does not allege when and how the same was paid.

THIRD:

The complaint alleges notices given by complainants to and demand made by them on the defendants, William J. H. Goetz and Christine E. Goetz, but does not allege when and how such notice was given or what was the tenor and effect of said notices and demand.

FOURTH:

The complaint does not allege that the defendants knew that the alleged sewer and septic tank were located as alleged in said bill, nor facts from which it might be presumed that they knew they were there; nor facts to put them upon notice that the septic tank and sewer were located as alleged.

FIFTH:

The complaint does not allege that the complainants believed and relied upon the statements alleged to have been made by the defendant, William J. H. Goetz, to the complainant, Charles A. Henry.

SIXTH:

That it does not appear from said bill of complaint that

the presence of the alleged septic tank is the cause of complainants' damages, but for aught that appears in said bill of complaint the alleged damages are the proximate result of the improper functioning of the said septic tank and sewer system.

SEVENTH:

For aught that appears in the said bill of complaint the presence of said septic tank and sewer system as alleged does not adversely affect the value and use of said property for the purposes for which the complainants alleged the same was purchased by them.

EIGHTH:

For that the said complaint alleges that complainants spent large sums of money in improving said property and claim damages therefor, but does not allege when the said improvements were made, nor the character of the same, nor the cost thereof, nor that the said improvements are damaged by virtue of the said septic tank and sewer system.

NINTH:

For that said complaint alleges that the complainants tendered to W. C. Beebe and H. M. Hall, as copartners composing the firm of Beebe & Hall, possession of said premises and a reconveyance to William J. H. Goetz and Christine E. Goetz of the said property, with the demand that the vendor's lien be cancelled and the notes evidencing the debt thereby secured be delivered up, the money repaid and your complainants' damages paid, but does not allege that the said W. C. Beebe and H. M. Hall were authorized by the said complainants to receive the same and to surrender up and cancel the said vendor's lien and the notes thereby secured, nor to pay complainants' damages, nor does it allege that the complainants demanded any sum certain as damages.

TENTH:

That the said bill shows on its face that this Court is without jurisdiction of the matters thereof.

SEVENTEENTH:

Said bill of complaint prays judgment in favor of Marguerita Henry and does not show that the said Marguerita Henry had any knowledge of the representations alleged to have been made by the said William J. H. Goetz, or that she relied on the same.

EIGHTEENTH:

That it affirmatively appears in the bill of complaint that the complainants by their conduct, after knowledge of the matters complained of, occupied said premises and treated the same as their own, mortgaging the same, and by such acts have waived their rights to rescind the said contract, and that they should now be estopped to claim any rights thereunder.

NINETEENTH:

That there is a misjoinder of parties complainant.

TWENTIETH:

That there is a misjoinder of parties defendant.

TWENTY-FIRST:

That said bill is multifarious.

Beebe & Hale

Attorneys for Defendants.

873

MARGUERITA HENRY and CHARLES A. HENRY, Complainants,

vs.

WILLIAM J. H. GOETZ ET AL., Respondents.

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA.
IN CHANCERY.
NO. 873.

APPLICATION FOR ORAL EXAMINATION OF WITNESSES FOR RESPONDENTS.

Filed January 2, 1935.

W. A. Stone
Register.

MARGUERITA HENRY & CHARLES A. HENRY,

COMPLAINANTS

VS

WILLIAM J. H. GOETZ, ET AL,

RESPONDENTS

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA
#873
IN CHANCERY

ORDER

This cause coming on to be heard on the Motion of the Respondents to dismiss the Bill of Complaint for want of jurisdiction and the Plea of Respondents, was submitted to the Court and the Court being fully advised in the premises finds that there is no merit in said Motion and Plea and that said Motion and Plea should be denied.

It is , therefore, ordered that the Motion and Plea of Respondents be and the same hereby are denied, over-ruled and dismissed and that Respondents be and they hereby are allowed sixty (60) days from this date in which to answer to the Bill of Complaint.

Dated this 26th day of August, 1932.

F. W. Hare

Judge.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
#873
IN CHANCERY

RECORDED

MARGUERITA HENRY AND CHARLES A. HENRY,

COMPLAINANTS

VS

WILLIAM J. H. GOETZ, ET AL,

RESPONDENTS

ORDER

Lloyd A. Magney
Attorney for Complainants.

RECORDED

Goetz
vs
Henry

C. A. HENRY, ET AL

COMPLAINANTS

vs

W. J. H. GOETZ, ET AL,

DEFENDANTS

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA
IN CHANCERY

BRIEF OF COMPLAINANTS ON MOTION TO DISMISS FOR WANT OF JURISDICTION.

The motion of the Defendants to dismiss the Bill for want of jurisdiction and the brief submitted in support of said motion, proceed upon the theory that the allegations of the Bill disclose a case in which the Court would not be justified in decreeing a recision of the contract because, the averments of the Bill disclose that the Complainants continued in the occupancy of the property and treated the property as their own and so have lost the right of recision which would have been available to them, under the facts, if promptly exercised.

There is no question but that the authorities cited by Defendants establish the law to the effect that one who is entitled to sue for a recision of his contract because of fraud in inducing him to enter into such contract, must proceed promptly upon discovery of the fraud and if he fails so to do, without goodexcuse, the right of recision will be lost. This is a general rule of law and there is no disposition on the part of Complainants to question it.

But there are exceptions to this general rule of law and Defendants apparently have over-looked the allegations of Paragraph 17 of the Bill which clearly bring this case within one of the generaly recognised exceptions to the rule requiring prompt action to rescind a contract.

The exception to the rule is well established by the authorities. The law is stated by Corpus Juris as follows:

> (#230) E. EXCUSES FOR DELAY - 1. IN GENERAL. Lapse of time will not b ar relief where circumstances exist which excuse the delay and render it inequitable to interpose the bar. There is no absolute rule as to what constitutes an excuse for an apparently unreasonable

delay. It depends on the circumstances of the particular case and rests in the sound discretion of the Chancellor, and the conclusion reached by him will not ordinarily be disturbed on appeal. Great/liberality is allowed in excusing delay where actual fraud is charged than in other cases. " 21 C. J. Page 237.

"(#239) 5. NEGOTIATIONS FOR SETTLEMENT.
Delay will be excused when occasioned by efforts to obtain a settlement or satisfaction without litigation. " 21 C. J. Page 243.

"(#240) 6. DELAY INDUCED BY DEFENDANT. a. IN GENERAL.
A delay is excusable where it was induced by the adverse party; he cannot take advantage of a delay which he himself has caused or to which he has contributed, especially where actual hindrance has been caused by his fraud or concealment, so where Plaintiff's delay has taken place in pursuance of an agreement with Defendant that the later will not take advantage of it, or under such circumstances as to show an acquiescence therein by Defendant, no laches can be imputed to Plaintiff for his failure sooner to commence the suit." 21 C. J. Page 243.

"(Section 241) b. RECOGNITION OF PLAINTIFF'S RIGHT.
The continued recognition of acknowledgment by Defendant of Plaintiff's right is generally sufficient to account for delay in instituting suit to enforce it. Delays will thus be excused when occasioned, not only by Defendant's promises to do equity, or by actual payments, but also by Defendant's silence or other conduct indicating acquiescence in Plaintiff's right . " 21 Corpus Juris. Pages 243 and 244.

"The Supreme Court of Alabama is committed to this rule.

"The right to recision may be lost by failure to manifest an election to disaffirm the contract within a reasonable time. What constitutes a reasonable time must be determined from the circumstances of the case." Foster vs. Gressett, 29 Ala. 393.
Undue and unnecessary delay in exercising the power of recision is regarded as evidence of an election to treat the sale as valid, but is dependent for its weight upon existing circumstances. According to the averments of the bill, the Complainants had neither notice nor knowledge of the vendor's want of title until May 1,1888 and made the offer to rescind November 21, 1888. Complainants were strangers and residences of the State of Georgia, and in the meantime yellow fever was prevalant in Decatur, Under these circumstances we cannot say that the delay was sufficient to amount to acquiescence in the sale." Orendorff, et al vs Tallman, et al. 90 Ala 441 7 So 821.

Certainly the averments of this bill which, for the purposes of this motion must be taken as true, do not disclose any intention on the part of the Complainants in this case to affirm that contract or to give up or waive any of their rights against the

Defendants by reason of fraud which had been perpetuated upon them and the test is, according to the decisions, whether or not the delay in filing the suit manifests an election on the part of the Complainants to treat the contract as valid. The fact is apparent that so long as the Town of Foley's septic tank remained in operation immediately adjacent to the property involved, Complainants refused to accept the property and at all times were looking to the Defendants to make good to them for the fraudulent representations of fact upon which Complainants had relied. However, in the event that the injunction suit against the Town of Foley could be won by Complainants and the removal of the septic tank compelled, then the Complainants would be willing to ratify the contract and go on with it and it was at the Defendant's request that they prosecuted the suit against the Town and relied upon Defendant's promises that in the event the suit was lost the Defendant's would then adjust the matter. And it was at Defendant's request that they remained in possession of the property and did not then immediately sue for a Recision of the contract and in consideration of their doing so the Defendant's extended the time of payment of the next installment of the purchase price until the suit against the Town could be determined.

In another expression of the rule in such cases by the Supreme Court of Alabama we find the following language:

> "The relief appropriate to be afforded by the Courts is by enforcing recision of the contract of sale and cancellation of the deed. The right to rescind may be waived by the parties in whom it resides, whether he be the one originally injured, or his successor in interest; and such waiver may be implied from conduct inconsistent with an intention to exercise it, including acquiescence in the transaction for an unreasonable length of time. Howle vs Land Company 95 Ala. 389. 11 So 15. Lockwood vs Fitts 90 Ala. 150 7 So 467. Butmere delay in these steps to avoid the deed may be so explained as to show it was not in acquiescence. What will be considered a reasonable time for moving to disaffirm may depend on the situation and condition of the parties, and the circumstances of the particular case. Orendorff vs Tallman. 90 Ala. 441 7 So 821 18 Enc. Pl & Prac. 826.

"The bill avers, in substance, that the deed it assails was obtained from Complainant's ancestress, while her mind was unsound, at about one-fourth the value of the land it conveyed and by means of the purchased influence of the one in whom she was accustomed to repose trust and confidence; that thereafter she continued to decline to a state of total insanity lasting until her death. Taken as ture as they must be on demurrer, these averments show a right lay in the grantor to have the sale avoided and they furthermore rebut all presumption that willing acquiescence was the cause of her failure to assertthat right. Subjects of such infirmity merit protection from Courts of Equity, so far, at least, as to be relieved from such presumptions, and the imputation of laches as well."

"Complainants themselves waited before filing this bill about two years and eight months after the death of their ancestress. But it is averred that since then they have continuously asserted their rights in the lands, by demands on Defendant, and that he made promises to pay for their claims, on which they relied, and were so caused to postpone legal proceedings. Delay so induced by Defendant cannot fairly be attributed to acquiescencein his holding nor can it be accounted laches." Walling & Thomas, 133 Ala. 426, 31 So 982.

Under these authorities the averments of Paragraph 17 of Complainant's bill are amply sufficient to excuse Complainants for the delay between the time of their original contract with the Defendants and the time of filing their suit for recission. True that time is from February 1, 1927 to February 5, 1930, approximately three years but the bill discloses that it was impossible for the Complainants to rescind after the contract was made and after they discovered the fraud until November 1927 for in the meantime the Defendants were travelling in Europe. Immediately upon their return Complainants notified Defendants of their dissatisfaction but at Defendants's request Complainants went ahead with the negotiations then pending with the Town of Foley and when those negotiations were fruttless filed their suit against the Town of Foley as agreed with the Defendants and prosecuted that suit to a final decree which was not entered until August 29, 1929. Immediately upon the termination of the suit Complainants notified the Defendants by mail, as the Defendants were then, as now, residing in California and the necessary correspondence until the Defendants finally refused

to adjust the matter as they had promised, took up the balance of the time until the suit was filed.

Inasmuch as this delay was occasioned not only with the consent of the Defendants but at their express request and as the of the Defendants that if the septic tank were not removed that then the Defendants would adjust the matter with them, certainly it cannot be said that they have at any time, by their actions in dealing with the property since they acquired it, evidenced any intention to ratify the contract they were induced to enter into by the fraudulent misrepresentations of the Defendants.

This being true, the case is one in which, if the averments of the bill are proved, the Court not only could but should decree a recision and in such a case the service on the Defendants shown by this record, constructive service by registered mail, is all that is necessary to give the Court jurisdiction.

The Complainants contend that the motion of the Defendants to dismiss the bill for want of jurisdiction should be overruled by the Court.

Respectfully submitted,

Lloyd McMurray

Solicitor for Complainants

I hereby certify that a copy of this brief was served on Beebe & Hall, Solicitors for Defendants, this 22nd day of March, 1932.

Lloyd McMurray.

Solicitor for Complainants.

MARGUERITA HENRY and CHARLES A. HENRY, Complainants, vs W. C. BEEBE and H. M. HALL, individually and as partners composing the firm of BEEBE & HALL, ET AL, Defendants.	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN EQUITY.

TO CHARLES A. HENRY and MARGUERITA HENRY, Complainants, and NORBORNE STONE, attorney for Complainants, in the above styled cause:

Notice is hereby given that motion will be made before the Hon. F. W. Hare, Judge of said Circuit Court on the 28th., day of February, 1930, to dissolve the injunction issued in the above styled cause against W. C. Beebe and H. M. Hall, individually and as partners composing the firm of Beebe & Hall, enjoining and restraining them from foreclosing or attempting to foreclose or causing to be foreclosed, or proceeding directly or indirectly with the exercise of the powers of sale contained in the vendor's lien to and in favor of William J. H. Goetz and Christine E. Goetz, in, by and under that certain deed from William J. H. Goetz and Christine E. Goetz to Marguerita Henry and Charles A. Henry of date February 8, 1927, of record in the office of the Judge of Probate of Baldwin County, Alabama, in Record Book 42NS, pages 249-50, for want of equity in the bill of complaint upon which said injunction was issued.

Beebe & Hall

W C Beebe

H M Hall

MARGUERITA HENRY and CHARLES A. HENRY,
Complainants,

vs

W. C. BEEBE and H. M. HALL, individually and as partners composing the firm of BEEBE & HALL, ET AL,
Defendants.

IN THE CIRCUIT COURT OF

BALDWIN COUNTY, ALABAMA.

IN EQUITY.

Comes W. C. Beebe and H. M. Hall, individually and as partners composing the firm of Beebe & Hall, Defendants in the above styled cause, and moves the Court to dissolve the injunction heretofore issued in the aforesaid cause on the 16 day of Feby, 1930, enjoining and restraining them from foreclosing or attempting to foreclose or causing to be foreclosed, or proceeding directly or indirectly with the exercise of the powers of sale contained in the vendor's lien to and in favor of William J. H. Goetz and Christine E. Goetz, in, by and under that certain deed from William J. H. Goetz and Christine E. Goetz to Marguerita Henry and Charles A. Henry of date February 8, 1927, of record in the office of the Judge of Probate of Baldwin County, Alabama, in Record Book 42NS, pages 249-50, and for grounds of such dissolution of the said injunction assigned that:

The bill of complaint upon which said injunction was issued is without equity.

Beebe & Hall
W C Beebe
H M Hall

BAY MINETTE, ALA. 3/1/30

M J W Richerson Clk

THE BALDWIN TIMES

PUBLISHED IN THE LAND OF THE GOLDEN SATSUMA

SUBSCRIPTION $2.00 PER YEAR IN ADVANCE
ADVERTISING RATES GIVEN ON APPLICATION

N C Stone Atty

Notice of Mc Ca Heavy vs W D Teetz et als.
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THE BALDWIN TIMES

PUBLISHED IN THE LAND OF THE GOLDEN SATSUMA

SUBSCRIPTION $2.00 PER YEAR IN ADVANCE
ADVERTISING RATES GIVEN ON APPLICATION

R. B. VAIL
EDITOR AND PROPRIETOR

BAY MINETTE, ALA.

WILLIAM J. H. GOETZ, CHRISTINE E. GOETZ, And W. C. BEEBE And H. M. HALL, individually and as partners composing the firm of Beebe & Hall. Respondents.
IN THE CIRCUIT COURT-EQUITY SIDE.
STATE OF ALABAMA,
BALDWIN COUNTY.

It being shown and made to appear by the Bill of Complaint in this cause, said Bill of Complaint being sworn to, that the defendants, William J. H. Goetz and Christine E. Goetz, are non-residents of the State of Alabama, residing at Orange, in the State of California, and that said defendants and each of them are over the age of twenty-one years; it is therefore

ORDERED that the defendants, William J. H. Goetz and Christine E. Goetz and each of them be and they and each of them hereby are required to answer or demur to said Bill before the 17th day of March, 1930; it is further,

ORDERED that this Order of Publication be published in The Baldwin Times, a newspaper published at Bay Minette, Alabama, printed in the English language and of general circulation in Baldwin County, Alabama, the County where published, once a week for four consecutive weeks, that a copy of this Order be posted up at the door of the Court House of Baldwin County, Alabama, and that another copy thereof be sent by mail to each of said defendants addressed to Orange, California, which copies shall be posted up and sent by mail within twenty (20) days from the making of this Order.

IN WITNESS WHEREOF, the said T. W. Richerson hereunto sets his

Date of notice published

ALFIDAVIT OF PUBLICATION

STATE OF ALABAMA,
BALDWIN COUNTY.

R. B. Vail, being duly sworn, deposes and says that he is the **PUBLISHER** of **THE BALDWIN TIMES**, a Weekly Newspaper published at Bay Minette,, Baldwin County, Alabama; that the notice hereto attached of

M & A Henry

vs

Wm J H Goetz, C E Goetz et als

Was published in said Newspaper for 4 consecutive weeks in the following

February 13	1930	Vol.	41	No.	2
February 20	1930	Vol.	41	No.	3
February 27	1930	Vol.	41	No.	4
March 6	1930	Vol.	41	No.	5

Subscribed and sworn to before the undersigned this 27 day of March 1930

R. B. Vail
Publisher.

T. W. Richerson
Clerk Circuit Court.

[illegible]

RECEIPT FOR REGISTERED ARTICLE NO. 627

15 fee paid. 1 class postage paid. 2-11-, 1930
(Date)

From J.W. [illegible]
(Sender)

[illegible]

Addressed to [illegible]
(Street and number) (Post office and State)

Orange [illegible]
(Addressee)

(Street and number) (Post office and State)

Accepting employee will place initials in space below, indicating restricted delivery.

Return receipt fee ______ *Special delivery fee* ______

Delivery restricted to addressee { *in person* ______ / *or order* ______ } *Postmaster, per* ______

BAY MINETTE, ALA. REGISTERED FEB 11 1930 POSTMARK

RECEIPT FOR REGISTERED ARTICLE NO. 628

15 fee paid. 1 class postage paid. 2-11-, 1930
(Date)

From J.W. Pickerson
(Sender)

City

Addressed to [illegible] Mrs Christine Goels
(Street and number) (Post office and State)

Orange Calif
(Addressee)

(Street and number) (Post office and State)

Accepting employee will place initials in space below, indicating restricted delivery.

Return receipt fee 3 *Special delivery fee* ______

Delivery restricted to addressee { *in person* ______ / *or order* ______ } *Postmaster, per* ______

BAY MINETTE, ALA. REGISTERED FEB 1930 POSTMARK

15 Jno. Richey 2-11- 30
Jno. Williams Est. Henley
Orange 3

15 Jno. Richey 2-11- 30
[illegible] Jno. Johnson Est. Goode
Orange 3

SUMMONS--ORIGINAL

Moore Printing Co., Bay Minette, Ala.

The State of Alabama,
Baldwin County

Circuit Court of Baldwin County, In Equity

To Any Sheriff of the State of Alabama--GREETING:

WE COMMAND YOU, That you summon ~~W.C.Beebe,~~ H.M.Hall, individually and as partners composing the firm of Beebe & Hall,

of Baldwin County, to be and appear before the Judge of the Circuit Court of Baldwin County, exercising Chancery jurisdiction, within thirty days after the service of Summons, and there to answer, plead or demur, without oath, to a Bill of Complaint lately exhibited by

Marguerite Henry and Charles A.Henry

against said ~~W.C.Beebe,H.M.Hall ,individually and as partners composing the firm of~~ Beebe & Hall et al,

and further to do and perform what said Judge shall order and direct in that behalf. And this the said Defendant shall in no wise omit, under penalty, etc. And we further command that you return this writ with your endorsement thereon, to our said Court immediately upon the execution thereof.

WITNESS, T. W. Richerson, Register of said Circuit Court, this 6th day of ~~Febuary~~ 193__

T W Richerson Register

N. B.—Any party defendant is entitled to a copy of the bill upon application to the Register.

sent by Reg mail 2/11/30

SUMMONS--ORIGINAL

Moore Printing Co., Bay Minette, Ala.

The State of Alabama,
Baldwin County

Circuit Court of Baldwin County, In Equity

To Any Sheriff of the State of Alabama—GREETING:

WE COMMAND YOU, That you summon ~~William J.H.Goetz and Christine~~ E.Goetz, Orange California,

of - - - - - - - - - - - - County, to be and appear before the Judge of the Circuit Court of Baldwin County, exercising Chancery jurisdiction, within thirty days after the service of Summons, and there to answer, plead or demur, without oath, to a Bill of Complaint lately exhibited by

Marguerita Henry and Charles A.Henry,

against said ~~William J.H.Goetz and Christine E. Goetz et al.,~~

and further to do and perform what said Judge shall order and direct in that behalf. And this the said Defendant shall in no wise omit, under penalty, etc. And we further command that you return this writ with your endorsement thereon, to our said Court immediately upon the execution thereof.

WITNESS, T. W. Richerson, Register of said Circuit Court, this 6th day of Febuary 193 0

T W Richerson

Register

N. B.—Any party defendant is entitled to a copy of the bill upon application to the Register.

Original

SERVE ON _____

Circuit Court of Baldwin County
In Equity

No. _____

SUMMONS

Marguerita Henry and
Charles A. Henry.

vs.

William J.H.Goetz and
Christine E.Goetz,
Orange, California.

Norborne Stone.
Solicitor for Complainant

Recorded in Vol _____ Page _____

THE STATE OF ALABAMA,
BALDWIN COUNTY

Received in office this -6- _____

day of _____ 19__

_____
Sheriff.

Executed this _____ day of

_____ 19__

by leaving a copy of the within Summons with

_____

_____
Defendant.

_____
Sheriff.

By _____
Deputy Sheriff.

6 — Abjected

SERVE ON

Circuit Court of Baldwin County
In Equity

No.

SUMMONS

Marguerite Henry and

Charles A.Henry

vs.

W.C.Beebe ,H.M.Hall,individually

and as partners composing the

firm of Beebe & Hall et al,

Norborne Stone.
Solicitor for Complainant

Recorded in Vol. ____ Page ____

THE STATE OF ALABAMA,
BALDWIN COUNTY

Received in office this 6th

day of Febuary 19 30

Sheriff.

Executed this ____ day of

____ 19 ____

by leaving a copy of the within Summons with

Defendant.

Sheriff.

By ____

Deputy Sheriff.

BENJAMIN HENRY and
CHARLES A. HENRY,

Complainants,

vs.

WILLIAM J. H. COATS, CHRISTINE E. COATS, W. O. DOBBS and H. H. HALL, individually and as partners composing the firm of Dobbs & Hall,

Respondents.

IN THE CIRCUIT COURT-EQUITY SIDE
STATE OF ALABAMA
BALDWIN COUNTY.
NO._____

TO ANY SHERIFF OF THE STATE OF ALABAMA, GREETING:-

We command you that without delay you execute this writ and due return thereof make to us how you have executed same on the first Monday in March, 1930.

WITNESS my hand and seal as Register of the Circuit Court, Equity Side, Baldwin County, Alabama, this February 5th, 1930.

T. W. Rivenburgh
Register of the Circuit Court, Equity Side, Baldwin County, Alabama.

To WILLIAM J. H. COATS, CHRISTINE E. COATS and W. O. DOBBS and H. H. HALL, individually and as partners composing the firm of Dobbs & Hall:

WHEREAS, Benjamin Henry and Charles A. Henry did on the 5th day of February, 1930, file their Bill of Complaint in the Circuit Court, Equity Side, of Baldwin County, Alabama, against William J. H. Coats, Christine E. Coats, and W. O. Dobbs and H. H. Hall, individually and as partners composing the firm of Dobbs & Hall, praying, among other things that a preliminary or temporary writ of injunction issue against William J. H. Coats, Christine E. Coats and W. O. Dobbs and H. H. Hall, individually and as partners composing the firm of Dobbs & Hall, restraining and enjoining them and all of them from foreclosing or attempting to foreclose, causing to be foreclosed or proceeding, directly or indirectly, with the exercise of any powers of sale contained in the Vendor's Lien to and in fav-

or of William J. H. Coots and Christine L. Coots Jr. by and under that certain Deed from William J. H. Coots and Christine L. Coots to Marguerite Henry and Charles A. Henry, of date February 6, 1957, of record in the office of the Judge of Probate of Baldwin County, Alabama, in Record Book Number 68 R.P., pages 560-66, and covering the following described land situated in Baldwin County, Alabama, to-wit:-

> Lots Number Seven (7), being the Southwest quarter of the Northeast quarter of Section twenty-eight (28), Township seven (7) South, Range four (4) East, except four (4) acres described as follows: Beginning at the Northeast corner of the Northeast quarter of Section 28, Township 7 South of Range 4 East, run North 660 feet; thence, West 300 feet, thence, South 660 feet, thence, East 300 feet, to the place of beginning;

and from doing anything whatever to change the status quo now existing with reference to the said Vendor's Lien and in pending foreclosure thereof;

AND WHEREAS, on the said Bill being submitted to the Hon. Francis X. Hare, Judge of said Court, on the day of the filing thereof, he did order that upon Complainants entering into Bond with sureties in the sum of Seven hundred fifty Dollars ($ 750.00), approved by the Register of this Court and payable and conditioned according to law, a Writ of Injunction issue out of said Court according to the prayer of said Bill;

AND WHEREAS, Bond has been given as required by said Writ;

THESE, THEREFORE, are to command and strictly enjoin you and each and all of you from foreclosing or attempting to foreclose, causing to be foreclosed or proceeding, directly or indirectly, with the exercise of any powers of sale contained in the Vendor's Lien to and in favor of William J. H. Coots and Christine L. Coots Jr. by and under that certain Deed from William J. H. Coots and Christine L. Coots to Marguerite Henry and Charles A. Henry, of date February 6, 1957, of record in the office of the Judge of Probate of Baldwin County, Alabama, in Record Book Number 68 R.P., pages 560-66, and covering the following described land situated in Baldwin County, Alabama, to-wit:-

from Number Seven (7), being the Southwest quarter of the Northeast quarter of Section twenty-eight (28), Township seven (7) North, Range four (4) East, except four (4) acres described as follows: Beginning at the Northwest corner of the Northeast quarter of Section 28, Township 7 North of Range 4 East, run North 400 feet; thence, East 300 feet, thence, South 600 feet, thence, West 300 feet, to the place of beginning

and from doing anything whatever to change the status quo now existing with reference to the said Vendor's lien and in pending foreclosure thereof, until further orders from this Court; and this Writ or Injunction you will comply with and obey under penalty.

Issued this February 5th, 1931.

T. W. Richmond

As Register of the Circuit Court, Equity Side, Baldwin County, Alabama.

MARGUERITA HENRY and
CHARLES A. HENRY,

Complainants,

vs.

WILLIAM J. H. GOETZ, CHRISTINE
H. GOETZ, W. C. BOEBE and H. H.
HALL, individually and as part-
ners composing the firm of
Boebe & Hall,

Respondents.

IN THE CIRCUIT COURT-EQUITY SIDE

STATE OF ALABAMA

BALDWIN COUNTY.

NO._____

TO ANY SHERIFF OF THE STATE OF ALABAMA, GREETING:-

You are commanded that without delay you execute this writ and due return thereof make to me how you have executed same on the first Monday in March, 1950.

WITNESS my hand and seal as Register of the Circuit Court, Equity Side, Baldwin County, Alabama, this February 5th, 1950.

D. W. Richerson

Register of the Circuit Court, Equity Side, Baldwin County, Alabama.

TO WILLIAM J. H. GOETZ, CHRISTINE H. GOETZ and W. C. BOEBE and H. H. HALL, individually and as partners composing the firm of Boebe & Hall:

WHEREAS, Marguerita Henry and Charles A. Henry did on the 5th day of February, 1950, file their Bill of Complaint in the Circuit Court, Equity Side, of Baldwin County, Alabama, against William J. H. Goetz, Christine H. Goetz, W. C. Boebe and H. H. Hall, individually and as partners composing the firm of Boebe & Hall, praying, among other things that a preliminary or temporary writ of injunction issue against William J. H. Goetz, Christine H. Goetz and W. C. Boebe and H. H. Hall, individually and as partners composing the firm of Boebe & Hall, restraining and enjoining them and all of them from foreclosing or attempting to foreclose, causing to be foreclosed or proceeding, directly or indirectly, with the exercise of any powers of sale contained in the Vendor's Lien to and in fav-

or of William J. H. Coots and Christine E. Coots in, by and under that certain Deed from William J. H. Coots and Christine E. Coots to Marguerite Henry and Charles A. Henry, of date February 8, 1927, of record in the office of the Judge of Probate of Baldwin County, Alabama, in Record Book Number 42 R.B., pages 548-50, and covering the following described land situated in Baldwin County, Alabama, to-wit:-

> Farm Number Seven (7), being the Northwest quarter of the Northwest quarter of Section twenty-eight (28), Township seven (7) South, Range four (4) East, except four (4) acres described as follows: Commencing at the Southwest corner of the Northwest quarter of Section 28, Township 7 South of Range 4 East, run North 600 feet; thence, East 300 feet, thence, South 600 feet, thence, West 300 feet, to the place of beginning;

and from doing anything whatever to change the statu quo now existing with reference to the said Vendor's Lien and in pending foreclosure thereof;

AND WHEREAS, on the said Bill being exhibited to the Hon. Francis W. Hare, Judge of said Court, on the day of the filing thereof, he did order that upon Complainants entering into Bond with sureties in the sum of Seven hundred fifty Dollars ($ 750.00), approved by the Register of this Court and payable and conditioned according to law, a writ of Injunction issue out of said Court according to the prayer of said Bill;

AND WHEREAS, Bond has been given as required by said Act;

THESE, THEREFORE, are to command and strictly enjoin you and each and all of you from foreclosing or attempting to foreclose, causing to be foreclosed or proceeding, directly or indirectly, with the exercise of any powers of sale contained in the Vendor's Lien to and in favor of William J. H. Coots and Christine E. Coots in, by and under that certain Deed from William J. H. Coots and Christine E. Coots to Marguerite Henry and Charles A. Henry, of date February 8, 1927, of record in the office of the Judge of Probate of Baldwin County, Alabama, in Record Book Number 42 R.B., pages 548-50, and covering the following described land situated in Baldwin County, Alabama, to-wit:-

Farm Number Seven (7), being the Southwest quarter of the Northwest quarter of Section twenty-eight (28), Township seven (7) South, Range four (4) East, except four (4) acres described as follows: Commencing at the Southwest corner of the Northwest quarter of Section 28, Township 7 South of Range 4 East, run North 600 feet; thence, East 300 feet, thence, South 600 feet, thence, West 300 feet, to the place of beginning;

and from doing anything whatever to change the status quo now existing with reference to the said Vendor's lien and in pending foreclosure thereof, until further orders from this court; and this writ of injunction you will comply with and obey under penalty.

Issued this February 5th, 1930.

T. W. Richerson

As Register of the Circuit Court, Equity Side, Baldwin County, Alabama.

MARGUERITA HENRY & CHARLES A. HENRY,

COMPLAINANTS,

vs

WILLIAM J. H. GOETZ, ET AL,

RESPONDENTS

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA IN CHANCERY

DECREE ON DEMURRER.

This cause coming on to be heard on the demurrers of Respondents to the Bill of Complaint, was submitted to the Court and upon consideration thereof the Court finds:-

That there is no merit in the said demurrers and that the same should be, and they hereby are, over-ruled and that the Respondents be and they hereby are allowed thirty (30) days within which to plead to the Bill of Complaint.

Dated this 4th day of March, 1933.

F. W. Hare

Judge.

RECORDED

Release on
Contract

Filed for Record March 5, 1937
D. Richmond
Register.

Marguerita Henry and Charles A. Henry, Complainants, -vs- The Town of Foley, a municipal corporation, Respondent.	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN CHANCERY. BRIEF OF RESPONDENT.

While a first reading of the testimony in this case will give the impression that there is anirreconcilable conflict as to the true facts, much if not all of this apparent conflict can be reconciled and made to dissappear if we keep in mind the two facts which are made clearly to appear, viz: that for some time after the septic tank was built and the use of it begun by the town, it did not function properly, but that repairs and alterations were made in August, 1928, since which time it has performed (better according to complainant's witnesses) perfectly, according to defendant's witnesses.

From the time of complainants' first complaint about the tank, it is evident from the record that the Town was constantly trying to find out why the tank did not function as it should, but it was not until it was emptied and cleaned out so that they could get down into it and measure it from the inside, that the three engineers employed by the Town to find out what was wrong (Dr. Robert Macy, R. J. Greenwood and Winston E. Wheat), were able to discover the defect. This was, that the contractor in building the tank had failed by 14½ inches to set it deep enough into the ground so that the inlet and outlet sewers were lower down in the tank than they should have been and this had the effect of rendering inoperative the baffle walls and partitions of the tank, utterly destroying its power to function as intended. It was a matter difficult to discover, which would account for the apparent delay, but once discovered it was promptly remedied, with an effect which is clearly disclosed by the testimony of the witnesses for both sides.

While almost all of complainants's testimony is with reference to conditions before the repairs and alterations, they all concede a difference since; for instance, Mrs. Henry, one of the complainants says on direct examination:

> "We have not been able to smell at the house the foul odors from the tank and creek during the cold weather, since about November, but we could smell it when we went down close to the creek."

And on cross-examination:

> "The smells kept getting worse and worse right along until last November, but since then we have not been able to smell anything at the house."

A. H. Mueller testified for complainants:

> Q Mr. Mueller, are you familiar with the work done on this septic tank in the latter part of August and early part of September of this year under the directions of Engineers R. J. Greenwood of Foley, and Winston E. Wheat of Pensacola, Florida?
> A No, sir.
> Q The testimony you have given then, except for what you saw there this morning-that is, toilet paper in the stream-is based upon the condition of the sewer and septic tank before the repairs of August and September, 1928. Is that correct?
>
> A. Except that, yes sir.

(That paper having the appearance of toilet paper was discovered in the stream on several occasions, both below the tank where it might have been deposited by the discharge from the tank, and above the tank where it could not possibly have been if it came out of the tank, is undisputed in the testimony.)

Charles Olsen testified for complainants on direct examination:

> "I perceived odors today (December 12, 1928) from that sewage but it was not as bad today as it was when I left there last September. I cannot explain the difference."

Julius Valentine, for complainants, direct examination:

> I am the same witness who was examined here in December. I went down to see the tank again today (February 13, 1929.) On account of flood conditions it is not as offensive down there today as it was when I was there before. The condition of the water was less filthy today, that is, the water from the tank, than it was before. The water flowing from the tank does not make the creek look as bad as it did when I was there before."

These witnesses, and in fact, all of complainant's witnesses, describe conditions before the repairs and alterations were made, which cannot be justified, but the whole tenor and effect of the testimony is that a decided change for the better has been made, and when we consider the testimony of the Defendant, the fact that all of its witnesses have made their examinations and based their testimony on conditions as they found them after the repairs, and that but very little of complainant's testimony is since the repairs, the preponderance of the evidence is so strong as to be over-whelming, that since these alterations and repairs have been made, the tank is functioning perfectly.

Thirty-nine (39) separate examinations and inspections are

related by Defendant's witnesses and not one of them disclosed anything offensive about this tank, its discharge, or the waters or banks of the stream.

It must be conceded that for a time, even after the repairs, the stream was polluted by the contents of the tank which were emptied into it when the tank was cleaned so that the repairs could be made, and while the record does not definitely disclose it, it must be true that it took some considerable time for all this to be carried away; but every one of the 39 inspections by Defendant's witnesses, made after December 19, 1928, disclose the fact that there was, in the effluent from the tank and in the waters of the stream and on the bushes along the stream, absolutely nothing which could have been discharged from the septic tank, except a little paper which was found both above and below the tank, and so, obviously, did not come from it.

Nor was any offensive odor disclosed by any of these critical examinations, although several of the witnesses had their heads right in the 15 inch discharge pipe, and all of them were close enough to the discharge to touch it. Only a careful reading of all the testimony can disclose the many and varied tests made by these witnesses, but they all agree that there was no offensive odor perceptible at the tank or the creek.

Both the County Health Officer of Baldwin County (Dr. J. A. Norris,) and the Assistant State Sanitary Engineer of the State of Alabama (Mr. H. G. Menke) testify that this particular tank is now performing satisfactorily the functions of a septic tank, and it is undisputed that this is the customary method of sewage disposal by small towns such as Foley, and that only one public disposal system in the whole state of Alabama, large or small, carries the purification of its sewage further than the septic tank method.

True, any septic tank will, at times, emit some odor but "It would only be under rare circumstances and an unusual combination of circumstances that there could be an offensive odor from a properly functioning septic tank discernible as much as 800 feet away from it" Mr. Menke tells us (without dispute) and Henry's house is 835 feet from this tank according to his own testimony (Page 8). It is also true that the water discharged from a septic tank is to some degree polluted, not absolutely pure from either a chemical or bacteriological standpoint, but these are disadvantages incident to modern civilization which do

not justify the abolishment of a modern, efficient, sanitary sewer system to prevent.

> "As before stated one of the most important objects of municipal government is the preservation of the public health; and science has demonstrated that nothing contributes more to secure the end than a sanitary system of sewerage and water closets connected therewith..... There are times when the public health is the object of paramount concern, and the law wisely lodges in municipal bodies discretion and power adequate to such emergencies."
>
> Spear vs. Ward, 199 Ala. 105, 74 So. 27.

The Supreme Court of the United States agrees: In California Reduction Co. vs. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100, Justice Harlan says:

> "This court has said that 'the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authorities of the country essential to the safety, health, peace, good order, and morals of the community..... Every intendment is to be made in favor of the lawfulness of the excercise of municipal power making regulations to promote the public health and safety."

BEFORE GRANTING AN INJUNCTION THE COURT SHOULD COMPARE THE INJURY TO THE COMPLAINANTS, AND ALSO TO THE PUBLIC, TO ACCRUE FROM GRANTING OR REFUSING THE INJUNCTION PRAYED FOR.

> "The peculiar equities of this case, however, authorize a modification of the injunction, such as will do exact justice to both parties litigant. The proceeding is one in restraint of a public work of great utility,-the construction of a railroad,-thus presenting a case in which injunctions are granted with great caution. Delay in the construction of the work may operate very oppresivley against the defendant, as well as resultin great injury to the public. Courts very often, insuch cases, balance the questionof damages to one party, and that of benefit to the other, resulting from the maintainence of the injunction on the one hand, and its dissolution on the other, and refuse to take any action which will cause great injury to the one party, and probably be of serious detriment at the same time to the public, without corresponding advantage to the other party."
>
> C. & W. Ry. Co. vs. Witherow, 82 Ala. 190, 3So. 23.
>
> "Counsel have pressed the proposition that mere convenience in the use of its property by the company, does not entitle it to pour down upon the appellee's land, and into the stream on his land, the debris from the washers erected by it, and we think the contention is reasonable. But it is not every case of nuisance or continuing trespass which a court of equity will restrain by injunction. In determingng this question, the court should weigh the injury that may accrue to the one party or the other, and also to the public, by granting or refusing the injunction. Wood vs. Sutcliffe, 2 Sim (N.S.) 163; Railroad Co. vs. Railroad Co. 75 Ala. 275; Railroad Co. vs. Witherow, 82 Ala. 190, 3So. 23; I High Inj. #598; Davis vs. Sowell,77 Ala. 262; Torrey vs. Railroad, 18 N.J. Eq. 293; McBride vs. Sayre, 5 So. 791.
>
> "The court will take notice of the fact that in the developement of the mineral interests in

this state, recently made, very large sums of money have been invested. The utilization of these ores, which must be washed before using, necessitates, in some measure, the placing of sediment where it may flow into streams which constitute the natural drainage of the section where the ore banks are situated. This must cause a deposit of sediment on the lands below; and while this invasion of the rights of the riparian owner may produce injury, entitling him to redress, the great public interests and benefits to flow from the conversion of these ores into pig metal should not be lost sight of. As said by the vice-chancellor, in Wood vs. Sutcliffe, supra, "Whenever a court of equity is asked for an injunction in cases of such nature as this, (a bill to enjoin the pollution of a stream), it must have regard, not only to the dry, strict rights of the plaintiff, but also to the surrounding circumstances.'"

Clifton Iron Co. vs. Dye, 86 Ala. 468, 6 So. 192.

"While this section of the city is exclusively residential in the general sense, yet on Highland avenue, within a few blocks of this location, there a number of apartment houses, and occupants owning cars are without place of storage, thus necessitating their remaining in the street; that in the propsed garage repairs to cars are not contemplated, but only service with gas, oil, cleaning, and washing the cars and matters of that character; that the public at large will be greatly benefitted appears clear, and the demand for such a business is great.

"In our opinion a case is presented where the public benefit so preponderates over whatever inconvenience may be occasioned complainants, that injunctive process should not be granted as against an anticipated nuisance. We think the motion to dissolve the injunction should have been sustained.

Nevins vs. McGavock, 214 Ala. 93, 106 So. 597.

See also, Standard Chemical Co. vs. Faircloth, 200 Ala. 657, 77 So. 31.

If the court will make the comparison suggested by these expressions by the Supreme Court of Alabama, in this case, the following state of affairs must appear: "It would be only under rare circumstances and an unusual combination of circumstances that there could be an offensive odor from a properly functioning septic tank as much as 800 feet away from it." (Testimony of H. G. Menke, P. 44) Henry's house is 835 feet from this tank. (Testimony C. A. Henry, P 8.)

The pollution of Wolf Creek is only such as is permissible under the law of Alabama, as will appear from the authorities cited later herein.

On the other hand to grant the prayer of complainant's bill to perpetually enjoin the Town of Foley from continuing its septic tank, would work a tremendous hardship on the public as represented by the citizens of that town. There are only two ways in which such a requirement could be met; the first, to abandon the sanitary sewer system and

go back to the old system of individual, out-door privies; the other, as suggested by Mr. Roach's cross-examination of Mr. F. M. Blair, to construct a 15 inch tile, pipe-line 1400 feet across complainant's land, but this would deposit the unchanged effluent from the tank on the land of the Foleys who would have just as much right to compel another removal as would Henry. If such a line were constructed to carry the effluent across the road from the Foley lands, it would strike the lands of Mrs. Green and Mr. Dreis, and would have to be piped 2,000 feet further to get off from Dreis' land, who, of course, would have the same right to insist on its removal from his land as would Henry. And the next land owner would have the same right, and so on . But even this much pipe line would cost, according to the testimony of Mr. Blair which is undisputed, $4,375.00 at the rate of $1.25 per foot, andsuch an expenditure is utterly impossible to the defendant, according to the testimoney of its Mayor, C. W. Green, and so would leave only the other alternative of abandoning the sewer system altogether.

There is no comparison between the injury to the public if this injunction be granted, and the injury to complainants if it be refused, and even assuming that there ~~has been~~ is now some violation of complainants' legal rights (which we deny), this certainly is not a case where an injunction is a matter of right.

> "The remedy sought is prentive and incidentally compensatory. An injunction for such purpose is not a matter of absolute right; but if, as has been said, it rests in judicial discretion, the excercise of such discretion is not without limitations, and is to be guided by the settled principles on which interference by the court, in such cases, depends. In considering whether or not an injunction should be granted regard must be had, on the one hand, to the right of every person to use his own property as his taste, desires, and interest may dictate; and, on the other, to the right of his neighbors to the comfortable and uhmolested enjoyment of their property. No one shouldbe restrained as to the use of his property, unless such use offends the legal rights of another. There are certainly instances of private nuisances for which an action on the case can be maintained, yet insufficient to justify interference by injunction. This extraordinary and transcendent power should be excercised only when imperatively necessary to prevent a multiplicity of suits, or irreparable injury, or continuous of constantly recurring grievances, when, from their irreparable nature, continuance, or frequent repititions, the legal remedies are inadequate to afford full redress. While it is not essential the the injury should be strictly continuous, it must not be only occasional or accidental. Rouse vs. Martin, 75 Ala. 510."
>
> English et al. vs. Progress Electric Light & Motor Co., 95 Ala.259, 10 So. 134.

"By the settled rule in this state a case must be proved which establishes the necessity of a preventive remedy,- a case within that class of cases of irreparable or continuous injury which can be adequately redressed only by injunction. An in all cases where the right is doubtful, and the excercise of the power would interfere with, industries promotive of public utility, it becomes the duty of the court to abstain from interfering. In such cases the proof should be clear and convincing and the power 'should be cautiously and sparingly excercised.' Ray vs. Lucas, 10 Ala. 63, Rouse vs. Martin, 75 Ala. 510."

English et al. vs Progress Electric Light & Motor Co., supra.

NO LEGAL RIGHTS OF THE COMPLAINANTS ARE BEING VIOLATED BY THE MAINTAINENCE OF THIS SEPTIC TANK IN ITS PRESENT CONDITION.

While this argument thus far, has proceeded upon the theory that even though this tank as at present operated, does in some measure or degree violate complainants' legal rights and is to that extent a private nuisance, still no case is disclosed which would justify an injunction, we do not for one moment admit that any of complainants' legal rights are being violated. In fact, it is contended that under the law of Alabama as applied to the evidence herein, the opposite is conclusively established and that this tank does not in any degree violate any of complainants' legal rights.

Two things are complained of: the first, an offensive odor, the second, pollution of the waters of Wolf Creek on complainants' land by deposit of filth therein.

There is no odor. The testimony is overwhelming that no offensive odor is discernible even right at the tank and that it almost impossible that any odor should ever reach the house of complainants.

In Jones vs. Adler, 183 Ala. 435, 62 So. 777, the Supreme court has said:

> SYLLABUS: "A smell disagreeable to ordinary persons but not hurtful to health, is not such a physical annoyance as makes the use of the property producing it a "nuisance", unless the annoyance or discomfort caused thereby is of such a degree or extent as to materially interfere with the ordinary comfort of home existence."
>
> OPINION: "The annoyance or discomfort caused must be of 'such degree or extent as to materially interfere with the ordinary comfort of home existence'. English vs. Progress Electric Light & Motor Co., 95 Ala. 259, 10 So. 134; Adler & Co. vs Pruitt, 169 Ala. 213, 53 So. 315, 32 LRA (NS) 1889; Murkeson vs. Adler, 59 So. 505."
>
> ---
>
> "While it is not essential that the injury should be strictly continuous, it must not be only occasional or accidental. Rouse vs. Martin, 75 Ala. 510."
>
> English et al. vs. Progress Electric Light & Motor Co., supra.

See Page 7½

Not one single witness for complainants testifies to a state of fact which would justify an injunction on account of the alleged odors, under these rules. Indeed, Mrs. Henry herself,

"The mere fact, if you believe it is a fact from the evidence, that odors from the septic tank can be detected at times from plaintiff's residence, would not entitle plaintiff to recover damages." (Instruction number 7 taken from statement of the case.)

"There was no error in giving charge seven at the request of the defendants. Every odor, or the occasional detection of same, is not, as a matter of law, a nuisance."

Murkeson vs. Adler, 178 Ala. 622, 59 So. 505.

says that since last fall, about November, they have been unable to smell any odor at the house, and that agrees exactly with the testimony of defendant's witnesses who, in 39 separate inspections and examinations, were unable to discover any offensive odor as far as 10 feet away from the tank. Since the repairs to the tank, and after a time sufficient to let the matter taken from the tank during the repairs be carried away, there has been no odor according to the great weight of the testimony, and the only experts on septic tanks whose testimony appears in the record (engineers J. R. Carson, Winston E. Wheat and H. G. Menke) all agree that so long as the tank continues to operate as it now is, there can be no odor discernible at complainants' house, except, possibly, "under rare circumstances and an unusual combination of circumstances", according to the testimony of Mr. Menke. This will not meet the requirements that a smell, to be a nuisance, must be of such "degree or extent as to materially interfere with the ordinary comforts of home existence"; or "must not be only occasional or accidental."

Complainants' proof, as to odors, will not sustain the relief prayed for.

THERE IS NO UNLAWFUL POLLUTION OF COMPLAINANTS' LAND, OR WATER.

The water which is discharged from this septic tank, is according to the great weight of the evidence, colorless and odorless. There is some diversity of opinion among the witnesses as to whether or not it is pure enough to drink, use for washing clothes, or watering stock. There is no real evidence as to whether it is or is not fit for these various uses, as no critical examination has ever been made to determine its degree of purity and none of the witnesses know any more about it than they can see and smell, and all of them are somewhat prejudiced because of their knowledge of where it comes from, and are influenced as one of the witnesses expresses it, by "imaginative ideas." The burden of proof as to pollution, of course, is upon Complainants. Beyond the fact that the water comes from a septic tank, and in times gone by has been visibly polluted, they have not attempted to go. We do not believe that they have sustained the burden of proving that degree of pollution which is necessary, under the law of Alabama, to be actionable.

"The test is whether the water was so polluted as to un-

reasonably, injuriously, unjuslty or materially affect its ordinary and extraordinary use by the lower proprietor, and if it is so polluted as to unreasonably, i injuriously or materially affect its ordinary and extraordinary use by its lower proprietor the party polluting the stream is liable to the lower owner so affected."

American Tar Products Co. vs Jones, 17 Ala. App. 481, 86 So. 113.

See also Jones vs. T.C.I. & R. CO., 202 Ala, 382, 80 So. 464.

"It is certainly true that owing to the wants, if not the necessitieis of the present age,-of agriculture, of manufacture, of commerce, of invention and of the arts and sciences,-some changes must be tolerated in the channels in which water naturaly flows, and in its adaptation to beneficial uses. Reasonable diminution of its quantity, in gratifying and meeting customary wants, has always been permitted. So, its temporary detention for manufacturing purposes, followed by its release in increased volume, is a necessary consequenceof its utilization as a propelling force. Nor must we shut our eyes to the tendency - the inevitable tendency - of these and other uses in which the water is an indispensable element, to detract somewhat from its normal purity, These modifications of individual rights must be submitted to in order that the greater good of the public be conserved and promoted. But there is a ~~dxxyxxx~~ limit to this duty to yield, to this claim and right to expect and demand. The water course must not be diverted from its channel, or so diminished in volume, or so corrupted and polluted as practically to destroy or greatly to impair its value to the lower riparian owner. "Sic utere tuo" in such condition is enjoined alike by social obligation and by law. It is difficult if not impossible, to declare a rule in language so clear and precise as that it can be applied with certainty to every case that may arise."

T.C.I.& RR. CO. vs. Hamilton, 100 Ala. 252, 14 So. 167.

Granting, for the sake of argument, that there is in this water some degree of pollution, just how much the evidence does not disclose, the complainants have failed lamentably to prove, as the law requires they must, such a degree of pollution in this water at this time "As practically to destroy or greatly to impair its value" to them.

IT IS THE CONDITION AT THE TIME OF HEARING THAT DETERMINES WHETHER OR NOT A THING IS A NUISANCE.

In Collins vs. L. & N. Ry. Co., 176 Ala. 174, 57 So. 833, it is said:

SYLLABUS: "A bill to abate a nuisance created by privies at a railroad station was properly dismissed with costs against the defendants, where it appeared that adequate closets had been provided after bringing of the suit and that plaintiff's damages were merely nominal."

OPINION: "Conceding, as the better course, that the defendant's closets and pipes, as originally constructed, were a nuisance, it appears that pending a final decree

in these cases, the defendants have arranged for the flushing of these closets as often as they are used by connecting them with a standpipe nearby. Bulke, in his testimony, concedes that the odor is not as bad as formerly, while Collins, who has been at his place of business in the storehouse steadily since these bills were filed, testifies that he has not smelled any odor since that time. The testimony of other witnesses makes if reasonably clear that, so long as these closets are properly cared for there will be no occasion for complaint on their account, If they should be used hereafter so as to become a nuisance, complainants will have their remedy at law or in equity."

"Though the testimony of the witnesses on the part of complainant may be somewhat exaggerated by supersensitiveness and an excited imagination, it may be conceded that their evidence strongly tends to show material annoyance and inconvenience caused by the smoke, soot, noise and vibrations during the administration of Cawthorn, and even for a time after the defendant purchased and operated the plant. The evidence, however, shows that defendant has made alterations and improvements, especially as to the escape of steam, which have greatly diminished the evils complained of. As an establishment of public utility in a city, the rule is that its lawful use will not be perpetually enjoined, when, by the application of scientific appliances, such alterations in the machinery may be made as will remedy the evils. In such case the court will go no further than to require such appliances to be introduced, and in some cases will direct a reference to ascertain if the evils can be thus remedied. Green vs. Lake, 54 Miss. 540, 1 High Inj. #787a On the same principle the court will not make the injunction perpetual when such appliances have been used, <u>even during the pendency of the suit</u>, and the desired results effected. The real and important question is, does the manner in which defendant operates the plant, since the alterations and improvements were made, interfere with the comfortable use and enjoyment of their residence by complainants to such extent as to create a nuisance which, when the locality and the circumstances are considered, it becomes the duty of the court to enjoin?"

English et al. vs. Progress Electric Light & Motor Co., supra.

Complainants in their brief, quote several times and at great length from the Connecticut case of Morgan vs. Danbury, 67 Conn. 484, 35 Atl. 499, a very old case, which is authority, in Connecticut, for the proposition that it is actionable for a municipality to pollute a stream by discharging sewage into a stream which flows through complainant's land, but there is no disposition to dispute this proposition, beyond insisting on the qualifications to it laid down by the Supreme Court of Alabama in the cases of American Tar Products Co. vs Jones, supra; Jones vs M. C. I. & R. Co., supra, and T.C.I. & R. Co. vs Hamilton, Supra, to the effect that to be actionable the degree of pollution must be such "as practically to destroy or greatly to impair its value". These cases are the settled law of Alabama, whether the rule they announced be enforced elsewhere or not and Complainants must bring thier case within the protection afforded by them to be entitled to relief from this Court.

Complainants attempt to argue away and explain the wealth of testimony produced by Respondent as to the condition of the tank and Wolf Creek during the months of December, January and February immediately preceeding the submission of this case, by claiming that while the testimony is true (since they cannot well dispute the testimony of so many reputable witnesses) it is true only because the weather was cold at the times the examinations were made and there was much more water in the creek at this time of year than is generally true. To meet the second proposition first, the record is entirely silent as to the amount of water carried at any time by Wolf Creek and the argument is wholly outside the record, but it is within the judicial knowledge of the Court that the rainfall in Baldwin County is practically the same for every month of the year, approximately 5 inches, and that there is nothing to justify the assumption that there is more water in this Creek during these three months than any other three that might be selected. It is true, of course, that the greater the volume of water flowing in a stream, the greater the amount of pollution can be discharged into it without materially affecting the water; that is a mere matter of dilution, but Mr. Menke testified "The stream I saw there, Wolf Creek, is one large enough to take care of the discharge of a septic tank of that size, that is the flow there today was large enough, although of course, I do not know what it is all the year round." But there is no evidence in the record that it was larger that day, February 1st, than at any other time, and the fact is, of course, that it is of approximately the same size at all times, larger, of course, immediately after a rain.

Complainant's other proposition, that there was no odor either at the tank or at any place along the stream only because the weather was cold, is not born out by the record. While it is true that some of the examinations related by Respondent's witnesses were made on cold days, it is also true that others were made on warm days and covering as they do, a period of almost three months, with thirty-nine separate examinations during that time, it seems a trifle far-fetched, to say the least, to assume that there may be an odor at some other time even if there was none on any of these occasions. While it is probably true, that a thing which smells bad will smell worse in warm weather than in cold, it is also indisputably true that that which has no bad odor will

their own witnesses which does indeed, establish a decided diminution, but it is evident that they entirely ignore the testimony of respondent's witnesses all of whom testify to an entire removal of and total absence of, any offensive conditions at all, but when they say that their "diminution" is "manifestly due not to anything done by respondent" because nothing has been done to the tank since Dec. 19, 1928, it is difficult to understand just what they do have in mind to warrant them in such a belief. Of course nothing more was done to the tank after the repairs ordered by Wheat and made by Blair and his men in August, 1928, because nothing was left that needed to be done. Those alterations and repairs made of this tank one which functions perfectly according to all of the testimony about it since the repairs and alterations were made and there has been no occasion for respondent to do anything more to it. Just how this establishes that even the "diminution" which complainants concede, is not due to the efforts of respondent is beyond my comprehension. This "diminution" which they concede, but which is, as the evidence makes certain, such a decided diminution as to be a total and permanent abatement of the offensive conditions of which they complain, is due of course, to the efforts which respondent has constantly made ever since the first complaint was received and which culminated in the alterations and repairs of August, 1928.

But, they say, Wheat who ordered the alterations did not inspect the work done by Blair and so we do not know that the proper repairs and alterations were made, because, although Blair testifies that they were "Blair was not an engineer." But he was and is a construction and concrete foreman of 25 years experience, has built a number of septic tanks, is familiar with the theory on which they are based and has more practical knowledge about them than any witness for complainants, all according to undisputed testimony, and he testifies fully and unequivocally that the repairs and alterations were made as ordered and no one disputes his testimony in any particular, and that they were made, and properly made, is evidenced by the way in which the tank is now performing its functions.

Complainants quote their witness A. H. Mueller to the effect that this as a two compartment tank that can never sterilize the sewage. How Mueller knows what kind of a tank this is does not ap-

pear as he says himself that he has never seen inside of it and "I have had no occasion or opportunity to become familiar with a two-compartment septic tank such as the Town of Foley has installed"; and again "I have never had any experience with this kind of a tank". But he does say that such a tank will not remove offensive odors from sewage and when pressed for his reasons for ~~xxxx~~ a conclusion so widely at variance with the testimony of the those witnesses who do know about and have had experience with such septic tanks he gives us the following: "I base this opinion upon the fact that in Illinois the state and municipal authorities did not at the time I worked there, during the years 1911-1914, did not permit two compartment tanks. They required three compartments and up according to the use to which the tank was to be put."

Further comment seems superfluous; complainants' conclusions of fact as stated in their brief are not supported by the evidence. These facts are so supported: 1: that there was a time when a nuisance did exist; 2: there is no nuisance at the present time. The testimony is so strong as to be conclusive on these propositions and if there is no nuisance there <u>at this time</u> complainants' bill should be dismissed, but with costs to the Respondent since at the time of filing the bill a nuisance did exist for which Respondent was responsible though it had done its best to provide a modern and efficient system of sewage disposal and was merely unfortunate that it had not then succeeded.

Inasmuch as no claim is made for damages, taxation of the costs to respondent is the only relief complainants are entitled to under their bill and the evidence.

Respectfully submitted,

Stephen Magney

Attorney for Respondent.

not give one forth either in hot weather or in cold, and the testimony is conclusive that there is no bad odor about this tank, its discharge or the waters of the creek, at this time. Hence it would seem, that it is asking this Court to entirely disregard the record, when Complainants ask that the Court assume that there will be an odor some time in the future although they are entirely unable to dispute the testimony that there is none there at this time. Such an assumption, in the face of this record, would be not only violent but entirely unwarranted.

Complainants say of the undisputed testimony that there is, in the whole state of Alabama, only one public sewage disposal system, large or small, which carries the purification of sewerage beyond the septic tank method, that "if these other tanks are operating to the creation of nuisances, then this fact would not excuse the respondent for the nuisance alleged in the bill" and it must be conceded that this is so. But are we justified in assuming that every sewage disposal system in the entire state of Alabama is a nuisance and subject to be enjoined at the suit of any property owner? Is it not more reasonable to conclude that this undisputed fact demonstrates, more clearly than any argument or citation of authorities could, that a properly functioning septic tank is not a nuisance but such an establishment as any municipality is entitled to maintain under the laws of Alabama. And that this particular tank is functioning properly is conclusively established by the testimoney in this case. Certainly, a town as small as Foley, should not be the first to be required to go beyond every other town and city in the state in its method of handling its sewerage

Complainants argue that since it is admitted that this tank did not function properly for a time after its use was begun, it is incumbent upon Respondent to show an abatement of the nuisance that did for a time exist, and so much may be admitted. But, they say, Respondent has not sustained this burden as "the very best it can claim from its own evidence, is simply a diminution, not a removal of the offensive conditions, and this diminution is maifestly due not to anything done by respondent; for it is positively proved that since December 19, 1928, it has done nothing whatever to the septic tank to remove the offensive and filthy conditions of the sewage."

It must be that when complainants talk of "simply a diminution" of offensive conditions, they must have in mind the testimony of only

R.PERCY ROACH
LAWYER
MOBILE ALA.

Oct. 18, 1929

Mr. T.W. Richerson
Bay Minette, Alabama

Dear Mr. Richerson:

Please look in the file of the case of Henry vs. the Town of Foley and send me the copy of the decision of the Surpreme Court in the case Martin Building Company vs. the Imperial Laundry which I sent to the judge as authority for the Complainant on the trial. I am herewith enclosing you a stamped self-addressed envelope and thank you in advance for your kindness.

Yours very truly,
R.P. Roach.

RPR:F

The decision I refer to was one put out by the Supreme Court in June 1929 and I secured a certified copy from the clerk of the supreme court and sent it as an authority to Judge Kare.
R.

STATE OF ALABAMA,)
)
COUNTY OF BALDWIN.)

Marguerita Henry and Charles A. Henry, Complainants, -vs- The Town of Foley, a municipal corporation, Respondent.	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN CHANCERY. ANSWER TO BILL AS AMENDED.

Comes now the Respondent, the Town of Foley, by its solicitor, and for answer to the bill of the complainants as amended in red ink, on the 15th day of February, 1929, re-files its original answer in this cause.

WHEREFORE, having fully answered, the said Respondent prays that it may go hence without day, and have judgment for its costs herein expended.

Solicitor for Respondent.

6 6 RECORDED

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

Marguerita Henry, et al.,

Complainants,

-vs-

The Town of Foley, a
municipal corporation,

Respondent.

ANSWER TO BILL AS AMENDED.

Filed February 18th/929
T W Richerson
Register

Lloyd A. Magney,
Solicitor for Respondent.

NOTE OF TESTIMONY,

Marguerite Henry and
Charles A.Henry,

Complainants.

vs

The Town of Foley, Defendants.

The State of Alabama,
Baldwin County.

IN EQUITY
Circuit Court.

(FOR COMPLAINANTS.)

This cause is submitted in behalf of the Complainant's upon the original Bill of Complaint and Bill of Complaint as amended Depositions of Chas A.Olson, A.H.Mueller, Julius Vallentine, Herman Jensen, Chas. A.Henry, Marguerite Henry, Mrs. Angie Green, Mrs. James Schols, and

(1) Article in December 1st, 1928, issue of Ohio Health News," Stream pollution "

(2) Article in Literary Digest, Feb 16th, 1929, issue "Pollution moving upstream"

(3) First Annual Report " Ohio Conference on Sewage treatment "Oct 26th, 1927,

Various objections of Complainants, to items of evidence of Respondents.

One bottle of water shown by testimony of C.A.Henry, taken from effluent from outlet of sewer.

(For Respondent)

The answer of respondent to the Bill and the answer of Respondent to the Bill as amended.

Testimony of Defendants witnesses as follws:-

Winston E.Wheat, J.A.Norris, H.G.Menke, Martin C. Crosby B.F.Patterson, M.Josephy , C.W.Green, A.N.Hayselden, W.E.Cooney, J.R.Carson, J.J.Malee, George C.Randolph and Robert Davise.

3 bottles of water exhibited to the Court, shown by testimony of C.W.Green to have been taken as follows:-

1st. Fifteen feet above sewer outlet.
2nd. Fifteen feet below sewer outlet.
3rd. From effluent flowing from outlet of sewer.

Varous objections of respondent to items of testimony of Complainant's.

T.W. Rickman
Register.

RECORDED

Marguerite V C a
Henry
vs
Town of Foley

Note of Testimony
of Complainant
& Respondent.

Filed March 1st 1929
T. W. Reiemann
Register

THE STATE OF ALABAMA,)
)
BALDWIN COUNTY.)

CIRCUIT COURT

IN EQUITY.

MARGUERITA HENRY and
CHARLES A. HENRY,
Complainants,

VS

THE TOWN OF FOLEY, a
MUNICIPAL CORPORATION,
Respondent.

Come the Complainants and confess the exceptions, number two and five, filed by the Defendant April 19th, 1928, and moves the Court to permit them to amend their bill of complaint in this cause in red ink, by striking out the following words in paragraph four thereof.

> "Complainants further charge that, although the water in said sewage could not cause disease to be imparted through milk produced by Complainants cows, which were pastured on the lands of Complainants through which the creek in which the sewage was deposited flowed, yet on account of the evil report and rumors falsely spread by a certain Medical Doctor about Complainants property, people who bought Complainants' milk and butter, refused further to buy same after hearing the said report and rumors, false though same were about the fact that said sewage flowed on Complainants said land."

Complainants move the Court further to amend the bill in red ink, by striking out the following words in paragraph five thereof.

"And they have promised to abate it."

R. P. Rouch.
Sollicitor for Complainants.

4

RECORDED

Henry
as
Town of Foley

Filed May 3/928
T. A. Riviere
Register

Summons—Original, Moore Printing Co. :::: Bay Minette, Ala.

The State of Alabama,
Baldwin County.

} Circuit Court of Baldwin County, In Equity.

To any Sheriff of the State of Alabama—GREETING:

WE COMMAND YOU, That you summon ~~[illegible]~~ The Town of Foley, a Municipal Corporation,

of Baldwin County, to be and appear before the Judge of the Circuit Court of Baldwin County, exercising Chancery jurisdiction, within thirty days after the service of Summons, and there to answer, plead or demur, without oath, to ~~a~~ AMENDED Bill of Complaint lately exhibited by

Marguerite Henry and Charles A. Henry,

copy of said amended bill hereto attached,

against said Town of Foley a municipal corporation,

and further to do and perform what said Judge shall order and direct in that behalf. And this the said Defendant shall in no wise omit, under penalty, etc. And we further command that you return this writ with your endorsement thereon, to our said Court immediately upon the execution thereof.

WITNESS, T. W. Richerson, Register of said Circuit Court, this 3rd day of July 1928

T. W. Richerson, Register

N. B.—Any party defendant is entitled to a copy of the bill upon application to the Register.

Original

10½

SERVE ON.....

Circuit Court of Baldwin County
In Equity.

No.....

SUMMONS

Marguerite Henry and C.A. Henry,

vs.

Town of Foley.

Serve copy on John H Stark Foley

R.P.Roach.

Solicitor for Complainant

Recorded in Vol.....Page.....

RECORDED

THE STATE OF ALABAMA,
BALDWIN COUNTY

Received in office this.....

day of.....192...

.....

Sheriff.

Executed this 3rd day of July 1925

by leaving a copy of the within Summons with John H Stark as Town Clerk for the Town of Foley Defendant.

C. Green

Sheriff.

By B. Allgood

Deputy Sheriff.

THE STATE OF ALABAMA,
BALDWIN COUNTY.

MARGUERITA HENRY AND
CHARLES A.HENRY,
Complainants
vs.
THE TOWN OF FOLEY, a
MUNICIPAL CORPORATION,
RESPONDENT.

CIRCUIT COURT IN EQUITY.

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Complainants move the Court to amend the Bill in red ink, by striking out the following words in paragraph five thereof:-

"And they have promised to abate it."

FILED MAY 3rd, 1928.
T.W.Richerson, Register.

R.P.Roach,
Solicitor for Complainant.

C. A. Henry, et al., Complainants, -vs- The Town of Foley, a Municipal Corporation, Respondent.

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN CHANCERY.

AFFIDAVIT.

STATE OF ALABAMA)
County of Baldwin.)

J. R. Carson, being first duly sworn, on oath deposes and says:-

I am the same J. R. Carson who gave my testimony in this case before. I am a civil engineer by profession. I went with Mr. Crosby to the Foley septic tank at 9:00 o'clock A. M., the morning of July 11th. It was an extremely hot day, but I saw no difference in conditions there than I saw last winter when I made several trips. There was no odor from the tank at all. I went right up to the outlet which is a fifteen inch tile pipe discharging about three or four feet back of a concrete headwall which also has in it a fifteen inch tile opposite that in the tank proper, although no water is discharged through this opening in the head wall. The water all falls behind this wall. But by putting my head right in this opening and so within just a few feet of the discharge there is a very faint dank sort of a smell, but this does not come out so that it can be smelled even a few feet away from the tank and one can stand right beside the discharge and not detect the slightest odor from it.

The water of the branch was clear and unpolluted so far as I could see. I did notice small collections of a dark scum in several places where the water flowed against a log or bush or something of that sort and thought that possibly that was caused by the tank, but Mr. Crosby insisted that that was common in all these little streams and so we went some distance above the tank and found exactly the same sort of deposit whereever the flow of the water was obstructed by something down in the creek. This, to me, was conclusive evidence that this scum on the water was not caused by the tank or anything coming from it, but was the result of some

pollution of the water above the tank. However, I have noticed the same thing in other branches and cannot see anything about this Wolf Creek that is different from the ordinary branch or creek in this section. Much of my work is in the field and I see a great many of these little water courses and this one, the water, the banks and the bed of the stream , looks just the same as the rest in this neighborhood. There is no odor from the water at all, and to me it appears as clean and unpolluted as any of them. They are all, of course, more or less polluted and I would not consider the water of any of them fit for domestic use, whether there is a septic tank discharging into them or not

I have had considerable experience with septic tanks in designing and installing them, and think I know when one is working as it should, and in my judgment this tank is functioning perfectly and could not be improved upon. I do not mean by this that any septic tank is the highest possible method of sewage disposal, but merely that this tank is doing all that any tank of its size and capacity could be expected to do. The effluent is clear, colorless, odorless and there are no solid particles in it that one can see, and it has no discernible effect upon the water into which it discharges. There is certainly nothing in the least offensive about it.

J R Barnes

Subscribed in my presence and sworn to before me this 12th day of July, 1929.

Stanley Montgomery
Notary Public.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALBAMA.
IN CHANCERY.

C. A. Henry, et al.,

Complainants,

-vs-

The Town of Foley, a
Municipal Corporation,

Respondent.

AFFIDAIVT OF J. R. CARSON.

Filed July 17, 1929
T. W. Hare
Judge

Lloyd A. Magney,
Solicitor for Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

MARGUERITA HENRY AND
C. A. HENRY,

Complainants,

-vs-

The TOWN OF FOLEY, a
Municipal Corporation,

Respondent.

REPLY BRIEF OF RESPONDENT ON MOTION TO SET ASIDE SUBMISSION.

The brief submitted by Complainants under date of July 31st, and the addition thereto contained in the letter of August 7th, seem to raise no new propositions which are within the record, and Respondent feels content to rest its case on the matters discussed in this last brief of Complainants on the authorities therein quoted.

The first point raised is, apparently, that it being conceded that there was once a nuisance such as complained of, the Court has no discretion in the matter and must grant an injunction as prayed, whether or not the nuisance has been abated since the bringing of the action.

It is now and always has been the contention of the Respondent that there is not now and was not at the time this cause was submitted, any nuisance existing and that consequently, the bill must be dismissed, and Complainant's own authority fortifies this position as will appear from the following re-quotation from his brief.

EFFECT OF ABATEMENT BY DEFENDANT:- An injunction should not be granted where the alleged nuisance, although it existed before the suit was commenced, has been abated in good faith before the time of trial;.....29 Cyc. page 1250.

And this same proposition of law has been settled by the decisions of our own Supreme Court as appears from the citations and quotations in the orignal brief of Respondent. Indeed, without authority, it would seem to be too clear to admit of argument; the Complainants allegation is that there is a nuisance, his prayer that it be abated. The only relif to which he is entitled is to have it abated and if it has already been done, as the proof in this case makes certain, his

right to relief has been met and satisfied and his prayer already granted.

Complainants cite Town of Vernon vs. Edgeworth, 148 Ala. 490, 42 So. 749, and we have no quarrel with that authority except that it has no application, and consequently is not at all helpful, in this case, and the same may be said of his citation of Stouts Mountain Coal & Coke Co., vs. Tedder, 189 Ala., 637, 66 So. 619. Neither case, on the facts, is at all like this one beyond the fact that both were cases to abate alleged nuisances, and the legal principles they announce are inapplicable here for that reason.

Complainants next citation, that of Pratt Con. Coal Co. vs. Pierce, 12 Ala. App. 431, 68 So. 563 is erroneous in that the case appearing in the books and pages cited is that of YOLANDE COAL & COKE CO., vs. Pierce, but again there is nothing in the citation that applies to this case. The books are full of nuisance cases, many involving pollution of waters in innumerable ways, but it can serve no useful purpose to cite any except those that by reason of their similarity to this case can aid in determining it. This similarity need not be on the facts entirely, but the rules announced should at least be applicable to the facts here and none of the case cited by Complainant in this brief meet this requirement.

Complainant attempts to adduce in this brief certain evidence, not heretofore offered, which purports to recite the comparitive efficiency of various methods of sewage disposal. We object to this course of proceedure; it is hard enough to try and decide law suits when confined to the record and to permit the injection of entirely new matter into any case, by way of bald assertion in a brief, is not contemplated by or permitted under any system of jurisprudence with which the writer is familiar. The record in this case is made; Complainants have submitted their case on that record, and should be confined to it unless the Court sees fit to allow their motion to set aside the submission and permit the taking of additional testimony.

But Complainants seem to have abandoned their attempt to set aside the submission, and have substituted for it a request

that the Court, instead of determining the only issue in the case, whether or not the Town of Foley's septic tank is a nuisance, refer the entire matter to the Register to bring in a report as to the facts and the best way to remedy the evils if found to exist.

Now it has been for many years, according to the decisions of the Alabama Supreme Court, within the power of a Court of Chancery to direct a reference to determine matters of this kind, and nothing new is added to the law by the decision of Martin Building Co. vs. Imperial Laundry Co., cited by Complainants. But having received the case, on formal submission, after avoluminous record has been compiled, it seems to the writer that it is the duty of the Court to decide the case on the facts as presented and the law as the Court knows it.

Should the Court decide, in spite of the overwhelming preponderance of the evidence that there is no nuisance and nothing legally objectionable about this septic tank, that it is a nuisance, then would be the time to direct a reference to see if it could be remedied "by approved appliances or scientific alterations". But until the Court finds that there is a nuisance, there is no occasion for a reference for any such purpose, and it would seem to be impossible to find that a nuisance does now exist on the record in this case.

Mr. Roach would have us believe that any septic tank is a nuisance and must be so no matter how well it functions or how little evidence there may be of it when far enough away not to see it, but I submit, and again call the Court's attention to the <u>undisputed</u> testimony in this case, that there is not a single, public sewage disposal system in the whole state of Alabama, that carries the process beyond the septic tank method, that Mr. Roach's conclusion as to septic tanks in general is absolutely unwarranted.

The evidence in this case is positive, and of such volume and character that it cannot be disbelieved, that this tank discharges nothing but a colorless, odorless and inoffensive stream of water and that the waters of the creek on Mr. Henry's land are not affected in any discernible way by the tank, and I submit that if this be true, as it undoubtedly is, there cannot be a nuisance and

that this bill should be dismissed and an end put to this litigation.

Mr. Roach advances the novel theory that doctrine of "comparitive inconvenience" as he terms it can only apply where t there is a real necessity for incovenience and that if the Town would confess his bill and throw away its present system of sewage disposal, at an expense of many thousands of dollars, and adopt some other system, no matter what, then there would be no inconvenience to any one and no need to compare. I doubt if he can have made any computation as to the amount of "incovenience" this would occasion to the good people of Foley, but any way, there is absolutely no legal authority for his proposition and it cannot be supported by either reason or authority.

The doctrine to which he refers, and which he so complacently ignores, is so well established in this state as to be the settled law. To state it again:

> "But it is not every case of nuisance or continuing trespass which a court of equity will restrain by injunction. In determining this question, the court should weigh the injury that may accrue to the one party or the other and also to the public, and by granting or refusing the injunction.
>
> Clifton Iron Co. vs. Dye, 86 Ala. 468, 6 So. 192.

A number of the cases in which this doctrine has been annohnced and applied by the Supteme Court of Alabama, will be found on pages 4 and 5 of Respondent's original brief and it seems useless to restate them here, but this much is true, that these cases, and this doctrine of Comparitive Injury, become applicable only where a nuisance is found to exist, and where the question is whether to enjoin it or not. They are cited in this case merely as a precautionary measure, as it is the firm conviction, and unyeidding contention of the Respondent, that there is no nuisance at all. And this contention is so firmly fortified by such a great mass of unimpeachable testimony, that it seems beyond belief that the Court can ever reach the point of comparing the injuries to the Town and to the Henrys. If it ever does, the Court's conclusion must be that there is no injury being done to Complainants and that their bill should be dismissed.

This case has already been unduly prolonged and the fertility of the genius of council for Complainants, seems to promise that so long as it remains undecided it will be constantly and further complicated by the injection of new theories, new evidence (whether the submission be set aside or not) and new reasons theretofore unknown to either law or logic, why an injunction should be granted. In spite of all the extraneous matters which have been forced into it, the case presents only two questions:

1: Is the Foley septic tank a nuisance?

2: If it is, is the injury to complainants so great, ascompared with that which an injunction would cause, as to warrant the court in issuing an injunction, or, should complainants be left to their remedy at law to recover whatever damage may have accrued to them?

It is urged that a careful consideration of the testimoney will result in the answer to the first question in the negative, and that the case must therefore be dismissed.

Respectully submitted,

Lloyd McMagney.

Solicitor for Respondent.

I hereby certify that a copy of this brief was mailed to R. P. Roach, Esquire, Solicitor for Complainants, this 13th day of August, 1929.

Lloyd McMagney.

Solicitor for Respondent.

MARGUERITA HENRY and CHARLES A. HENRY,	:	IN THE CIRCUIT COURT OF
	:	BALDWIN COUNTY, ALABAMA
COMPLAINANTS,	:	
-VS-	:	IN EQUITY.
THE TOWN OF FOLEY, a Municipal Corporation,	:	
RESPONDENT.	:	

Come the complainants and pray the court to permit them to amend their Bill of Complaint in red ink by inserting in the third paragraph after the words "Town of Foley" in the second line thereof the words "to-wit: in the year 1925", and further amending by inserting in the third line from the bottom of the third paragraph the words "west" before the word "line", and further, by inserting the word "southeastwardly" before the word "for" in the last line of the said third paragraph, and further to amend their Bill in red ink by adding in the fourth paragraph after the words "creek and" in the third line from the top of the said paragraph, the following: "that it pollutes the waters of said creek as same flow through complainants said land and".

R. P. Roach
Solicitor for Complainants.

I, the undersigned solicitor for the respondent, accept service of this proposed amendment and waive further notice of same. This the 13 day of February, 1929.

Leigh M. Magney
Solicitor for Respondents.

RECORDED

C. A. Henry

Marguerita Henry

vs.

The Town of Foley,
a Municipal Corp.

Bill Amendment
to Bill.

Filed Feb 15-1923
T. W. Rennison
Register

STATE OF ALABAMA)
)
COUNTY OF BALDWIN.)

Marguerita Henry and Charles A. Henry, Complainants, -vs- The Town of Foley, a municipal corporation, Respondent.	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN CHANCERY. STIPULATION.

The above named parties, by their respective solicitors, do hereby agree to waive commission to take the testimony of the witnesses named below, viz: Mrs. Marguerita Henry, Mrs. Angie Green, Mrs. James Schols and Julius Valentine, and that Elma Carson act as Commissioner to take the testimony of said witnesses.

R. O. Reed,
Solicitor for Complainants.

Leigh M. Magney
Solicitor for Respondent.

DEPOSITION OF MRS. MARGUERITA HENRY.

Marguerita Henry, being first sowmn to tell the truth, the whole truth and nothing but the truth, deposed as follows:

My husband and myself moved down here to Foley on the 8th day of February, 1927. We bought the property we are now living on, and the same property concerned in this suit, on the 8th day of February, 1927. I did not know at that time, when we bought the property, ~~xxxx~~ anything about this septic tank that I afterwards found out about. When I first found out about this septic tank only a few of the people in the town were using it. It is being used now by more of the inhabitants of the town than when I first discovered it was there. We begun th smell the real bad odors between August 20th and 24th, 1927, when the American Legion Convention was here at Foley. The odors were not so very bad right at first but they got worse and worse. These odors are not as bad as winter as in summer; last summer we could hardly stay at our home the odors were so bad. The odors smelled just like a stale toilet. When the wind comes from the direction of the tank it blows the toiletsmell right into our back porch and the rooms upstairs. I found these odors very foul and objectionable. You can always smell this bad smell in warm weather in our back yard right near the house and when the wind blows from the direction of the tank you can smell it on the back porch and in the rooms facing in that direction. I have smelled these odors on my front porch occasionally, but not so often.

I have been down to the creek and septic tank myself, many, many times. I have the seen the real excreta from the toilet coming from this septic tank, toilet paper and this foul matter that I saw coming from the septic tank would flow all the way down across our lands to the public road. I have seen this foul matter from this septic tank floating in the creek down on our land so frequently that I cannot name the number of times, and all along up till February 1st, 1929, and on that date I went down and made an examination and I saw ~~xkxx~~ green slime and filth in the water and some pieces of paper hanging in the bushes just like always. We have not been able to smell/the foul odors from this tank and creek ~~xrx~~ during the cold weather, at the house since about November, but we could smell it when we went down close to the creek.

These foul smells have made our home less comfortable and pleasant to live in and we have been trying to have boards there at our place and in

STATE OF ALABAMA)
)
COUNTY OF BALDWIN.)

Marguerita Henry and Charles A. Henry, Complainants, -vs- The Town of Foley, a municipal corporation, Respondent.	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN CHANCERY. STIPULATION.

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R. O. Reed
Solicitor for Complainants.

Louis Thomasson
Solicitor for Respondent.

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Marguerita Henry, being first sowrn to tell the truth, the whole truth and nothing but the truth, deposed as follows:

My husband and myself moved down here to Foley on the 8th day of February, 1927. We bought the property we are now living on, and the same property concerned in this suit, on the 8th day of February, 1927. I did not know at that time, when we bought the property, ~~xxxx~~ anything about this septic tank that I afterwards found out about. When I first found out about this septic tank only a few of the people in the town were using it. It is being used now by more of the inhabitants of the town than when I first discovered it was there. We begun th smell the real bad odors between August 2oth and 24th, 1927, when the American Legion Convention was here at Foley. The odors were not so very bad right at first but they got worse and worse. These odors are not as bad as winter as in summer; last summer we could hardly stay at our home the odors were so bad. The odors smelled just like a stale toilet. When the wind comes from the direction of the tank it blows the toiletsmell right into our back porch and the rooms upstairs. I found these odors very foul and objectionable. You can always smell this bad smell in warm weather in our back yard right near the house and when the wind blows from the direction of the tank you can smell it on the back porch and in the rooms facing in that direction. I have smelled these odors on my front porch occasionally, but not so often.

I have been down to the creek and septic tank myself, many, many times. I have the seen the real excreta from the toilet coming from this septic tank, toilet paper and this foul matter that I saw coming from the septic tank would flow all the way down across our lands to the public road. I have seen this foul matter from this septic tank floating in the creek down on our land so frequently that I cannot name the number of times, and all along up till February 1st, 1929, and on that date I went down and made an examination and I saw ~~xxxx~~ green slime and filth in the water and some pieces of paper hagging in the bushes just like always. We have not been able to smell/the foul odors from this tank and creek ~~xxx~~ during the cold weather, at the house since about November, but we could smell it when we went down close to the creek.

These foul smells have made our home less comfortable and pleasant to live in and we have been trying to have boards there at our place and in

the summer time the smell is so bad that the boards complainab out the bad small and some have left my house.

When I first discovered this water running from the septic tank into the creek on our ground, we had about 15 caws and a bull which were being pastured on the land which the creek ran through. We have not still got the cows and the bull, we had to dispose of them. We disposed of them because it was said the cows were drinking the Foley sewer.This broke up our dairy business. Then my husband bought 82 goats and put them in this pasture in which this creek runs,; my husband bought these goats the 10th of last May and betwen 35 and 40 of them have died off since them,one by one, and I think the death of these goats was caused by the waters of that creek. We laso have some hogs which we pasture on this land through which this creek runs. If the water had stayed in its natural purity I could have used it for laundry purposes and to have continued my dairy farm. I cannot use it for those purposes in its condition as it now is. This water flowing in that creek below the outlet to the septic tank, I call polluted water because it could not be anything else since the toilet flows right into the creek; I mean the waters from the town sewer system. My husband and myself have complained to the town authorities of Foley many times about these conditions. I personally complained to Mr. Hayselden about these conditions.

CROSS EXAMINATION.

This septic tank was there, just where it is now, at the time we bought this property. I say that there are more people using the sewer now than were when we came here because the hotel has been built since then, and I couldn't smell it when we first came and then after a while we could smell it, that is all I can say. The smells kept getting worse and worse right along until last November, but since then we have not been able to smell anything at the house. In summer time it is worst. We did not loose any of our cows. I have two hunters staying at my house and they tell me that some of our goats have been shot by other hunters. They have never told me just how many were shot. We have never lost any hogs. Right across our west line is the Foley City Cemetery. The land on which this cemetery is located is higher than the creek; naturally water runs down hill but I will not say that the water from this cemetery runs into this creek because I have never seen it. I have never connected the proximitybof this cemetery with the trouble we have had with the waters of this creek, because water from a cem-

etery and water from a toilet do not smell the same. We have two wells on our place but it would not indicate to me that because there is water in these wells, that there is water running under our land; that I do not know. I have heard that there is a spring comes up out of the ground right west of our land and next to the cemetery and I know there is always water in the ditch Mueller dug to clean out the tank, but I never saw this springs. It never occurred to me that the proximity of this cemetery to our creek might have anything to do with the condition of the water. So long as I have water at the house, as I do, I would not use any of the waters of the creek even if it was pure as crystal, but if I did not have water at the house, then I would use the creek water if it was pure. I mean for washing clothes and other household purposes. I have never had any occasion to need any water from the creek for any household purpose since we lived there.

RE-DIRECT EXAMINATION.

None of the goats that died, as far as I have been informed, had any shot in them. We sold some of the live goats to the hunters who were boarding with us and these hunters reported to me that several of these goats, when they killed them, were reported to have small shot in them. I estimate that the used part of the cemetery is 600 feet from the creek. The used part of this cemetery slopes over towards the ditch that leads into the Pensacola road which runs in front of our house. We, that is my husband and myself had thought of fixing us a bathing beach on the creek on our land but we cannot do this with the water of the creek in the condition that it is. Between my husband and myself we had laid plans to have this bathing beach and we have nnt carried out our plans because the water in the creek seemed never to get any better and we did not consider the water fit to be used for a bathing beach, it was too filthyThere is rising ground or hills on both sides of the creek through our land.

Marguerite Henry

TESTIMONY OF MRS. ANGIE GREEN

Mrs. Angie Green, being first duly sworn, to tell the truth, the whole truth, and nothing but the truth, deposes as follows:

DIRECT EXAMINATION by Mr. Roach:

My name is Mrs. Angie L. Green. I live on the Foley and Pensacola Road about one mile east of the town of Foley. I mean east of the depot in the town. Wolf Creek ~~xxx~~ runs through my premises. I moved into my present residence in August, 1928. I have perceived offensive odors from that Creek since I moved into my residence. I perceive these odors most distinctly in warm weather and when the air is heavy. These odors are very unpleasant. I do not perceive these odors at all when the weather is bright and clear and cold. I have crossed the bridge on the said public road on the said creek between my house and Foley numbers of times. I have perceived these odors from that creek at that bridge. These odors were distinct and offensive. I perceived these odors from the creek at the bridge there frequently but I can not say that I perceived them every time I passed there. I have smelled sewer gas which I knew to be sewer gas. I can not answer whether or not these odors which I smelled from that creek were or were not similar to sewer gas. The only thing that I know about the odors that I smelled there was that they smelled very bad. I have been to the home of Mr. and Mrs. C. A. Henry but I can not say that I have smelled the same odors there that I smelled at my house and at the bridge. Mr. and Mrs. Henry's dwelling house is much closer to the nearest point on Wolf Creek to their house than is my house from that point, and that point is nearer where I am told the septic tank is than is my house.

CROSS EXAMINATION By Mr. Magney:

I can not say how many times I have been able to smell these odors since last August but whenever the weather is warm and the air heavy you can smell them at the bridge. ~~While~~ While I can not identify these smells as sewer gas they have a similarity and are different from the smell of a dead animal, for instance. The creek is a good city block away from my house at its closest point, and as nearly as I can tell this point is nearly a mile from where I understand the tank is located.

Angie L Green

DEPOSITION OF MRS. JAMES SCHOLS.

Mrs. James Schols, being first duly sworn to tell the truth, the whole truth and nothing but the truth deposed as follows:

My name is Mrs. Jane Schols. I reside on the Pensacola road, about a mile and a quarter east of the post office. I have been residing there three years this month. I have been very often to see Mr. and Mrs. Henry at their residence on the Pensacola road just east of the cemetery. I have not been directly down to the septic tank but I know about where it is and when the wind is from the direction of that tank I have been at Mr. and Mrs. Henry's residence and smelled bad odors from that direction. I have smelled these odors more than once, but I can only say that I have smelled these odors at Mr. and Mrs. Henry's house when the wind is from that direction. I have been down to the creek on Mr. and Mrs. Henry's place back of their house, and I saw a little bridge across this creek and you can hardly cross the bridge because of the nasty, steady flowing from the creek, lodging on the bridge. I have been down this creek on two different occasions, the first in August, 1927, just after the American Legion Convention, and the other in the latter part of August or September, 1928, I cannot say the exact date. I smelled bad smells on that occasion and alos on the first occasion. I saw particles of paper and other filthy matter that appeared to come from closets in the creek bed. The water must have been very low in the creek at that time. It was very filthy. I could not say whether it had rained just before that or not but there in the creek it was wet and muddy.

CROSS-EXAMINATION.

I have not been down to the creek since August 1928.

Frederick Schols

DEPOSITION OF JULIUS VALENTINE.

Julius Valentine being first duly sworn, deposed as follows:

I am the same witness who was examined here in December. I went down to see the tank and creek again today. On account of flood conditions it is not as offensive down there today as it was when I was there before. The condition of the water was less filthy today, that is the water from the tank, than it was before. The water flowing from the tank does not make the creek look as bad as it did when I was there before. On account of the flushing of the water coming in from the upper end of the creek it is naturally more dissolved. You can trace easy enough the flow from the tank in the creek. There is some difference between the color of the water below where the tank empties and above. There is some paper floating in the water and some hanging on the bushes today ; this was just above the stock bridge on Mr. Henry's land, but there was less today than before because the highwater had washed some away. I cut off a little limb that was hanging in the creek today and I found on that limb toilet paper and slimy products and these have a bad odor. It was cut from a bush further down the creek between the fence and the little stock bridge on Mr. Henry's land, and the bush was hanging in the water.

CROSS-EXAMINATION.

I think this limb must have been of recent deposit because we have had high water, more than three feet high in the creek, and this would have washed away in that high water. I have been down there several times since I testified herein December and know the condition of the water. I worked on the stock bridge since December, and had the odor to my heart's content. Conditions were better down there today than I ever saw them before, on account, I think, of the high water.

RE-DIRECT EXAMINATION.

When I said that I had the odor to my heart's content, I meant that I had more odor than I wanted and it smelled very bad.

RE-CROSS EXAMINATION.

I was 70 years old Christmas day. Mr. Henry gives me quite a little work around his place. I also work quite a little for Mr. Krump down at Oak. I do not have any steady employment. I used to be in the building contracting business but only take smaller jobs now on account of my age.

Julius A Valentine

STATE OF ALABAMA,)
)
County of Baldwin.)

I, Elma Carson, do hereby certify that in accordance with the stipulation of the parties by their respective solicitors, heretofore attached, I did cause to be examined as witnesses in behalf of the Complainants, the persons named in said stipulation; that eachof was witnesses was, before testifying, duly sworn to tell the truth, the whole truth and nothing but the truth, and was interrogated on oral interrogatories and cross-interrogatories, and the answers thereto, in narrative form, written down, in part by me and in part under my direction; that the entire deposition of each of said witnesses was by the witness read over and by him signed.

That I am not of counsel or of kin to any of the parties to this cause, or in any manner interested in the result thereof.

That said depositions were taken in part on the 1st day of February, 1929, and in part on the 13th day of February, 1929.

IN TESTIMONY WHEREOF I have hereunto subscribed my name, this 15th day of February, 1929.

Elma Carson
Commissioner.

Marguerita Henry and Charles A. Henry, Complainants, -vs- THE TOWNOF FOLEY, a Municipal Corporation, Respondent.	No._____. IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN CHANCERY. OBJECTIONS OF RESPONDENT TO MOTION TO SET ASIDE SUBMISSION.

Comes now the Respondent and objects to the setting aside of the submission in this cause, as moved by Complainants, for the following reasons:

(1) The cause has been tried at great length by both parties, many witnesses examined, and the record is voluminous and fully and fairly presents all the facts in the case for the consideration of the Court.

(2) Any evidence taken hereafter for re-submission, would be merely cumulative and would not disclose any different facts than now appear from the testimony.

(3) The motion of Complainants is unsupported by any showing of any nature as to a change in the situation since Respondents testimony was taken, amounts to the mere bald assertion by Complainants, or their Solicitor, and does not disclose any facts which should challenge the discretion of the Court to set aside the submission for the purpose of taking additional testimony.

(4) To set aside the submission for additional testimony would cause needless expense to Respondent and to Complainants and could result in no different evidence but merely cumulative testimony.

Respectfully Submitted,

Loyd McMagney
Solicitor For Respondent.

I hereby certify that I have this day mailed a copy hereof to Mr. R. P. Roach, Attorney for Complainants. May 17, 1929.

Loyd McMagney

RECORDED

11

Objection to Motion
to set aside former
submission —
Filed May 20, 1929
F. W. Hare
Judge

C. A. HENRY and MARGUERITA HENRY,

COMPLAINANTS,

-vs-

THE TOWN OF FOLEY, a Municipal Corporation,

DEFENDANT.

NO._____

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA.

IN EQUITY.

Before me, Charles Stein Notary Public in and for Baldwin County, Alabama, personally appeared Mrs. Auguste Kremers....., who being duly sworn says that he has personally inspected the outlet to the Foley Sewer where it empties into the Wolf Creek, just west of the west line of the lands of complainants in the above stated suit, and also inspected the effluent from said sewer at said outlet and the waters and banks of said creek below said outlet on the said lands of complainants;

That said inspections occurred on the day of May, 1929, and on the 13 day of June, 1929. Affiant further says that said effluent from said sewer, had a foul and offensive odor, that it was on both said occasions said effluent had in it fecal matter and the liquid was somewhat thick and ropy or mucillaginous, that it discolored to a very perceptable degree, the waters of the creek down stream from said outlet, that the banks and bottom of said creek, and the twigs and limbs of bushes in said creek downstream from said outlet of said sewer were coated and offensive with the said foul fecal matter from said effluent from said sewer. That this sewage flowing into said creek was and is unsanitary, nasty, filthy and foul, and makes the atmosphere on the lands of complainants foul with odors and unhealthful. That the waters of said creek on complainants said lands are made wholely unfit for domestic use by said sewage from said sewer flowing in same.

That affiant resides ~~in~~ near the Town of Foley and has so resided for Six years and is familiar with the conditions

caused in said creek and on the lands of complainants and knows that those conditions are unbearably foul and unsanitary and are a menace to the comfort and health of the complainants and others occupying the complainants home on said lands.

Mrs Augusta Kremers
AFFIANT.

Sworn to and subscribed before me on this the 13 day of June, 1929.

Notary Public
County, Alabama.

My Commission Expires
November 12th, 1931

Filed June 15th 1929.
R. W. Hall
Judge

C.H.Henry and
Marguerita Henry,
Complainants,

vs

The Town of Foley,
a Municipal Corporation,
Respondent,

Circuit Court of Baldwin County
In Equity.

For a brief reply to Respondent's last brief, Complainants would ask the court to consider the Respondents testimony. Although Respondent argues that,the Nuisance,which existed without denial at the time the bill was filed,has been abated,its own testimony does not bear out this argument. In some part of almost every witness, for Respondent,will be found an admission to the effect that the effluent from that septic tank is offensive and polluted. This also is a fact so manifest to any one knowing what town sewage is,that it is strange indeed that any argument disputing it should be presented.

The most that can be said is that according to the Respondent's evidence the nuisance has been diminished somewhat in its intensity, made not quit so offensive as it was when the bill was filed.

Every expert witness examined by Respondent,who was asked about it stated that the Septic Tank is not the best method of Sewage Disposal. The witnesses for the Complainant, who are every whit as well qualified to testify as those for Respondent, state that a two compartment septic tank will not take the foul matter out of the sewage flowing thruugh it. Their evidence shows that they could see and smell the foul matter still in the effluent from this tank. And this testimony tallies with the well known bad odor and foul appearance of town sewage. It conforms to what the best Scientists tell us as cited to the Court in our last brief,Roseneau on Preventive Medicine and Hygene.

Now, we reppectfully submit that the Court Judicially knows that the Septic Tank is not only not the best method of Sewerage Disposal, but that it is one of the worst. That is of course,subject to the well known expedient of aiding the judicial knowledge with the current knowledge of those qualified to speak on the subject.

In 23 C.J.Pg 58,we have the beginning of an exposition of the Law as to Judicial Notice. The index itself covers three or nearly three pages. It might be of interest to the Court to examine this clear statement of the law,because it might be an aid to the court on this subject of Judicial Notice. We all recognise it as true that "Judicial cognizance may extend to matters beyond the actual knowledge of the Judge.But it is as much an error for the court to mistake a fact of which it has taken cognizance,as to mistake a principle of law.When the matter is a proper subject of judicial knowledge,the judge,in order to attain mental certainty,may require the assistance of the party who invoked his judicial knowledge;he may investigate the matter for himself,or he may persue both courses. The scope,direction,and details of such investigation are entirely with in the discretion and under the direction of the judge,uncontrolled by the rules of evidence or wishes or suggestions of the parties. The judge may resort to or obtain information from any source of knowledge which he feels would be helpful to him,always seeking that which is most appropriate,including public officail documents or records of all kinds,whether of the state or national government,such as those in the state and navy departments,census bureau,weather bureau, or land office. Indeed he may resort to any public document properly authenticated,or to government publications;to dictionaries,encyclopoedias, geographies,or other books, periodicals and public addresses. He may even enquire of others".

It is a matter of common knowledge among those well informed on the subject of sewerage disposal that the septic tank is not the best method of disposal. The Complainant submits that this is also a matter of Judicial Notice or knowledge,and for that reason has offered to aid the Court by furnishing the Treatise on the Subject by Roseneau,refered to in the last brief furnished the court. This book is one from the library of the heath Department of the City and County of Mobile,and is one of the latest works on the subject,and the language is so clear and uncumbered with technical terms,that it does not require a Doctor or chemist to grasp its meaning. This Book is available to the judge at any time he may see fit to eall for it.

The Complainants submit in conclusion that it is shown without dispute that:

(1) That the effluent from the tank is the town sewage that has not been sterilized nor cleansed from its pollution.

(2) That no analysis of the effluent from the tank has been made, but that the fact remains that it is foul and offensive.

(3) That Respondent has no sort of supervision over its sewerage disposal system.

(4) That this septic tank has never been inspected on the inside by any engineer or other expert who might know whether it is ~~the~~ some plete as a tank of its kind or type.

(5) That Complainants live on the place where this vile sewage is discharged, and know the conditions, which they describe as intolerable.

For the Court to give this Town a decree to the effect that it has abated the nuisance which it admits was there when the bill was filed, would be to strike at the very foundations of the home of complainants, and all others similarly situated. The town tells the court it has done nothing since the evidence of Complainants was begun on December 12th last year to remedy conditions. It is manifest that unless the court compels it to do so it does not intend to do anything more about it. Its motto appears to be just let conditions rot on, let Henry endure the stench and pollution . Let them bear the burden of this Town's stingy policy of running its sewage down there on Henry's ground, refusing to spend the money necessary to releive Complainants of this burden.

We submit that this is not right. If the town will not give the relief voluntarily, then the strong arm of the Court of Equity should be extended to force that to be done which ought to be done.

We leave it to this Honorable Court, feeling that it will go to the bottom of this matter, and render a decree fair to all parties, which will relieve Complainants' home of this filthy stream of pollution.

R. P. Roach

Solicitor for the Complainants.

I am this day mailing a copy of this brief to Lloyd A. Magney Esqr, Solicitor for the Respondent. August 20th, 1929.

R. P. Roach

Solicitor for Complainants.

Copy.

The State of Alabama, Circuit Court.
In Equity.
Baldwin County.

Marguerite Henry and
Charles A.Henry, Complainants.

vs

The Town of Foley,a Municipal
Corporation, Respondent.

Comes the Complainant and prays the court to permit them to amend their bill of Complaint in this Cause in red Ink by striking out of the Bill of Complaint at the head or Caption thereof the words "At Law",and in their place,Insert the Words "In Equity". This amendment is made necessary because of a typographical error,in writing the words "At Law",where the words In Equity should have been written. This is a suit in equity and not at law,and the bill of complaint,was intended to so state.

Respectfully submitted,

R. P. Roache
Solicitor for the Complainant.

In the above cause, after due consideration, the motion is hereby granted,

This the 12th day of April, 1928.

John D. Leigh
Judge.

LLOYD A. MAGNEY
ATTORNEY AND COUNSELLOR AT LAW
FOLEY, ALABAMA

February 16, 1929.

Hon. T. W. Richerson,
Clerk & Register, Circuit Court,
Bay Minette, Alabama,

Dear Mr. Richerson:-

I enclose herewith answer to the bill, as just amended, in the case of Henry vs. Foley. It is merely a re-filing of my original answer. Please file the same and oblige,

Yours very truly,

Lloyd Magney

LAM:L.

37 N. J. E. Reports, pg. 345-347.

JOHN THOMPSON, et al,

v.

HENRY BEHRMANN.

A preliminary injunction restraining the proprietor of a shooting -gallery from so using it or permitting it to be used as to annoy the neighbors with the noise and smoke of the shooting was granted on order to show cause, it appearing that it was a nuisance at the time of filing the bill, though the evidence was conflicting whether it was so or not at the time of hearing the order to show cause.

Bill for injunction. On order to show cause and depositions taken thereunder.

Each of the two complainants is the owner of a dwelling-house in Paterson, in which he resides with his family. The defendant has a rifle range, established in June last, on a lot laterally adjoining the property of Thompson, one of the complainants, and about forty feet from the lot of Heinrich, the other. There is a store in each of those dwelling-houses. The bill states that for the period of two months past the defendant has, for hire, permitted large numbers of persons to shoot in the range, and has, almost continously during that time, allowed the shooting to be kept up until late at night; that the complainants and their families, and the tenants of Thompson, are and have been greatly annoyed and disturbed by the noise of the shooting in the range; that Thompson and his family and tenants have been awakened from their sleep and kept awake by it at night, and are and have been so annoyed by the smoke from the powder, that they are and have been compelled to keep their windows shut in order to exclude it, and that Heinrich's children have been awakened and kept awake by the noise of the shooting.

The defendant, by his answer, denies that the shooting in the range is a nuisance, and alleges that since the 8th of August last (the bill was filed on the 25th of that month), he has used no rifle there but one of small calibre and adapted to and made expressly for rifle galleries in cities. He admits that he keeps the range open until eleven o'clock on Saturday nights and until ten on other week-day nights. He was nitified on behalf of the complainants on the 11th day of August that the shooting was a great annoyance to them, and was requested to put a stop to it. He paid

no attention to the notice. I am satisfied from a careful examination of the evidence that when the bill was filed and the order to show cause served, the shooting the range was a nuisance, not only to the complainants, but to other persons residing in the neighborhood, and that it was one of such a character as to warrant the application to this court. Since that time it appears that there has been much less annoyance. The defendant insists that there is none at all. Perhaps the shooting can be so conducted as not to annoy the neighbors. There is a conflict of testimony as to whether it is so conducted now. Being satisfied that there was ground for an injunction when the bill was filed, it is my duty, under the circumstances, to grant the writ. The defendant has not stopped the shooting, but is now using a rifle of smaller calibre. Had he ceased altogether there would have been no needeof an injunction, but he has not, and he may again conduct the business in such a way as to be a nuisance, if he does not do so now. The complainants have a right to protection. There will, therefore, be an injunction restraining the defendant from so using the shooting-gallery or rifle range, or permitting it to be used, as in any way to annoy the complainants or their families, or tenants occupying their respective premises, by the noise of the shooting or the smoke therefrom.

C. A. HENRY and MARGUERITA HENRY,	:	
COMPLAINANTS,	:	NO._____
-vs-	:	IN THE CIRCUIT COURT OF
	:	MOBILE COUNTY, ALABAMA.
THE TOWN OF FOLEY, a Municipal Corporation,	:	IN EQUITY.
DEFENDANT.	:	

Before me, [signature] in and for Baldwin County, Alabama, personally appeared Mr. Frank T. Kremers....., who being duly sworn says that he has personally inspected the outlet to the Foley Sewer where it empties into the Wolf Creek, just west of the west line of the lands of complainants in the above stated suit, and also inspected the effluent from said sewer at said outlet and the waters and banks of said creek below said outlet on the said lands of complainants;

That said inspections occurred on the day of May, 1929, and on the 13 day of June, 1929. Affiant further says that said effluent from said sewer, had a foul and offensive odor, that it was on both said occasions said effluent had in it fecal matter and the liquid was somewhat thick and ropy or mucillaginous, that it discolored to a very perceptable degree, the waters of the creek down stream from said outlet, that the banks and bottom of said creek, and the twigs and limbs of bushes in said creek downstream from said outlet of said sewer were coated and offensive with the said foul fecal matter from said effluent from said Sewer. That this sewage flowing into said creek was and is unsanitary, nasty, filthy and foul, and makes the atmosphere on the lands of complainants foul with odors and unhealthful. That the waters of said creek on complainants said lands are made wholely unfit for domestic use by said sewage from said sewer flowing in same.

That affiant resides ~~in~~ near the Town of Foley and has so resided for Six years and is familiar with the conditions

caused in said creek and on the lands of complainants and knows that those conditions are unbearably foul and unsanitary and are a menace to the comfort and health of the complainants and others occupying the complainants home on said lands.

Frank T Kremers
AFFIANT.

Sworn to and subscribed before me on this the 13 day of June, 1929.

Notary Public
Gadsden, Alabama.

My Commission Expires
Oct 24 1931

Filed June 15th 1929
R. W. Hare
Judge.

STATE OF ALABAMA,)
)
County of Baldwin.)

Margueritea Henry

and Charles A. Henry,

Complainants,

IN THE CIRCUIT COURT
IN CHANCERY SITTING.

The Town of Foley, a municipal corporation,

Exceptions of Respondent to Bill.

Respondent.

Comes now the above named Respondent, The Town of Foley, and excepts to the Bill heretofore filed by the Compainants herein, for the reason that said Bill is unneccessarily prolix and repititious and contains unnecessary allegations and impertinent matter, as follows:

1: That part of paragraph "Second", to-wit:- "

> "That Compainants have expended a large sum of money to wit: SIXTEEN THOUSAND ($16,000.00) Dollars on said property in its purchase and improvement, with a view to making it a comfortable and convenient dwelling place, and as a place out of which these compainants can derive profits from the use of it, in connection with their home, for dairy purposes as well as for a hotel, or boarding house, for permanent boarders as well as transients."

is unnecessary and impertinent in that it is wholly irrelevant to the issue tendered by Complainants and is not a proper issue between the parties.

2: That part of paragraph "Fourth", to-wit:-

> "Complainants further charge that, although the water in said sewage could not cause disease to be imparted through milk produced by Complainant's cows, which were pastured on the land of Complainants through which the Creek in which the sewage was deposited flowed, yet on account of the evil reports and rumors falsely spread by a certain medical doctor about Complainants property people who bought Complainants milk and butter, refused further to buy same after hearing the said reports and rumors, false though the same were about the fact that said sewage flowed on Complainants said land."

is unnecessary and impertinent in that it is wholly irrelevant to the issue tendered by Complainants and is not a proper issue between the parties.

3: That part of paragraph "Fourth", to-wit:-

> "The fact that the sewage flowed over Complainant's said land greatly decreased the value of the land

"because of its foul ordors and disagreeable gasses and filth."

is repititious, the same allegation having been previously made in the same paragraph of the Bill.

4: That part of paragraph Fifth, to-wit:-

"And they have promised to abate it,"

is unnecessary and impertinent in that it is wholly irrelevant to the issue tendered by Complainants and is not a proper issue between the parties.

WHEREFORE, Respondent excepts to said Bill, for the reasons hereinbefore stated, and prays that said Bill may be stricken from the files of this Court and that Respondent may go hence without day and have judgment for its costs herein expended.

Lloyd McMagnus

Solicitor for Respondent.

C. A. Henry, et al.,
Complainants,

-vs-

The Town of Foley, a municipal corporation,
Respondent.

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA.
IN CHANCERY.

Brief of Respondent as to Setting aside submission.

It is the contention of the Respondent that this cause having been heretofore submitted upon a very full and complete record, it would be an abuse of discretion to set aside that submission to permit the taking of further testimony, and this is certainly made manifest by the various affidavits filed by the parties in connection with the application to set aside the submission.

These affidavits, on both sides, are merely cu mulative, present no new facts for the Court's consideration, and do not in any way change the facts established by the testimony heretofore presented, except that they do serve to destroy the effect of Complainant's argument that conditions will be worse in hot weather than in cold.

I trust that it is not overstepping the bounds of propriety for me to state here that if it seems wise or necessary to so encumber the record, it would be possible to procure and submit literally hundreds of affidavits such as those tendered herewith.

It seems obvious that to permit the taking of additional testimony would merely multiply depositions without disclosing any different situation than is already reflected by the record.

True, it is entirely within the discretion of the Court to set aside this submission, the statute in so many words granting the power, and there is a dearth of authority in the decisions of the Supreme Court as to when and how the power should be excercised. The case of Harrell vs. Mitchell, 61 Ala., 270, quoted by your honor in the decree of May 23rd, 1929, states that it should be excercised only "under very special circumstances."

The affidavits filed by Complainants in support of their motion, disclose no "special circumstances" and are merely a repetition of statements made in the original submission.

Indeed, no more can be said for the affidavits submitted by Respondent; they too, merely repeat the same story that all of Respondent's witnesses have heretofore told, although they do, of course, demonstrate that the hot weather has no effect upon the operation of the septic tank and does not cause any offensive condition about it.

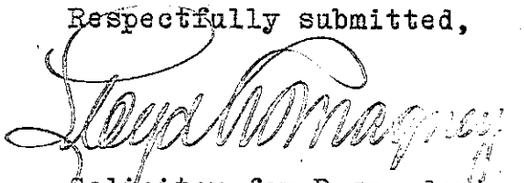
But the very fact that neither side can produce anything new or different at this time is the best possible argument that the case was fully and fairly submitted and that a re-submission would accomplish nothing and would merely cause additional expense and annoyance to all concerned.

The case of Dixon vs. Higgins, 82 Ala. 284, 2 So. 289 Holds:

> By our decisions the allowance to take additional testimoney, whether on special application or otherwise, has been held to rest in the discretion of the Chancellor. Gordon vs. Tweedy, 74 Ala. 232; Nunn vs. Nunn, 66 Ala. 35. The power should be sparingly exercised, the merits of the case being the controlling consideration.

Tested by these rules this application should be denied. There are no "very special circumstances" disclosed by Complainant's affidavits and no good reason advanced for the action requested, and to grant it would serve no useful purpose.

Respectfully submitted,



Solicitor for Respondent.

MARGUERITA HENRY AND C. A. HENRY, Complainants, -vs- THE TOWN OF FOLEY, a Municipal corporation, Respondent.	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN CHANCERY. AFFIDAVIT.

STATE OF ALABAMA,
County of Baldwin.

H. G. MENKE, being first duly sworn, on his oath deposes and says: that he is the same H. G. Menke who testified as a witness for Respondent in the original submission of this case, and that he was then and is now and has been for six and one-half years, the Assitant State Sanitary Engineer of the State of Alabama.

That he did on the 2nd day of July, 1929, at the hour of about 10:30 A. M., make an examination and inspection of the septic tank of the Town of Foley, the territory surrounding the same and of the land of complainant along Wolf Creek for a distance of about 300 feet below said septic tank.

This is a very hot day, the thermometer being over 90 and with considerable humidity.

That he noticed a very slight and not unpleasant odor at the point of the discharge of the septic tank effluent into the creek, but this odor was not perceptible continuously and was never strong enough to attract the attention of any one unless they were specifically looking for such evidence. The tank, in affiant's opinion was functioning properly, in fact excellently, and no solid particles passed from the tank during the time of the inspection. There was a slight deposit on the twigs and debris of the creek proper; all this was at the actual discharge point of the septic tank and not further than fifteen feet below the outlet of the tank. Further down the stream, at the small bridge, he noticed no odor whatsoever and the organic deposit on the twigs and branches had almost entirely dissappeared. A part of this deposit was fished

out ~~and~~ with a twig and held close to the nose and gave off no odor that was perceptible. In fact at no point more than ten feet from the tank was there the slightest odor attributable to the tank or sewage perceptible.

A comparison of the result of this inspection in warm weather and that made on February 1st, in the winter months, showed no difference as regards quality of effleunt, and presence of odors, and deposit in the stream or upon the debris in the stream.

Briefly, then, conditions were unchanged and this septic tank is now, as it was then, properly performing the functions it is intended to perform and there is no insanitary or offensive conditions due to this tank.

H. J. Merrill

Subscribed in my presence and sworn to before me this 2nd day of July, 1929.

Louis Lamagna

C. A. Henry, et al.,)
)
Complainants,)
)
-vs-)
)
The Town of Foley, a Municipal Corporation,)
)
Respondent.)

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA.
IN CHANCERY.

AFFIDAVIT.

STATE OF ALABAMA)
)
COUNTY OF BALDWIN.)

B. F. Patterson, being first duly sworn, on oath deposes and says:-

My name is B. F. Patterson, I am the proprietor of the Foley Motor Co., of Foley, Alabama, and am a member of the Town Council. I testified as a witness in this case last February and have today, July 12th, 1929, at about 9:30 A. M., made another trip to the Town's septic tank in order to compare conditions in hot weather and in cold. It was a hot morning, with the thermometer between 85 and 90 degrees, but I could not see any difference between conditions there today and in the colder weather last January and February. I have not been there before today for several months as the tank is located away off from the road in a wild and inaccessible place and is difficult to get to, but today I went clear down to the outlet and put my head right in the pipe through the head wall and right close up to the water as it flows from the tank and even in that position the only odor was a very faint musty odor such as one smells in a damp cave, and there was none at all except right in this pipe. Away from the tank even just a few feet, two or three, there was no odor at all that one could smell and although I went clear down to the stock bridge on Mr. Henry's land I could not smell any odor at any place along the branch or any place on Mr. Henry's land or at any point between the tank and where I left my car.

I could not see anything about the water or the banks of the branch to show that there was any pollution of the water and I could not see any difference between this branch and any other. The water was clear and looked all right to me and there was no odor from it. I cannot see that Mr. Henry has any reason at all to com-

plain about this tank as it seems to me to be working perfectly and the hot weather has not made any difference at all that I can discover.

There were no solids at all in the water from the tank and to me it seemed to be perfectly clear and there was nothing offensive in the slightest degree about this tank or the water that comes out of it. It all looked all right to me.

B. F. Cattron

Subscribed in my presence and sworn to before me, this 12th day of July, 1929.

Lucile Anderson
Notary Public.

C. A. Henry, et al.,)
)
Complainants,)
)
-vs-)
)
The Town of Foley, a)
municipal corporation,)
)
Respondent.)

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.
in chancery.

AFFIDAVIT.

STATE OF ALABAMA,)
)
County of Baldwin.)

O. E. Davis, being first duly sworn, on oath deposes and says:-

My name is O. E. Davis and I am a bookkeeper for the Foley Motor Co. I went this morning, July 12th, 1929, with Mr. Patterson, to the Town septic tank. I t is a very hot morning. We went clear down to the outlet of the tank and I tried to smell some odor from it, but there was nothing that I could smell at all. I looked at the water of the branch at several places but I could not see anythingin it that looked different ~~kkxk~~ from any other branch and I have lived in southern Alabama and have been familiar with these little streams or branches all my life. I could neither see nor smell anything out of the ordinary.

I was down there once before with Mr. Patterson last winter but I could not see any difference this morning from what I saw on a cold morning. If I did not know that this septic tank is there, there is nothing about this branch that I could tell it from as the water is clear and there is nothing floating in it that I could see, except just what you will see in any of these branches and there is no smell about it at all. So far as I can see the tank makes no difference to it except that it causes more water to flow than would otherwise.

I neither saw nor smelled anything in the least offensive or objectionable to me.

O. E. Davis

Subscribed in my presence and sworn to before me this 12th day of July, 1929.

Lucile Anderson
Notary Public.

C. A. Henry, et al,

Complainants,

-vs-

The Town of Foley, a Municipal Corporation,

Respondent.

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN CHANCERY.

AFFIDAVIT.

STATE OF ALABAMA,
County of Baldwin.

Martin C. Crosby, being first duly sworn, on oath deposes and says:

My name is Martin C. Crosby, I am the proprietor of a drug store in the Town of Foley, and am the same Crosby who testified in this case last February.

I went down to the Town's septic tank on Wolf Creek, near Mr. Henry's place at 5:00 o'clock P. M. on July 8th, 1929. It had rained hard that morning and after the rain got very hot and it was a close, sticky day. I thought it was just the kind of a day that would show up anything wrong with the septic tank and a day on which any odor would be particularly noticeable. There was absolutely no odor of any kind. I was right at the outlet pipe, could put my handin the water as it came out of the tank and could not smell a thing and the water was perfectly clear. There was no discoloration and nothing at all in the water, such as solid particles. The water of the branch was rather muddy as was to be expected after a heavy rain and I was not able to tell very much about its condition for that reason but I did not see anything about it that looked like it had been affected at all by the discharge from the tank, and certainly there was no odor at all.

I went down again on July 11th, yesterday, and took with me Mr. J. R. Carson, a civil engineer. We went down about 9:00 o'clock in the morning and it was another very hot day, but there had been no rain and the water was perfectly clear again and we could see if there was anything from the tank in it. There is lots of stuff down in this branch and it is grown up all around it with a very heavy growth of trees and bushes and at several places where

a log or branch was down in the water we noticed a sort of scum on the water collected against the obstruction. There was not much of this but we thought it might come from the tank and so we went up the stream a ways, above the tank and before the discharge from the tank gets into the water at all, and we found precisely the same condition there. It could not have worked up the stream, against the flow of the water, and then, too, it was always on the upstream side of the obstruction showing that it had been carried there by the water from further up the stream. I have seen the same sort of scum in other branches and this one, in all respects looks to me just like all the rest we have down here and I cannot see or smell anything about this branch which is different from the rest.

We also went down the stream to the little stock bridge and examined the water where ever we could get to it through the underbrush and I could not see or smell a thing. This septic tank does not make the slightest difference in this branch so far as I can determine.

It is just the same in hot weather as it was in cold so far as I can see and there is not a bit of smell anywhere, even right at the tank. I do not see how any septic tank could work better than this one is doing and there is nothing the least bit offensive about it even on a very hot, murky day.

Martin C. Ewing.

Subscribed in mympresence and sworn to before me, this 12th day of July, 1929.

Thurle Anderson
Notary Public.

C. A. Henry, et al., Complainants, -vs- The Town of Foley, a Municpal Corporation, Respondent.

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN CHANCERY.

AFFIDAVIT.

STATE OF ALABAMA, County of Baldwin.

C. W. Green, being first duly sworn, on oath deposes and says:-

I am the same C. W. Green who testified for the Town in the original submission of this case and am the Mayor of Foley. I have recently made two trips to the Town's septic tank for the purpose of inspecting it and comparing it and its operations during hot weather, with the conditions there as I found them during the cold weather last winter when my testimony was first taken.

The first of these trips I made on June 21st, 1929, in company with Dr. John Stark. It was a hot, dry day and we went to the tank at about 10:00 o'clock A. M. I inspected the tank, the discharge from it, the banks and waters of the branch down as far as Henry's stock bridge, about 300 feet east of the tank, and I was absolutely unable to discern the slightest odor any place. Right at the outlet, within just a few ~~inches~~ feet of the stream of water as it comes out of the tank, it was impossible for me to smell anything at all and at no place along the stream was there anything which I could see or smell to distinguish this branch or creek from any of the hundreds which flow through this section. The water was just as clear, there was no more deposit in the stream or on the banks or the branches of the trees and bushes which lie in the water than any of these surface water branches and nothing at all to show that the tank emptied into it. To my mind it is impossible for anyone to stand anywhere on Mr. Henry's property and from anything that can be seen or smelled, tell that there is a septic tank discharging into this branch. There is simply nothing there to disclose

C. A. Henry, et al., Complainants, -vs- The Town of Foley, a Municipal Corporation, Respondent.

IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN CHANCERY.

AFFIDAVIT.

STATE OF ALABAMA, County of Baldwin.

Dr. Sibley Holmes, being first duly sworn, on oath deposes and says:-

My name is Sibley Holmes and I am a Doctor of Medicine and have been engaged in the practice of my profession continuously for the past thirty-three years, the last twelve, almost thirteen years, in Foley, Alabama. I am the Senator from the Twenty-first Senatorial District of the State of Alabama.

I am very much interested in all matters pertaining to health and sanitation, and so was glad to go with Mayor C. W. Green of Foley, to inspect the septic tank of the Town, and we went there about 10:00 o'clock A. M., July 1st, 1929. This was a very hot, humid day and we went clear down to the branch and right up to the outleftof the septic tank, but although were were within just a few feet of it, there was no odor of any kind that I could sense nor was there any odor from the tank at any place in that vicinity that I could detect. We went down the stream, onto Mr. Henry's property, to the stock bridge which he has constructed across the stream and examined the water at several points along the way, but I was unable to see anything which in my judgment was attributable to this tank. There was noticeable, at several points, small collections of foreign matter against obstructions to the flow of the water, but I do no know that these came from the septic tank and do not believe that they did, as they are characteristic of all the branches in this part of the country.

I saw no evidences of sewage pollution. It is possible that there may be some pollution of this water from this septic

tank, but, if so, it was not apparent from the superficial examination I was able to make. It is a fact that all of these surface waters are subject to pollution of one kind or another and that is particularly true of this Wolf Creek which flows for some distance through or close to the Town of Foley, but I cannot see that the septic tank is the cause of any appreciable pollution of it.

There is nothing offensive about the tank itself or the condition of the stream, no odors of any kind, and nothing that could be called a nuisance in my judgment. I think that the Town of Foley has a very good system of sewage disposal and that it is a distinct advantage to the health of the community.

Sibley Holmes

Subscribed in my presence and sworn to before me, this 12th day of July, 1929.

Fleeta Anderson
Notary Public.

it.

July 1st was an extremely hot day, lots of humidity and I went down to the tank again at about 10:00 o'clock A. M. in company with Dr. Sibley Holmes. The conditions were just the same as I found them on June 21st, no odor and no deposit in the stream which I could lay to the tank. Of course, in all these surface waters, there is lots of rubbish, dead limbs of trees, shrubbery etc., and the water is shallow, only a few inches deep and spread out over a good deal of ground with a very heavy growth of trees, bushes and all kinds of vegetation and there is more or less of a slimy deposit on obstructions to the water in all of them, but this one, known as Wolf Creek, is no different from any of the rest so far as I can see, and certainly there is no more smell from it than from any of the others which the Town's septic tank does not touch at all; in fact there is no smell at all that I can distinguish.

If anything there was less odor during these two inspections I made in hot weather, than there was in the inspections I made during cold weather, because I could then smell a very faint odor right at the tank, while these last two trips there was no odor at all. I was very agreeably surprised because I had thought there might be some truth in Mr. Henry's contention that conditions would be worse in hot weather than in cold, but the fact is that they are not and that there is nothing offensive about this tank at all, and it is performing wonderfully well in my judgment.

A. A. Greene

Subscribed in my presence and sworn to before me, this 12th day of July, 1929.

Thirle Anderson
Notary Public.

STATE OF ALABAMA,)
BALDWIN COUNTY.)
MARGUERITA HENRY and CHARLES A. HENRY Complainants,)
Vs.)
THE TOWN OF FOLEY a Municipal Corporation, Respondent.)

CIRCUIT COURT

~~AT LAW~~ In Equity

TO THE HONORABLE JOHN D. LEIGH, JUDGE OF THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA:

Your Oratrix and Orator, Marguerita Henry and Charles A. Henry file this bill of Complainant in this Honorable Court and for cause of Complainant, respectfully show as follows:

First: Complainants allegethat they are resident Citizens of the County of Baldwin,State of Alabama, and over the age of twenty one years. That the Respondent is a town ,incorporated as a Municipal Corporation, under the general Laws of the State of Alabama, and is situated in the County of Baldwin, State of Alabama.

Second: Complainants further show the Court that they are the owners of the following described tract of land situated in said State and County to wit:

> Farm Number Seven(7), being the Southwest quarter of the Northeast quarter of Section Twenty-eight (28),Township Seven (7)South, Range Four (4) East, except four (4) acres described as follows:- Commencing at the Southwest corner of the Northeast quarter of Section(28), Township (7) South of Range (4) East, run North 600 Feet; thence, East 300 feet, thence, South 600 feet, thence, West 300 Feet, to the place of beginning.

That compalinants acquired the title to said real estate on to wit: 8th day of February,1927 and at an early date thereafter, took possession of said property, moved on it as their home and have occupied it as their homestead and residence ever since and are now so occupying it. That said property is not within the corperate limits of the said Town but is adjacent thereto. That complainants have expended a large sum of money to wit: SIXTEEN THOUSAND ($16000.00)

DOLLARS on said property in its purchase and improvement, with a view to making it a comfortable and convenient dwelling place, and as a place out of which these Complainants can derive profits from the use of it, in connection with their home , for Dairy purposes as well as for a hotel, or boarding house, for permanent boarders as well as for transients.

Third: Complainants further show that the Respondent, the Town of Foley, constructed in the year 1925 and has been for more than one year and is now operating a sanitary sewer in and through the said town, into which by connection s with the dwellings, stores and other houses and habitations of said town, the sewage composed of many kinds of filth and of excreta from the toilets or privies in constant use, insaid town flows and Complainants further charge that the sewer discharges its flow at or very near the west line of these Complainants said land, into a small stream locally known as Wolf Creek, which stream flows Southeasterly for about 1200feet through Complainants land.

Fourth: Complainants further ~~[illegible]~~ charge that the said sewage composed as aforesaid is constantly being discharged upon Complainants said land in said Creek and that it creates foul odors and vapors and gasses detrimental to the comfort and well being of the Complainants dwelling and that said dwelling and property of complainants is much depreciated in value by the discharge of said sewage from the said sewer on and near their land and in such proximity to their dwelling house, as to make it very much less pleasant and habitable as a dwelling house and practically destroys its value as a hotel or boarding house, because of the foul and nauseating odors and gasses exhaled from the said sewage, which causes the vile, and offensive odors to fill the air in and around said dwelling house. ~~Complainants further charge that, although the water in said sewage could not cause disease to be imparted through milk produced by Complainants cows, which were pastured on the lands of Complainants through which the creek in which the sewage was deposited flowed, yet on account of the evil report and rumors falsely spread by a certain medical Doctor about Complainants property, people who bought complainants' milk and butter, refused further to buy same after hearing the said report and rumors, false though same were about the fact that said sewage flowed on Complainants said land.~~ The fact that the

that it pollutes the waters of said Creek, as same flow through complainants land and

sewage flowed over Complainants said land greatly decreased the value of the land because of its foul odors and disagreeable gasses and filth. Said nuisance is a continuing one as said sewer is used constantly by said Town.

Fifth: Complainants show that they in October, 1927, demanded of the Mayor and other responsible officers of said Town an abatement of the above stated nuisance ~~and they have promised to abate it,~~ but though to wit: four months have elapsed since such demand, ~~have~~ no abatement of said nuisance has been made.

That the injury to Complainants' said property, and the discomfort and inconvenience and loss to which Complainants are subjected, all as above set forth are of such a nature, and so recurring every day, that she can not be fully compensated in damages; that under the facts as h erein alleged the Complainants have not an adequate remedy at Law.

PRAYER FOR RELIEF.

Complainants respectfully pray that this Honorable Court make and enter a decree directing and commanding the Respondent, the Town of Foley, to abate the said nuisance caused by the sewage flowing from its sewer on to Complainants land, and Complainants pray for permanent injunction against Respondent, enjoining it from continuing the aforesaid nuisance; Complainants pray for such other or further relief as they may be entitled to, under the allegations and proof.

PRAYER FOR PROCESS.

Complainants pray that the Town of Foley, as a Municipal Corporation, be made a party to this suit, and to that end that process issue out of this Honorable Court, commanding it to plead answer or demur to this bill of Complaint within the time prescribed by Law, and in default thereof, that a decree pro confesso be rendered against it, and as in duty bound Complainants will even pray etc.

R. O. Roach.
Sol. for Complainants.

FOOT NOTE:

The Respondent is required to answer this bill of Complaint from paragraph one to paragraph five inclusive, but not under oath as oath to answer is hereby expressly waived.

R. O. Roach.
Sol. for Complainants.

RECORDED

Marguerita Henry
and
Elmer A. Henry
vs
Town of Foley.

Bill of Complaint
to Abate Nuisance

Filed Mar 15-1926
T. W. Richardson
Register

R. P. Roach.
Complainants' Solicitor

Marguerita Henry, et als.)
Complainants,)
Vs.) In The Circuit Court of
The Town of Foley, a cor-) Baldwin County, Alabama.
poration,) In Equity.
Respondent.)
)

This cause is submitted on motion of Complainant to set aside the submission and permit the taking of additional testimony in the cause, and on respondent's objections thereto.

The rule in Alabama governing such motions is thus stated by Chief Justice Brickell in Harrell V. Mitchell, 61 Ala. 270:

"The rule in courts of equity, disallowing except under very special circumstances, the examination of witnesses after the publication of the evidence, even before hearing and decree, is founded on the soundest policy and highest wisdom, and it is feared that it is not enforced as rigorously as the ends of truth and justice require".

While this is the rule, the general rule, it is nevertheless in the sound discretion of the judge to take such action "under very special circumstances". If the circumstances of this case are very exceptional, the complainant should have the right to so show by affidavits, which respondent should be allowed rebut by counter affidavits. The Register will enroll the following decree.

DECREE.

This cause is submitted on motion of Complainant to set aside the former submission and permit the taking of additional testimony, and upon the respondents objection to the allowance of said motion. Upon consideration of said motion the Court is of the opinion that the hearing of said motion should be continued to allow Complainant to show by affidavits, if he can, that the facts and circumstances of this case are of such exceptional nature as to warrant the granting of his motion, and to permit the Respondent to rebut by counter affidavits, if it sees proper.

It is therefore ordered, adjudged and decreed by the Court that this hearing be continued and the complainant allowed thirty days to procure and file such affidavits as he may be advised are pertinent and proper, serving the respondent with copies of all such affidavits. The respondent is allowed thirty days from the date of such service to procure and file rebutting affidavits if it so desires.

Done at Chambers at Monroeville, Ala. May 23rd, 1929.

F. W. Hare
Judge

1st 2nd

Decree
Filed May 23, 1929.
F. W. Hare
Judge

RECORDED

Marguerita Henry and
Charles A. Henry,

Complainants,

-vs-

The Town of Foley, a
municipal corporation,

Respondent.

IN THE CIRCUIT COURT OF
BALDWIN COUNTY ALABAMA.
IN CHANCERY.

STIPULATION.

It is hereby stipulated, by and between the parties hereto, by their respective solicitors, as follows:

That C. A. Henry, for complainants, testified orally before the court, that the bottle of water by him exhibited to the Court was procured by him from the discharge of the septic tank as the same comes from the tank and before it falls to the ground, at 5:00 o'clock P. M., February 28th, 1929.

That C. W. Green, for the Respondent, testified orally before the court that the three bottles of water by him exhibited to the court, were procured by him at 7:00 o'clock A. M., March 1st, 1929, as follows:

#1 was taken from the waters of Wolf Creek, 15 feet below the point where the septic tank empties into said creek.

#2 was taken from the waters of Wolf Cree, 15 feet above the point where the septic tank empties into said creek.

#3 was taken from the discharge of the septic tank at the same place and in the same manner as that testified to by C. A. Henry.

That Dr. JohnStark testified orally before the court that he is the Town Clerk of the Town of Foley and has charge of its records. That the approximate yearly income of said Town is $6,000.00 and its yearly expenditures slightly in excess of that sum and that the Town now has a floating, unsecured indebtedness of $5,900.00.

That the number of connections to the Foley SanitarynSewer system is between 80 and 100.

That by special assessments against the property benefitted the Town of Foley has recently completed an installation of sidewalks amounting to approximately $19,000.00.

R. P. Roach.
Solicitor for Complainants.

Stuart McMaguey
Solicitor for Respondent.

Henry et al RECORDED

vs

Town of Foley

Note of Testimony

Filed March 1st 1929

T. C. Rickman

Register

The State of Alabama, Circuit Court.
In Equity.

Baldwin County.

Marguerita Henry and
Charles A.Henry, Complainants,

vs

The Town of Foley,a Municipal
Corporation,
Respondent.

Comes the Complainant and prays the court to permit them to amend their bill of Complaint in this Cause in red Ink by striking out of the Bill of Complaint at the head or Caption thereof the words "At Law",and in their place,Insert the Words "In Equity". This amendment is made necessary because of a typographical error,in writing the words "At Law",where the words In Equity should have been written. This is a suit in equity and not at law,and the bill of complaint,was intended to so state.

Respectfully submitted,

R.T.Roach

Solicitor for the Complainant.

RECORDED

Marguerita Henry et al

To

The Town of Fairfax.

Motion to Amend
bill in Red Book.

Filed April 11th 1928
T. M. Richards
Register

MARGUERITA HENRY and CHARLES A. HENRY,	:	NO._____
Complainants,	:	IN THE CIRCUIT COURT OF
-vs-	:	BALDWIN COUNTY, ALABAMA
THE TOWN OF FOLEY, a Municipal Corporation.	:	
Respondent.	:	IN EQUITY.
	:	

Come the complainants in the above stated cause and move the court to set aside the submission in this cause on the following grounds, upon each ground of which separately, the complainants insist:-

(1) This is a suit filed to abate a nuisance. It is admitted by the defendant that the nuisance did exist when the suit was filed and up to a certain time, but it was claimed by the defendant at the hearing, and on the submission, and it now claims, that the nuisance has been abated.

(2) The complainants, while maintaining that the proof introduced by them on the submission of the cause showed that then the nuisance had not been abated, are prepared now to prove that the nuisance is continuing and that its continuance is an injury to them and has never been abated. That the cold weather and abundant rains which prevailed when respondent's evidence was taken, lent color to the respondent's claim that it has abated the nuisance, but now that the warm, dry weather has come, the nuisance which was only minimized by the cold and rain, is as bad and offensive as ever.

(3) Complainants wish to introduce further evidence or have the court order a reference or, in some other way, bring it officially in evidence to the attention of the court that the said nuisance is not abated, but is now continuing and is as offensive and harmful to complainants as charged in their said Bill of Complaint.

R. R. Roach
SOLICITOR FOR COMPLAINANTS.

I hereby certify that I this day mailed a copy of this motion to Mr. Lloyd A. Magney, colicitor for respondents. May 15th, 1929.

R. R. Roach
SOLICITOR FOR COMPLAINANTS.

State of Alabama,
County of Baldwin.

In the Circuit Court
in Chancery Sitting:
Exceptions of
Respondent to Bill.

Margueritea Henry and
Charles A.Henry, Complainants.
vs.
The Town of Foley, a Municipal,
Corporation ~~&&&&&&&&&&~~Respondent.

Comes now the above named Respondent, The Town of Foley, and except to the Bill heretofore filed by the Cpmplainants herein, for the reason that said bill is unnecessarily prolix and repititious and contains unnecessary allegations and impertinent matter, as follws:

1. That part of paragraph "Second", to wit:-"

" That Complainants have expended a large sum of money to wit, SIXTEEN THOUSAND ($16.000.00) Dollars on said property in its purchase and improvement , with a view to making it a comfortable and convenient dwelling place, and as a place out of which these complainants can derive profits from the use of it, in connection with their home, for dairy purposes as well as for a hotel, or boarding house, for permanent boarders as well as transients,"

is unnecessary and impertinent in that it is wholly irrelevant to the issue tendered by Complainants and is not a proper issue between the parties .

2. That part of paragraph "FOURTH", to-wit:-

"Complainanst further charge that, although the water in said sewage could not cause disease to be imparted through milk produced by Complainants cows, which were pastured on the land of Complainants through which the Creek in which the sewage was deposited flowed, yet on account of the evil reports and rumors falsely spread by a certain medical doctor about Complainants property people who bought Complainants milk and butter, refused further to buy same after hearing the said reports and rumors, false though the same were about the fact that said sewage flowed on Complainants said land."

is unnecessary and impertinent in that it is wholly irrelevant to the issue tendered by Complainants and is not a proper issue bewteen the parties.

3. That paragraph "Fourth", to wit:

" The fact that the sewage flowed over Complainant's said land greatly decreased the value of the land " because of its foul odors and disagreeable gases and filth."

is repititious, the same allegations having been previoulsy made in the same paragraph of the Bill.

4: That part of paragraph Fifth, to wit:-

" And the have promised to abate it,"

is unnecessary and impertinent in that it is whol y irrelevant to the issue tendered by Complainants and is not a proper issue berweent the parties.

WHEREFORE: Respondent excepts to said Bill, for the reasons hereinbefore stated, and prays that said bill may be stricken from the files of this Court and that Respondent may go hence without day and have judgment for its costs herein expended.

Lloyd Magney.

Solicitor for Respondent.

Filed April 19th, 1928.

T.W. Richerson, Register.

SUMMONS—ORIGINAL. MoorePtgCo.

The State of Alabama, Baldwin County. } Circuit Court of Baldwin County, In Equity.

To any Sheriff of the State of Alabama—GREETING:

WE COMMAND YOU, That you summon The Town of Foley a Municipal Corporation,

of Baldwin County, to be and appear before the Judge of the Circuit Court of Baldwin County, exercising Chancery jurisdiction, within thirty days after the service of Summons, and there to answer, plead or demur, without oath, to a Bill of Complaint lately exhibited by Marguerite Henry and Charles A. Henry,

against said The Town of Foley a Municipal Corporation,

and further to do and perform what said Judge shall order and direct in that behalf. And this the said Defendant shall in no wise omit, under penalty, etc. And we further command that you return this writ with your endorsement thereon, to our said Court immediately upon the execution thereof.

WITNESS, T. W. Richerson, Register of said Circuit Court, this 15th day of March 1928.

T. W. Richerson Register.

N. B.—Any party defendant is entitled to a copy of the bill upon application to the Register.

2 Original

RECORDED

SERVE ON.....

Circuit Court of Baldwin County
In Equity.

No.....

SUMMONS

Marguerite Henry and
Charles Henry.

vs.

The Town of Foley a Municipal
Corporation.

R.P.Roach.
Solicitor for Complainant

Recorded in Vol..... Page.....

THE STATE OF ALABAMA,
BALDWIN COUNTY.

Received in office this 15th
day of March 1928

Sheriff.

Executed this 20 day of
March 1928
by leaving a copy of the within Summons with
John H. Starke

Defendant.

C. Irwin
Sheriff.

By B. A. Higgins
Deputy Sheriff.

Marguerita Henry, et als.,	)	
	)	
Complainants,	)	IN THE CIRCUIT COURT OF BALDWIN
	)	
Vs.	)	COUNTY, ALABAMA.
	)	
Town of Foley,	)	IN EQUITY.
	)	
Respondent.	)	

The bill seeks the abatement of an alleged nuisance, but no damages are sought to be recovered. It appears from the pleading and testimony that the septic tank complained of as constituting a nuisance was constructed by the Town of Foley in the year, 1925, and that the Complainants came to Foley on or about the first of February, 1927, purchasing their property described in the bill of complaint on the second day after their arrival, but without any knowledge that the tank was in operation and discharging its effluent into Wolf Creek within fifteen feet of their property line. It further appears that the creek runs through complainants' land for a distance of some twelve hundred feet, and within some eight hundred feet of their dwelling. It seems that complainants occupied their dwelling from February 1st., 1927, to August 1st., 1927, before they knew of the existence of this tank so near their land, at which time the odor from same became most offensive, this, possibly, because there was an increased volume of sewerage discharged through the tank. But Complainants are not precluded from relief by the priority of occupation.

There can be no question but that at the time of filing the bill of complaint, and for long prior and subsequent thereto, the tank did constitute such a nuisance as justified the bill and entitled complainants to relief. I am convinced, however, that a prepondenance of the evidence shows an abatement of the very bad conditions existing at the time the bill was filed. Officers from the State and County Health Offices testify that the septic tank is functioning as intended. A number of doctors and engineers, who qualify as experts, testify to the same effect.

It appears that such sewerage disposal, or treatment, is usual in the towns and cities of the State, and must have the approval of the Department of Health. It's Sanitary Engineer has examined and approved this particular tank.

The Town of Foley has expended large sums in its sanitary arrangements, and this septic tank is a vital and necessary part of its system. It appears that the town consulted qualified sanitary engineers before installing the system and this tank as a part thereof. It is true that, from faulty construction, the tank failed to function properly when built, and that the town officers delayed an unreasonable length of time in remedying complainants' just ground of complaint, but the great weight of the evidence shows that, after so long a time, this has been done. I am convinced that Complainants have suffered damage, annoyance, discomfort and real injury, for which, on a proper showing on appropriate pleadings, they would be awarded just compensation, but in this suit only injunctive relief is ~~sought~~ asked. In cases such as this it is the duty of the court to consider the comparative injury to the parties before awarding a writ of injunction, and this, too, where complainants' rights to such relief is otherwise plain and clear. Our Supreme Court has many times taken into consideration the fact that a public utility was involved and has frequently rested its denial of the writ almost entirely upon the fact that its issuance would injuriously affect the public convenience. Conceding, against what appears to me to be the great weight of the evidence, that the admitted nuisance has not been abated, it does not follow that an injunction should issue, for the reason that the consequences to the citizens of Foley would, in all probability, be worse than mere "inconvenience". I am convinced from a consideration of the evidence that for months the contents of the sewers were dumped without any treatment upon complainants' land, whereby the stream was polluted; also the air, and, in fact, the entire premises. It is further no doubt true that, even under present improved conditions, the stream is unfit for

drinking purposes, or other domestic uses. No one with a knowledge of the facts could ever bring himself to drink the water in the future, no matter what different system of purification might be substituted for the one in present use. It is common knowledge that the waters of such streams in close proximity to towns are unfit for domestic uses, and the testimony in this case affirmatively shows this to be true of the waters of this stream above the tank. Consequently, no manner of injunction could be of benefit to Complainants by way of restoring the purity of the waters of the creek. If, as the great weight of the testimony indicates, the offensive odors have been removed by the repairs to the tank, no substantial benefit would accrue to Complainants by the issuance of an injunction, whereas its issuance would entail great expense, (if no more serious consequences), on the citizens of Foley without benefit either to themselves or to Complainants. On the other hand, if in fact the nuisance has not been permanently abated, but conditions only temporarily improved, these proceedings do not estop or preclude complainants from seeking redress by way of damages for future injuries; or, for that matter, any past injuries not barred by the statute of limitations, or affected by the doctrine of res adjudicata, if here applicable.

Since the submission on the merits the complainants have moved the Court to set aside the submission and permit the taking of additional testimony as to present conditions. By decree entered May 23rd., 1929, the parties were permitted to submit affidavits in support and in opposition to this motion. A consideration of these affidavits leaves no doubt that it would serve no good purpose to re-open the case, and that the motion should be overruled.

The Register will enroll the following

D E C R E E.

This cause is submitted for final decree on the

pleading and proof as noted by the Register, and on motion of Complainants' to set aside said submission and allow the taking of additional testimony, the Respondent's objection to the allowance of said motion to set aside said submission, and on affidavits supporting and rebutting said motion. Upon a consideration of said motion to set aside the former submission, the objections filed thereto, and the supporting and rebutting affidavits in relation thereto, I am of the opinion that said motion should be overruled. It is therefore, ordered, adjudged and decreed that said motion to set aside the submission be, and same hereby is, overruled and refused.

Upon consideration of the pleading and proof I am of the opinion that the nuisance complained of has been abated pending the suit, and that there now exists nothing upon which to predicate a writ of injunction, or against which a writ of injunction should properly issue.

It is therefore, ordered, adjudged and decreed by the Court that complainants bill of complaint be dismissed, but at the costs of respondent, for which let execution issue.

Done at Chambers at Monroeville, Alabama, this the 24th., day of August, 1929.

F. W. Hare
Judge.

Final Dec

Decree

Filed Aug 29th 1929
T M Richmond
Register

RECORDED

STATE OF ALABAMA
COUNTY OF BALDWIN

I, Elma Carson, do hereby certify that in accordance with the stipulation of the attorneys for the respective parties in this cause, I did, on the 12th day of December, 1928, cause to come before me as Commissioner to take depositions the following named persons: Charles A. Olson, A. H. Mueller, Julius Valentine, Herman Jensen, C. A. Henry, witnesses on behalf of the complainant, and that I have personal knowledge of the identity of said witnesses. That I am not of counsel or of kin to any of the parties to said cause, or in any manner interested inthe result thereof. That each of said witnesses was by me duly sworn and testified as herein set down; that the answers of said witnesses were by me reduced to writing as near as may be in the language of the witness.

In witness whereof, I have hereunto set my hand at Foley, Alabama, this 12th day of December, 1928.

Elma Carson

F E E S

6350 words @ 20¢ per 100--$12.70

Attendance 1 day 1.50

$14.20

Paid by Complainant

Elma Carson

STATE OF ALABAMA

BALDWIN COUNTY

Marguerita Henry	:	
and Charles A. Henry, Complainants	:	IN THE CIRCUIT CORT OF
	:	BALDWIN COUNTY, ALABAMA
vs.	:	
The Town of Foley, a municipal corporation,	:	
Respondent	:	

The above-named parties by their solicitors agree to and hereby waive commission to take the testimony of witnesses named below, namely, Charles A. Olson, A. H. Mueller, Julius Valentine, Herman Jensen, C. A. Henry and Marguerita Henry, all of whom reside in Foley, Alabama. And that Elma Carson act as commissioner to take the testimony of the said witnesses.

Dec 12, 1928

R. P. Roach.
Solicitor for Complainant

Lloyd McMillan.
Solicitor for Respondent

STATE OF ALABAMA :
:
BALDWIN COUNTY. :

By virtue of an agreement between the parties or counsel in the case of Marguerita Henry and Charles A. Henry vs. The Town of Foley, pending in the Circuit Court of Baldwin County, the undersigned, acting as commissioners, have caused Charles A. Olson, A. H. Mueller, Julius Valentine, Herman Jensen, C. A. Henry and Marguerita Henry, witnesses in said case, to testify on behalf of complainants, to come before me, who, being duly sworn deposed and testified as follows on oral interrogatories.

Answered, subscribed, and sworn to before me, this 12th day of December, 1928.

Elmer Carson
Commissioner

- - - - - - - - - - - - - - - -

R. P. Roach, representing the complainant, and Lloyd A. Magney, representing the respondent.

Mr. C. A. Henry, being duly sworn, testified as follows:

(DIRECT EXAMINATION by Mr. Roach:)

Q What is your name

A Charles A. Henry. C. A. Henry

Q Are you one of the complainants in this case

A. Yes, sir.

Q When did you move here, Mr. Henry, and where from?

A Moved from Chicago first day of February, 1927.

Q You moved to the town of Foley?

A Yes sir.

Q Shortly after you movedhhere, did you buy any property

A Yes, sir, the second day--that would be about the 3d or 4th.

Q. Of February?

A Yes,sir.

Q Now was it this property described in this bill of complaint?

A Yes sir

Q And how long after you had purchased the property was it before you moved on to it

A Immediately

Q For what purpose were you occupying it?

A Dairy business

Q Did you occupy the place as a dwelling

A Yes sir

Q Mr. Henry, what character of place--how many acres of land ?

A 36

Q 36 acres of land in the land that you occupy

A Yes sir

Q Was it fenced up

A Yes sir

Q Did it or not have a dwelling house on it?

A Yes sir it did

Q The land was open or wooded land

A Both open and wooded

Q About how many acres of each

A About 10 acres of open and 26 acres of wooded

Q Did a stream of water run thru this land

A Yes sir

Q What was the name of that stream?

A Wolf Creek

Q How did that stream run thru the place--I mean in what direction?

A As near as I can describe semicircular from west to east.

Q Did it not enter your land about the middle of the west line?

A Yes sir

Q Now how far did it run from your dwelling house--occupied by you--as it crossed the land going out on the east side?

A 550 feet.

Q You say the creek made a semicircular thru the land from the northwest to the southeast where it made its exit from this land?

A Yes sir

Q Tell as near as you can how far the creek is from your house at the point where it leaves your land.

A About 800 feet

Q About 800 feet?

A Yes sir

Q Is it not a fact that the most of your land that is the uncleared part is north and northeast of the creek?

A Yes sir

Q The cleared portion of your land is direct south and southwest is it not

A South and ~~xxxxxxxxxx~~ and southwest.

Q Now what improvements have you on this tract of land south and southwest of the creek?

A There is a dwelling and a barn, a chicken house, a garage, a power house,

Q Have you an orchard, garden or field cultivated ?

A Yes sir a 10 acre pecan orchard.

Q What is the lay of this land ?. Is it all level ?

A No, it is rolling.

Q How about right where the house is

A Hilly

Q House site hilly

A No, it is ~~xxxxx~~ flat--the land itself is rolling, sloping towards the creek.

Q How big or wide is this creek--I mean the natural flow of the stream?

A The creek bed is about 3 feet wide on the average. It is seldom filled with water.

Q Now, have you a map or plat showing the general situation there with regard to your land and the sewer as it runs toward the north?

A Yes.

Q Is that it?

A Yes.

Mr. Roach I ask that this map be introduced not as an accurate or detailed map of the situation but to show the general outline at that point.

The witness introduces the plat or map and same is hereto attached as Exhibit "A" and made a part of this witness' testimony.

Q When you moved to Foley, was there a sanitary sewer in and thru the said town?

A Not to my knowledge

Q When you first moved here--you did not know that there was a sewer?

A No.

Q How long after you moved here before you found out that there was a sewer system here that ran down that creek west of your house?

A I can't answer your question because--you said sewer or septic tank--one I knew about and one I didn't--I knew about the sewer but I did not know about the septic tank. I found out about the sewtic tank about August 1, 1927

Q Was the sanitary sewer and septic tank put down since you moved to Foley or before?

A Before.

Q Is this sanitary sewer being operated by the town of Foley?

A Yes sir.

Q Is it in and thru the said town?

A Yes sir.

Q Has it sewerage connections with the dwellings, stores and other houses and habitations of said town ?

A Yes.

Q You don't mean that it has connection with every single structure in the town, do you?

A Not that I know of.

Q Mr. Henry, how many connections, if you know, how many connections has this sewerage system with this sewer?

A I don't know exactly, but I should judge 6 or 700 inhabitants use the sewerage system

Q Does this sanitary sewer carry off the sewage from this town ?

A Yes sir.

Q Of what is this sewage composed?

A From toilets and all filthy matters which has to be disposed of.

Q From what?

A From each and every dwelling.

Q From any particular part of the dwelling?

A ~~xxxxxx~~ Toilets.

Q Toilets or privies?

A Yes.

Q Also other houses in the town--business houses, offices,factories, and such as that have connection with this sewer?

A Yes sir.

Q Are these in constant use in said town

A Yes continued use

Q Continually in use in said town?

A Yes sir

Q Where does that sanitary sewer discharge?

A Into Wolf Creek.

Q How far from the line of the proprty of yourself and your wife?

A That is the fence?

Q Yes

A About 15 feet.

Q About 15 feet from the west property line into Wolf Creek?

A Yes sir

Q Does Wolf Creek flow from where the discharge of the sewer comes into it, onto your land and thru it?

A Yes sir.

Q About how far thru your land does this creek flow

A Clear thru the 40 acres but I can't tell exactly how many feet.

Q Is this sewage being constantly discharged on to the lands of yourself and wife?

A Yes sir

Q In said creek?

A In said creek.

Q What if any odors do you perceive there,--are they delightful or they--

MR. MAGNEY: Question objected to as leading and suggestive.

A They are very nauseating.

Q Can you tell what is the cause of these nauseating odors.

A Yes

Q Well, tell what is the cause.

MR. MAGNEY: Objected to as calling for the conclusion of the witness.

A Any pure dung will smell.

MR. MAGNEY: Moved that the answer be stricken as not responsive.

Q Tell if you know what causes those nauseating odors?

MR. MAGNEY: Objected to as calling for the conclusion of the winess.

A Because these foul matters coming thru this sewerage system are not dissolved.

MR. MAGNEY: Moved that the answer be stricken as not responsive.

Q Mr. Henry, you said that there was foul sewage coming from that sewer?

MR. MAGNEY: Objected to as assuming a fact not in evidence.

A Yes sir.

Q Is that sewage the cause of these nauseous odors?

MR. MAGNEY: Objected to as leading and suggestive.

A Yes sir.

Q Up to the time of the filing of this bill, was that condition going on?

A Yes sir.

Q For how long had it been going on prior to March 14, 1928?

A As long as we have been on the property.

this land have upon its value?

MR. MAGNEY: Objected to as incompetent, irrelevant and immaterial and calling for the conclusion of the witness.

A Almost a total loss.

Q How far is the discharge of this sewer from your dwelling house? I mean where the water goes out of the sewer into the creek--the sewage goes out into the creek?

A 835 feet.

Q And you say it is in anorthwesterly direction from your dwelling house?

A Yes sir.

Q Does this sewage have any effect on your dwelling house as a pleasant and habitable place?

MR. MAGNEY: Objected to as leading and suggestive.

A It certainly has. It has a bad effect.

Q What effect if any does it have on its value as a hotel boarding house?

MR. MAGNEY: Objected as incompetent, irrelevant and immaterial and as calling for the conclusion of the witness.

A Enough to make our patrons leave on account of the odor.

MR. MAGNEY: Moved that the answer be stricken as not responsive.

Q You say that it improves the value of your property as a boarding house? Or does it depreciate it?

MR. MAGNEY: Objected to for the reason that the question misquotes the witness, assumes facts not in evidence and is leading and suggestive.

A It certainly does depreciate it.

Q What depreicates it?

A The sewage.

Q Have you had any boarders there at your house since you began to occupy it?

A Yes sir.

Q Was there any complaint made by any of your boarders as to the foul odors arising from that sewer?

MR. MAGNEY: Objected to as incompetent, irrelevant and immaterial and calling for hearsay testimony.

Q Cpuld these odors, vapors and gases be smelled at any place on your proprty?

MR. MAGNEY: Objected to as leading and suggestive.

A Yes sir.

Q At what places on your property?

A At the house.

Q Your dwelling house?

A Yes sir.

Q Mr. Henry, was these odors very perceptible or was it a very slight and indistinct smell?

MR. MAGNEY: Objected to as leading and suggestive and calling for the conclusion and opinion of the witness.

A They was strong enough to lose customers in our hotel.

MR. MAGNEY: Objected to as not responsive and moved that the answer be stricken.

Q Now answer if you can.

MR. MAGNEY: Objected to as leading and suggestive and calling for the conclusion and opinion of the winess, by repeating the question objected to before.

A Strong.

Q Were they not offensive--were these odors or not offensive?

MR. MAGNEY: Objected to as leading and suggestive.

A Yes, very offensive.

Q What if any effect had these nauseating odors on the comfort and wellbeing of your dwelling house?

A Not any.for the comfort for they just simply could not stand it.

MR. MAGNEY; Moved that the answer be stricken as not responsive.

Q Explain what you mean by not any on the comfort.

A Any such smell is nauseating. Loss of appetite--nauseating.

MR. MAGNEY: Moved that the answer be stricken as not responsive.

Q Were these nauseating odors arising from that sewage beneficial or detrimental to your home?

MR. MAGNEY: Objected to as assuming matters not in evidence, leading and suggestive, calling for conclusion of the witness.

A Very detrimental both physically and financially.

Q What if any effect had the discharge of this sewage on and near

A Yes sir.

Q Tell whether or not they left on account of the foul odors arising from that sewer.

MR. MAGNEY: Objected to as incompetent, irrelevant and immaterial and calling for the conclusion of the witness, leading and suggestive.

A Yes, on several occasions.

Q State whether or not the foul odors arising from that sewer are just on one side of your house or whether you can smell it all over the house.

MR. MAGNEY: Objected to as leading and suggestive.

A Naturally, you can smell it mostly on the north side because it comes from the sewer, but you can also smell it in the front if the wind is strong enough.

MR. MAGNEY: Moved that the answer be stricken as not responsive.

Q When if at any time can the odors you speak of be perceived to be strongest?

A On a hot day when the wind is blowing from the northwest.

Q Now what happens on those days when the wind is blowing from the northwest. Just explain--that gives you an opportunity to explain the whole thing.

A The natural thing we commenced talking about the sewer because we smell it. We would like to get away from it but we can not run away and leave it.

MR. MAGNEY: Moved that the answer be stricken as not responsive.

Q Now you have told about the vile and offensive odors which arise from that sewer?

A Yes sir.

Q And you say that you can smell those worst on a hot day when the wind is from the northwest? Now do these vile and offensive XXXXXXXXXXXX XXXXXXXXXXX odors fill the air in and around the dwelling house?

MR. MAGNEY: Objected to as leading and suggestive.

A Yes sir.

Q Now you say that the sewage flows over somplainants land in that creek?

A Yes sir

Q Is there sometimes an overflow?

A Yes, in rainy weather there is an overflow and in dry weather less water than a 6 inch pipe would carry.

MR. MAGNEY: Moved that that part of the answer following the word "overflow" be stricken as not responsive.

Q Before this bill was filed, have you examined the sewage that flowed out into that creek to see if there is any material of any kind floating in the water, and if so what kind, and name it.

A There has floated down the creek toilet papers, merry widows, and dung--and does so today. This has been continuously from August 1, 1927, until now--since I took notice of it.

MR. MAGNEY: Moved that that part of the answer after the word "dung" be stricken as not responsive.

Q Mr. Henry, you said that the foul odors arose from this sewage had greatly depreciated the value of your land and dwelling house?

A Yes sir.

Q Now tell what proportion ~~xxx~~ or fraction of its value has been taken away --your best estimate?

MR. MAGNEY: Objected to as incompetent, irrelevant and immaterial, not tending to prove or disprove any of the issues of this case, and calling for conclusion of the witness.

A Its like I said before that buyers object to this odor and I can not sell it, so it is a total loss unless it is ~~rented~~ remedied.

MR. MAGNEY: Moved to strike the answer as not responsive.

Q ~~Ix~~ Has this sewer been used all the time ever since you filed this bill and is being used to this date?

A Yes sir.

Q Is there or not a larger volume of sewage being discharged now than the time the bill was filed? Being discharged from that sewer?

MR. MAGNEY: Objected to as incompetent, irrelevant and immaterial.

A I would say about double. the amount now--of sewage now that was being discharged at the time the bill was filed.

Q Explain that.

MR. MAGNEY: Objected to as incompetent, irrelevant and immaterial.

A Since that time the citizens of Foley has been compelled to install toilets and connect with the sewer.

Q Are there more connected with the sewer now than there were when you filed the bill?

A Yes sir.

Q About how many more?

A I have no idea as I am not checking up on the citizens of Foley. But the amount of sewage that goes thru looks to me about double.

MR. MAGNEY: Moved to strike that part of the answer following the word "Foley" as not responsive and as stating the conclusion of the witness.

Q Have or not the bad conditions arising from that sewage been increased or diminished since you filed the bill?

A It certainly has increased.

Q How do you know?

A ~~[illegible]~~ I can see from the sewer itself that it is about double. The odors ~~[illegible]~~ are increasing and the foul matter is also increasing.

Q Did you ever make any demand on the Mayor or any other responsible officer of the Town of Foley for the abatement of that nuisance?

A Yes sir.

Q When was that demand made, do you remember?

A August 1--the first Monday in August, 1927- at the council meeting.

Q Had any abatement of ~~[illegible]~~ that nuisance been made when your bill was filed?

A No sir.

CROSS-EXAMINATION by Mr. Magney:

Q You say Mr. Henry you bought this property about the 2d day after you came to Foley?

A As near as I can remember. I don't think it was executed until the 8th of February.

Q The town's septic tank which is located about 15 feet from your west line was there on February 8, 1927, was it not?

A Not to my Knowledge.

Q Did you look to see whether there was any tank there?

A I had no reason for looking for it.

Q I take it from that that you did not look?

A No.

Q You made no investigation to determine what was on or near this land before you bought it? Is that correct?

A No sir. I mean it was told the owner had given 20 feet to the city and that was the sewer with the abutment leading toward the bridge over this particular creek. That was all that was said about it.

Q You say you knew that there was a sewer somewhere in the neighborhood?

A I saw the sewer outlet when I walked over the land before purchasing it.

Q Now it was the 1st of August, 1927, before you discovered the septic tank west of your property. Is that correct?

A Yes sir.

Q Do you know when it was put in there?

A I do not.

Q You did not see it put in after you bought the property, did you?

A No.

Q Would you have seen it had the tank been built after you bought the property?

A It depends upon if I paid any attention to it.

Q Were there any hot days with a northwest wind between February 8, 1927 and August 1, 1927?

A I presume there was.

Q You complained to the town, did you, immediately upon learning of the discharge of the septic tank into Wolf Creek shortly before August 1, 1927?

A Yes sir.

Q The septic tank is on land owned by the town of Foley, is it not?

MR. ROACH: We object to that question on the ground that it calls for incompetent evidence, and irrelevant evidence.

A As near as I learned, it is ~~lying~~ laying on land Mr. Goetz ~~Gotz~~ gave to the city for a street.

Q How far distant from the creek is the septic tank?

A Right on the creek.

Q And it is in the same position and condition now that it always has been, so far as you know?

A Only increase of volume coming out of it.

REBUTTAL by Mr. Roach:

Q When was the last time you were down there to see the sewage flowing from that sewer?

A Today.

Q Tell what you see flowing from the mouth of that sewer?

A Everything that is expected to come from a toilet, both dung as well as paper, floating everywhere in the creek.

Q On your land?

A On my land.

Q

R. G. Henry

A. H. Mueller, being duly sworn, deposed as follows:

My name is A. H. Mueller, age 39 years, reside in Foley, Alabama, and have resided here for 8 years. I have been engaged as a general contractor most of my business life. I have engaged in construction of sewers and septic tanks. I know by my experience how sewers and septic tanks should be constructed. There is a sewer in the town of Foley and a septic tank in the said town. This sewer and septic tank were constructed approximately two years ago. I now believe that it was put in in the year 1925. This sewer runs thru the town of Foley. There are various connections to and with this sewer with the dwelling houses and business houses of this town of Foley. My best judgment is that since March 14, 1928 there have been about a dozen additional connections with this Foley sewer above

referred to. Sewage does flow thru this Foley sewer and it is composed of various kinds of filth and excreta from the toilets and privies and this flow is constant as is the use of these toilets and privies. A toilet is an indoor fixture and a privy is an outdoor fixture, but both are water closets connected with the sewer. I was not present nor did I see any of the construction work going on, on this septic tank. I was asked to see if there could not be a remedy for the septic tank not working properly. The town council asked me this. I examined the septic tank and I found the sewage passing thru the by-pass instead of thru the tank, which was remedied. In the construction of the tank the by-pass was never properly placed. The by-pass is an opening prior to getting into the tank which would allow flood water to pass on without going into the tank. I made this examination about a year ago now. At the time I examined this tank, some of the sewage or fecal matter went thru without being affected by the septic tank. I can not say what percentage of this matter was going thru without being affected by the tank. The by-pass was closed. This did not entirely stop the flow of the sewage that was unaffected by the tank. I was there this morning and examined the outflow from this sewer. I surely could smell foul odors. I could see that there was toilet paper flowing from the exit of this sewer into Wolf Creek. This was flowing on down the creek onto Mr. and Mrs. Henry's land. The purpose of a septic tank is to free all foreign matter passing thru it. When I looked at this water this morning flowing from that sewer into Wolf Creek, I could see that there was some pollution in it--I mean sewage. I looked at this Creek about a year ago, and I saw evidences of foul matter from this sewer in that creek a thousand feet or so down below the entrance of the sewer into the creek. I have been to Mr. and Mrs. Henry's dwelling-house on this tract of land. I have smelled odors from this sewer at the residence on said land of Mr. and Mrs. Henry. I was there on one occasion this last July helping to build Mr. and Mrs. Henry's frontyard fence in front of their dwellinghouse. It was a hot, sultry day and these odors from this sewer were very offensive. I have never spent the night at Mr. Henry's home. I have been there to visit but was fortunate enough to have a south breeze when I was there.

It is a fact that when a south breeze is blowing the odors are not so perceptible as when a northwest breeze blows. I know that the conditions with reference to said sewer which I have described above have continued from November or December of last year when I was called on to examine the said septic tank, and these conditions are still continuing. I could not answer whether these foul odors would increase or decrease the value of this property. It stands to reason that there are objections there to that foul odor produced by the sewer but as to whether or not that would be detrimental or beneficial to its market value, I am not prepared to say. It is a fact that these foul odors would have the effect of making this dwellinghouse a less pleasant and habitable one. At the time when the northwest wind is blowing these foul and offensive odors from the sewer can be perceived all in and around said dwelling place on said property. This condition which I have described is a continuing dondition as the sewer is constantly being used by said town.

CROSS-EXAMINATION by Mr. Magney:

Q Mr. Mueller, are you familiar with the work done on this septic tank in the latter part of August and early part of September of this year under the direction of Engineers R. J. Greenwood of Foley and Winston Wheat of Pensacola, Florida.

MR. ROACH: Question objected to on the ground, 1st, that it calls for illegal and incompetent evidence. 2d, that it calls for work done on said sewer since the bill was filed in this case. And 3d, that it is not shown that the nuisance has thereby been abated.

A No sir.

Q The testimony which you have given then, except for what you saw there this morning--that is toilet paper in the stream--is based upon the condition of the sewer and septic tank before the repairs of August and September 1928. Is that correct?

A Except that, yes sir.

REBUTTAL by Mr. Roach:

I do not know that any repairs were made on this septic tank in August or September, 1928. It is a fact if any repairs were made on that septic tank in August or September, 1928, to remove the foreign and offensive matter from that sewerage, I should not now see what I saw there this morning, but I would have smelled the odor that I smelled there this morning on that type of septic tank.

Q Is it not a fact that that type of septic tank that you are speaking about on the sewer in the town of Foley is not a type of tank that will remove the foul odors from the sewage that flows from the sewer--that sewer?

MR. MAGNEY: Object to the question for the reason that it calls for opinion evidence and the conclusion of this witness for which no proper foundation has been laid.

A It is.

Q Is that tank one that would remove the bulk of the foreign matter from the sewage if it was in good repair and operated as it was planned to be?

A- It is.

Q Explain as far as you can what was the reason that it does not remove the foreign matter from the sewage as you saw it was not doing when you looked at it today?

A I have not examined it on the inside and therefore can not answer the question.

By reason of the fact that I saw foreign matter coming from that exit of the sewer from the tank today I know that it is a fact that there is something wrong with the tank but I can't tell you just what it is.

SUR-REBUTTAL by Mr. Magney:

I am not an engineer and what experience I have with sewer systems and with septic tanks comes from having built and constructed them from plans prepared by engineers.

I am familiar with the type of septic tank which I have built, but I have never built a tank planned as this one is. This is a two-compartment tank and I have never built a two-compartment tank. I have had no occasion or opportunity to become familiar with a two-compartment septic tank such as the town of Foley has installed. I have, as a cement contractor, had some experience in the construction of various kinds of septic tanks, and what I know about them I have learned from this practical experience, but I have never had any experience with this kind of a tank. I say that this tank will not remove odors from the water which comes from the tank, and I base this opinion upon the fact that in Illinois the State and municipal authorities did not at the time I worked there, during the years 1911-1914, did not permit two-compartment tanks. They required three compartments and up according to the use to which the tank was to be put. I have seen two-compartment tanks in the South.

D. F. Mueller

Charles A. Olson, being duly sworn, testified as follows:

I am now residing in Mobile. I resided in the town of Foley for a two-year period of time next prior to September, 1928. I know the tract of land and residence occupied now by Mr. and Mrs. C. A. Henry, the complainants in this suit. I had known this place for about a year prior to the time I moved away from Foley. I had known of the place but had not known any of its conditions. I boarded at this residence of Mr. and Mrs. Henry for about four months from June to September, 1928. I knew about the Foley sewer which discharge in Wolf Creek just west of the west line of said tract of land.

My attention was called to this sewer coming from Wolf Creek. After I was told by Mr. and Mrs. Henry where the offensive odors came from I went down and examined where the water flowed from the sewer into the creek and where it flowed on down the creek thru their lands. I made this examination the latter part of June, 1928. I found in the water that flowed from the sewer into the creek toilet paper and other refuge that comes from toilets. The odors arising from the creek in which this sewage flowed were very offensive. These odors were, when there was a northwest wind prevailing, very perceptible in and about and around the dwellinghouse or Mr. and Mrs. Henry on that land. When the windows were open in that dwellinghouse the odors arising from this creek were very offensive in that dwellinghouse. When I arrived at Mr. and Mrs. Henry's boarding house, which is called the Riviera Hotel, on the lands described in the bill, I was satisfied with all of the accomodations furnished and with everything connected with the boardinghouse there except this offensive odor which arose from Wolf Creek and on account of that odor I left the place and would not continue to board there. I have been to Mr. and Mrs. Hen's said house on two or three occasions since I left there in September, 1928, and I was there again today. I went down and examined the conditions there again today. The foul odor and conditions of that sewage in the creek are continuing today as they were when I left there in September last. The odor when the weather is hot is very bad; when it is not so hot, it is not so bad. I perceived odors today from that sewage but it was not as bad today as it was when I left there last September. I can not explain the difference. I have had some experience with smelling foul gases from sewers. I will say that from my experience and knowledge of sewer gases, I do know that the foul smell or odors that I perceived at the residence of the complainants came from the sewer discharging into Wolf Creek. I am familiar with the market value of properties such as the Henry property around Foley.

Q Mr. Olson, from your knowledge of market values, can you say whether or not the market value of this property of Mr. and Mrs.

Henry has been increased or decreased by the presence of these foul sewage odors that you have mentioned?

MR. MAGNEY: Objected to for the reason that the question calls for opinion evidence and the conclusion of the witness for which no sufficient foundation has been laid and for the further reason that it is incompetent, irrelevant and immaterial in that it does not tend to prove or disprove any of the issues of this case.

A In my opinion it has decreased considerable.

The property on this land has been used for dwellinghouse and boardinghouse purposes. Without the sewer on this land, it would be capable of being used for dairy purposes.

CROSS-EXAMINATION by Mr. Magney:

Q You lived in the Henry house for four months from June until September, 1928? Is that correct?

A Yes sir.

Q You lived there four months and then moved clear out of the county in order to get away from these odors, did you?

A I did not move out of the county to get away from the odors; I moved away from Mr. Henry's to get away from the odors. When I did leave Mr. Henry's place, I moved out of Baldwin County to Mobile. I knew of no suitable place to live in Foley, so I moved to Mobile.

Charles A. Olson

The next witness, Herman Jensen, being duly sworn, testified as follows:

Q I have been living in Foley a year and five months. I am upwards of sixty years of age. I moved here from Chicago and have been living here about a year and a half. I am not very familiar with the property occupied by Mr. and Mrs. Henry as a residence in Foley. I have been knowing this property about a year and five months. I know that the Foley sewer out flows from the septic tank and runs into Wolf Creek. On one occasion in July, 1927, I was visiting Mr. Henry's residence and sitting on his back gallery which is the gallery next to the creek, on the north end of his house, and I noticed a very offensive odor, At that time I did not know what caused that odor, but later on probably the same day I went down thru the field to the septic tank and to where the sewer empties into the creek. I saw a lot of unmentionable rotten matter. This seemed to come from the pipe leading from the septic tank. This had the smell of sewer gas and had a disagreeable odor. I could tell that this was the same odor that I had smelled at Henry's house when I was sitting on his gallery.

Q Do you know whether that odor would add to or detract from the market value of that property of Mr. and Mrs. Henry?

MR. MAGNEY: Objected to as calling for the conclusion of the witness and opinion evidence for which no sufficient foundation has been laid.

A Detract.

MR. MAGNEY: Moved that the answer be stricken as not responsive.

Q Do you know of anybody who would buy and occupy that property with that foul odor prevailing there?

MR. MAGNEY: Objected to as incompetent, irrelevant and immaterial.

A No.

I have been to Mr. Henry's house on several occasions since the time I mentioned in July, 1927, but I did not always smell this foul odor when I was there. I can not tell whether or not that was due to the fact that the wind was not from that direction. I was at Mr. and Mrs. Henry's residence on that property again today. I went down to the creek where the sewer enters into it. I saw the same as I saw before, unspeakable stuff floating in the creek. This was down the creek from the entrance of the sewer. I did not see a carload of this foul stuff but I saw it hanging on the roots and trees and bushes along the run of the creek and as far up on the bushes as the water reached at certain times. I noticed the same kind of foul odor there today that I noticed when I was there before.

CROSS-EXAMINATION by Mr. Magney:

I have known Mr. and Mrs. Henry since I came to Foley. I have never lived at their house but have visited there a number of times and sometimes the odor I mention would be noticeable and sometimes it would not. My purpose in going there today was so I could testify as a witness in this case.

Herman Jensen

The next witness, Julius Valentine, being duly sworn, testified as follows:

My name is Julius Valentine; I am 69 years of age. I have lived here in the neighborhood of Foley for 9 years. I am familiar with the property of Mr. and Mrs. Henry described in the bill of complaint. I have known this property ever since about a month after Mr. Henry began to occupy it. I know about the sanitary sewer that empties into Wolf Creek there near the west line of said property.

I did carpenter's work on this house of Mr. and Mrs. Henry's for about three months from September, 1927, and then off and on again during the time since that time up to the present. I did while I was working in and round Mr. and Mrs. Henry's said residence perceive vile and disagreeable odors. This odor was sewer gases. [illegible]

Q [illegible] Can you tell from what these odors came or arose?

A These odors came from the so-called septic tank, which is not a septic tank.

MR. MAGNEY: I move that so much of the answer beginning with the word "so-called" be stricken for the reason that same is not responsive to the question and is a volunteer statement on the part of the witness.

WITNESS (Continues):

The matter that flowed from this sewer into Wolf Creek was water-closed matter, human refuse and toilet paper. It didn't look pleasant. The smell that arose from it was something similar to ordinary sewer gas and rotten matter. When the water would be especially low there was a lot of this foul matter in the Creek; when the water would be high[illegible] it would have a tendency to wash the foul matter out and reduce the bulk of it . I could perceive the odor at the residence of Mr. and Mrs. Henry. I have been along this Creek clear across that land of Mr. and Mrs. Henry and I have at times noticed a lot of this foul matter in the creek almost all along at places where I could get into it and I have noticed that the odor [illegible] would be noticeable at the residence when the wind would be blowing from the north almost as bad if not as bad as when the wind would blow from the northwest. I have also noticed the odor when the wind would be blowing from the northeast. This would be true especially on a warm day. There was not so much of this foul matter in the water today as when I first saw it. I have seen it on different occasions when there was mor or less in accordance with the height of the water in the creek.

CROSS-EXAMINATION by Mr. Magney:

I have seen this creek off and on, the last time before today about three weeks ago. It was worse then than today. It seems to me that the condition is worse when the water is low and better when the water is high.

Julius C Valentine

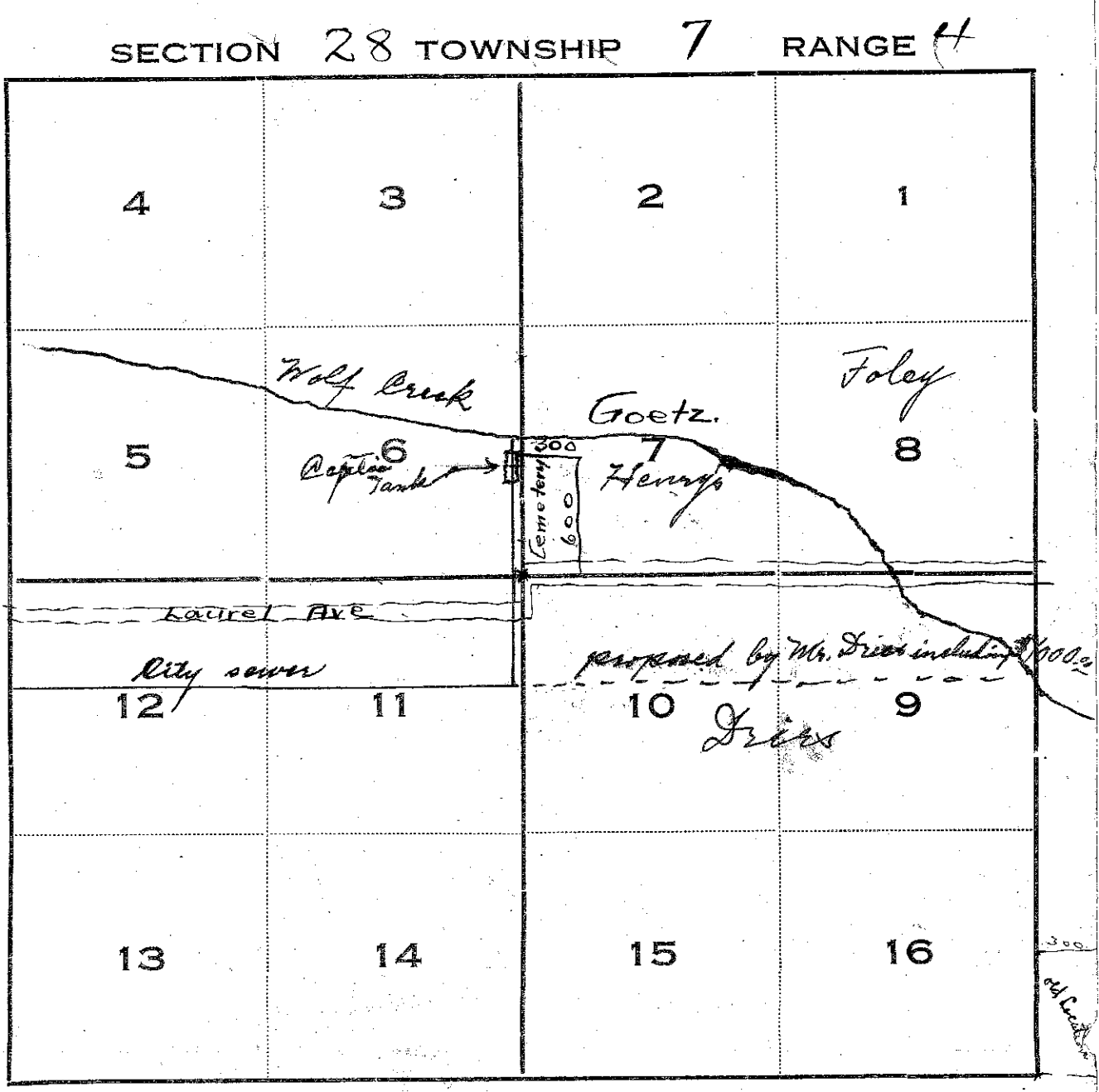


Exhibit "A" to deposition of

C. A. Henry in the case of

Margaretta Henry and Charles A. Henry, Complainants,

vs.

The Town of Foley, Respondent

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA

MARGUERITA HENRY and

CHARLES A. HENRY,

Complainants

Vs.

THE TOWN OF FOLEY, Respondent

THE DEPOSITIONS OF CHARLES A. OLSON, A. H. MUELLER, JULIUS VALENTINE, HERMAN JENSEN and C. A. HENRY.

Ida by Ca Henry 8/14 20

Marguerita Henry and Charles A. Henry, Complainants, -vs- The Town of Foley, a municipalcorporation, Respondent.	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN CHANCERY. ANSWER.

This defendant, reserving to itself all right of exception to the bill, for answer thereto says:

FIRST: That it admits the allegations of the paragraph of the bill numbered First.

SECOND: That if admits the allegations of the paragraph of the bill numbered Second.

THIRD: This Respondent, answering further, denies that the allegations of the paragraph of the bill numbered Third are true, and in this connection says: That the said Town has constructed and is now operating a sanitary sewer system, which is new, modern and efficient and that no sewage is discharged from said system for the reason that said Town has also constructed a new, large, modern and efficient septic tank, on its own property, and that no sewage or filth is discharged from said septic tank and that nothing but water from which all filth and odor has been removed, comes from said tank, which said water is carried, on respondent's own land, into a small stream known as Wolf Creek, but respondent admits that after leaving the land of the Town the waters of said stream do flow upon and across the land of Complainants. Respondent says, however, that there is no odor, gas, or filth of any description in said water but that the same is clear and inoffensive and does not polute the waters of said stream in any way.

Fourth: Respondent answer further, denies the allegations of the paragraph of said bill numbered Fourth.

Fifth: Answering further, respondent denies the allegations of the paragraph of the bill numbered Fifth.

WHEREFORE, having fully answered, Respondent prays that it may go hence without day and have judgment for its costs herein expended.

_____
Solicitor for Respondent.

Copy

IN THE CIRCUIT COURT OF
BALDWIN COUNTY, ALABAMA.

Marguerita Henry
and Charles A. Henry,

Complainants,

-vs-

The Town of Foley, a Municipal corporation,

Respondent.

COPY OF ANSWER.

Filed Aug 11th 1925
T. K. Richmon
Register

Lloyd A. Magney,

Solicitor for Respondent.

C. A. KENNY and MARGUERITA KENNY,

COMPLAINANTS,

-vs-

THE TOWN OF FOLEY, a Municipal Corporation,

DEFENDANT.

NO._____

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA.

IN EQUITY.

Before me, [signature] Notary Public in and for Baldwin County, Alabama, personally appeared FRED K. JOHANSON ....., who being duly sworn says that he has personally inspected the outlet to the Foley Sewer where it empties into the Wolf Creek, just west of the west line of the lands of complainants in the above stated suit, and also inspected the effluent from said sewer at said outlet and the waters and banks of said creek below said outlet on the said lands of complainants;

That said inspections occurred on the day of May, 1929, and on the 13 day of June, 1929. Affiant further says that said effluent from said sewer, had a foul and offensive odor, that it was on both said occasions said effluent had in it fecal matter and the liquid was somewhat thick and ropy or mucillaginous, that it discolored to a very perceptable degree, the waters of the creek down stream from said outlet, that the banks and bottom of said creek, and the twigs and limbs of bushes in said creek downstream from said outlet of said sewer were coated and offensive with the said foul fecal matter from said effluent from said sewer. That this sewage flowing into said creek was and is unsanitary, nasty, filthy and foul, and makes the atmosphere on the lands of complainants foul with odors and unhealthful. That the waters of said creek on complainants said lands are made wholely unfit for domestic use by said sewage from said sewer flowing in same.

That affiant resides in the Town of Foley and has so resided for 3 years and is familiar with the conditions

caused in said creek and on the lands of complainants and knows that those conditions are unbearably foul and unsanitary and are a menace to the comfort and health of the complainants and others occupying the complainants home on said lands.

Fred K. Johnson
AFFIANT.

Sworn to and subscribed before me on this the 13 day of June, 1930.

Notary Public Bolltown
Talladega, Alabama.

My Commission Expires
November 12th, 1931
Oct. 24 1931

caused in said creek and in the lands of complainants and knows that those conditions are unbearably foul and unsanitary and are a menace to the comfort and health of the complainants and others occupying the complainants home on said lands.

Filed June 15-1926
R. M. Nace
Judge

Attorney.

Sworn to and subscribed before me on this the 13 day of June, 1926.

Notary Public

My Commission Expires
Oct. 24, 1927

Marguerita Henry and Charles A. Henry, Complainants, -vs- The Town of Foley, a municipal corporation, Respondent.	)	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN CHANCERY. BRIEF OF RESPONDENT.

While a first reading of the testimony in this case will give the impression that there is anirreconcilable conflict as to the true facts, much if not all of this apparent confliet can be reconciled and made to dissappear if we keep in mind the two facts which are made clearly to appear, viz: that for some time after the septic tank was built and the use of it begun by the town, it did not function properly, but that repairs and alterations were made in August, 1928, since which time it has performed (better according to complainant's witnesses) perfectly, according to defendant's witnesses.

From the time of complainants' first complaint about the tank, it is evident from the record that the Town was constantly trying to find out why the tank did not function as it should, but it was not until it was emptied and cleaned out so that they could get down into it and measure it from the inside, that the three engineers employed by the Town to find out what was wrong (Dr. Robert Macy, R. J. Greenwood and Jinston E. Wheat), were able to discover the defect. This was, that the contractor in building the tank had failed by 14½ inches to set it deep enough into the ground so that the inlet and outlet sewers were lower down in the tank than they should have been and this had the effect of rendering inoperative the baffle walls and partitions of the tank, utterly destroying its power to function as intended. It was a matter difficult to discover, which would account for the apparent delay, but once discovered it was promptly remedied, with an effect which is clearly disclosed by the testimony of the witnesses for both sides.

While almost all of complainants's testimony is with reference to conditions before the repairs and alterations, they all concede a difference since; for instance, Mrs. Henry, one of the complainants says on direct examination:

> "We have not been able to smell at the house the fould odors from the tank and creek during the cold weather, since about November, but we could smell it when we went down close to the creek."

20 2 Ala - 82

And on cross-examination:

> "The smells kept getting worse and worse right along until last November, but since then we have not been able to smell anything at the house."

A. H. Mueller testified for complainants:

> Q Mr. Mueller, are you familiar with the work done on this septic tank in the latter part of August and early part of September of this year under the directions of Engineers R. J. Greenwood of Foley, and Winston E. Wheat of Pensacola, Florida?
> A No, sir.
> Q The testimony you have given then, except for what you saw there this morning-that is, toilet paper in the stream-is based upon the condition of the sewer and septic tank before the repairs of August and September, 1928. Is that correct?
>
> A. Except that, yes sir.

(That paper having the appearance of toilet paper was discovered in the stream on several occasions, both below the tank where it might have been deposited by the discharge from the tank, and above the tank where it could not possibly have been if it came out of the tank, is undisputed in the testimony.)

Charles Olsen testified for complainants on direct examination:

> "I perceived odors today (December 12, 1928) from that sewage but it was not as bad today as it was when I left there last September. I cannot explain the difference."

Julius Valentine, for complainants, direct examination:

> I am the same witness who was examined here in December. I went down to see the tank again today (February 13, 1929.) On account of flood conditions it is not as offensive down there today as it was when I was there before. The condition of the water was less filthy today, that is, the water from the tank, than it was before. The water flowing from the tank does not make the creek look as bad as it did when I was there before."

These witnesses, and in fact, all of complainant's witnesses, describe conditions before the repairs and alterations were made, which cannot be justified, but the whole tenor and effect of the testimony is that a decided change for the better has been made, and when we consider the testimony of the Defendant, the fact that all of its witnesses have made their examinations and based their testimony on conditions as they found them after the repairs, and that but very little of complainant's testimony is since the repairs, the preponderance of the evidence is so strong as to be over-whelming, that since these alterations and repairs have been made, the tank is functioning perfectly.

Thirty-nine (39) separate examinations and inspections are

related by Defendant's witnesses and not one of them disclosed anything offensive about this tank, its discharge, or the waters or banks of the stream.

It must be conceded that for a time, even after the repairs, the stream was polluted by the contents of the tank which were emptied into it when the tank was cleaned so that the repairs could be made, and while the record does not definitely disclose it, it must be true that it took some considerable time for all this to be carried away; but every one of the 39 inspections by Defendant's witnesses, made after December 19, 1928, disclose the fact that there was, in the effluent from the tank and in the waters of the stream and on the bushes along the stream, absolutely nothing which could have been discharged from the septic tank, except a little paper which was found both above and below the tank, and so, obviously, did not come from it.

Nor was any offensive odor disclosed by any of these critical examinations, although several of the witnesses had their heads right in the 15 inch discharge pipe, and all of them were close enough to the discharge to touch it. Only a careful reading of all the testimony can disclose the many and varied tests made by these witnesses, but they all agree that there was no offensive odor perceptible at the tank or the creek.

Both the County Health Officer of Baldwin County (Dr. J. A. Norris,) and the Assistant State Sanitary Engineer of the State of Alabama (Mr. H. G. Menke) testify that this particular tank is now performing satisfactorily the functions of a septic tank, and it is undisputed that this is the customary method of sewage disposal by small towns such as Foley, and that only one public disposal system in the whole state of Alabama, large or small, carries the purification of its sewage further than the septic tank method.

True, any septic tank will, at times, emit some odor but "It would only be under rare circumstances and an unusual combination of circumstances that there could be an offensive odor from a properly functioning septic tank discernible as much as 800 feet away from it" Mr. Menke tells us (without dispute) and Henry's house is 835 feet from this tank according to his own testimony (Page 8). It is also true that the water discharged from a spptic tank is to some degree polluted, not absolutely pure from either a chemical or bacteriological standpoint, but these are disadvantages incident to modern civilization which do

not justify the abolishment of a modern, efficient, sanitary sewer system to prevent.

> "As before stated one of the most important objects of municipal government is the preservation of the public health; and science has demonstrated that nothing contributes more to secure the end than a sanitary system of sewerage and water closets connected therewith..... There are times when the public health is the object of paramount concern, and the law wisely lodges in municipal bodies discretion and power adequate to such emergencies."
>
> Spear vs. Ward, 199 Ala. 105, 74 So. 27.

The Supreme Court of the United States agrees: In California Reduction Co. vs. Sanitary Reduction Works, 199 U. S. 306, 50 L. ed. 204, 26 Sup. Ct. Rep. 100, Justice Harlan says:

> "This court has said that 'the possession and enjoyment of all rights are subject to such reasonable conditions as may be deemed by the governing authorities of the country essential to the safety, health, peace, good order, and morals of the community..... Every intendment is to be made in favor of the lawfulness of the exercise of municipal power making regulations to promote the public health and safety."

BEFORE GRANTING AN INJUNCTION THE COURT SHOULD COMPARE THE INJURY TO THE COMPLAINANTS, AND ALSO TO THE PUBLIC, TO ACCRUE FROM GRANTING OR REFUSING THE INJUNCTION PRAYED FOR.

> "The peculiar equities of this case, however, authorize a modification of the injunction, such as will do exact justice to both parties litigant. The proceeding is one in restraint of a public work of great utility,-the construction of a railroad,-thus presenting a case in which injunctions are granted with great caution. Delay in the construction of the work may operate very oppresivley against the defendant, as well as resultin great injury to the public. Courts very often, insuch cases, balance the questionof damages to one party, and that of benefit to the other, resulting from the maintainence of the injunction on the one hand, and its dissolution on the other, and refuse to take any action which will cause great injury to the one party, and probably be of serious detriment at the same time to the public, without corresponding advantage to the other party."
>
> C. & W. Ry. Co. vs. Witherow, 82 Ala. 190, 3So. 23.
>
> "Counsel have pressed the proposition that mere convenience in the use of its property by the company, does not entitle it to pour down upon the appellee's land, and into the stream on his land, the debris from the washers erected by it, and we think the contention is reasonable. But it is not every case of nuisance or continuing trespass which a court of equity will restrain by injunction. In determingng this question, the court should weigh the injury that may accrue to the one party or the other, and also to the public, by granting or refusing the injunction. Wood vs. Sutcliffe, 2 Sim (N.S.) 163; Railroad Co. vs. Railroad Co. 75 Ala. 275; Railroad Co. vs. Witherow, 82 Ala. 190, 3So. 23; I High Inj. #598; Davis vs. Sowell, 77 Ala. 262; Torrey vs. Railroad, 18 N.J. Eq. 293; McBride vs. Sayre, 5 So. 791.
>
> "The court will take notice of the fact that in the developement of the mineral interests in

this state, recently made, very large sums of money have been invested. The utilization of these ores, which must be washed before using, necessitates, in some measure, the placing of sediment where it may flow into streams which constitute the natural drainage of the section where the ore banks are situated. This must cause a deposit of sediment on the lands below; and while this invasion of the rights of the riparian owner may produce injury, entitling him to redress, the great public interests and benefits to flow from the conversion of these ores into pig metal should not be lost sight of. As said by the vice-chancellor, in Wood vs. Sutcliffe, supra, "Whenever a court of equity is asked for an injunction in cases of such nature as this, (a bill to enjoin the pollution of a stream), it must have regard, not only to the dry, strict rights of the plaintiff, but also to the surrounding circumstances.'"

Clifton Iron Co. vs. Dye, 86 Ala. 468, 6 So. 192.

"While this section of the city is exclusively residential in the general sense, yet on Highland avenue, within a few blocks of this location, there a number of apartment houses, and occupants owning cars are without place of storage, thus necessitating their remaining in the street; that in the proposed garage repairs to cars are not contemplated, but only service with gas, oil, cleaning, and washing the cars and matters of that character; that the public at large will be greatly benefitted appears clear, and the demand for such a business is great.

"~~In the settled rule~~ In our opinion a case is presented where the public benefit so preponderates over whatever inconvenience may be occasioned complainants, that injunctive process should not be granted as against an anticipated nuisance. We think the motion to dissolve the injunction should have been sustained.

Nevins vs. McGavock, ___Ala.___, 106 So. 597.

See also, Standard Chemical Co. vs. Faircloth, 200 Ala. 657, 77 So. 31.

If the court will make the comparison suggested by these expressions by the Supreme Court of Alabama, in this case, the following state of affairs must appear: "It would be only under rare circumstances and an unusual combination of circumstances that there could be an offensive odor from a properly functioning septic tank as much as 800 feet away from it." (Testimony of H. G. Menke, P. 44) Henry's house is 835 feet from this tank. (Testimony C. A. Henry, P 8.)

The pollution of Wolf Creek is only such as is permissible under the law of Alabama, as will appear from the authorities cited later herein.

On the other hand to grant the prayer of complainant's bill to perpetually enjoin the Town of Foley from continuing its septic tank, would work a tremendous hardship on the public as represented by the citizens of that town. There are only two ways in which such a requirement could be met; the first, to abandon the sanitary sewer system and

go back to the old system of individual, out-door privies; the other, as suggested by Mr. Roach's cross-examination of Mr. F. M. Blair, to construct a 15 inch tile, pipe-line 1400 feet across complainant's land, but this would deposit the unchanged effluent from the tank on the land of the Foleys who would have just as much right to compel another removal as would Henry. If such a line were constructed to carry the effluent across the road from the Foley lands, it would strike the lands of Mrs. Green and Mr. Dreis, and would have to be piped 2,000 feet further to get off from Dreis' land, who, of course, would have the same right to insist on its removal from his land as would Henry. And the next land owner would have the same right, and so on . But even this much pipe line would cost, according to the testimony of Mr. Blair which is undisputed, $4,375.00 at the rate of $1.25 per foot, andsuch an expenditure is utterly impossible to the defendant, according to the testimoney of its Mayor, C. W. Green, and so would leave only the other alternative of abandoning the sewer system altogether.

There is no comparison between the injury to the public if this injunction be granted, and the injury to complainants if it be refused, and even assuming that there is now ~~has been~~ some violation of complainants' legal rights (which we deny), this certainly is not a case where an injunction is a matter of right.

> "The remedy sought is prentive and incidentally compensatory. An injunction for such purpose is not a matter of absolute right; but if, as has been said, it rests in judicial discretion, the excercise of such discretion is not without limitations, and is to be guided by the settled principles on which interference by the court, in such cases, depends. In considering whether or not an injunction should be granted regard must be had, on the one hand, to the right of every person to use his own property as his taste, desires, and interest may dictate; and, on the other, to the right of his neighbors to the comfortable and unmolested enjoyment of their property. No one shouldbe restrained as to the use of his property, unless such use offends the legal rights of another. There are certainly instances of private nuisances for which an action on the case can be maintained, yet insufficient to justify interference by injunction. This extraordinary and transcendent power should be excercised only when imperatively necessary to prevent a multiplicity of suits, or irreparable injury, or continuous of constantly recurring grievances, when, from their irreparable nature, continuance, or frequent repititions, the legal remedies are inadequate to afford full redress. While it is not essential the the injury should be strictly continuous, it must not be only occasional or accidental. Rouse vs. Martin, 75 Ala. 510."
>
> English et al. vs. Progress Electric Light & Motor Co., 95 Ala.259, 10 So. 134.

"By the settled rule in this state a case must be proved which establishes the necessity of a preventive remedy,- a case within that class of cases of irreparable or continuous injury which can be adequately redressed only by injunction. An in all cases where the right is doubtful, and the exercise of the power would interfere with, industries promotive of public utility, it becomes the duty of the court to abstain from interfering. In such cases the proof should be clear and convincing and the power 'should be cautiously and sparingly exercised.' Ray vs. Lucas, 10 Ala. 63, Rouse vs. Martin, 75 Ala. 510."

English et al. vs Progress Electric Light & Motor Co., supra.

says that since last fall, about November, they have been unable to smell any odor at the house, and that agrees exactly with the testimony of defendant's witnesses who, in 39 separate inspections and examinations, were unable to discover any offensive odor as far as 10 feet away from the tank. Since the repairs to the tank, and after a time sufficient to let the matter taken from the tank during the repairs be carried away, there has been no odor according to the great weight of the testimony, and the only experts on septic tanks whose testimony appears in the record (engineers J. R. Carson, Winston E. Wheat and H. G. Menke) all agree that so long as the tank continues to operate as it now is, there can be no odor discernible at complainants' house, except, possibly, "under rare circumstances and an unusual combination of circumstances", according to the testimony of Mr. Menke. This will not meet the requirements that a smell, to be a nuisance, must be of such "degree or extent as to materially interfere with the ordinary comforts of home existence"; or "must not be only occasional or accidental."

Complainants' proof, as to odors, will not sustain the relief prayed for.

THERE IS NO UNLAWFUL POLLUTION OF COMPLAINANTS' LAND, OR WATER.

The water which is discharged from this septic tank, is according to the great weight of the evidence, colorless and odorless. There is some diversity of opinion among the witnesses as to whether or not it is pure enough to drink, use for washing clothes, or watering stock. There is no real evidence as to whether it is or is not fit for these various uses, as no critical examination has ever been made to determine its degree of purity and none of the witnesses know any more about it than they can see and smell, and all of them are somewhat prejudiced because of their knowledge of where it comes from, and are influenced as one of the witnesses expresses it, by "imaginative ideas." The burden of proof as to pollution, of course, is upon Complainants. Beyond the fact that the water comes from a septic tank, and in times gone by has been visibly polluted, they have not attempted to go. We do not believe that they have sustained the burden of proving that degree of pollution which is necessary, under the law of Alabama, to be actionable.

"The test is whether the water was so polluted as to un-

reasonably, injuriously, unjustly or materially affect its ordinary and extraordinary use by the lower proprietor, and if it is so polluted as to unreasonably, injuriously or materially affect its ordinary and extraordinary use by its lower proprietor the party polluting the stream is liable to the lower owner so affected."

✓ American Tar Products Co. vs Jones, 17 Ala. App. 481, 86 So. 113.

✓ See also Jones vs. T.C.I. & R. CO., 202 Ala, 382, 80 So. 464.

"It is certainly true that owing to the wants, if not the necessitiels of the present age,-of agriculture, of manufacture, of commerce, of invention and of the arts and sciences,-some changes must be tolerated in the channels in which water naturaly flows, and in its adaptation to beneficial uses. Reasonable diminution of its quantity, in gratifying and meeting customary wants, has always been permitted. So, its temporary detention for manufacturing purposes, followed by its release in increased volume, is a necessary consequenceof its utilization as a propelling force. Nor must we shut our eyes to the tendency - the inevitable tendency - of these and other uses in which the water is an indispensable element, to detract somewhat from its normal purity. These modifications of individual rights must be submitted to in order that the greater good of the public be conserved and promoted. But there is a ~~duty~~ limit to this duty to yield, to this claim and right to expect and demand. The water course must not be diverted from its channel, or so diminished in volume, or so corrupted and polluted as practically to destroy or greatly to impair its value to the lower riparian owner. "Sic utere tuo" in such condition is enjoined alike by social obligation and by law. It is difficult if not impossible, to declare a rule in language so clear and precise as that it can be applied with certainty to every case that may arise."

✓ T.C.I.& RR. CO. vs. Hamilton, 100 Ala. 252, 14 So. 167.

Granting, for the sake of argument, that there is in this water some degree of pollution, just how much the evidence does not disclose, the complainants have failed lamentably to prove, as the law requires they must, such a degree of pollution in this water <u>at this time</u> "As practically to destroy or greatly to impair its value" to them.

IT IS THE CONDITION AT THE TIME OF HEARING THAT DETERMINES WHETHER OR NOT A THING IS A NUISANCE.

In Collins vs. L. & N. Ry. Co., 176 Ala. 174, 57 So. 833, it is said:

SYLLABUS: "A bill to abate a nuisance created by privies at a railroad station was properly dismissed with costs against the defendants, where it appeared that adequate closets had been provided <u>after</u> bringing of the suit and that plaintiff's damages were merely nominal."

OPINION: "Conceding, as the better course, that the defendant's closets and pipes, as originally constructed, were a nuisance, it appears that pending a final decree

in these cases, the defendants have arranged for the flushing of these closets as often as they are used by connecting them with a standpipe nearby. Bulke, in his testimony, concedes that the odor is not as bad as formerly, while Collins, who has been at his place of business in the storehouse steadily since these bills were filed, testifies that he has not smelled any odor since that time. The testimony of other witnesses makes if reasonably clear that, so long as these closets are properly cared for there will be no occasion for complaint on their account, If they should be used hereafter so as to become a nuisance, complainants will have their remedy at law or in equity."

"Though the testimony of the witnesses on the part of complainant may be somewhat exaggerated by supersensitiveness and an excited imagination, it may be conceded that their evidence strongly tends to show material annoyance and inconvenience caused by the smoke, soot, noise and vibrations during the administration of Cawthorn, and even for a time after the defendant purchased and operated the plant. The evidence, however, shows that defendant has made alterations and improvements, especially as to the escape of steam, which have greatly diminished the evils complained of. As an establishment of public utility in a city, the rule is that its lawful use will not be perpetually enjoined, when, by the application of scientific appliances, such alterations in the machinery may be made as will remedy the evils. In such case the court will go no further than to require such appliances to be introduced, and in some cases will direct a reference to ascertain if the evils can be thus remedied. Green vs. Lake, 54 Miss. 540, 1 High Inj. #767a On the same principle the court will not make the injunction perpetual when such appliances have been used, <u>even during the pendency of the suit</u>, and the desired results effected. The real and important question is, does the manner in which defendant operates the plant, since the alterations and improvements were made, interfere with the comfortable use and enjoyment of their residence by complainants to such extent as to create a nuisance which, when the locality and the circumstances are considered, it becomes the duty of the court to enjoin?"

English et al. vs. Progress Electric Light & Motor Co., supra.

Complainants in their brief, quote several times and at great length from the Connecticut case of Morgan vs. Danbury, 67 Conn. 484, 35 Atl. 499, a very old case, which is authority, in Connecticut, for the proposition that it is actionable for a municipality to pollute a stream by discharging sewage into a stream which flows through complainant's land, but there is no disposition to dispute this proposition, beyond insisting on the qualifications to it laid down by the Supreme Court of Alabama in the cases of American Tar Products Co. vs Jones, supra; Jones vs T. C. I. & R. Co., supra, and T.C.I. & R. Co. vs Hamilton, Supra, to the effect that to be actionable the degree of pollution must be such "as practically to destroy or greatly to impair its value". These cases are the settled law of Alabama, whether the rule they announced be enforced elsewhere or not and Complainants must bring thier case within the protection afforded by them to be entitled to relief from this court.

Complainants attempt to argue away and explain the wealth of testimony produced by Respondent as to the condition of the tank and Wolf Creek during the months of December, January and February immediately preceeding the submission of this case, by claiming that while the testimony is true (since they cannot well dispute the testimony of so many reputable witnesses) it is true only because the weather was cold at the times the examinations were made and there was much more water in the creek at this time of year than is generally true. To meet the second proposition first, the record is entirely silent as to the amount of water carried at any time by Wolf Creek and the argument is wholly outside the record, but it is within the judicial knowledge of the Court that the rainfall in Baldwin County is practically the same for every month of the year, approximately 5 inches, and that there is nothing to justify the assumption that there is more water in this Creek during these three months than any other three that might be selected. It is true, of course, that the greater the volume of water flowing in a stream, the greater the amount of pollution can be discharged into it without materially affecting the water; that is a mere matter of dilution, but Mr. Menke testified "The stream I saw there, Wolf Creek, is one large enough to take care of the discharge of a septic tank of that size, that is the flow there today was large enough, although of course, I do not know what it is all the year round." But there is no evidence in the record that it was larger that day, February 1st, than at any other time, and the fact is, of course, that it is of approximately the same size at all times, larger, of course, immediately after a rain.

Complainant's other proposition, that there was no odor either at the tank or at any place along the stream only because the weather was cold, is not born out by the record. While it is true that some of the examinations related by Respondent's witnesses were made on cold days, it is also true that others were made on warm days and covering as they do, a period of almost three months, with thirty-nine separate examinations during that time, it seems a trifle far-fetched, to say the least, to assume that there may be an odor at some other time even if there was none on any of these occasions. While it is probably true, that a thing which smells bad will smell worse in warm weather than in cold, it is also indisputably true that that which has no bad odor will

not give one forth either in hot weather or in cold, and the testimony is conclusive that there is no bad odor about this tank, its discharge or the waters of the creek, at this time. Hence it would seem, that it is asking this Court to entirely disregard the record, when Complainants ask that the Court assume that there will be an odor some time in the future although they are entirely unable to dispute the testimony that there is none there at this time. Such an assumption, in the face of this record, would be not only violent but entirely unwarranted.

Complainants say of the undisputed testimony that there is, in the whole state of Alabama, only one public sewage disposal system, large or small, which carries the purification of sewerage beyond the septic tank method, that "if these other tanks are operating to the creation of nuisances, then this fact would not excuse the respondent for the nuisance alleged in the bill" and it must be conceded that this is so. But are we justified in assuming that every sewage disposal system in the entire state of Alabama is a nuisance and subject to be enjoined at the suit of any property owner? Is it not more reasonable to conclude that this undisputed fact demonstrates, more clearly than any argument or citation of authorities could, that a properly functioning septic tank is not a nuisance but such an establishment as any municipality is entitled to maintain under the laws of Alabama. And that this particular tank is functioning properly is conclusively established by the testimoney in this case. Certainly, a town as small as Foley, should not be the first to be required to go beyond every other town and city in the state in its method of handling its sewerage

Complainants argue that since it is admitted that this tank did not function properly for a time after its use was begun, it is incumbent upon Respondent to show an abatement of the nuisance that did for a time exist, and so much may be admitted. But, they say, Respondent has not sustained this burden as "the very best it can claim from its own evidence, is simply a diminution, not a removal of the offensive conditions, and this diminution is manifestly due not to anything done by respondent; for it is positively proved that since December 19, 1928, it has done nothing whatever to the septic tank to remove the offensive and filthy conditions of the sewage."

It must be that when complainants talk of "simply a diminution" of offensive conditions, they must have in mind the testimony of only

their own witnesses which does indeed, establish a decided diminution, but it is evident that they entirely ignore the testimony of respondent's witnesses all of whom testify to an entire removal of and total absence of, any offensive conditions at all, but when they say that their "diminution" is "manifestly due not to anything done by respondent" because nothing has been done to the tank since Dec. 19, 1928, it is difficult to understand just what they do have in mind to warrant them in such a belief. Of course nothing more was done to the tank after the repairs ordered by Wheat and made by Blair and his men in August, 1928, because nothing was left that needed to be done. Those alterations and repairs made of this tank one which functions perfectly according to all of the testimony about it since the repairs and alterations were made and there has been no occasion for respondent to do anything more to it. Just how this establishes that even the "diminution" which complainants concede, is not due to the efforts of respondent is beyond my comprehension. This "diminution" which they concede, but which is, as the evidence makes certain, such a decided diminution as to be a total and permanent abatement of the offensive conditions of which they complain, is due of course, to the efforts which respondent has constantly made ever since the first complaint was received and which culminated in the alterations and repairs of August, 1928.

But, they say, Wheat who ordered the alterations did not inspect the work done by Blair and so we do not know that the proper repairs and alterations were made, because, although Blair testifies that they were "Blair was not an engineer." But he was and is a construction and concrete foreman of 25 years experience, has built a number of septic tanks, is familiar with the theory on which they are based and has more practical knowledge about them than any witness for complainants, all according to undisputed testimony, and he testifies fully and unequivocally that the repairs and alterations were made as ordered and no one disputes his testimony in any particular, and that they were made, and properly made, is evidenced by the way in which the tank is now performing its functions.

Complainants quote their witness A. H. Mueller to the effect that this is a two compartment tank that can never sterilize the sewage. How Mueller knows what kind of a tank this is does not ap-

pear as he says himself that he has never seen inside of it and "I have had no occasion or opportunity to become familiar with a two-compartment septic tank such as the Town of Foley has installed"; and again "I have never had any experience with this kind of a tank". But he does say that such a tank will not remove offensive odors from sewage and when pressed for his reasons for ~~such~~ a conclusion so widely at variance with the testimony of the those witnesses who do know about and have had experience with such septic tanks he gives us the following: "I base this opinion upon the fact that in Illinois the state and municipal authorities did not at the time I worked there, during the years 1911-1914, did not permit two compartment tanks. They required three compartments and up according to the use to which the tank was to be put."

Further comment seems superfluous; complainants' conclusions of fact as stated in their brief are not supported by the evidence. These facts are so supported: 1: that there was a time when a nuisance did exist; 2: there is no nuisance at the present time. The testimony is so strong as to be conclusive on these propositions and if there is no nuisance there at this time complainants' bill should be dismissed, but with costs to the Respondent since at the time of filing the bill a nuisance did exist for which Respondent was responsible though it had done its best to provide a modern and efficient system of sewage disposal and was merely unfortunate that it had not then succeeded.

Inasmuch as no claim is made for damages, taxation of the costs to respondent is the only relief complainants are entitled to under their bill and the evidence.

Respectfully submitted,

Attorney for Respondent.

TWENTY-FIRST JUDICIAL CIRCUIT
OF ALABAMA
F. W. HARE, JUDGE
M. R. FARISH, COURT REPORTER
MONROEVILLE, ALABAMA

August 24th., 1929.

Hon. R. Percy Roach,
Mobile, Alabama.

Hon. Lloyd A. Magney,
Foley, Alabama.

Gentlemen: Re: Henry Vs. Town of Foley.

Enclosed I hand you copy of opinion and decree in the above styled case.

In the opinion I have attempted nothing more than to express plainly and frankly my reasons for decreeing as I did. Neither the opinion nor the decree may evidence the fact, but it is nevertheless true that I have given the case unusual study and thought in an effort to decree justly.

I wish to thank both of you gentlemen for your able and elaborate arguments and briefs, which have been most helpful to me in handling a most difficult case. The case has "set heavy on my stomach", and I hope Mr. Roach will appeal and set me right if I am in error.

With personal regards to you both, I am,

Yours very truly,

F. W. Hare

FWH/mrf.

August 26, 1929.

Hon. F. W. Hare,
Judge Circuit Court,
Monroeville, Alabama.

Dear Sir:-

Thank you very much for your kind letter of the 24th, enclosing decree in favor of the Respondent in the case of Henry vs. Foley.

Of course, I am delighted with your decision and am convinced that it is free from error.

The Mayor and members of the Town Council have asked me to also express to you their appreciation of the careful consideration you gave to their case.

Very truly yours,

LAH:L.

Marguerite Berry, et als., Complainants, Vs. Town of Foley, Respondent.	IN THE CIRCUIT COURT OF BALDWIN COUNTY, ALABAMA. IN EQUITY.

The bill seeks the abatement of an alleged nuisance, but no damages are sought to be recovered. It appears from the pleading and testimony that the septic tank complained of as constituting a nuisance was constructed by the Town of Foley in the year, 1926, and that the Complainants came to Foley on or about the first of February, 1927, purchasing their property described in the bill of complaint on the second day after their arrival, but without any knowledge that the tank was in operation and discharging its affluent into Wolf Creek within fifteen feet of their property line. It further appears that the creek runs through complainants' land for a distance of some twelve hundred feet, and within some eight hundred feet of their dwelling. It seems that complainants occupied their dwelling from February 1st., 1927, to August 1st., 1927, before they knew of the existence of this tank so near their land, at which time the odor from same became most offensive, this, possibly, because there was an increased volume of sewerage discharged through the tank. But Complainants are not precluded from relief by the priority of occupation.

There can be no question but that at the time of filing the bill of complaint, and for long prior and subsequent thereto, the tank did constitute such a nuisance as justified the bill and entitled complainants to relief. I am convinced, however, that a preponderance of the evidence shows an abatement of the very bad conditions existing at the time the bill was filed. Officers from the State and County Health Offices testify that the septic tank is functioning as intended. A number of doctors, and engineers, who qualify as experts, testify to the same effect.

It appears that such sewerage disposal, or treatment, is usual in the towns and cities of the State, and must have the approval of the Department of Health. It's Sanitary Engineer has examined and approved this particular tank.

The Town of Foley has expended large sums in its sanitary arrangements, and this septic tank is a vital and necessary part of its system. It appears that the town consulted qualified sanitary engineers before installing the system and this tank as a part thereof. It is true that, from faulty construction, the tank failed to function properly when built, and that the town officers delayed an unreasonable length of time in remedying complainants' just ground of complaint, but the great weight of the evidence shows that, after so long a time, this has been done. I am convinced that Complainants have suffered damage, annoyance, discomfort and real injury, for which, on a proper showing on appropriate pleadings, they would be awarded just compensation, but in this suit only injunctive relief is sought asked. In cases such as this it is the duty of the court to consider the comparative injury to the parties before awarding a writ of injunction, and this, too, where complainants' rights to such relief is otherwise plain and clear. Our Supreme Court has many times taken into consideration the fact that a public utility was involved and has frequently rested its denial of the writ almost entirely upon the fact that its issuance would injuriously affect the public convenience. Conceding, against what appears to me to be the great weight of the evidence, that the admitted nuisance has not been abated, it does not follow that an injunction should issue, for the reason that the consequences to the citizens of Foley would, in all probability, be worse than mere "inconvenience". I am convinced from a consideration of the evidence that for months the contents of the sewers were dumped without any treatment upon complainants' land, whereby the stream was polluted; also the air, and, in fact, the entire premises. It is further no doubt true that, even under present improved conditions, the stream is unfit for

drinking purposes, or other domestic uses. No one with a knowledge of the facts would ever bring himself to drink the water in the future, no matter what different system of purification might be substituted for the one in present use. It is common knowledge that the waters of such streams in close proximity to towns are unfit for domestic uses, and the testimony in this case affirmatively shows this to be true of the waters of this stream above the tank. Consequently, no manner of injunction could be of benefit to Complainants by way of restoring the purity of the waters of the creek. If, as the great weight of the testimony indicates, the offensive odors have been removed by the repairs to the tank, no substantial benefit would accrue to Complainants by the issuance of an injunction, whereas its issuance would entail great expense, (if no more serious consequences), on the citizens of Foley without benefit either to themselves or to Complainants. On the other hand, if in fact the nuisance has not been permanently abated, but conditions only temporarily improved, these proceedings do not estop or preclude complainants from seeking redress by way of damages for future injuries; or, for that matter, any past injuries not barred by the statute of limitations, or affected by the doctrine of res adjudicata, if here applicable.

Since the submission on the merits the complainants have moved the Court to set aside the submission and permit the taking of additional testimony as to present conditions. By decree entered May 23rd., 1939, the parties were permitted to submit affidavits in support and in opposition to this motion. A consideration of these affidavits leaves no doubt that it would serve no good purpose to re-open the case, and that the motion should be overruled.

The Register will enroll the following

O R D E R.

This cause is submitted for final decree on the

pleading and proof as noted by the Register, and on motion of Complainants' to set aside said submission and allow the taking of additional testimony, the Respondent's objection to the allowance of said motion to set aside said submission, and on affidavits supporting and rebutting said motion. Upon a consideration of said motion ~~to~~/set aside the former submission, the objections filed thereto, and the supporting and rebutting affidavits in relation thereto, I am of the opinion that said motion should be overruled. It is therefore, ordered, adjudged and decreed that said motion to set aside the submission be, and same hereby is, overruled and refused.

Upon consideration of the pleading and proof I am of the opinion that the nuisance complained of has been abated pending the suit, and that there now exists nothing upon which to predicate a writ of injunction, or against which a writ of injunction should properly issue.

It is therefore, ordered, adjudged and decreed by the Court that complainants bill of complaint be dismissed, but at the costs of respondent, for which let execution issue.

Done at Chambers at Monroeville, Alabama, this the 24th., day of August, 1929.

Judge.