INTERNATIONAL SHOE COMPANY *v.* GIBBS.

Opinion delivered March 30, 1931.

1. NUISANCE—COMPENSATION.—The general policy of the law respecting nuisances is to avoid a multiplicity of actions, and, if practical, to afford compensation in one action for all injuries.
2. NUISANCE—PERMANENCY—DAMAGES.—Where sewage from a permanent structure, such as a septic tank, is discharged into the bed of a stream, constituting a nuisance, a riparian owner is allowed to recover, on the ground that the nuisance thus created is of a permanent character, all damages, past and future, which the nuisance thus created has caused or will cause in the future.
3. APPEAL AND ERROR—NECESSITY OF REQUEST FOR INSTRUCTION.—Where, in an action for damages caused by a septic tank polluting a stream, both parties treated the injury therefrom as of a permanent nature, appellant, not having asked the court to submit the question whether the injury was temporary or per-

manent, cannot complain on appeal because that question was not submitted to the jury.

4. NUISANCE—DAMAGES.—An award of $1,000 for discharging sewage into a stream running through plaintiff's land *held* under the evidence not to be excessive.

Appeal from Hot Spring Circuit Court; *Thomas E. Toler,* Judge; affirmed.

STATEMENT OF FACTS.

This action was brought by appellee against appellant to recover damages caused by the pollution of a branch running through the former's land by the discharge of sewage from the construction of a septic tank by the latter. Appellant denied that it constructed and maintained the septic tank in a negligent manner so that it had become a nuisance and thereby damaged the land of appellee.

Appellee, Ed Gibbs, owned 32.66 acres of land located on the Hot Springs highway about a half a mile from the depot at Malvern in Hot Spring County, Arkansas. For five years past he had been using and renting this land for a cow pasture, and in the northwest corner of the tract was a dwelling house which he had been renting for $10 per month.

Appellant is a Missouri corporation which constructed at Malvern, Arkansas, a textile plant which employs from 170 to 200 persons. It built a septic tank in connection with its plant which is from 200 to 300 yards from appellee's land. The Hot Springs highway is the dividing line between the land of appellant and of appellee. All the water from the plant goes into the septic tank and then is discharged from the septic tank into a branch or creek which runs through the land of appellee. The water from the slosher in the plant of appellant, which contains grease or tallow and some cotton fiber, as well as the sewage, is discharged from the septic tank into the branch running through the land of appellee.

According to the testimony of appellee, he had owned the land for seventeen years, and there was a running

stream through it which had not gone dry more than three times in the seventeen years in which he had owned the land. Until the sewage from the septic tank of appellant had been discharged into it, the water in the stream was clear and fit for use of stock. He had rented his land for a cow pasture, and the cattle would drink the water which was clear and pure. Since the sewage from the septic tank had been emptied into the creek or branch, the water had become impure and had an offensive odor like any other "toilet or back-house." You could smell it anywhere along the creek, and the offensive odor was very noticeable around the dwelling house, especially on damp days and early in the morning and late in the evening. Since the tank was built, cattle will not drink the water in the branch, and people have quit pasturing their cows on the land. Besides being good for cattle pasture, his land was near enough to Malvern to be worth $6,000. The emptying of the sewage into the branch running through his land had very materially damaged its market value.

Other evidence for appellee tended to show that his land was worth from $3,500 to $4,000, and that it had been damaged 50 per cent. or more in market value by the emptying of the sewage from the septic tank of appellant into the creek or branch running through appellee's land. The witnesses said that since the sewage had been emptied into the creek, cattle would not drink the water in it unless they could not get any other to drink. They also testified that the odors emanating from the sewage were very noxious and offensive.

The evidence also showed that a short time before the trial the ground around the septic tank on appellant's land had been plowed and run into furrows so that the sewage from the septic tank would not any longer flow into the branch running through appellee's land. In other words, the plowing had diverted the water into the plowed field. Appellee admitted this to be true but testified that the first rain would cause the sewage to be

discharged into the branch just as it had been before the plowing had been done.

According to the evidence for appellant, there was no offensive odor from the septic tank except right around the tank itself which was on appellant's land. Evidence adduced by it also tended to show that cattle would drink the water from the branch running through appellee's land just as they would before the sewage had been discharged into it. The evidence adduced by appellant also tended to show that in the summertime the branch running through appellee's land would dry up in holes, and that offensive odors would be occasioned thereby.

Other facts will be stated or discussed in the opinion.

There was a verdict and judgment for appellee for $1,000, from which comes this appeal.

H. B. Means and *McRae & Tompkins,* for appellant.

Joe W. McCoy and *John L. McClellan,* for appellee.

HART, C. J., (after stating the facts). The first contention in the case is upon the ruling of the circuit court on the question of the measure of damages. Appellant insists that the court erred in telling the jury that, in event it allowed a recovery by appellee, the measure of damages would be the difference in value of his land immediately before and after the stream running through his land was used as an outlet for the sewage from the septic tank constructed by appellant. The instruction was based upon the theory that the damages to the land of appellee were permanent. Appellant contends that the injury, if any, was only temporary, and that the measure of damages for appellee would be the diminution in the rental value of his land. The action by appellee against appellant was for damages for an injury resulting from the construction and operation of a septic tank by appellant whereby its sewage was discharged from the tank and allowed to flow into the branch or creek running through appellee's land and which rendered the water unfit for use by cattle and polluted the air by

noxious and offensive odors about a dwelling house on his land.

The general policy of the law in such cases is to avoid a multiplicity of actions, and, if practical, to afford compensation in one action for all injuries. Under a similar state of facts in the cases of municipal corporations and sewer districts organized in them, where the sewage was discharged into the bed of a stream, the riparian owner was allowed to recover on the ground that the nuisance thus created was of a permanent and continuous character, and the landowner damaged was allowed to recover in one action all damages, past and future, which the nuisance has caused or will occasion in the future. Hence it was held that the measure of damages was the depreciation in the market value of the riparian owner's land immediately before and after the nuisance was created. *McLaughlin* v. *Hope,* 107 Ark. 442, 155 S. W. 910, 47 L. R. A. (N. S.) 157; *El Dorado* v. *Scruggs,* 113 Ark. 239, 168 S. W. 846; *Jones* v. *Sewer Imp. Dist. No. 3 of Rogers,* 119 Ark. 166, 177 S. W. 888; and *Sewer Imp. Dist. No. 1 of Wynne* v. *Fiscus,* 128 Ark. 250, 193 S. W. 521, L. R. A. 1917D, 682.

In the cases cited the court said that the municipal corporations and sewer districts in constructing the sewer systems so as to turn the sewage into the streams, indicated an intention to acquire a permanent right to pollute the stream, and the damages to the riparian landowner should be assessed upon that basis and as though the corporation was proceeding to acquire it under the power of eminent domain. The court further said that the turning of the sewage into the stream and the pollution of the water to the damage of the riparian owner constituted a taking or at least a damage to the property for public use within the meaning of the Constitution.

The same rule and the same reasoning has been applied in the case of *quasi*-public corporations, such as railroads, under similar state of facts. *St. L. I. M. & S. Ry. Co.* v. *Biggs,* 52 Ark. 240, 12 S. W. 331, 6 L. R. A. 804,

30 Am. St. Rep. 174; *St. L. I. M. & S. Ry. Co.* v. *Anderson,* 62 Ark. 360, 35 S. W. 791; *Turner* v. *Overton,* 86 Ark. 406, 111 S. W. 270, 20 L. R. A. (N. S.) 894; *C. R. I. & P. Ry. Co.* v. *Humphreys,* 107 Ark. 330, 155 S. W. 127, L. R. A. 1916E, 962; and *Yates* v. *Missouri Pac. Rd. Co.*, 168 Ark. 170, 269 S. W. 353, 38 A. L. R. 1434.

Where the injury was of a permanent and continuing character, the rule as to the measure of damages has been the same in cases where the wrong was caused by a private person or corporation. *Czarnecki* v. *Bolen-Darnell Coal Co.,* 91 Ark. 58, 120 S. W. 326; *Junction City Lumber Co.* v. *Sharp,* 92 Ark. 538, 123 S. W. 370; *Falcon Zinc Co.* v. *Flippen,* 171 Ark. 1151, 287 S. W. 394; *Standard Oil Company of La.* v. *Goodwin,* 174 Ark. 602, 299 S. W. 2; and *Arkebauer* v. *Falcon Zinc Co.,* 178 Ark. 943, 12 S. W. (2d) 916.

Our attention has not been called to any distinction in the authorities generally in the application of the rule in connection with corporations having the power of eminent domain and in cases arising where the injury complained of was not caused by the exercise of that power. The fact that the injury was caused by the exercise of the power of eminent domain has been considered of no importance except as showing that the structure was permanent in character. *Virginia Hot Springs Co.* v. *McCray,* 106 Va. 461, 56 S. E. 216, 10 Ann. Cas. 179; *Highland Avenue & Belt Railroad,* 99 Ala. 24, 10 So. 267, 14 L. R. A. 462.

If appellant had possessed the power of eminent domain, and had the damages been assessed in condemnation proceedings, it would not have acquired title to the land. The same damages would have been awarded, and damages, which can be assessed in condemnation proceedings, can be assessed just as well in an ordinary action at law. When the tank was constructed, it was evidently intended by appellant that it should be permanent, and it has been so treated and used by it ever since. As long as the sewer is used, just so long will the nuisance con-

tinue to injure the land of appellee. This court has recognized the rule that, when a nuisance is of such a character that its continuance is necessarily an injury and is of a permanent character, so that it will continue without change from any cause but human labour, the damage is original and can be at once fully compensated. *St. L. I. M. & S. Ry. Co.* v. *Anderson,* 62 Ark. 360, 35 S. W. 791.

In the instant case, at the trial the parties treated whatever injury might be caused by the pollution of the stream by the discharge in it of the sewage and the noxious odors arising therefrom around the dwelling house as of a permanent and continuous character. Appellant did not even ask the court to submit to the jury the question whether the damage or injury to appellee was temporary or permanent. Having failed to ask that this question of fact should be submitted to the jury, it cannot now complain that the court submitted to the jury the case upon the theory that the damage was original and susceptible of immediate estimation.

It is next insisted that the verdict in favor of appellee for $1,000 was excessive. The witnesses for appellee estimated the value of the land for all purposes immediately before the construction of the alleged nuisance was somewhere from $3,500 to $6,000. Some of the witnesses said that the land was damaged fifty per cent. or more by the discharge of the sewage into the branch running through appellee's land. The jury might have found from the testimony of the witnesses that the land was not only valuable for use as a cow pasture, but that it was also susceptible of being cut up into small lots and sold to people desiring to erect houses in the immediate vicinity of the city of Malvern. When all the uses to which the land might be adapted are considered, it cannot be said that the jury's finding that the land was damaged to the extent of $1,000 is excessive.

We find no reversible error in the record, and the judgment will be affirmed.