

State of New York,

239

SUPREME COURT,

APPELLATE DIVISION, 4TH DEPARTMENT.

*VILLAGE OF CANANDAIGUA, By
Charles F. Robertson, et al., Con-
stituting the Board of Water Commis-
sioners of said Village,*

Respondent,

Against

*ROBERT M. BENEDICT, Impleaded,
Etc.,*

Appellant.

Motion Papers on Appeal From Order.

*THOMAS H. BENNETT,
Attorney for Respondent,
Canandaigua, N. Y.*

*JAMES A. ROBSON,
Attorney for Appellant,
Canandaigua, N. Y.*

CANANDAIGUA, N. Y.:
W. A. BROWN, PRINTER AND STATIONER.
TILLOTSON BLOCK.

STATE OF NEW YORK,
SUPREME COURT, ₁
APPELLATE DIVISION, FOURTH DEPARTMENT.

SUPREME COURT—ONTARIO COUNTY.

VILLAGE OF CANANDAIGUA, BY CHARLES F.
ROBERTSON, EDWARD G. HAYES, JOHN JOHN-²
SON, JOHN H. KELLY, MATTHEW R. CARSON,
AND MACK S. SMITH, CONSTITUTING THE
BOARD OF WATER COMMISSIONERS OF SAID
VILLAGE,

Plaintiff,

against

ROBERT M. BENEDICT AND ONTARIO ORPHAN ³
ASYLUM,

Defendants.

SIRS :

Please to take notice : That upon the petition
in the above entitled proceeding, verified July
16th, 1895, and on the notice of the presentation ⁴
thereof annexed thereto, copies of which petition
and notice annexed, are herewith served upon
you, and upon the summons, complaint, affida-

5 vits, undertaking, and injunction order, hereto-
fore served by you, the above named Robert M.
Benedict, in an action in the Supreme Court,
commenced by you on the 5th day of June, 1895,
against the above named Board of Water Com-
missioners, and William T. O'Connor and oth-
ers, defendants, and on the order of Mr. Justice
6 William E. Werner, dated June 11th, 1895, vacat-
ing such injunction order, and on your affidavits
and order to show cause therein, dated June 13th,
and on the order of said Justice, made June 15th,
denying your motion to set aside said vacating
order, and on your notice of appeal therefrom to
the General Term, served July 8th, 1895, and on
7 the answer in said action, and all the papers and
proceedings in said action heretofore served by
either party upon the other ; also upon the peti-
tion verified by you July 1st, 1895, in the sum-
mary proceedings instituted by you on that day
before the County Judge of Ontario County
against the above named village of Canandaigua,
Charles F. Robertson and others, constituting the
8 Board of Water Commissioners of said village,
William T. O'Connor and others, defendants, and
on the precept to remove issued on said petition
July 1st, 1895, returnable July 5, 1895, and on all
the papers in said special proceeding heretofore
served by either party upon the other, and upon
the affidavits annexed to this notice of motion,
9 and herewith served upon you, I shall move this
Court, at a Special term thereof, appointed to be
held in the Court House in Powers' Block, in
the City of Rochester, in and for the County of
Monroe, on the 29th day of July, 1895, at the

opening of Court, on that day, or as soon there-¹⁰
 after as counsel can be heard, for a rule or order
 allowing the above named plaintiff to continue
 in the possession of the property sought to be
 condemned in this proceeding, upon the security,
 or deposit of such sum of money, as the Court
 may then and there direct, to be held as security
 for the payment of the compensation which may¹¹
 be finally awarded to the owners thereof,
 and therefor, and the costs of this proceeding,
 and that in the meantime the said action in the
 Supreme Court, the Appeal therein from said
 order to the General Term, the said summary
 proceedings, and all actions and proceedings
 brought or commenced by the said Benedict¹²
 against the said village of Canandaigua, or
 against the said above named Board of Water
 Commissioners of said village, on account of the
 said property, be stayed, and for such other,
 further, or different order or relief, as may be
 just, and as the Court may deem it meet and
 proper to grant.

Dated, July 19th, 1895.

¹³

Yours, &c.,

THOMAS H. BENNETT,
 Attorney for Plaintiff,
 Canandaigua, N. Y.

To Robert M. Benedict, Esq., and Ontario
 Orphan Asylum, Defendants.

¹⁴

15 SUPREME COURT—ONTARIO COUNTY.

VILLAGE OF CANANDAIGUA, BY CHARLES F. ROBERTSON, EDWARD G. HAYES, JOHN JOHNSON, JOHN H. KELLY, MATTHEW R. CARSON AND MACK S. SMITH, CONSTITUTING THE BOARD OF WATER COMMISSIONERS OF SAID VILLAGE,

16

Plaintiff,

against

ROBERT M. BENEDICT AND ONTARIO ORPHAN ASYLUM,

Defendants.

STATE OF NEW YORK, }
COUNTY OF ONTARIO, } ss.:

17

THOMAS H. BENNETT, of Canandaigua, in said county, being duly sworn, deposes and says :

I. That he resides at Canandaigua, in said county, and is the attorney for the village of Canandaigua, and also attorney for its above named Board of Water Commissioners, plain-
18 tiff in the above entitled proceedings for the condemnation of a right of way, privilege or easement in or to, or appurtenant to certain lands and premises of the defendants above named, and specifically described in the petition herein, verified July 16th, 1895 ; and that de-
19 pendent is and has been the general attorney for said village of Canandaigua, and also for its said above named Board of Water Commissioners, in all matters, suits and proceedings pertaining to, arising or growing out of the construction of the system of water works, for said

village, by its said board, and referred to in said 20
petition, and also was and is the attorney for the
said village, and for its said board, in the sev-
eral and respective suits and proceedings insti-
tuted by the said defendant Benedict, as herein-
after stated.

2. That on or about the 15th day of May
last past, the said Board of Water Commission-²¹
ers, at a regular meeting, by resolution duly
passed and entered of record in their minutes,
specially charged this deponent with the duty
of procuring all rights of way, privileges and
easements and lands necessary to be acquired
for the purpose of the construction and opera-
tion of the said system of water works for said
village, and especially along and upon the line²²
of the trench and pole line leading from the
corporation line in the highway known as the
“ Lake Shore Road ” southerly to the pumping
station of said system, and being a distance of
about 9,257 feet; that said Board also instructed
deponent to endeavor in the first instance to ac-
quire all such interests by negotiation for pur-²³
chase, if possible, and not by condemnation un-
less absolutely necessary; that deponent prompt-
ly acting in pursuance of such instruction
caused the necessary deeds for such interests
and easements to be prepared and made ready
for execution, and also caused Walter F. Ran-
dall, Esq., the consulting engineer of said board,²⁴
having charge of the construction of said water
works, to prepare the statutory map, showing
how and in what manner, and to what extent,
the lands of each owner along said trench and

25 pole line would be affected thereby, and to have the same in readiness for filing in case of failure to acquire the necessary easements by purchase ; that said map was so prepared and delivered to deponent long before defendant Benedict commenced the action in the Supreme Court hereinafter mentioned ; that at the time said Benedict commenced said action deponent was actually engaged in negotiating for the purchase of said easements and interests along said pole and trench line, and the progress of such negotiations was such as to lead deponent in good faith to believe that the same would certainly be acquired by amicable negotiation and purchase, and to cause him to advise said board that the

26

27 filing of said map and order of the Board of Water Commissioners, as required by Chapter 181 of the Laws of 1875, as amended, would be unnecessary ; that by reason of constant and pressing demands upon his time and attention deponent had not been able to see said Benedict in person and open negotiations with

28 him for the purchase of the easements required along said highway across his premises before the 4th day of June last past ; that on the evening of that day he met said Benedict on Main street in the village of Canandaigua, and informed him of his intention to see him in a day or so and arrange with him for the purchase of

29 the required easement if possible, and said Benedict made some pleasant reply, and left deponent without the slightest suspicion that he was about to commence the action, and had even

then verified his complaint therein, as herein-30
after stated.

3. Deponent further says that on the 10th day of June, 1895, the said Board of Water Commissioners duly made and signed an order as required by the said Statute, and attached the same to their said map, and caused the said map and order to be filed in the Clerk's Office³¹ of Ontario County, and that a duplicate copy of said map and order, now on file in said Clerk's Office, duly certified, is herewith presented on this motion.

4. Deponent further says that on or about the 5th day of June last past, the said Robert M. Benedict commenced an action in the Supreme Court, against the above named Charles³² F. Robertson, Edward G. Hayes, John Johnson, John H. Kelly, Matthew R. Carson, and Mack S. Smith, constituting the Board of Water Commissioners of said village of Canandaigua, William T. O'Connor, William O'Connor, and Sidney C. Mackaye, defendants, by the service of the summons, complaint, affidavits, under-33 taking, and injunction order therein; that the complaint and moving affidavits in said action all appear to have been verified June 4, 1895, and appear to have been presented to Mr. Justice William E. Werner, of the Supreme Court, on June 5th last, who thereupon made and signed an injunction order, in substance, enjoining³⁴ and restraining the said defendants from in any manner digging or excavating a trench or pole line upon or along the highway across the plaintiff's premises, or interfering therewith; that

35 copies of said papers were duly served upon said defendants, or some of them, on June 5th, and on June 11th defendants moved *ex-parte* before same Justice, upon the plaintiff's papers to vacate said injunction order, which motion was granted, and an order vacating said injunction order was duly entered and served on the plaintiff's attorney on June 12th, who thereupon and
 36 on June 13th obtained an order for defendants to show cause before the same Justice why said vacating order should not be set aside and said injunction order be restored. Defendants showed cause on June 15th and after argument before the same Justice, the plaintiff's motion was denied, and an order thereon was duly entered and
 37 served on the plaintiff's attorney on June 19th; that as a condition of the denial of the plaintiff's said motion to set aside said vacating order, the said Justice then and there required said village of Canandaigua, within ten days from the date of his said order of denial, being ten days from the 15th day of June, 1895, to make, execute and deliver to the said Benedict, its bond, in the sum of \$5,000, conditioned to pay him any sum that might be awarded against the said village, in proceedings for condemnation of the rights of way, privileges and easements required by said Board of Water Commissioners of and for the said village for the construction of its system of water works; that on June 19th last past and within
 38 the time limited by said Justice's order of June 15th the village of Canandaigua duly made, or caused to be made, executed in due form of law, and delivered to said Robert M. Benedict, its

bond in the penal sum of \$5,000, and in all⁴⁰ things conditioned as required in the said Justice's order, and that said Robert M. Benedict accepted said bond and has ever since retained and now holds and retains the same, and deponent therefor alleges that said Benedict is now most abundantly secured by said bond of the village of Canandaigua, plaintiff in the proceed-⁴¹ing, for the payment of any compensation which may be finally awarded to him for the property sought to be condemned herein, and for all costs of this proceeding; that issue was duly joined in said action by the service of an answer in behalf of all said defendants on the 27th day of June last past; that said action is now pending unde-⁴²termined in the Supreme Court; that the next Equity Term of this Court, at which said cause can be tried, is appointed to be held in and for said County of Ontario on the second Monday of October next; and that on or about the 8th day of July last past said Benedict duly perfected an appeal to the General Term from said Justice's order of June 15th, denying his said⁴³ motion to set aside said vacating order of June 11, and restore said injunction order on condition of giving said bond, which said appeal is now pending undetermined in the General Term, and the next General Term in and for the Fifth Department, at which the said appeal can be argued, is appointed to be held in the city of⁴⁴ Rochester on the first Tuesday of October, next.

5. Deponent further says that notwithstanding all these premises, and also the ample

45 security of the said bond, so held and retained
by him, the said Benedict instituted summary
proceedings to recover possession of the real
property described in the petition herein on
or about the 1st day of July last, before the
County Judge of Ontario County ; that the pe-
46 verified by him, and was also addressed and pre-
sented to Hon. J. Henry Metcalf, Ontario
County Judge, by James A. Robson, Esq., and
John Gillette, Esq., his attorney and counsel,
on said last mentioned day, as appears by the
said petition on file in said Clerk's office, and by
the Clerk's minutes of the Ontario County
47 Court ; that the usual precept to remove or
show cause on July 5th, at 2 o'clock P. M., was
issued upon the said petition to the village of
Canandaigua, its said above named Board of
Water Commissioners, and also to the said
William T. O'Connor, William O'Connor, and
Sidney C. Mackaye, defendants in said proceed-
48 ing, which precept appears to have been issued
and signed by Hon. S. S. Taylor, County Judge
of Chemung County, acting as County Judge of
Ontario County ; that thereupon the defendants
in that proceeding, claiming that said last
named County Judge had no jurisdiction to re-
ceive said petition or act upon the same, applied
to the Special Term of the Supreme Court for
49 an alterative writ of prohibition, commanding
said Hon. S. S. Taylor to desist and refrain
from further hearing, and the said Benedict
from further prosecuting the said proceedings,
and to show cause before the present special

term why said writ should not be made absolute; 50
 that an order allowing said writ was duly made,
 granted, entered and served, also said writ was
 duly issued, signed, sealed, and served, together
 with the affidavits upon which the same were so
 made and allowed, on the said County Judge and
 also upon the said Benedict, on the said 5th day
 of July last, since which day nothing further 51
 has been done in the said proceeding by way of
 hearing or prosecution, but said County Judge
 assumed to direct an adjournment of the On-
 tario County Court to the first day of August
 next at 2 o'clock P. M.

6. Deponent further says that the said Bene-
 dict alleged in his complaint in said action in 52
 the Supreme Court, and again in his affidavit to
 procure said injunction order, both of which
 were verified on June 4th last, that he had offer-
 ed to, and was ready and willing to grant to
 said Board of Water Commissioners the right
 and privilege to construct its trench and pole
 line through and along the said highway across
 his premises upon conditions stated by him to 53
 Mack S. Smith, one of the members of said
 board; that as deponent is informed by said
 Board of Water Commissioners, particularly by
 said Mack S. Smith of said board, both in con-
 versation and by affidavit to that effect drawn
 by deponent and verified by said Mack S.
 Smith, the offer or proposition of said Benedict 54
 to grant the required rights or privilege to con-
 struct said pipe or trench and pole line in the
 highway across his premises, a distance of 1017
 feet, as shown on said map, was upon the sole

55 condition that said board should stipulate and agree to furnish his farm and premises with water as he and his grantees should require, and as long as said trench and pole line should exist, or in other words, to annex to his said farm the perpetual right to take water from said pipe line running through said highway, with-
56 out compensation, in consideration of said proposed grant ; that the said Smith duly communicated the said proposition to said board ; that deponent advised said board that they had no lawful authority to accept said proposition, for the reason that the Statute only permits them to acquire lands or easements necessary for the
57 purpose of constructing or operating their said system of water works by purchase or condemnation, and in either case the consideration therefor must be paid in money, and not in especial or perpetual privileges for the use of water ; that thereupon said board declined said proposition and said Benedict commenced said
58 action without giving any opportunity for further negotiation in the premises, and before deponent had an opportunity to see him in person, as above stated, and also well knowing that said board and its authorized attorney were perfectly willing to purchase the required easements and pay him a fair price therefor ; that on the 6th of June last, and the next day after
59 the commencement of said action in Supreme Court, deponent had an interview with James A. Robson, Esq., plaintiff's attorney in said action, understanding at the time that the entire matter of negotiating for the required ease-

ments had been left with him by plaintiff in 60
that action ; that deponent then said to plain-
tiff's attorney that such action was entirely
useless and unnecessary ; that the Board of
Water Commissioners were willing, even anx-
ious to agree with said Benedict as to his dam-
ages, if possible ; that if such arrangement
could not be had, deponent would promptly 61
commence proceedings to acquire the rights re-
quired by the Board of Water Commissioners,
by condemnation, but before doing so, he and
his clients would much like to have Mr. Bene-
dict name some sum in money he would con-
sider and be willing to accept as just compen-
sation. Deponent further called attention to 62
the Statute of 1875, as amended, and claimed
that in any case the board could only make
compensation in money. Plaintiff's attorney
agreed to communicate deponent's request to
Benedict and inform deponent of the result.
On June 7th deponent received a note from Mr.
Robson saying that he had done as requested,
and that Mr. Benedict had commenced the ac- 63
tion to protect his rights, and no sum was
named. Again, on June 12, after said injunc-
tion order was vacated, deponent again applied
to the plaintiff's attorney to get his client to
name any sum in money he would accept as
compensation, and again he promised to do so,
and again no sum was named. Upon a subse- 64
quent occasion, deponent again preferred
such request, but up to the present time he
has never been able to get any such sum
named which said Benedict would accept as

65 compensation for the rights and easements re-
 quired by said board, and deponent verily be-
 lieves that said action was commenced and in-
 junction order applied for therein, and said sum-
 mary proceedings instituted in the manner above
 stated, by said Benedict, and that the same have
 been prosecuted as above stated, not for the pur-
 66 pose of protecting any right, real or imaginary,
 but to vex, annoy, and harass the defendants
 therein, and to compel said board to accede to
 his demand to furnish water in perpetuity for
 his farm and premises, as a condition of his
 conveyance of the rights required by them for
 the construction and operation of said system of
 67 Water Works, and to that end, he has at all
 times refused, and also instructed his attorney to
 refuse to entertain any offer of compensation in
 money, or to name any sum in money, he would
 accept for a compensation for the rights re-
 quired by said board.

7. No previous application for such an order
 as this has been made in this proceeding, and
 68 no application has been made for a stay in said
 action in the Supreme Court, nor has any ap-
 plication for a stay been made in said summary
 proceedings, except the application for said writ
 of prohibition therein as above fully set forth.

THOMAS H. BENNETT.

Sworn to before me this 19th day of July, A.
 69 D. 1895.

JOHN S. COE,

Notary Public,

Ontario County, N. Y.

SUPREME COURT—ONTARIO COUNTY. 70

VILLAGE OF CANANDAIGUA, BY CHARLES F. ROBERTSON, EDWARD G. HAYES, JOHN JOHNSON, JOHN H. KELLY, MATTHEW R. CARSON AND MACK S. SMITH, CONSTITUTING THE BOARD OF WATER COMMISSIONERS OF SAID VILLAGE, 71

Plaintiff,

against

ROBERT M. BENEDICT AND ONTARIO ORPHAN ASYLUM,

Defendants. 72

STATE OF NEW YORK, }
COUNTY OF ONTARIO, } ss.:

CHARLES F. ROBERTSON and MACK S. SMITH, of Canandaigua, in said County, being duly severally sworn, each for himself, desposes and says:

1. That said Charles F. Robertson is the President, and Mack S. Smith is one of the members of the Board of Water Commissioners in and for the said Village of Canandaigua, and that they have been such President and member of said board, since about the 21st day of December, 1894. 73

2. That said Mack S. Smith, for himself further says that he is the person and the member of said Board of Water Commissioners referred to in said Benedict's complaint, and also in his affidavit for an injunction order, in said action 74

75 in the Supreme Court and both verified on the 4th day of June, 1895, as the member of said board to whom he, said Benedict, made his proposition to grant and convey the interests and easements required by said Board for constructing its trench and pole line in the highway across his premises; that said proposition
76 was made by said Benedict to this deponent in an interview between them in said village about the 10th day of May last past; that said Benedict then said that he did not wish a money consideration for the rights desired by said board, and that he would grant and convey the rights desired on consideration of an agreement
77 by said board to furnish water to his premises as required as long as said pipe and pole line should exist. Deponent said he would communicate said proposition to said board, and it was then arranged between them that deponent should communicate the answer of said board thereto, to James A. Robson, Esq, said Benedict's attorney, as said Benedict expected
78 to be away from home; that shortly thereafter deponent communicated said proposition to said board at a regular meeting, and after discussion and advice of counsel thereon, said proposition was declined and thereupon deponent informed said Benedict's attorney of such declination, and of the readi-
79 ness of the board to negotiate for the purchase of the rights required on the basis of a just and adequate compensation therefor in money. And deponent further says that said Benedict never made any other or different proposition to said

board for such conveyance, before or after the 80 commencement of his said action, that in any wise came to the knowledge of this deponent.

3. And the said deponents further say, the said Charles F. Robertson on his own knowledge, and the said Mack S. Smith on information and belief, that the consent of the Commissioners of Highways of the town of Canandaigua for said board to enter upon said premises covered by said highway, and to use the soil there under for the purpose of introducing water into and through the portions of said village, pursuant to the provisions of Chapter 181 of the Laws of 1875, as amended, was duly had and obtained ; that thereupon as each deponent for himself says upon his knowledge, said board entered upon said premises along said highway and caused the iron pipes for said water mains to be distributed along said highway in and during the month of April, 1895 ; that said Benedict never made any objections to such entry to the knowledge and belief of these deponents until he commenced his said action in the Supreme Court on June 5th last to restrain said board from laying said pipes and erecting said pole line, and after he had made his said proposition to grant the privileges required by said board as above stated ; that said Board of Water Commissioners so entered upon said premises and thereafter at all times remained 84 in the actual possessions and occupancy of the same, and used the ground or soil under said highway or road described in the petition in this proceeding for the purpose of introducing

85 water into and through portions of said village, and for no other purpose, according to the provisions of said Statute as amended ; that such use of the said highway and soil thereunder was such only as was necessary for the purpose of introducing water into said village, by means of the plans which the said Board of Water
 86 Commissioners, in the due exercise of the authority conferred upon them by said Statute as amended, had adopted as, in their opinion, were most feasible for procuring such supply of water ; that since the said month of April, 1895, the said board has been in the actual, lawful, peaceable possession of the premises of which
 87 condemnation is sought in this proceeding, for all the uses and purposes of said Statute ; that at no time since the said board so deposited said iron pipes along the said highway, has it, or its agents, servants, employees, or contractors, or any other persons in its behalf, held possession of the said highway or premises or soil thereunder by force, or violence, or with the
 88 show of either, but on the contrary thereof all that has been done in or about the construction of said pipe or trench line, or in or about the erection and construction of said pole line has been in all respects lawfully and peaceably done ; that as these deponents are informed and verily believe that said trench line was excavat-
 89 ed and said water mains were laid therein and buried in said trench with the consent of said Benedict, who, after having failed to secure said injunction order in his said action, withdrew all opposition thereto ; and that said pole line was

erected along said trench line in the highway 90
 across said premises, with especial reference to
 doing the least possible damage or injury to
 said Benedict's premises, or to the use thereof,
 and was completed on or about the 22d day of
 June last, and has since remained undisturbed,
 and ungarded by any one.

4. And the said deponents, each for himself, 91
 further says that substantially nothing now re-
 mains to complete the entire system of water
 works in and for said village but to lay the in-
 take pipe, and restore the highways to their
 former condition, and that the work of so doing
 is being pushed with all possible vigor.

CHARLES F. ROBERTSON. 92
 MACK S. SMITH.

Severally subscribed and sworn to before me
 this 10th day of July, A. D. 1895.

JOHN S. COE,
 Notary Public,
 in and for Ontario County, N. Y.

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95 SUPREME COURT—ONTARIO COUNTY.

VILLAGE OF CANANDAIGUA, BY CHARLES F. ROBERTSON, EDWARD G. HAYES, JOHN JOHNSON, JOHN H. KELLY, MATTHEW R. CARSON, AND MACK S. SMITH, CONSTITUTING THE BOARD OF WATER COMMISSIONERS OF SAID VILLAGE,

Plaintiff,

against

ROBERT M. BENEDICT AND ONTARIO ORPHAN ASYLUM,

Defendants.

97 To the Supreme Court of the State of New York:

The petition of the Village of Canandaigua, by Charles F. Robertson, Edward G. Hayes, John Johnson, John H. Kelly, Matthew R. Carson and Mack S. Smith, constituting the Board of Water Commissioners of said village, respectfully shows to this Court :

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First. That the above named Village of Canandaigua, at all the times and dates hereinafter mentioned was, and now is, a municipal corporation, located and being in the town of Canandaigua, county of Ontario and State of New York, and one of the political divisions of the said State ; that the names and places of residence of its principal officers are as follows, viz:

Daniel M. Hulse, President, Canandaigua, New York.

A. Eugene Cooley, Trustee, Canandaigua, 100
New York.

Dwight R. Burrell, M. D., Trustee, Canandaigua, New York.

James R. Dwyer, Trustee, Canandaigua, New York.

James Mahaney, Trustee, Canandaigua, New York.

Henry C. Beeman, Trustee, Canandaigua, New York. 101

Lucas Smith, Trustee, Canandaigua, New York.

Albert L. Beahan, M. D., Trustee, Canandaigua, New York.

William H. Warfield, Trustee, Canandaigua, 102
New York.

And that the name and place of residence of the Clerk of the said President and Board of Trustees of said village of Canandaigua, is Mark T. Powell, Canandaigua, New York; that on about the 21st day of December, 1894, the above named Charles F. Robertson, Edward G. Hayes, John Johnson, John H. Kelly, Matthew 103
R. Carson, and Mack S. Smith, were duly appointed and constituted a Board of Water Commissioners in and for the said village of Canandaigua, by the Trustees of said village, under and by virtue of the provisions of Chapter 181 of the Laws of 1875, and the several acts of the Legislature amendatory thereof, and supplementary thereto, and the said last above named 104
persons thereupon each duly qualified and duly organized and entered upon the discharge of their duties as such Board of Water Commis-

105 sioners, and are now acting as such ; that each
of the said Water Commissioners resides in the
village of Canandaigua, New York ; that the
above named Charles F. Robertson is the Presi-
dent, and the above named Edward G. Hayes
is the Secretary, of the said Board of Water Com-
missioners; that there are no other officers of
106 the said board, and that Charles F. Robertson
and Edward G. Hayes each resides in the vil-
lage of Canandaigua as above stated.

Second. That heretofore and shortly after
their said appointment the said Board of Water
Commissioners in and for said village (after due
107 examination and consideration of all matters re-
lating to supplying the said village of Canan-
daigua, and its inhabitants, with pure and
wholesome water) duly adopted a plan and spec-
ifications for the construction of a system of
water works in and for said village, as author-
ized and directed by said Statute as amended,
and in their opinion the most feasible for pro-
108 curing such supply of water, and consisting
generally of a power house erected and located
at the foot of Main street, in said village of
Canandaigua, from which power is to be trans-
mitted by electricity to a pumping station locat-
ed on or near the west shore of Canandaigua
lake, about three and one-half miles distant, and
109 which power is to be transmitted by means of
a pole line erected along or upon a public high-
way in said county of Ontario, and known as
the Lake Shore Road; that water is to be there
taken from said lake and pumped into a reser-

voir located about 320 feet above the level of I10
 said lake, and 3500 feet distant therefrom ; that
 the water from said reservoir is to be distributed
 therefrom by gravity pressure through iron
 pipes and mains to be laid from said reservoir
 and pumping station through and along said
 lake shore road, and thence through and along
 the public streets of said village, and from I11
 thence distributed, supplied and sold to the said
 village, and the inhabitants thereof ; that said
 proposed pole line is to consist of the location,
 at (necessary) intervals along said highway, (of
 about 110 feet, but in such a manner as not to
 interfere with travel upon or the public use of
 the same,) of large poles, such as are commonly I12
 used by telegraph and telephone companies,
 with cross-trees or cross arms attached thereto,
 and at a height of 20 to 25 feet above the sur-
 face of the ground, and upon which are to be
 strung, carried and (safely) supported the lines
 of properly insulated wire, by which the current
 of electricity is to be transmitted from the gen-
 erator in said power house to the motors in the I13
 pumping station, respectively located as afore-
 said; that the line of water mains is to consist
 of a twelve inch cast iron pipe to be properly
 buried in the ground along the said highway
 and to follow the contour of the same, which is
 to be so laid along the side of said highway (out
 of the beaten line of travel) by making an ex- I14
 cavation sufficient to receive the pipe, and to
 bury the same at an average depth of five feet
 eight inches,) with the surface of said pipe or
 trench line fully restored to its usual state); that

115 the said highway or road known as the Lake
 Shore road, is about four rods in width, and
 runs in a northerly direction from said pump-
 ing station, along or near the westerly shore of
 Canandaigua lake, to said village of Canandai-
 gua, and passes through a certain farm or prem-
 ises owned and occupied by the defendant, Rob-
 116 ert M. Benedict, containing about 134 acres of
 land (a distance of 1017 feet); that the said
 highway known as the Lake Shore road is the
 highway upon and along which the Board of
 Water Commissioners have determined, fixed
 and adopted for the line of their pipes or water
 mains and pole line, in the erection, construc-
 tion and (necessary) operation of said system of
 117 water works (as hereinbefore stated).

Third. The property to be condemned is a
 right of way, privilege, or easement in or to, or ap-
 purtenant to the following specifically described
 property located in the town of Canandaigua,
 County of Ontario and State of New York, and
 118 described by metes and bounds as follows: Sit-
 uate, lying and being in the town of Canandai-
 gua, county of Ontario, and State of New York,
 and beginning in the Lake Shore road, so call-
 ed, on the westerly side of Canandaigua lake,
 at the southerly line of lands of John Kruse
 and running thence southerly along the easter-
 119 ly side of said highway or road a distance of
 1017 feet to the lands of Frank O. Chamber-
 lain, and being a strip of land ten feet in width
 on either side of the center line of the pipe or
 trench line as shown by the red line upon the

survey and map of the same made by said ¹²⁰ Board of Water Commissioners, and filed in Ontario County Clerk's Office, June 10, 1895, and upon and along which said trench line said water pipes are now laid, and within which said ten feet on the easterly side of said pipe or trench line said pole line is now erected.

¹²¹ Fourth. The property, right of way, privilege or easement is required for the use of said municipal corporation, the village of Canandaigua, for the purpose of the erection, completion and due operation of said system of water works, pursuant to the provisions of said Chapter 181 of the laws of 1875, as amended; that the same is indispensably necessary for the use of ¹²² said municipal corporation as a part of said system of water supply for said village of Canandaigua, by its said Board of Water Commissioners, their successors, agents, servants, contractors and employees, to enter upon, open and construct a proper and necessary ditch or channel, and to lay, relay and maintain all necessary ¹²³ water pipes for the conduct of water upon and along the courses and lines aforesaid, and upon and across the lands and premises aforesaid, and to erect and maintain all necessary poles, wires, fixtures and appliances to transmit and conduct electrical power to operate said system of water works, and upon and along the lines and courses ¹²⁴ aforesaid, and upon and across the lands and premises aforesaid; for all of the uses and purposes, and to the full extent authorized by the statute aforesaid, and thereafter to maintain

125 forever such ditch or channel and pipes for con-
 ducting water, and also such pole line, fixtures
 and appliances for conducting electricity to op-
 erate said system of water works, and at any
 and all times to repair the same, and to keep
 and maintain the same in repair for the uses
 and purposes aforesaid, but at all times causing
 126 the surfaces of such channel to be relaid and
 restored to its usual state, and all damages done
 to said highway to be repaired, by the said vil-
 lage of Canandaigua, by its Board of Water
 Commissioners, their successors, or other offi-
 cers, or officer thereunto duly authorized by
 said Statute as amended, or by any law appli-
 cable thereto, and to do any other act or acts
 127 necessary in the premises, and authorized by
 law, in opening, constructing, completing and
 forever maintaintng and water course, and op-
 erating said system of water works by the
 means and appliances aforesaid, as provided by
 said Statute, or other law amendatory thereof,
 or applicable in the premises; that the said
 128 right of way, privilege or easement in or to, or
 appurtenant to the lands and premises above
 specifically described is necessary for a part of
 said pipe or trench line, from said reservoir and
 pumping station through and along said high-
 way to said village of Canandaigua as aforesaid,
 and also necessary for a part of said pole line
 129 from the motors in said pumping station,
 through and along said highway, and thence to
 the generator in said power house; that without
 said pipe or trench line it is not possible to con-
 duct water from said reservoir or pumping sta-

tion to any of the water mains in and along the 130
several streets in said village of Canandaigua;
that said pole line is absolutely necessary to op-
erate said system of water works by power sup-
plied from said power house; that the said
Board of Water Commissioners of the said vil-
lage of Canandaigua have heretofore entered
upon said above described premises and used the 131
ground or soil under said highway for the pur-
pose of introducing water through and into por-
tions of said village, and for no other purpose,
as by the said Statute as amended they were
authorized and empowered to do, and upon the
condition prescribed in the said Statute; that
such use of said highway, premises and soil was 132
such only as was necessary for the said purpose
of introducing water into and through the said
village, according to the said above mentioned
plans by which the said commissioners, in the
due and lawful exercise of the power and au-
thority conferred upon them by said statute as
amended, had adopted, as in their opinion, were
most feasible for securing such supply of water; 133
that before entering upon, detaining, taking, or
using said highway, premises or soil for the
purposes above stated, the said Board of Water
Commissioners caused a survey and map to be
made of the lands intended to be taken for any
of the said purposes, on which map the lands
of each owner or occupant, including the said 134
defendant, Robert M. Benedict, was designated,
and which map was signed by the President of
said Board of Water Commissioners, and by
their Secretary, and was filed in the office of the

135 County Clerk of said county of Ontario on the
 10th day of June, 1895; that they also by an
 order that was duly made by them, and signed
 by their said President and Secretary, and was also
 attached to and filed with the said map, design-
 136 purposed aforesaid, and which designation in-
 cluded the lands, and premises of the defendant
 Benedict, above described; that the plaintiff vil-
 lage is now lawfully in possession of the said
 right of way, privilege or easement in or to, or
 appurtenant to said lands and premises through
 and along said highway or road; that said
 Board of Water Commissioners in and for said
 137 village have dug up and excavated a trench
 through and along said highway and have laid
 therein the said iron pipes and water mains along
 the courses and lines aforesaid, and have also
 erected their said pole line and have planted and
 established their poles and placed thereon the
 necessary insulated wires for the purpose of
 138 conducting electricity to operate said system of
 water works, within said ten feet of said trench
 line on the easterly side thereof, and have filled
 up said trench line, and are now about to restore
 the surface of said highway to its natural state,
 and to repair all damages done thereto; that
 said Board of Water Commissioners, acting as
 139 the agents, officers and servants of said village,
 and not otherwise, and strictly within the limits
 of their statutory and official duties in the
 premises, have incurred great expense and have
 paid and contracted to pay large sums of money,

on behalf of said village, for machinery, pumps, 140
 boilers, engines, generator, motors, power house,
 pumping station, reservoir, materials and labor
 in and about the erection and construction of
 said system of water works; that the entire cost
 and expense of constructing and completing
 said system of water works will exceed the sum
 of \$125,000, all just and proper allowances hav- 141
 ing been made, and the acquirements of all nec-
 essary rights of way, privileges and easements
 having been provided for; that said Board of
 Water Commissioners have borrowed upon the
 credit of said village, and paid upon the accounts
 of the construction of said system of water
 works large sums of money amounting in the 142
 aggregate to the sum of upwards of \$110,000;
 that to provide the necessary funds to repay
 said borrowed money, and to carry on said work
 to final completion, the said board has duly
 made, executed and delivered a contract on be-
 half of said village, to make, execute and de-
 liver \$130,000 of the bonds of said village, bear-
 ing interest at 4 per cent, payable semi-annu- 143
 ally, and principal payable twenty years from
 date, which contract has been duly guaranteed
 by the deposit of the certified check of the pur-
 chasers in the sum of \$5,000; that it is inde-
 spensably necessary to the construction, com-
 pletion and due operation of said system of wa-
 ter works in and for said village, that the plain- 144
 tiff village acquire upon due compensation to
 the owner, the said right of way, privilege or
 easement along and through said lands and
 premises in said highway for the excavating,

145 laying and maintaining of said trench or pipe
 line, and for erecting and maintaining said pole
 line as hereinfore described; that the center line
 of said trench or pipe line is shown by the red
 line on said map and survey, and said land and
 premises and the title and interest therein in-
 146 are described in said order attached thereto, and
 filed therewith, in said Clerk's Office on the 10th
 day of June, 1895.

Fifth. That the name and place of residence
 of the said owner of the property is as follows:
 Robert M. Benedict, widower, residing at Can-
 147 andaigua, Ontario county, New York, who is of
 full age and competent to convey the same; that,
 as the plaintiff is now informed and believes,
 the said Robert M. Benedict is the owner in fee
 of the lands and premises above specifically de-
 scribed, and covered by said highway or road,
 subject only to the easements of the public
 therein as a public highway. That the defend-
 148 ant Ontario Orphan Asylum is a corporation,
 duly incorporated under and pursuant to an act
 of the Legislature of the State of New York,
 passed April 12, 1848, entitled, "An act for the
 incorporation of benevolent, charitable, scientif-
 ic, and missionary societies," and the several
 acts supplementary thereto, and amendatory
 149 thereof; that said Ontario Orphan Asylum is
 interested in said real estate, or some part there-
 of, as mortgagee, as appears from the record of
 its said mortgage in Ontario County Clerk's
 Office, in Liber 120 of Mortgages at page 289;

that said corporation is located at Canandaigua, 150 Ontario county, New York, and has its principal office and asylum at that place; that the principal officers of said corporation with their respective places of residence are as follows, viz: Hon. James C. Smith, President, Canandaigua, New York; Charles A. Richardson, Secretary, Canandaigua, New York; Frank H. 151 Hamlin, Treasurer, Canandaigua, New York.

Sixth. That the plaintiff has been unable to agree with the owner of said property for the purchase of said right of way, interest or easement in said lands required for the purposes aforesaid, for the reason that the said defendant 152 Benedict has unequivocally refused to sell said property to this plaintiff, and has also refused to accept any money compensation whatever for the same; that this plaintiff has offered the said defendant for the said property a sum which this plaintiff deems largely in excess of the actual value thereof, which the said defendant has refused, and that this plaintiff has endeavored 153 in good faith to agree with said owners as to the amount of such compensation, but has wholly failed to induce him to name any sum in money he would be willing to accept for the purchase of said property.

Seventh. That the value of said right of 154 way, interest or easement in said lands and premises in and along said highway, to be condemned does not exceed fifty dollars.

155 Eighth. That it is the intention of the plaintiff in good faith to complete the work or improvement for which the property is to be condemned, and to maintain and operate the same, and that all the preliminary steps required by law have been taken to entitle the plaintiff to institute proceedings.

156 Wherefore, the plaintiff demands that it may be adjudged that the public use requires the condemnation of the real property herein described, and that the plaintiff be entitled to take and hold such property, for the public use specified upon making compensation therefor, and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners for the property so taken, and that such further or other order be made herein as may be just and agreeable to the statutes and the rules and practice of this Court in such case made and provided.

157
158 Dated July 16, 1895.

VILLAGE OF CANANDAIGUA,

By Charles F. Robertson, Edward G. Hayes, John Johnson, John H. Kelly, Matthew R. Carson, and Mack S. Smith, constituting the Board of Water Commissioners of said Village, Plaintiff.

159

THOMAS H. BENNETT,

Attorney for Plaintiff,

Canandaigua, N. Y.

STATE OF NEW YORK, }
 COUNTY OF ONTARIO, } SS.:

160

Daniel M. Hulse and Charles F. Robertson, of said County, being duly severally sworn, each for himself deposes and says: The said Daniel M. Hulse for himself says that he is the President of the plaintiff, the village of Canandaigua. The said Charles F. Robertson for 161 himself says that he is the President of the Board of Water Commissioners of the said village of Canandaigua; that each of the deponents for himself says that he has heard the foregoing petition read, and knows the contents thereof; and that the same is true to his own knowledge, except as to the matters therein 162 stated to be alleged on information and belief, and as to those matters he believes it to be true.

DANIEL M. HULSE.

CHARLES F. ROBERTSON.

Severally subscribed and sworn to before me this 16th day of July, A. D. 1895.

BRADLEY WYNKOOP,

Notary Public,

Ontario County, N. Y.

163

164

165 SUPREME COURT—ONTARIO COUNTY.

VILLAGE OF CANANDAIGUA, BY CHARLES F. ROBERTSON, EDWARD G. HAYES, JOHN JOHNSON, JOHN H. KELLY, MATTHEW R. CARSON, AND MACK S. SMITH, CONSTITUTING THE BOARD OF WATER COMMISSIONERS OF SAID VILLAGE,

166

Plaintiff,

against

ROBERT M. BENEDICT AND ONTARIO ORPHAN ASYLUM,

Defendants.

Take notice, that the petition of the village of Canandaigua, by Charles F. Robertson, Edward G. Hayes, John Johnson, John H. Kelly, Matthew R. Carson, and Mack S. Smith, constituting the Board of Water Commissioners of said village, a copy of which is herewith served upon you, will be presented to the Supreme Court of the State of New York, at a Special Term, thereof appointed to be held at the Court House, in Power's Block, in the City of Rochester, on the 29th day of July, 1895, at the opening of Court on that day, or as soon thereafter as counsel can be heard, and a motion will then and there be made that the demand of said petition be granted.

167

168

Dated this 16th day of July, 1891.

169

Yours, &c.,

THOMAS H. BENNETT,

Attorney for Plaintiff,

Office and P. O. Address, Canandaigua, N. Y.
To Robert M. Benedict and Ontario Orphan Asylum, Defendants.

ROBERT M. BENEDICT,
Plaintiff,
against

CHARLES F. ROBERTSON, EDWARD G. HAYES,¹⁷¹
JOHN JOHNSON, JOHN H. KELLY, MATTHEW
R. CARSON, AND MACK S. SMITH, CONSTITUT-
ING THE BOARD OF WATER COMMISSIONERS
OF THE VILLAGE OF CANANDAIGUA, WILLIAM
T. O'CONOR; WILLIAM O'CONOR, AND SIDNEY
C. MACKAYE.

Defendants. 172

To the above named defendants:

You are hereby summoned to answer the
complaint in this action, and to serve a copy of
your answer on the plaintiff's attorney within
twenty days after the service of this summons,
exclusive of the day of service; and in case of
your failure to appear or answer, judgment will¹⁷³
be taken against you by default for the relief
demanded in the complaint.

Trial to be held in the County of Ontario.

Dated this 4th day of June, 1895.

JAMES A. ROBSON,
Plaintiff's Attorney,
Office and P. O. Address,¹⁷⁴
Canandaigua, Ontario Co., N. Y.

175 SUPREME COURT—ONTARIO COUNTY.

ROBERT M. BENEDICT,
Plaintiff,
against

CHARLES F. ROBERTSON, EDWARD G. HAYES,
JOHN JOHNSON, JOHN H. KELLY, MATTHEW
176 R. CARSON, AND MACK S. SMITH, CONSTITUT-
ING THE BOARD OF WATER COMMISSIONERS OF
THE VILLAGE OF CANANDAIGUA, WILLIAM T.
O'CONOR, WILLIAM O'CONOR, AND SIDNEY C.
MACKEYF.

Defendants.

The plaintiff in the above entitled action for
177 his cause of action herein states and shows to
this Court:

I. That the Village of Canandaigua, at the
time and dates hereinafter named, was, and still
is, a municipal corporation, located and being in
the town of Canandaigua, County of Ontario,
and State of New York, and that on or about
178 the 21st day of December, 1894, the above
named defendants, Charles F. Robertson, Ed-
ward G. Hayes, John Johnson, John H. Kelly,
Matthew R. Carson, and Mack S. Smith, were
duly appointed a Board of Water Commission-
ers for said Village of Canandaigua by the
trustees of said village, under and by virtue of
179 the statute in such case made and provided, and
the said defendants duly qualified and duly
organized and entered upon the discharge of
their duties as such Board of Water Commis-
sioners, and are now acting as such.

II. That as this plaintiff is informed and ¹⁸⁰
 verily believes to be true the above-named de-
 fendants, William T. O'Connor, William O'Connor,
 and Sidney C. Mackaye, are co-partners doing
 business together as such under the firm name
 of William T. O'Connor & Co., as contractors in
 the city of Syracuse, New York, and that on or
 about the first day of April, 1895, as this plain- ¹⁸¹
 tiff is informed and verily believes to be true,
 said defendants constituting the Board of Water
 Commissioners for said Village of Canandaigua,
 and the said defendants, constituting the firm of
 William T. O'Connor & Co., duly made and en-
 tered into a contract or agreement in writing by
 which the said defendants, under the name of ¹⁸²
 William T. O'Connor & Co., agreed to build and
 construct a system of water works in and for the
 village of Canandaigua, according to the plans
 and specifications theretofore adopted by said
 Board of Water Commissioners, and to so con-
 struct a system of water works, to consist of a
 power house in the village of Canandaigua and
 the transmission of power therefrom by electric- ¹⁸³
 ity to a pump house, located on the west shore
 of Canandaigua Lake, about three and one-half
 miles distant, and which power is to be trans-
 mitted by means of a pole line erected along or
 upon the public highway hereinbefore men-
 tioned, and known as the Lake Shore Road, and
 that water is to be there taken from said lake ¹⁸⁴
 and pumped into a reservoir, located about three
 hundred and twenty feet above the level of said
 lake and thirty-five hundred feet distant there-
 from; that the water therefrom is to be distrib-

185 uted from said reservoir by gravity pressure
 through pipes and mains to be laid from said
 pump house through and along said highway,
 and through and along the public streets of said
 village, and distribute, supply and sell the same
 to the said village and the citizens thereof.
 That said proposed pole line is, as this plaintiff
 186 is informed and believes to be true, to consist of
 the location at frequent intervals upon said
 highway of large poles, such as is commonly
 used by telegraph and telephone companies,
 with cross trees or cross arms attached thereto,
 and upon which is to be carried and supported
 the lines of wire by which the current of elec-
 187 tricity is to be transmitted from the power house
 located in said village of Canandaigua to said
 pump house located as aforesaid.

That the line of water mains is to consist of a
 twelve-inch cast-iron pipe, to be buried in the
 ground along said highway, and to follow the
 contour of the same, which is to be so laid by
 making an excavation sufficient to receive the
 188 pipe and to bury the same four to six feet.

III. That pursuant to said contract and agree-
 ment so made and entered into between said
 defendants, the said defendants, William T.
 O'Connor & Co., have entered upon the construc-
 tion of and are now constructing the said system
 189 of water works, and have laid the pipes and
 mains through a large number of the streets in
 the said village of Canandaigua, and are now
 engaged in laying mains and pipes through
 other streets, and have nearly completed the

laying of said mains and pipes in the village, ¹⁹⁰ and they are now constructing the reservoir, power house, and pump house, located as hereinbefore stated, and that they have employed and have now in their employ a large body of laborers, superintendents, and assistants, who are now engaged in said work, and according to the contract or agreement they are required to ¹⁹¹ finish the construction of said system, and have the work completed and ready for operation by the first day of July, 1895.

IV. This plaintiff further says that he is now, and has been for many years last past, the owner in fee simple and possessed of a farm, ¹⁹² located upon the west side of Canandaigua Lake, in the town of Canandaigua, Ontario County, New York, the location of which is especially desirable and made valuable by reason of its being so adjacent to the shores of Canandaigua Lake, and with its attractive surroundings affording a desirable view and outlook, and, being adjacent to the village of Canandaigua, made ¹⁹³ especially desirable for a residence, and which he has used and occupied as a home and residence, and through which runs the highway usually known as the Lake Shore Road, which is the highway upon and through which the said defendants have determined, fixed, and adopted for the line of their pipes, water mains, and pole line as hereinbefore stated. ¹⁹⁴ That the plaintiff is the owner in fee of all that portion of the highway aforesaid which passes through the premises of this plaintiff, and being about half

195 a mile in length and about four rods in width,
subject only to the easement of the public
therein as a public highway.

V. That on or about the 25th day of April
this plaintiff had an interview with the defend-
ant Mack S. Smith, one of the members of the
196 said Board of Water Commissioners, relative to
the proposed construction of said pipe and pole
line along the highway running through said
premises so owned by this plaintiff as aforesaid,
and this plaintiff then and there offered to grant
unto the said Board of Water Commissioners
the right and privilege to so construct its pipe
and pole line upon the terms and conditions
197 then stated by him, and which proposition said
defendant Smith stated would be by him pre-
sented to and considered by the Board of Water
Commissioners at its next meeting thereafter.
This plaintiff expecting soon thereafter to be
absent from home it was agreed that the said
Mack S. Smith, representing the said Board of
198 Water Commissioners, should inform the plain-
tiff's attorney of their decision in the matter,
and whether they would accept his said proposi-
tion. That on or about the 18th day of May,
as this plaintiff is informed and verily believes
to be true, the said defendant, Mack S. Smith,
informed this plaintiff's attorney that the said
199 proposition had been submitted to the said Board
of Water Commissioners, and they had deter-
mined that in no event would they accept the
same, or agree thereto, and no further proposi-
tion has been made by this plaintiff, or his

attorney to said Board of Water Commissioners, ²⁰⁰ and this plaintiff has not given or granted any right, privilege, or permission to said defendants, or either of them, to enter upon his said premises, or the said highway hereinbefore described, or any part thereof, to lay said line of water mains, or locate or erect said line of poles.

VI. That this plaintiff further states that ²⁰¹ the said defendants before the negotiations hereinbefore referred to, and since the letting of the contract as aforesaid, have laid, or caused to be laid along and upon the surface of said highway, premises of the plaintiff as aforesaid, the pipes, or mains proposed to be used by the said defendants for their water mains, and the said ²⁰² defendants having now nearly completed their said system of water works, as this plaintiff is informed and verily believes to be true, are about to enter upon the said premises of this plaintiff, the highway as aforesaid, and with large forces of men proceed at once to dig up and excavate a trench through the said premises ²⁰³ of this plaintiff, and lay therein the pipes and water mains which they have heretofore placed thereon as aforesaid, and to construct and erect the said pole line and plant, and establish the poles and place thereon the wires called for by their contract as hereinbefore set forth, the effect of which will be to greatly hinder and obstruct the view and outlook from plaintiff's said ²⁰⁴ residence, and impair the beauty, desirability and value thereof.

That the said defendants, or either of them,

205 have not instituted any proceedings to acquire the right to so lay pipes, or water mains through the said lands and premises of this plaintiff, the said highway, or have they in any other way acquired the right so to do.

That the next term of Court at which said defendants, the Board of Water Commissioners, 206 could present a petition to acquire such right is appointed to be held on the 24th day of June, 1895, and as this plaintiff is informed and verily believes to be true, the said defendants before such time, if they are not restrained from so doing, will have entered upon the said lands and premises of this plaintiff, the said highway as 207 aforesaid, with a large force of men and proceed to construct the said pole line, and lay the said water mains as hereinbefore set forth, and will have laid the said water mains and constructed said pole line, and will have dug up and subverted the soil of said highway and obstructed the same in violation and defiance of the plaintiff's rights, privileges and property in said 208 premises, so that the value of the premises of this plaintiff will thereby be greatly impaired and lessened and the view from said premises and the beauty and desirability thereof as a place of residence, and his use of and access to said premises will be greatly impaired, lessened and interfered with, and thereby 209 this plaintiff will suffer irreparable loss and damage, and will be remediless in any action or proceeding that can thereafter be taken by him.

VII. The following is a brief description of

the premises of the plaintiff hereinbefore refer-²¹⁰
 red to. All that tract or parcel of land situate
 in said town of Canandaigua, lying west of and
 adjoining Canandaigua Lake, bounded on the
 east by the shore of said lake, on the south by
 lands of F. O. Chamberlain; on the west by
 lands formerly of William Beeman, deceased;
 and on the north by lands formerly of (said Bee-²¹¹
 man, lands of E. L. Vanwormer, and lands of
 Charles Kruse, containing within the above
 boundaries one hundred and thirty-four acres of
 land, be the same more or less.

Wherefore, this plaintiff asks the judgment
 and decree of this Court that the said defend-
 ants and each of them, their agents, servants,²¹²
 assistants, superintendents, sub-contractors, or
 employees, and each and every person acting
 under them, or either of them, be restrained
 and enjoined from entering upon the said prem-
 ises of this plaintiff, the highway aforesaid, and
 from laying or constructing said water mains
 thereon, or digging or excavating any trench
 for the same, or digging or causing to be dug²¹³
 any holes for the erection of said pole line,
 or erecting the same, or any part thereof
 through the said premises, the highway as afore-
 said, and that they and each of them be further
 so restrained and enjoined during the pending
 of this action, and that the plaintiff have such
 other, further or different relief in the premises²¹⁴

215 as shall be just, equitable and proper, together
with the costs of this action.

JAMES A. ROBSON,
Plaintiff's Attorney,
Office and P. O. Address,
Canandaigua, N. Y.

216 STATE OF NEW YORK, }
COUNTY OF ONTARIO, } ss:

Robert M. Benedict being duly sworn, says,
that he is the plaintiff in the above entitled ac-
tion; that he has read the foregoing complaint
and knows the contents thereof; that the same
is true of his own knowledge except as to those
217 matters therein stated to be alleged upon in-
formation and belief, and as to those matters he
believes it to be true.

R. M. BENEDICT.

Sworn to before me this 4th day of June,
1895.

A. B. SACKETT,

Notary Public.

218

219

ROBERT M. BENEDICT,
 Plaintiff,
 against

CHARLES F. ROBERTSON, EDWARD G. HAYES,
 JOHN JOHNSON, JOHN H. KELLY, MATTHEW²²¹
 R. CARSON, AND MACK S. SMITH, CONSTITUT-
 ING THE BOARD OF WATER COMMISSIONERS
 OF THE VILLAGE OF CANANDAIGUA, WILLIAM
 T. O'CONOR, WILLIAM O'CONOR, AND SIDNEY
 C. MACKAYE,
 Defendants.

222

To the above named defendants :

Take notice of the granting of an injunction order in the above entitled action, with a copy of which, together with a copy of the affidavits and of the summons and complaint and undertaking upon which the same was granted, you are herewith served.

Dated June 5th, 1895. 223

Yours, &c.,
 JAMES A. ROBSON,
 Attorney for Plaintiff,
 Office and P. O. Address,
 Canandaigua, Ontario Co., N. Y.

224

225 SUPREME COURT—ONTARIO COUNTY.

ROBERT M. BENEDICT,
Plaintiff,
against

CHARLES F. ROBERTSON, EDWARD G. HAYES,
226 JOHN JOHNSON, JOHN H. KELLY, MATTHEW
R. CARSON, AND MACK S. SMITH, CONSTITUT-
ING THE BOARD OF WATER COMMISSIONERS OF
THE VILLAGE OF CANANDAIGUA, WILLIAM T.
O'CONOR, WILLIAM O'CONOR, AND SIDNEY C.
MACKAYE,
Defendants.

227 It appearing to my satisfaction by the com-
plaint of the plaintiff in the above entitled
action, verified the 4th day of June, 1895,
supported by the affidavits of said plaintiff,
of James A. Robson, and of Maximilian C.
Beard, all verified on the said 4th day of
228 June, that the plaintiff demands and is enti-
tled to a judgment against the defendants
restraining the commission of the acts and
things hereinafter enjoined, and it further,
among other things, appearing that plaintiff is
the owner of certain lands and premises situate
on the west shore of Canandaigua Lake, through
which runs the highway known as the Lake
229 Shore Road (being the first road west of and
nearly parallel with the shore of said lake)
which premises of said plaintiff are briefly de-
scribed as follows: All that tract or parcel of
land situate in the town of Canandaigua, County

of Ontario, and State of New York, lying west 230
of and adjoining Canandaigua Lake; bounded
on the east by the shore of said lake, on the
south by lands of F. O. Chamberlain; on the
west by lands formerly of William Beeman, de-
ceased, and on the north by lands formerly of
said Beeman, lands of E. L. VanWormer, and
lands of Charles Kruse, containing within the 231
above boundaries about 134 acres of land. That
plaintiff is the owner of the fee of said highway,
subject only to the rights of the public therein
as a public highway, being that part of said
highway within the premises above described.
That the said defendants threaten to enter
upon, and are about to enter upon, said 232
premises of said plaintiff, the highway afore-
said, and dig and subvert the soil thereof,
and lay pipes or water mains in a trench to be
by them dug along said highway, and to erect
in and upon said highway a pole line, by plant-
ing poles in said highway and stringing wires
thereon, without right or authority and in vio-
lation of plaintiff's rights, privileges, and prop- 233
erty in said premises, and that the value of the
premises of said plaintiff will thereby be greatly
impaired and lessened, and the view from said
premises and the beauty and desirability thereof
as a place of residence, and the plaintiff's use of
and access to said premises will be greatly im-
paired, lessened, and interfered with, and that 234
he will suffer irreparable loss and damages, and
will be remediless in any action or proceeding
which can thereafter be taken by him, the said
facts above set forth being the grounds upon

235 which this injunction order is granted, and also upon the grounds that the plaintiff's right thereto is dependent upon the nature of this action and the plaintiff having given the undertaking required by law.

Now, on motion of James A. Robson, attorney for said plaintiff, it is—

236 ORDERED, That the said defendants and each of them, their agents, servants, assistants, superintendents, sub-contractors, or employes, and each and every person acting under them or either of them or by their direction or authority be and each of them is, until the further order of the Court herein, hereby enjoined and re-
 237 strained from entering into or upon that part of the highway above referred to which is part of the premises of the said plaintiff above described, the said part of said highway extending northerly and southerly through said premises, and also from entering into or upon any part or portion of the premises of this plaintiff for the
 238 purpose of laying or constructing any pipe or water mains thereon, or digging or excavating any trench for the same, or digging or causing to be dug any hole for the erection of said pole line or erecting the same or any part thereof through said premises, the said highway, and from digging up or subverting the soil or doing any other acts in said highway, the premises of
 239 the said plaintiff, or in any other part of the premises of said plaintiff, tending to interfere therewith in any way, or to change the surface

thereof or in any other way disturb the same or 240
interfere therewith.

Dated June 5, 1895.

WM. E. WERNER,
J. S. C.

SUPREME COURT—ONTARIO COUNTY.

ROBERT M. BENEDICT,
Plaintiff,

241

against

CHARLES F. ROBERTSON, EDWARD G. HAYES,
JOHN JOHNSON, JOHN H. KELLY, MATTHEW
R. CARSON, AND MACK S. SMITH, CONSTI- 242
TUTING THE BOARD OF WATER COMMISSION-
ERS OF THE VILLAGE OF CANANDAIGUA,
WILLIAM O'CONOR, WILLIAM O'CONOR, AND
SIDNEY C. MACKAYE,

Defendants.

STATE OF NEW YORK, }
COUNTY OF ONTARIO. } ss.:

243

Robert M. Benedict, being duly sworn, says
that he is the plaintiff in the above entitled ac-
tion, and that he has this day verified the com-
plaint herein.

That he is the owner and in possession of the
lands and premises as set forth and described in
the complaint herein; that the said lands and 244
premises consist of a farm and residence, which
are especially valuable by reason of their desir-
able location within a mile of the village of

245 Canandaigua, and adjacent to the shore of Canandaigua Lake; that the house is located upon the west side of the highway, and fronting thereon, with a broad piazza on the east side thereof, from which looking across said highway is afforded a commanding view of the lake, the village, and the adjacent country.

246 That deponent has been at great pains and expense in improving and beautifying his said premises, and making the surroundings thereof desirable and attractive as a home and residence, and that a great part of the value of said premises consists in its location, desirable view, and natural surroundings, and the improvements as made by deponent as aforesaid.

247 That the location and construction of the said water mains through the said premises, the highway which runs in front of said deponent's house, and the entire length through his premises parallel to said lake, and the location thereon of a pole line for the transmission of electricity, as provided by the plans and specifications adopted by the Board of Water Commissioners, would result in great damage and loss to this deponent, and would result in an irreparable injury to his said premises, and would destroy the beauty thereof and the view from his said residence, porch, and premises and greatly diminish its desirability and value as a
248 place of residence to his great and irreparable
249 damage.

That deponent believes that such damage will be greatly lessened and diminished, if a reasonable care and consideration was shown by the

defendants in the erection and construction 250 thereof, by placing the wires underground, or constructing them at such height and locating the poles necessary to sustain the same in such a manner as not to obstruct or hinder the view from deponent's residence and premises.

That the said defendants have for some time been engaged in laying the pipes, constructing 251 the pump house and reservoir, and as deponent has observed the laying of pipes is nearly completed in the village of Canandaigua, but that none of the pipe has been laid on the highway leading from the village of Canandaigua to the pump house on the shore of the lake.

That deponent has been informed that the 252 defendants contemplate and intend as soon as the laying the pipes is completed in the village, which will be within the next three or four days, to put a large force of men at each end of the line on said highway, and rapidly push the work to completion.

That the poles for said pole line have been delivered on the premises, near the power house, 253 in the village of Canandaigua, and are such poles as are ordinarily used by electric and telephone companies, but appear to deponent to be much shorter than other poles used in said village, and men are now engaged in fitting them preparatory to constructing such pole line.

That deponent has been ready and willing to 254 grant to the defendants the right to construct such water mains, and permit the conducting of said wires across said premises under proper restrictions, and made the proposition referred

255 to in the complaint to the defendant Mack S. Smith, to be presented to said Board of Water Commissioners in good faith, and for the purpose of protecting deponent's rights in said property, and as he is informed by James A. Robson, Esq., his attorney, the said Board of Water Commissioners have declined and refused
 256 to accept such proposition.

Deponent further says that said defendants have not instituted, and proceedings to acquire the right to construct said line of pipe or water mains through his said premises, the highway as aforesaid, and deponent has not granted unto them, or either of them, any leave, privilege, or
 257 right so to do.

Deponent further says that no previous application has been made for an injunction order herein.

R. M. BENEDICT.

Sworn to before me this 4th day of June, 1895.

A. B. SACKETT,

Notary Public.

258

259

ROBERT M. BENEDICT,
Plaintiff,
against

CHARLES F. ROBERTSON, EDWARD G. HAYES,
JOHN JOHNSON, JOHN H. KELLY, MATTHEW
R. CARSON, AND MACK S. SMITH, CONSTITUT-
ING THE BOARD OF WATER COMMISSIONERS
OF THE VILLAGE OF CANANDAIGUA, WILLIAM
T. O'CONOR, WILLIAM O'CONOR, AND SIDNEY
C. MACKAYE, Defendants. 261
262

STATE OF NEW YORK, }
COUNTY OF ONTARIO. } ss.:

James A. Robson, being duly sworn, deposes and says:

I. That he is the attorney for the plaintiff in the above entitled action, and is the attorney referred to in the complaint of plaintiff therein, 263 and in the annexed affidavit of the plaintiff.

II. That the statements contained in said affidavit and in said complaint as to inquiries having been made by said attorney, and as to information having been thereby ascertained and as to communications had with defendant Smith above named, as stated in said affidavit 264 and complaint, are true.

III. That no previous application for an injunction in this action has been made.

IV. That no one of the defendants above

265 named has answered or appeared herein, the complaint not having yet been served.

JAMES A. ROBSON.

Subscribed and sworn to before me this 4th day of June, 1895. A. B. SACKETT,
Notary Public.

266

SUPREME COURT—ONTARIO COUNTY.

ROBERT M. BENEDICT,
Plaintiff,
against

267 CHARLES F. ROBERTSON, EDWARD G. HAYES,
JOHN JOHNSON, JOHN H. KELLY, MATTHEW
R. CARSON, AND MACK S. SMITH, CONSTITUTING THE BOARD OF WATER COMMISSIONERS OF THE VILLAGE OF CANANDAIGUA, WILLIAM T. O'CONOR, WILLIAM O'CONOR AND SIDNEY C. MACKAYE,

Defendants.

268

STATE OF NEW YORK, }
COUNTY OF ONTARIO, } ss:

Maximilian C. Beard, being duly sworn says that he is a resident of and freeholder in the viilage of Canandaigua in said county of Ontario, that he knows the plaintiff in the
269 above entitled action and is familiar with the lands and premises owned by said plaintiff and described in his complaint in the above entitled action; that the said lands and premises consist of a farm with residence, farm buildings,

and tenant house and other buildings thereon²⁷⁰ which are especially valuable as a farm and country residence by reason of their desirable location within a mile of the village of Canandaigua and adjacent to the shore of Canandaigua Lake; that the residence of said plaintiff is a commodious stone house located upon the west side of the highway known as the Lake²⁷¹ Shore Road and referred to in the plaintiff's complaint, and fronting thereon, with a broad piazza on the east side thereof; that the said residence occupies high ground above the shore of the lake and looking therefrom across the said highway is afforded a beautiful and extensive view of the lake, its shore and the country²⁷² adjacent thereto. That the said plaintiff has evidently been at great pains and expense in improving and beautifying said premises, planting trees and shrubbery and hedges and making the surroundings thereof desirable and attractive as a residence, and that a great part of the value of said premises consist in its location, desirable view and natural surroundings, and²⁷³ improvements made by said plaintiff as aforesaid. That deponent is familiar with the proposed location and construction of the system of water works for supplying the village of Canandaigua with water referred to in plaintiff's complaint herein. That a part of said proposed system is the laying of a water main or pipe²⁷⁴ of twelve inches in diameter in and along the highway above referred to as the lake shore road, from the pumping station situated on said highway and on the shore of said lake, about three

275 miles south of the village of Canandaigua to the said village, and the erection of a pole line consisting of poles planted in the ground with cross bars or cross pieces thereon supporting wire for the purpose of conducting electricity as a power for pumping from a power house located at or near the foot of Main street in the
 276 village of Canandaigua to said pump house, said water mains and pole line to pass along and be erected and built in, along, and upon said highway passing through the premises of the plaintiff for a distance of about one half mile.

That deponent has personal knowledge of the construction of said system of water works and that the same has proceeded and been completed
 277 to such an extent that the pipes and water mains called for by the plans and specifications agreed upon in the construction of said system of water works have been nearly all laid in the village of Canandaigua, and that the laying thereof could be finished and completed within the next few days; that the defendants William
 278 T. O'Connor, William O'Connor, and Sidney C. Mackaye, constituting the firm of William T. O'Connor & Company, who are the contractors for the erection and completion of said system of water works, have in their employ and actually engaged in the prosecution of said undertaking and laying of said water pipes and
 279 water mains, a large force of laborers, superintendents, and assistants, and that as deponent is informed and verily believes it is the intention of said contractors to begin the digging and laying of the water mains on said Lake Shore

Road above referred to, and the erection of the 280 pole line thereon, immediately upon the completion of the laying of said pipes and water mains in the village of Canandaigua, which will be within the next few days. That the pipe to be used in the construction of said water main along said highway has been placed and now is upon said highway, the whole extent thereof 281 through the premises of this plaintiff, but that no digging for the laying of said pipe or water main or the erection of said pole line upon said highway through the premises of this plaintiff has as yet been begun, but that the same will be begun as deponent is informed and believes within the next few days. That the poles to be 282 used in the erection of the pole line on said highway, or a large part thereof, have been received and are now deposited near the power house aforesaid, and the same are now being prepared and fitted for use in the erection of said pole line.

That the location and construction of the said water main through the said premises of said 283 plaintiff, and the location thereon of a pole line for the transmission of electricity as above specified, would, in the judgment of this deponent, result in great damage and loss to the said plaintiff, and would in a great measure destroy the beauty thereof and interfere with and obstruct the view from his said residence and 284 premises and greatly diminish its desirability and value as a place of residence, and would to a considerable extent interfere with the free access to said premises or parts thereof.

285 That if said wires could be placed underground the damage to said plaintiff by reason of constructing said line would be decreased, but would still be of considerable extent.

MAX. C. BEARD.

Subscribed and sworn to before me, this 4th day of June, 1895.

286

A. B. SACKETT,
Notary Public.

Endorsed :

“ Read on application for injunction order.

“ June 5, '95.

W. E. WERNER,
“ J. S. C.”

287

SUPREME COURT—ONTARIO COUNTY.

ROBERT M. BENEDICT,
Plaintiff,

against

288

CHARLES F. ROBERTSON, EDWARD G. HAYES,
JOHN JOHNSON, JOHN H. KELLY, MATTHEW
R. CARSON, AND MACK S. SMITH, CONSTI-
TUTING THE BOARD OF WATER COMMISSION-
ERS OF THE VILLAGE OF CANANDAIGUA,
WILLIAM T. O'CONOR, WILLIAM O'CONOR,
289 AND SIDNEY C. MACKAYE,

Defendants.

The above-named plaintiff is about to apply for an injunction herein restraining the defen-

dants above named and each of them, their 290
 agents, servants, etc., from entering upon the
 premises of said plaintiff, and from laying or
 constructing water mains thereon or digging or
 excavating any trench for the same, or digging
 or causing to be dug any holes for the erection of
 any poles or constructing any pole line or
 erecting the same or any part thereof through, 291
 along, in or upon said premises or any part
 thereof, as in the complaint in the above entitled
 action particularly mentioned.

Now, therefore, we, Frank W. Chesebro, re-
 siding in the village of Canandaigua, by occu-
 pation a real estate agent, and Henry Stewart,
 residing in Canandaigua aforesaid, by occupa- 292
 tion a U. S. N. Surgeon retired, do hereby, pur-
 suant to the Statute jointly and severally un-
 dertake, that the said plaintiff will pay to the
 said defendants so enjoined, such damages, not
 exceeding the sum of five hundred dollars, as
 they may sustain by reason of such injunction,
 if the Court finally decides that the said plaintiff
 was not entitled thereto, such damages to be 293
 ascertained by a reference, or in such other
 manner as the Court may direct.

Dated at Canandaigua, N. Y., this 4th day of
 June, 1895.

FRANK W. CHESEBRO,
 HENRY STEWART.

STATE OF NEW YORK, }
 COUNTY OF ONTARIO, } ss.:

294

On this fourth day of June, A. D. 1895, be-
 fore me the subscriber, personally came Frank

295 W. Chesebro and Henry Stewart, to me personally known to be the same persons described in and who executed the above undertaking, and severally acknowledged that they executed the same.
 C. A. RICHARDSON,
 Notary Public.

296 COUNTY OF ONTARIO, ss :

Frank W. Chesebro, one of the sureties to the foregoing undertaking, being sworn, says that he is a resident of and free holder within the State of New York, and is worth One Thousand Dollars, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution. FRANK W. CHESEBRO.

Sworn to before me this 4th day of June, 1895.
 C. A. RICHARDSON,
 Notary Public.

COUNTY OF ONTARIO, ss.:

298 Henry Stewart, one of the sureties to the foregoing undertaking, being sworn, says that he is a resident of and householder within the State of New York, is worth one thousand dollars, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

HENRY STEWART.
 Sworn to before me this fourth day of June, 1895.
 C. A. RICHARDSON,
 Notary Public.

I find the sureties in the foregoing undertaking sufficient, and do hereby approve and allow the same. 300

Dated this 5th day of June, 1895.

WM. E. WERNER,
J. S. C.

SUPREME COURT—ONTARIO COUNTY. 301

ROBERT M. BENEDICT,
Plaintiff,
against

CHARLES F. ROBERTSON, EDWARD G. HAYES, 302
JOHN JOHNSON, JOHN H. KELLY, MATTHEW
R. CARSON, AND MACK S. SMITH, CONSTITUT-
ING THE BOARD OF WATER COMMISSIONERS
OF THE VILLAGE OF CANANDAIGUA, WILLIAM
T. O'CONNOR, WILLIAM O'CONNOR, AND SIDNEY
C. MACKAYE, Defendants.

At Chambers. Present—Hon. Wm. E. Werner, 303
Justice of the Supreme Court. June 11,
1895.

A preliminary injunction order having been made and granted by me in the above entitled action, on the application of the plaintiff, and on summons, complaint verified June 4th, 1895, supported by the affidavits of the plaintiff, of 304
James A. Robson and of Max. C. Beard, all verified on the said 4th day of June, which order was so made on the 5th of June, 1895, and the

305 defendants, constituting the Board of Water
Commissioners of the village of Canandaigua, hav-
ing moved before me upon the papers on which
said preliminary injunction order was so grant-
ed, to vacate the same, and after hearing Hon.
James C. Smith, of counsel for said defendants
Board of Water Commissioners, in support of
306 said motion, and duly deliberating thereon,—

ORDERED, That the motion to vacate said
preliminary injunction order, so made herein,
be and the same hereby is granted, and that the
said order be and the same hereby is vacated,
annulled, and set aside.

Dated June 11th, 1895.

307 WM. E. WERNER,
J. S. C.

SUPREME COURT—ONTARIO COUNTY.

308 ROBERT M. BENEDICT,
Plaintiff,
against

CHARLES F. ROBERTSON, EDWARD G. HAYES,
JOHN JOHNSON, JOHN H. KELLY, MATTHEW
R. CARSON, AND MACK S. SMITH, CONSTITUT-
ING THE BOARD OF WATER COMMISSIONERS OF
THE VILLAGE OF CANANDAIGUA, WILLIAM T.
309 O'CONOR, WILLIAM O'CONOR, AND SIDNEY C.
MACKAYE,
Defendants.

On reading and filing the annexed affidavit

of James A. Robson, Esq., plaintiff's attorney, 310
 verified June 13, 1895, and upon the summons,
 complaint, affidavits, and injunction order grant-
 ed thereon, and upon the order duly made
 herein by me on the 11th day of June, 1895,
 let the defendants show cause before me at my
 Chambers in the Court House, in Powers Block,
 in the city of Rochester, New York, on the 15th 311
 day of June, 1895, at ten o'clock A. M., why an
 order should not be made herein vacating and
 setting aside the order made by me on the 11th
 day of June, 1895, vacating the injunction order
 granted herein by me on the 5th day of June,
 1895, and for such other, further and different
 order in the premises as the plaintiff shall then 312
 appear to be entitled to.

That a copy of this order and said affidavit
 upon which it was granted, be served upon
 Thomas H. Bennett, Esq., the defendants' at-
 torney, on or before the 14th day of June,
 1895, at nine o'clock in the forenoon of that
 day.

Dated, Rochester, New York, June 13, 1895. 313
 W. E. WERNER,
 J. S. C.

315 SUPREME COURT—ONTARIO COUNTY.

ROBERT M. BENEDICT,
Plaintiff,
against

316 CHARLES F. ROBERTSON, EDWARD G. HAYES,
JOHN JOHNSON, JOHN H. KELLY, MATTHEW
R. CARSON, AND MACK S. SMITH, CONSTITUT
ING THE BOARD OF WATER COMMISSIONERS
OF THE VILLAGE OF CANANDAIGUA, WILLIAM
T. O'CONOR, WILLIAM O'CONOR AND SIDNEY
C. MACKAYE,

Defendants.

317

STATE OF NEW YORK, }
COUNTY OF ONTARIO. } ss.:

James A. Robson, being duly sworn, says that he is the attorney for the plaintiff in the above entitled action.

318 That on the 5th day of June, 1895, as attorney for the plaintiff above named he procured an injunction *pendente lite* in the above entitled action, which was made and granted by Hon. William E. Werner, Justice of the Supreme Court, and that service thereof was thereafter made on most of the defendants herein.

319 That on Tuesday, the 11th day of June, 1895, deponent received a telegram from the Special Deputy Clerk in the Circuit Court, then held in Rochester, N. Y., Hon. William E. Werner, Justice, presiding, to the effect that an application had been made to vacate the said injunc-

tion, and if deponent desired to be heard to 320
come on next train.

That deponent received said despatch after
two o'clock in the afternoon of said day and was
informed by a telegraph operator at Canandaigua,
N. Y., that the same was not received at
the office in Canandaigua until nearly two
o'clock, and this deponent immediately on re- 321
ceiving said despatch telegraphed the said clerk
that he would come that afternoon, and did so,
and on his arrival was informed by Judge Wer-
ner that an order had been made vacating the
said injunction, as he (Judge Werner) had di-
rected said message to be sent to deponent about
11 o'clock of the forenoon of that day, and that 322
he had held the application until after the ar-
rival of the train leaving Canandaigua at 12:55,
and reaching Rochester before two o'clock.
That what purports to be a copy of said order
so granted vacating the said injunction order
has been served upon deponent, this 12th day
of June, 1895. That Thomas H. Bennett, Esq.,
of Canandaigua, N. Y., appeared as attorney on 323
the application for the order vacating said in-
junction order.

That deponent believes that the rights and in-
terests of the plaintiff herein have been pre-
judiced by the summary and *ex-parte* granting
of the order vacating the said injunction order,
and the said plaintiff desires that deponent 324
should be heard upon the application to vacate
said injunction order and that this deponent so
advised Hon. Wm. E. Werner, by letter, before

325 the application for said order vacating said injunction was made as aforesaid.

That said injunction order was granted and this action was commenced upon the ground that the defendants had failed to avail themselves of their statutory rights to proceed to acquire the right to construct their line of pipe
 326 through deponent's premises, and for the purpose of compelling said defendants to institute such proceedings, and to construct their said line of pipe under and by the direction of this Court, or Commissioners appointed thereby. That the rights of this plaintiff and the necessary damage to his premises would be lessened
 327 by said construction in a manner that while meeting the acquirements of the defendants, would protect the plaintiff's said premises from unnecessary damage.

That before the commencement of said action the said defendants had not filed, or caused to be filed, in the office of the Clerk of Ontario County, any map, as required by section 5 of
 328 of Chapter 181 of the Laws of 1875, under which the defendants are now constructing the system of water works, and as set forth in the plaintiff's complaint herein, nor had said map been so filed in the office of the Clerk of Ontario County when said injunction order was granted.

329 Deponent therefore asks that an order may be granted herein requiring the defendants to show cause why the order of June 11, vacating the said injunction order should not be vacated and set aside, and the reason why said order to

show cause is asked, is that if the motion is 330
heard on the regular notice for Special Term, to
be held the 24th of June, the plaintiff might
be deprived of his rights herein, and permit the
defendants to proceed to construct the said pipe
line, as is set forth in the complaint and moving
affidavits herein.

That no previous application has been made 331
for this order.

JAMES A. ROBSON.

Sworn to before me, this 13th day of June,
1895.

F. H. HAMLIN,

Notary Public.

SUPREME COURT—ONTARIO COUNTY. 332

ROBERT M. BENEDICT,

Plaintiff,

against

CHARLES F. ROBERTSON, EDWARD G. HAYES,
JOHN JOHNSON, JOHN H. KELLY, MATTHEW 333
R. CARSON, AND MACK S. SMITH, CONSTITUT-
ING THE BOARD OF WATER COMMISSIONERS OF
THE VILLAGE OF CANANDAIGUA, WILLIAM T.
O'CONOR, WILLIAM O'CONOR, AND SIDNEY C.
MACKAYE,

Defendants.

At Chambers. Present—Hon. Wm. E. Wer- 334
ner, Justice of Supreme Court. June 15,
1895.

An order having been granted and made by

335 me herein on the 13th day of June, 1895, re-
 quiring the defendants to show cause before me
 at my Chambers in the Court House, in Powers'
 Block, in the city of Rochester, on the 15th day
 June, at 10 A. M., why an order should not be
 made herein vacating and setting aside the order
 made by me herein, on the 11th day of June,
 336 1895, vacating the injunction order granted
 herein by me on the fifth day of June, 1895, and
 on reading and filing the summons, complaint,
 affidavits, and injunction order granted thereon,
 and also the affidavit of James A. Robson, Esq.,
 the plaintiff's attorney, verified June 13th, 1895,
 and the order to show cause, granted by me
 thereon, and on reading and filing the affidavits
 337 of Thomas H. Bennett and Mack S. Smith, in
 support of said order vacating said injunction
 order, and after hearing James A. Robson, Esq.,
 attorney for the plaintiff, and Hon. J. H. Met-
 calf, of counsel, in support of the motion,
 and Thomas H. Bennett, Esq., attorney for the
 defendants Board of Water Commissioners, and
 338 Hon. James C. Smith, of counsel, in opposition
 thereto,—

ORDERED, That the motion to vacate said
 order of June 11th, 1895, vacating said injunc-
 tion order of June 5, 1895, be and the same here-
 by is denied, and said order of June 11th, 1895,
 be and the same is hereby allowed to stand and
 339 to be and remain in full force and effect, and
 that as a condition of this order the Village of
 Canandaigua shall within ten days from the
 date hereof, make, execute, and deliverer to the
 plaintiff its bond in the penal sum of \$5,000,

conditioned to pay to said plaintiff any 340
 sum that may be awarded against it in the pro-
 ceedings for condemnation of the rights of way,
 privileges, and easements required by said
 defendants Board of Water Commissioners, in
 plaintiff's premises, for the construction of its
 system of water works, and the said plaintiff
 having also asked that said injunction order be 341
 restored specifically as to the erection of the pole
 line and the stringing of the wire, by the defen-
 dants, across the plaintiff's premises, said mo-
 tion is also denied.

Dated, June 15, 1895.

WM. E. WERNER,

J. S. C. 342

SUPREME COURT—ONTARIO COUNTY.

ROBERT M. BENEDICT,

Plaintiff,

against

343

CHARLES F. ROBERTSON, EDWARD G. HAYES,
 JOHN JOHNSON, JOHN H. KELLY, MATTHEW
 R. CARSON, AND MACK S. SMITH, CONSTITUT-
 ING THE BOARD OF WATER COMMISSIONERS
 OF THE VILLAGE OF CANANDAIGUA, WILLIAM
 T. O'CONOR, WILLIAM O'CONOR, AND SIDNEY
 C. MACKAYE, Defendants. 344

GENTLEMEN :

Please take notice, That the plaintiff herein
 appeals to the General Term of the Supreme

345 Court of the State of New York, Fifth Department, from the order of the Supreme Court, herein granted at a Special Term thereof, on the 15th day of June, 1895, and entered in the Clerk's Office of the county of Ontario on the 19th day of June, 1895, and from the whole of said order.

346 Dated at Canandaigua, New York, July 5th, 1895.

Yours, &c.,
 JAMES A. ROBSON,
 Attorney for the Appellant,
 Office and P. O. Address,
 Canandaigua, N. Y.

347 To the Clerk of the County of Ontario and to Thomas H. Bennett, Esq., Attorney for the Respondents.

SUPREME COURT—ONTARIO COUNTY.

348 ROBERT M. BENEDICT,
 Plaintiff,
 against

CHARLES F. ROBERTSON, EDWARD G. HAYES,
 JOHN JOHNSON, JOHN H. KELLY, MATTHEW
 R. CARSON, AND MACK S. SMITH, CONSTITUT-
 ING THE BOARD OF WATER COMMISSIONERS
 OF THE VILLAGE OF CANANDAIGUA, WILLIAM
 349 T. O'CONOR, WILLIAM O'CONOR AND SIDNEY
 C. MACKAYE,
 Defendants.

Charles F. Robertson, Edward G. Hayes,

John Johnson, John H. Kelly, Matthew R. Carson 350
 son, and Mack S. Smith, constituting the
 Board of Water Commissioners of the Village
 of Canandaigua, William T. O'Connor, William
 O'Connor, and Sidney C. Mackaye, defendanis in
 the above entitled action, answering the com-
 plaint of Robert M. Benedict, the above named
 plaintiff herein, by Thomas H. Bennett, their 351
 attorney, for first answer and defense herein—

I. Admit and allege: That the village of
 Canandaigua, at the time and dates hereinafter
 named, was, and still is, a municipal corpora-
 tion, located and being in the town of Canan-
 daigua, county of Ontario and State of New
 York, and that on or about the 21st day of Decem- 352
 ber, 1894, the above named defendants, Charles
 F. Robertson, Edward G. Hayes, John Johnson,
 John H. Kelly, Matthew R. Carson, and Mack
 S. Smith, were duly appointed and constituted a
 Board of Water Commissioners for said Village
 of Canandaigua, by the Trustees of said Village,
 under and by virtue of the statute in such case
 made and provided, and the said defendants duly 353
 qualified and duly organized and entered upon
 the discharge of their duties as such Board of
 Water Commissioners, and are now acting as
 such.

II. That the above named defendants William
 T. O'Connor, William O'Connor, and Sidney C. 354
 Mackaye, are now partners, doing business to-
 gether as such under the firm name of William
 T. O'Connor & Co., as contractors in the city of
 Syracuse, New York, and that on or about the

355 first day of April, 1895, said defendants, constituting the Board of Water Commissioners for said village of Canandaigua, and the said defendants, constituting the firm of William T. O'Connor & Co., duly made and entered into a contract or agreement in writing by which the said defendants, under the firm name of William
356 T. O'Connor & Co., agreed to build and construct a system of water works in and for said village of Canandaigua, according to the plans and specifications therefore adopted by said Board of Water Commissioners, and to so construct a system of water works, consisting generally of a power house erected and located in the village
357 of Canandaigua, from which power is to be transmitted by electricity to a pumping station, located on or near the west shore of Canandaigua Lake, about three and one-half miles distant, and which power is to be transmitted by means of a pole line erected along or upon a public highway in said county of Ontario, and known as the Lake Shore Road; that water is to be there
358 taken from said lake and pumped into a reservoir, located about three hundred and twenty feet above the level of said lake, and thirty-five hundred feet distant therefrom; that the water from said reservoir is to be distributed by gravity pressure through iron pipes and mains to be laid from said reservoir and pumping station
359 through and along said highway, and through and along the public streets of said village, and from thence distributed, supplied, and sold to the said village, and to the inhabitants thereof. That said proposed pole line is to consist of the

location, at necessary intervals along said high-³⁶⁰
 way, but in such manner as not to interfere
 with travel upon or the public use of the same,
 of large poles, such as are commonly used by
 telegraph and telephone companies, with cross-
 trees, or cross arms attached thereto, and at a
 height of from 20 to 25 feet above the surface of
 the ground, and upon which are to be strung,³⁶¹
 carried, and safely supported the lines of wire
 by which the current of electricity is to be
 transmitted from the said power house to the
 motors in the pumping station, respectively
 located as aforesaid, and that the line of water
 mains is to consist of a twelve-inch cast-iron
 pipe, to be properly buried in the ground along³⁶²
 said highway, and to follow the contour of the
 same, which is to be so laid by making an exca-
 vation sufficient to receive the pipe and to bury
 the same at an average depth of about five feet
 and six inches, with the surface of said trench
 fully restored to its usual state.

III. Defendants further admit and allege that³⁶³
 pursuant to said contract and agreement so
 made and entered into between the said defend-
 ants, the said defendants, William T. O'Connor
 & Co., have entered upon the construction of
 and are now constructing the said system of
 water works, and have laid the pipes and mains
 through a large number of the streets in the said³⁶⁴
 village of Canandaigua, and are now engaged in
 laying mains and pipes through other streets,
 and have substantially completed the laying of
 such mains and pipes in the said village; that

365 they are now constructing the reservoir, power
 house, and pumping station, respectively located
 as hereinbefore stated, and that each of said
 structures is also substantially completed; that
 they have employed and have now in their em-
 ploy a large body of laborers, superintendents,
 and assistants, who are now engaged in said
 366 work, and according to the contract or agree-
 ment they are required to finish the construction
 of said system and have the same completed and
 ready for operation by the first day of July,
 1895, or within about six days hence, and that
 said work of construction has so far progressed,
 and is now being prosecuted with such vigor,
 367 that in the judgment of the defendants, unless
 unforeseen contingencies intervene to prevent,
 the said system will be completed and made
 ready for operation at or about that date.

IV. Further answering the said complaint
 these defendants on information and belief ad-
 mit that the plaintiff is now, and for a number
 368 of years last past has been, the owner in fee
 simple and possessed of a farm, particularly de-
 scribed in the complaint, and located upon the
 west side of Canandaigua Lake in the town of
 Canandaigua, Ontario County, New York, and
 near the village of Canandaigua and therefore
 desirable as a place of residence, and which he
 369 has used and occupied as a home and residence,
 and through which farm runs the highway
 usually known as the Lake Shore Road, and
 being the highway along and through which
 the said Board of Water Commissioners have

determined, fixed, and adopted for the line of 370
 their pipes, water main, and pole line as herein-
 before stated, but these defendants allege that
 they have no knowledge or information sufficient
 to form a belief as to whether the plaintiff is the
 owner in fee of all that portion of the highway
 aforesaid which passes through the premises of
 the plaintiff, subject only to the easement of the 371
 public therein as a public highway, and that
 allege that the length or distance of said high-
 way so passing through the plaintiff's premises
 is only one thousand and seventeen feet.

V. Further answering the said complaint these
 defendants, upon information and belief, admit 372
 and allege that on or about the 10th day of May
 last past, the said plaintiff had an interview
 with the defendant Mack S. Smith, one of the
 members of said Board of Water Commission-
 ers, relative to the proposed construction of said
 pipe and pole line along the highway running
 through plaintiff's said premises; that said
 plaintiff then and there stated to said defendant 373
 Smith that he did not wish a money considera-
 tion for the rights, privileges, and easements in
 said highway required by said Board of Water
 Commissioners; that said plaintiff then and
 there offered to grant unto the said Board of
 Water Commissioners the right and privilege to
 so as aforesaid construct its pipe and pole line 374
 along and through said highway, in considera-
 tion of an agreement by said Board to furnish
 water for his said farm and premises as he
 should require, and as long as said pipe and pole

375 line should exist; that said plaintiff then and there stated and required, as the sole and only condition of such grant and conveyance, that the said Board should stipulate and agree with him to furnish his said farm and premises with water, as he and his grantees should require, or, in other words, that said Board of Water
376 Commissioners, in consideration of said proposed grant, should stipulate and agree to annex to plaintiff's said farm and premises the perpetual right and privilege of taking all the water required therefor from said pipe line running through said highway, without any further compensation whatever; that said defendant
377 Smith then and there stated to said plaintiff that he would present his said proposition to said Board and for its consideration, and did so at its next meeting thereafter; that it was also then and there agreed between the plaintiff and said Smith that he should inform James A. Robson, Esq., plaintiff's attorney, of the decision of the Board in the matter; that said Board declined
378 said plaintiff's proposition, and immediately thereafter said Smith informed plaintiff's attorney that said Board had determined not to accept the same; that the said Board has been ready and willing, and is now ready and willing, to purchase the rights, privileges, and easements in and along said highway required by it for the
379 construction of said system of water works, and has so repeatedly informed the plaintiff, or his attorney, to whom he has referred the matter, but have wholly failed to induce the plaintiff to to name any sum in money he would agree to

accept or take for the rights, privileges, and 380
 easements in said highway so required by said
 Board, and no further proposition for a grant or
 conveyance thereof has been made by the plain-
 tiff, or his attorney, to said Board, nor has the
 plaintiff at any time delivered, or offered to de-
 liver any such grant or conveyance, except
 upon the sole condition above stated. 381

VI. Further answering the said complaint,
 these defendants admit and allege that the de-
 fendants, constituting said Board of Water Com-
 missioners, since the letting of the contract as
 aforesaid, have laid or caused to be laid along,
 or upon the surface of said highway, the pipes
 or mains proposed to be used by them for their 382
 water mains; that the said defendants have now
 nearly completed their said system of water
 works as above fully stated; that they have ac-
 tually entered upon the said highway running
 through plaintiff's premises as aforesaid, and
 with large forces of men have proceeded to dig
 up and excavate a trench of about the depth of
 five feet and six inches through and along the 383
 said highway, and are now in readiness to lay
 therein the iron pipes and water mains which
 they have heretofore placed along the said high-
 way as aforesaid, and they have also construct-
 ed and erected their said pole line along the
 said highway, and planted and established their
 poles, and are now engaged in placing their 384
 wires thereon necessary for the purpose of con-
 ducting electricity to operate their said system
 of water works, and provided for by their said
 contract as hereinbefore stated, and these defend-

385 ants deny that the effect of the same will be to
 greatly hinder and obstruct the view and out-
 look from plaintiff's said residence, or in any
 wise impair the beauty, desirability and value
 thereof, and on the contrary allege that the val-
 ue of said plaintiff's farm and premises is actu-
 ally enhanced and increased by reason of the
 386 laying of said water mains along and through
 said highway running through said farm and
 premises, in that the plaintiff, and his grantees,
 may always secure a never failing supply of
 pure and wholesome water for the uses and pur-
 poses of the same at precisely the same rates of
 compensation as are paid by residents of said
 387 village of Canandaigua.

VII. Further answering the said complaint,
 these defendants allege that the said defendants,
 constituting the Board or Water Commissioners
 of the Village of Canandaigua, acting as the
 agents, officers, and servants of the said village,
 and not otherwise, and strictly within the limits
 388 of their statutory and official duties in the prem-
 ises, have incurred great expense, and have paid
 and contracted to pay large sums of money on
 behalf of the said village, for machinery,
 pumps, boilers, engines, generator, motors, ma-
 terials and labor in and about the erection and
 construction of their said system of water works ;
 389 that said Board of Water Commissioners, acting
 for and in behalf of said village, have long since
 awarded, closed, executed and delivered all and
 singular the necessary contracts for the entire
 work of constructing said system of water works,

and for furnishing all the materials therefor, of every name, nature and description; that the general contract so made and concluded by said Board of Waters Commissioners with the defendants, William T. O'Connor & Co., to furnish all of the materials, and perform all of the labor required in the construction of the said water system, and to fully complete the same on or before the 1st day of July, 1895, (the said Board reserving to itself in some instances to contract with material men direct) calls for an aggregate expenditure, by said village, of the sum of \$125,258.75; that of this sum the said Board of Water Commissioners, at the date of the verification of this answer, have actually borrowed upon the credit of said village, and paid upon account of the said contracts, on due estimates of their consulting engineer, divers sums of money aggregating about the sum of that the entire expense of constructing and completing said water system will probably exceed the aggregate amount of said contracts, all just and proper allowances having been made, and the acquirement of all necessary rights, privileges and easements having been provided for; that to provide the necessary funds to repay said borrowed money, and carry on said work to final completion, the said Board has made, executed and delivered their contract on behalf of said village, to make, execute and deliver to Seasongood & Mayer, of Cincinnati, Ohio, \$130,000 of the bonds of said village, bearing interest at four per cent, payable semi-annually, and principal payable twenty years from date,

395 for par, interest accrued to date of delivery, and
 \$4,000 premium, and which contract has been
 duly guaranteed by the deposit of the certified
 check of the purchasers in the sum of \$5,000;
 and that what has been so done by the said de-
 fendants, constituting the Board of Water Com-
 missioners of said Village of Canandaigua, for
 396 and in behalf of the said Village in and about the
 erection and construction of said water system
 therefor, and what they intend to do in and
 about completing the same, and putting the
 same in operation as above stated, to supply said
 village and its inhabitants with pure and whole-
 some water, and in all things pursuant to their
 397 statutory and official duty, power and authority
 in the premises, are the same acts, on the part
 of the said defendants, alleged and set forth in
 the plaintiff's complaint, and none other.

VIII. Further answering the said complaint
 these defendants deny each and every allegation
 in the said complaint contained, not hereinbe-
 398 fore specifically admitted, modified or denied.

II.

For a second, separate and further answer and
 defense herein, these defendants allege:

I. That the village of Canandaigua at the
 399 time and dates hereinafter named was, and still
 is, a municipal corporation, located and being in
 the town of Canandaigua, County of Ontario,
 and State of New York, and that on or about the
 21st day of December, 1894, the above-named

defendants, Charles F. Robertson, Edward G. 400
 Hayes, John Johnson, John H. Kelly, Matthew
 R. Carson, and Mack S. Smith, were duly ap-
 pointed and constituted a Board of Water Com-
 missioners in and for said village of Canandai-
 gua, by the trustees of said village, under and
 by virtue of the statute in such case made and
 provided, being Chapter 181 of the laws of 1875, 401
 and the several acts of the Legislature amendat-
 ory thereof and supplementary thereto, and the
 said defendants duly qualified and duly organ-
 ized and entered upon the discharge of their
 duties as such Board of Water Commissioners,
 in and for said village of Canandaigua, and are
 now acting as such.

402

II. That the said statute as amended makes
 it the duty of the said defendants, as such Board
 of Water Commissioners, among other things,
 to examine and consider all matters relating to
 supplying the said village with pure and whole-
 some water, and authorizes and empowers them
 to employ engineers, surveyors, and such other 403
 persons as shall be necessary for that purpose,
 and further authorizes and directs to adopt such
 plans, as in their opinion, may be most feasible for
 procuring such supply of water, and at any time
 before the appointment of Commissioners of ap-
 praisal as provided in said act as amended, to amend
 such plans; that a special meeting of the voters and 404
 taxpayers of the said village of Canandaigua,
 whose names appear upon the last assessment
 roll of the said village, duly called by the trus-
 tees of said village, and held on the 3d day of De-

405 cember, 1894, pursuant to notice duly given and
 published, for the purpose of voting upon the
 question of taxation for the water debt or ex-
 penses as provided for in Section 21 of said stat-
 ute, as amended, a large and decisive majority
 of such voters and taxpayers, voting at such
 special election, voted "For the Water Taxes,"
 406 as provided in the said act as amended; that as
 these defendants are advised and verily believe,
 and allege and charge the fact to be, that said
 special election of voters and taxpayers of the
 said village of Canandaigua was, in every re-
 spect and particular, duly and legally called,
 held, and properly and legally conducted; that
 407 the votes taken and received, and canvassed and
 counted thereat, were properly and legally re-
 ceived, pursuant to the provisions of said section
 21 of Chapter 181 of the Laws of 1875, and the
 acts amendatory thereof; that said votes were
 duly and legally counted and canvassed, and
 that the result of said election was properly
 and duly certified; and that the same was and
 408 is a final and conclusive determination by the
 voters and taxpayers of said village of Canan-
 daigua of the question of taxation so submitted
 at the said special election.

That the said result of the said special elec-
 tion was to charge the defendants, constituting
 the Board of Water Commissioners in and for
 409 said village of Canandaigua, when duly consti-
 tuted, appointed, and organized as aforesaid,
 with the sole and exclusive power, authority,
 and duty, as the officers and agents of the said
 village, and under and pursuant to the provis-

ions of the said statute, as amended, to examine ⁴¹⁰ and consider all matters relating to supplying the said village with pure and wholesome water, and especially to adopt such plans as in their judgment and opinion might be most feasible, for procuring such supply of water, as above alleged; and that said Board of Water Commissioners, after duly examining and considering all ⁴¹¹ matters relating to supplying said village with pure and wholesome water, and after the most mature discussion and deliberation in the premises, finally determined to construct a new and independent system of water works in and for said village of Canandaigua, and adopted plans and specifications therefor, the general nature of ⁴¹² which, and the means and appliances for the operation of which, are sufficiently stated and set forth in paragraph 2, of the first answer and defense herein, and here adopted as part of this second answer and defense, as if here reiterated at length.

And these defendants allege that the said Board of Water Commissioners, in finally ap- ⁴¹³ proving and adopting said plan of placing the power station of said system of water works in the village of Canandaigua, and of operating the pumps at the pumping station, by means of electricity transmitted by the said pole line, in and along the highway running through the plaintiff's said farm and premises, as above stated, ⁴¹⁴ was governed by the following, among other like reasons and considerations, each of which were fully considered and discussed and sanctioned by the Board, that is to say :

415 1. Economy in operation, in these particulars among others, to-wit: Doing away with the necessity of building and maintaining a dwelling-house for the engineer and other operatives, resident at the works.

The expense of building and maintaining a dock and other appliances upon the lake share
416 for boating coal, fuel, and supplies necessary for the operation of the works.

The expense of building barges, or suitable vessels, for boating coal from the dock at the foot of Main street in the Village of Canandaigua to the pumping station.

Doing away with the fixed and perpetual
417 charge of freight for boating or carting coal, fuel, and other supplies for operating the works, a distance of three and one-half miles.

2. Another governing consideration was, if possible, to so place the power-house as to insure certainty of immediate communication with the engineer in charge in all cases of emergency, such as fires, bursting of water pipes and the
418 like.

3. It seemed to the Board that the plan of placing the power house and all of the machinery so far distant from the village was to render the operation of the works unnecessarily difficult and the system of water supply less accessible for all purposes.

419 The duties of the engineer would at all times require his residence at or near the power station, and would also require his personal supervision of the mains, gates, and hydrants of the proposed water works. To locate him, therefor,

at a distance of three and one-half miles from 420
 the place where the most important part of his
 work was to be performed was deemed extremely
 inconvenient, if not wholly impracticable.

It was further considered that the operatives
 upon the water system should be so located as
 to be easily accessible to, and at all times under
 the direct supervision and control of the Board 421
 of Water Commissioners.

Governed by the foregoing, and other like
 considerations, the said Board of Water Com-
 missioners, having given the matter the most
 careful and painstaking consideration, and after
 due consultation with their engineer and other
 gentlemen expert in the matter of operating 422
 similar works at distances from the power house
 by electricity, duly determined that such plan
 was not only thoroughly practical, but was cer-
 tainly the most economical and desirable plan
 they could devise. The said defendants consti-
 tuting the Board of Water Commissioners in
 and for the said Village, therefore duly deter-
 mined to locate and have located and erected the 423
 power station for said system of water works
 upon a spur or branch of the Northern Central
 Railroad, at the foot of Main street, in the Vil-
 lage of Canandaigua, and have constructed the
 same in such manner that coal and freight of all
 descriptions is to be conveyed upon cars to the
 station, and coal is simply and inexpensively 424
 dropped from its car to the shed of the power
 house, thus avoiding all expense of cartage or
 boating of the same, a distance of three and one-
 half miles to the pumping station, and of hand-

425 ling all freight and supplies for the power station. And these defendants allege that after duly examining and considering all matters relating to the supplying of the said village with pure and wholesome water, as above stated, no better, more comprehensive, or economical plan than the one so considered and adopted by them, 426 has presented itself to them or either of them.

And these defendants further allege that the said statute, as amended, expressly provides that the said defendants, constituting the Board of Water Commissioners in and for said Village, and all persons acting under their authority, shall have the right to use the ground or soil 427 under any street, highway or road within the county in which such village is situated for the purpose of introducing water into and through any and all portions of said village on condition that they shall cause the surface of such street, highway or road to be relaid and restored to its usual state, and all damages done thereto to be repaired, and that such right shall be continuous 428 for the purpose of repairing and relaying water pipes upon like conditions; that said statute, as amended, also further provides that before entering upon, detaining, taking, diverting, or using any lands, streams or water rights therein for the purposes of said act, the said Board of Water Commissioners shall cause a survey and map to 429 be made of the land, water or streams intended to be taken, diverted or effected, or which is intended to be taken for any of said purposes, on which map the land, streams or water of each owner or occupant shall be designated, and

which map shall be signed by the President of 430
said Board of Water Commissioners and their
said Secretary and be filed in the office of the
County Clerk of the county or counties in which
said lands, streams or water are situated; that
they shall also in all cases, by an order made by
them and signed by said President and Secre-
tary, to be attached to and filed with said map, 431
describe the land, streams or water, and the title
and interest therein, which they intend to ac-
quire for the purposes of such improvement; that
at any time within one year after the filing of
any such map and order or amended map and
order, said Board of Water Commissioners may
take possession of such lands, streams or water, 432
or of the right, title or interest therein intended
to be taken as specified in said order or amend-
ed order, or of any part thereof, and use the same
for the purpose of such improvement, without
any suit or proceeding at law; provided however,
that within the time last aforesaid, they shall, if
they do not agree with the owner or owners
thereof as to the compensation to be paid there- 433
for, commence proceedings provided by said act
as amended, or by law, to acquire such title, and
the credit of the village, for the benefit of which
said improvement is undertaken is by said statu-
te pledged for the payment of the compensa-
tion for the property so taken.

And these defendants further allege that it is 434
also provided by said statute as amended, that the
said defendants, constituting the Board of Water
Commissioners in and for the said village, shall
have the power to contract for, purchase, and

435 take by deed, or other instrument under seal, in the name of said village, all lands, streams, water, water rights, or other property, real or personal, or rights therein situate at the place within the county or counties in which said village may be situated, which may be required for the purpose, and also the right to lay, relay, and
 436 maintain pipes through lands, and to take, detain, or divert water or streams of water which may be required for the purpose without taking the fee of the lands through which the pipes are laid or over which such streams of water flow, and to contract for the execution of the work, or any part thereof, or the supply of any necessary material.

437 And these defendants allege that before entering upon, taking, or using the soil under the said highway running through the plaintiff's said farm and premises, a distance of one thousand and seventeen feet as aforesaid, and before digging or excavating said trench for the purpose of laying the iron pipes and water mains
 438 therein, and also before erecting or constructing their said pole line along the said highway, as particularly alleged and set forth in the 6th paragraph of their first answer and defense herein, the said defendants, constituting the Board of Water Commissioners in and for the said village, duly caused the survey and map of the lands
 439 along said highway to be taken and made in form, substance, and manner required by said statute as amended, and to be signed by their President and Secretary, and also duly made their order and caused the same to be signed by

their said President and Secretary, in form, sub-⁴⁴⁰
 stance, and manner required by the said statute,
 and caused the said order to be attached to said
 survey and map, and the said survey, map, and
 order of the said Board of Water Commissioners
 thereto attached, and each duly signed as afore-
 said, to be filed in the office of the Clerk of the
 County of Ontario, that being the county in ⁴⁴¹
 which said lands and highway are situated,
 and also the Clerk's Office in which said
 survey, map, and order thereto attached
 is required to be filed by said statute as
 amended, all which was so done and fully com-
 pleted prior to and on the 10th of June, 1895;
 that before entering upon, taking, or using the ⁴⁴²
 soil under said highway, or digging or excavat-
 ing said trench for the purpose of laying the
 iron pipes and water mains therein, and also
 before erecting or constructing their said pole
 line along the said highway, as aforesaid, the
 said Board of Water Commissioners were ready
 and willing, and have at all times been, and are
 now ready and willing, to purchase the rights, ⁴⁴³
 privileges, and easements in and along said
 highway so required by it for said improvement,
 and for the construction and due operation of
 said system of water works, and to pay the
 plaintiff a just and adequate compensation
 therefor, and have so repeatedly informed the
 plaintiff or his attorney, to whom he has referred
 the matter, but have wholly failed to induce the ⁴⁴⁴
 plaintiff to name any sum in money he would
 agree to accept or take for the rights, privileges,
 or easements in said highway so required by

445 said Board, and are fully and particularly specified and designated in and by said survey, map, and order attached thereto, and filed as aforesaid; and that unless said Board of Water Commissioners can speedily acquire said rights, privileges, and easements of the plaintiff, by negotiation and purchase, as they are allowed and
446 permitted to do by said statute as amended, it is their purpose and intention, without any undue delay, and within the time limited by said statute, to commence and prosecute due and lawful proceedings to acquire the same in the manner required by said statute as amended; and these defendants allege that they are advised and verily believe, and therefore allege and charge the fact
447 to be, that the said defendants, constituting the Board of Water Commissioners, in and for the said village of Canandaigua, acting as the agents, officers, and servants of the said village, and not otherwise, have proceeded strictly according to, and within the limits of, the power, authority, and duty conferred and imposed upon
448 them in the premises, by the said statute as amended; that they have not done, nor do they threaten or propose to do, any act or thing in the premises, or in or about the erection or construction of said water system for said village, or in or about completing the same, and putting the same into operation as above stated, to supply
449 said village and its inhabitants with pure and wholesome water, in anywise transcending or beyond their statutory and official authority, power, and duty in the premises; and that what they have so done and intend to do in the prem-

ises are the same acts and threatened acts, on 450
 the part of these defendants, alleged and set
 forth in the plaintiff's complaint and none other.

III.

For a third, separate, and further answer and
 defense herein, these defendants allege: 451

That the defendants, constituting the Board
 of Water Commissioners, in and for the said
 village of Canandaigua, are the agents and offi-
 cers of said village; that the said Board of Water
 Commissioners is not a corporation and cannot
 be sued as such; that the said defendants, con-
 stituting said Board of Water Commissioners, 452
 are by said statute, as amended, expressly ex-
 empted from individual liability for their official
 acts; that the village of Canandaigua is their
 principal; that the plaintiff's supposed cause of
 action, if any is alleged or contained in his said
 complaint, is a cause of action against said vil-
 lage of Canandaigua, and not a cause of action
 against any or either of the individuals, consti- 453
 tuting the Board of Water Commissioners, in
 and for said village, or against any or either of
 the said defendants in this action, and these de-
 fendants allege that said village of Canandaigua
 is a necessary party defendant in this action,
 and should have been joined as such defendant
 herein, and they claim and insist that this action 454
 cannot, and ought not to be, had or maintained
 by the plaintiff, against all, any, or either of
 them, in the absence of such necessary party
 defendant.

455 Wherefore, the defendants demand the judgment of this Court, that the plaintiff's complaint herein be dismissed with costs.

THOMAS H. BENNETT,
Attorney for Defendants,
Canandaigua, N. Y.

456 STATE OF NEW YORK, }
COUNTY OF ONTARIO, } SS:

Charles F. Robertson, of Canandaigua, in said county, being duly sworn, deposes and says that he is the President of the Board of Water Commissioners in and for said village, and one of defendants in the above entitled action; that he
457 has read the foregoing answer therein, and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

CHARLES F. ROBERTSON.

458 Sworn to before me this 26th day of June, A.
D. 1895.

WALTER H. KNAPP,
Notary Public,
In and for Ontario County, N. Y.

459

To the Hon. J. H. Metcalf, Ontario County 460
Judge :

The petition of Robert M. Benedict, of the town of Canandaigua, in the County of Ontario and State of New York, respectfully shows :

That he is the owner in fee of the premises hereinafter mentioned and described, and that before and on the 22d day of June, 1895, and 461
thence hitherto, he, as such owner, was in lawful, actual, and peaceable occupation and possession of said premises subject only to the right of the public therein to use the same only for the purpose of and as a public highway, and said premises were subject to no other easement or right therein.

That said premises are described as follows: 462
The highway running in the general direction northerly and southerly through the farm, being premises of this petitioner, known as the Lake Shore Road, the said highway being about four rods in width and about twelve hundred feet in length through the premises of this petitioner. The said farm and premises of this petitioner 463
through which said highway runs and of which the same is a part, being described as follows : All that tract or parcel of land situate in said town of Canandaigua, lying west of and adjoining Canandaigua Lake; bounded on the east by shore of said lake ; on the south by lands of F. O. Chamberlain ; on the west by lands formerly 464
of William Beeman, now deceased, and on the north by lands formerly of said Beeman, lands of E. L. Van Wormer and lands of one Kruse. Con-

465 taining within the above boundaries about 134
acres of land.

Your petitioner further by his said petition respectfully shows that the village of Canandaigua at the times and dates hereinbefore and hereinafter set forth was and still is a municipal corporation located and being in the town of
466 Canandaigua, County of Ontario, and State of New York, and that on or about the 21st day of December, 1894, Charles F. Robertson, Edward G. Hayes, John Johnson, John H. Kelly, Matthew R. Carson, and Mack S. Smith were duly appointed a Board of Water Commissioners for the said village of Canandaigua, by the Trustees
467 of said village, under and by virtue of the provisions of the statutes of the State of New York, in such case made and provided, and the said Charles F. Robertson, Edward G. Hayes, John Johnson, John H. Kelly, Matthew R. Carson, and Mack S. Smith thereupon and thereafter duly qualified and duly organized and entered upon the discharge of their duties as
468 such Board of Water Commissioners, and are now acting as such Board of Water Commissioners.

That your petitioner is informed and verily believes to be true, William T. O'Connor, William O'Connor, and Sidney C. Mackaye are co-partners doing business together as
469 such under the firm name and style of William T. O'Connor & Co. as contractors in the city of Syracuse, N. Y., and that on or about the first day of April, 1895, the said Charles F. Robertson, Edward G. Hayes, John Johnson,

John H. Kelly, Matthew R. Carson, and Mack 470
 S. Smith, constituting the said Board of Water
 Commissioners for the said village of Canandai-
 gua, and said William T. O'Connor, William
 O'Connor and Sidney C. Mackaye, constituting
 the firm of William T. O'Connor & Co., duly
 made and entered into a contract or agreement
 in writing by which the said firm of William T. 471
 O'Connor & Co. agreed to build and construct a
 system of water works in and for the village of
 Canandaigua, according to the plans and speci-
 fications theretofore adopted by said Board of
 Water Commissioners, the said system of water
 works to be by them so constructed, to consist
 of a power house to be located in the village of 472
 Canandaigua, aforesaid, and the transmission of
 power therefrom by electricity to a pump house
 located on the west shore of Canandaigua Lake,
 about three and one-half miles distant from said
 pump house, and which power so to be trans-
 mitted by electricity is to be transmitted by
 means of a pole line erected along and upon the
 public highway hereinbefore mentioned, and 473
 known as the Lake Shore Road. That said
 water is to be taken from Canandaigua Lake at
 a point near said pump house and pumped there-
 from into a reservoir located about 320 feet above
 the level of said lake, and 3,500 feet distant
 therefrom ; that the said water therefrom is to
 be distributed from said reservoir by gravity 474
 pressure through pipes and mains to be laid from
 said pump house through and along said high-
 way and through and along the public streets of
 said village of Canandaigua to furnish water for

475 the use of said village and the citizens thereof.

That said proposed pole line consists of the location, erection and planting at intervals of about 100 feet upon said highway, the Lake Shore Road aforesaid, of large poles such as are commonly used by telegraph and telephone companies, with cross-trees or cross-arms attached
 476 thereto, and upon which are carried or supported the lines of wire by which the current of electricity is to be transmitted from said power house to the pump house aforesaid.

Your petitioner by his petition further respectfully shows that while he was so as aforesaid in the lawful, actual, and peaceable occupation of the premises above described, and of the
 477 whole thereof, and on or about the 22d day of June, 1895, certain persons, and, among others, the said Charles F. Robertson, Mack S. Smith, John H. Kelly, and William O'Connor, did unlawfully, and against the will of your petitioner, make an unlawful and forcible entry into and upon the said premises, to wit: The portion of
 478 the said Lake Shore Road so far as aforesaid owned by this petitioner, (being premises of your petitioner subject only to the easement therein of the public to use the same as a public highway and for no other purpose), with a strong hand and a multitude of people, and did then and there unlawfully and forcibly eject
 479 and expel your petitioner, his employees, agents, and servants from said premises and in like manner on said 22d day of June and on divers days and times since the said 22d day of June, did hold possession of said premises by

force and did erect thereon the pole line afore-480
 said and did plant in and upon the said high-
 way the poles above referred to, (called for by
 said contract referred to), by digging and
 excavating in the said highway so as aforesaid
 owned by this petitioner, holes at intervals of
 about 100 feet, and planting and erecting therein
 and in and upon said highway large poles upwards 481
 of 30 feet in length projecting above the surface of
 said highway upwards of 25 feet, to which poles
 are attached cross-trees or cross-arms, and upon
 which they did string or cause to be strung and
 attach wires for the transmission of electricity
 aforesaid, and have ever since held and still un-
 lawfully and forcibly hold in like manner, your 482
 petitioner, his agents, servants, and employees,
 out of the possession of said portion of said
 highway so as aforesaid occupied by said pole
 and pole lines, contrary to the form of the statute
 in such case made and provided.

Your petitioner, by his said petition, further
 respectfully shows upon his information and
 belief that the entry so as aforesaid made upon 483
 his premises, and the said unlawful and forcible
 ejection and expulsion of your petitioner and
 his employees, agents, and servants from said
 premises, and the said unlawful and forcible
 holding of said premises was made so as afore-
 said, and has since been continued by direction
 and authority of the Board of Water Commis- 484
 sioners aforesaid, as the Board of Water Com-
 missioners of the village of Canandaigua, and
 by said William O'Connor for the firm and by
 the direction of the said firm of William T. ...

485 O'Connor & Co. in the unlawful, illegal, and forcible attempt to complete the contract of said firm and to erect on the premises aforesaid illegally, unlawfully and forcibly the pole line aforesaid, and that the said unlawful and forcible holding of said premises is in like manner by the direction and authority of said Board of
 486 Water Commissioners and said firm of William T. O'Connor & Co.

Your petitioner, therefore, prays for a final order to remove the said village of Canandaigua, its agents, servants, contractors, and employees, and the said Charles F. Robertson, Edward G. Hayes, John Johnson, John H. Kelly, Matthew
 487 R. Carson, and Mack S. Smith, constituting the Board of Water Commissioners for the said village of Canandaigua, and Charles F. Robertson, Edward G. Hayes, John Johnson, John H. Kelly, Matthew R. Carson, and Mack S. Smith, and William T. O'Connor, and William O'Connor, Sidney C. Mackaye, and each and every one
 488 of them and each of their agents, servants, and employees from the possession of said premises, and each and every part and parcel thereof.

Dated at Canandaigua, N. Y., July 1st, 1895.

R. M. BENEDICT,

Petitioner.

STATE OF NEW YORK, }
 489 COUNTY OF ONTARIO, } ss.:

Robert M. Benedict, the petitioner named in the above petition, being duly sworn, deposes and says that he has read the foregoing petition subscribed by him and knows the contents

thereof, and that the same is true to the knowl-490
edge of the deponent, except as to the matters
therein stated to be alleged upon information
and belief, and that as to those matters he be-
lieves it to be true.

R. M. BENEDICT.

Sworn to and subscribed before me this 1st
day of July, 1895. 491

M. T. POWELL,
Notary Public,
Ontario County.

The People of the State of New York :

To the Village of Canandaigua and Charles⁴⁹²
F. Robertson, Edward G. Hayes, John Johnson,
John H. Kelly, Matthew R. Carson, and Mack
S. Smith, constituting the Board of Water Com-
missioners for the village of Canandaigua, and
Charles F. Robertson, Edward G. Hayes, John
Johnson, John H. Kelly, Matthew R. Carson,
Mack S. Smith, and William T. O'Connor, Wil-⁴⁹³
liam O'Connor, and Sidney C. Mackaye, and
every person in the possession of the premises
hereinafter described, or any part thereof, or
claiming the possession thereof or any part
thereof.

Whereas, Robert M. Benedict has presented
to me his petition in writing, subscribed by him⁴⁹⁴
and duly verified by his oath this first day of
July, 1895, which said petition sets forth that he,
the said Robert M. Benedict, is the owner of the
premises hereinafter mentioned and described,

495 subject only to the rights of the public therein
to use the same only for the purpose of a public
highway, and that on the 22d day of June, 1895,
he, as such owner, was in the lawful, actual oc-
cupation and possession of said premises, subject
only to the right of the public therein to use the
same only for the purpose of and as a public
496 highway, and while he was in such lawful and
actual occupation and on or about the day and
year last aforesaid, you, the said Village of Can-
andaigua, and Charles F. Robertson, Edward G.
Hayes, John Johnson, John H. Kelly, Matthew
R. Carson, and Mack S. Smith, constituting the
Board of Water Commissioners for the village
of Canandaigua, and Charles F. Robertson, Ed-
497 ward G. Hayes, John Johnson, John H. Kelly,
Matthew R. Carson, Mack S. Smith, and Wil-
liam T. O'Connor, William O'Connor, and Sidney
C. Mackaye, did make, and did order and direct
to be made, a forcible entry into and upon said
premises, and did forcibly eject the said peti-
tioner therefrom, and that you, in a like manner,
498 still hold the said petitioner out of the posses-
sion of said premises, as by reference to said
petition will appear.

This, therefore, is to require you and each of
you forthwith to remove from said premises, to-wit :
That portion of the highway running in the
general direction northerly and southerly
499 through the premises or said petitioner, known
as the "Lake Shore Road," the said highway
being about four rods in width and about twelve
hundred feet in length through the premises of
the petitioner, the said premises through which

said highway runs and of which the same is a 500 part, being described as follows: All that tract or parcel of land situate in the town of Canandaigua, County of Ontario, and State of New York, lying west of and adjoining Canandaigua Lake; bounded on the east by the shore of said lake; on the south by lands of F. O. Chamberlain; on the west by lands formerly of Wm. Beeman, now 501 deceased, and on the north by lands formerly of said Beeman, lands of E. L. Van Wormer and lands of one Kruse, containing within the above boundaries about 134 acres of land, and especially so much of said highway as is occupied by you by the erection and maintaining thereon and thereupon of the pole line 502 and poles which you have erected or which have been erected by the order and direction of you or some one or more of you, or show cause before me, the County Judge of Chemung County, now holding Court in the County of Ontario, pursuant to a statute in such case made and provided, at the County Court Room in the Court House in the village of Can- 503 andaugua, in the County of Ontario and State of New York, on the 5th day of July, 1895, at 2 o'clock in the afternoon of that day, why possession of said premises should not be returned to said Robert M. Benedict, the said petitioner.

Witness, Hon. Sylvester S. Taylor, County Judge of Chemung County, at the village of Can- 504

505 andaigua, County of Ontario, and State of New
York, this first day of July, 1895.

S. S. TAYLOR,
County Judge of Chemung County,
Acting County Judge of Ontario County.

STATE OF NEW YORK, {
506 COUNTY OF ONTARIO, } ss:

Charles F. Robertson, of Canandaigua, in
said county, being duly sworn, deposes and says
that on the 2d day of July, 1895, he was served
with a paper, purporting to be a copy of a pre-
cept, dated July 1st, 1895, and to have been
issued and signed by Hon. Sylvester S. Taylor,
County Judge of Chemung County, acting as
507 County Judge of Ontario County, which precept
recited the presentation to such Judge of a peti-
tion of Robert M. Benedict, subscribed and ver-
ified by him, setting forth that he is the owner
of certain premises therein described, subject
only to the rights of the public therein, to use
the same only for the purpose of a public high-
508 way, and that on the 22d day of June, 1895, he,
as such owner, was in the actual possession of
the said premises, subject only to the said right
of the public therein, and while he was in such
possession, and on or about the day and year
last aforesaid, the village of Canandaigua, and
this deponent and others, constituting the Board
509 of Water Commissioners of such village, and
William T. O'Connor and others, made and di-
rected to be made a forcible entry into and upon
said premises, and forcibly ejected the said peti-
tioner therefrom, and in like manner still hold

him out of the possession thereof. The said 510
 precept is addressed to the said village of
 Canandaigua, and this deponent and the others
 alleged in the petition therein referred to to have
 made such forcible entry, and requires them and
 each of them forthwith to remove from said
 premises therein described, being a portion of
 the highway situate in the town of Canandaigua, 511
 County of Ontario, lying west of Canandaigua
 Lake, known as the Lake Shore Road, or show
 cause before said County Judge of Chemung
 County, at the County Court Room in the Court
 House in the village of Canandaigua, in the
 County of Ontario, on the 5th day of July, 1895,
 at 2 o'clock in the afternoon of that day, why 512
 possession of the said premises should not be
 returned to the said Robert M. Benedict.

II. Deponent is informed and believes that a
 copy of a paper, purporting to be such precept,
 has been served upon each of the other parties
 alleged in the petition therein mentioned to
 have made such alleged forcible entry. The 513
 said paper which was served upon the deponent
 is hereto annexed and marked "A." Deponent
 has not been served with a copy of the petition
 recited in said precept, but alleges, on informa-
 tion and belief, that a paper, purporting to be
 such petition, and to have been verified by the
 said Benedict on the 1st day of July, 1895, and 514
 which appears, by the endorsement of said
 County Judge of Chemung County thereon, to
 have been read on application for precept July
 1st, 1895, is now on file in the Clerk's Office of

515 Ontario County, and a copy of the same is
hereto annexed and marked "B."

III. Deponent further says that he is informed and believes that a minute of proceedings of the County Court of Ontario County appears upon the records kept by the Clerk of said Court, a
516 copy of which minute is hereto annexed and marked "C," and that nothing appears upon such records showing that the County Judge of Chemung County was at any time requested by the County Judge of Ontario County to hold Court, or a term of Court, in the latter county, or that he was ever requested to act, or that he
517 ever did act, as a Judge in said County of Ontario, except in the matter of said petition. Deponent further says that J. Henry Metcalf, of Canandaigua, is the County Judge of Ontario County; that he was not, on the 1st day of July inst., and is not now, absent from said county, or in any way incapacitated from holding Court
518 therein.

IV. Deponent further says that J. Henry Metcalf was the counsel for the said Robert M. Benedict in an action brought in the Supreme Court by said Benedict to obtain an injunction to restrain this deponent and the other persons, constituting the Board of Water Commissioners
519 of the village of Canandaigua, and others, from entering upon the said portion of the said highway described in said petition, for the purpose of laying water pipes therein, and erecting a pole line thereon, in the construction of a sys-

tem of water works for the use of said village, 520
 and that on the 15th day of June last said J.
 Henry Metcalf appeared at a Special Term, held
 in Rochester, Monroe County, by Hon. W. E.
 Werner, a Justice of the Supreme Court, and
 argued a motion in behalf of the said Benedict,
 involving the right to such injunction; that said
 action is still pending, and, as deponent is in- 521
 formed and believes, said J. Henry Metcalf is
 still the counsel of said Benedict in said action,
 and has continued in such position since said
 15th day of June, including the time when the
 proceedings in the County Court of Ontario
 County were had, which were described in the
 paper hereto annexed marked "C;" that as ap- 522
 pears by the published appointments of the
 terms of the Ontario County Court for the year
 1895, no term was or is appointed for the month
 of July, and that the said adjournment of said
 County Court to the 1st day of July, 1895, was
 made on or about the 20th day of June, and sub-
 sequent to the argument of the motion in the
 injunction suit above referred to; that at the 523
 time when the said order of adjournment was
 made, and also at the time when Judge Metcalf
 opened his Court on July 1st, 1895, there was
 no business, civil or criminal, pending before
 said Court, to be transacted therein, and no bus-
 iness was transacted, except to adjourn said
 Court to 4.30 P. M. of the same day, as appears 524
 from the minutes of the said Court, and that as
 deponent is informed and verily believes the
 only persons present in Court on July 1st, 1895,
 except the officers of the Court, were the attor-

525 ney and counsel of said Benedict; and that said
County Judge of Chemung County did not ar-
rive in the village of Canandaigua until the af-
ternoon of that day.

V. Deponent further alleges upon the facts
and circumstances above stated, and as he is
526 advised and verily believes, that said County
Judge of Chemung County had no jurisdiction
when he made and issued said precept, to act in
the matter to which said precept relates, and
that said precept is null and void for the lack of
jurisdiction.

VI. Deponent further says that no previous
527 other application has been made for a writ of
prohibition herein to any Judge or Court.

Wherefore, deponent prays this Court that it
will exercise the jurisdiction and authority con-
ferred upon it by law, and issue a writ of prohi-
bition directed to the said the Hon. S. S. Tay-
lor, County Judge of Chemung County, and to
528 the said Robert M. Benedict, prohibiting the
said Judge from further entertaining or proceed-
ing with the matter of said petition and precept,
and prohibiting and restraining the said Bene-
dict from further prosecuting the same before
the said County Judge of Chemung County,
acting as County Judge of Ontario County, or
otherwise, and for such other or further relief as
529 may be just. CHARLES F. ROBERTSON.

Sworn to before me this 4th day of July, A. D.
1895.

A. B. SACKETT,
Notary Public,
In and for Ontario County.

The petition referred to as "A" and precept 530 as "B" and stated as annexed to this affidavit are same as hereinbefore set forth.

"C"

Extract from the minutes of the Ontario 531
County Court :

"Thursday, June 20th. Court met pursuant to adjournment. Present, same as yesterday.

"Adjourned to July 1st, 1895, at 2 P. M.

"Monday, July 1, 1895. Court met pursuant to adjournment. Present, Hon. J. Henry Metcalf, County Judge. 532

"Court adjourned to 4.30 o'clock this afternoon.

"Monday, July 1st, 1895, 4.30 P. M.

"Court met pursuant to adjournment. Present—Hon. J. Henry Metcalf, County Judge of Ontario County; Hon. S. S. Taylor, County Judge of Chemung County. 533

"James A. Robson, Esq., and John Gillette, Esq., having presented to J. H. Metcalf, County Judge of Ontario County, the petition of Robert M. Benedict in summary proceedings under Section 2330 of the Code of Civil Procedure, and the said J. H. Metcalf being disqualified to act therein, having been counsel for said petitioner, does therefore request the Hon. S. S. Taylor, 534
County Judge of Chemung County, who is now present holding Court to act in said matter.

(Endorsed:) "Monroe Special Term, July 5,

535 1895. Read on motion, and ordered filed in Ontario County. E. H. Slocum, Special Deputy Clerk. J. M. D. Filed, July 5, 1895, at 2.05. Wm. G. Lightfoot, Deputy Clerk."

At a Special Term of the Supreme Court, held at the Court House in the city of Rochester,
536 in the County of Monroe, on the 5th day of July, A. D., 1895.

Present—Hon. JOHN M. DAVY, Justice, presiding.

THE PEOPLE EX. REL. THE VILLAGE OF CAN-
ANDAIGUA, CHARLES F. ROBERTSON, AND
537 OTHERS, CONSTITUTING THE BOARD OF
WATER COMMISSIONERS OF SAID VILLAGE,
AND WILLIAM T. O'CONOR AND OTHERS.

against

SYLVESTER S. TAYLOR, COUNTY JUDGE OF CHE-
MUNG COUNTY, AND ROBERT M. BENEDICT.
538

On reading and filing the affidavit of Charles F. Robertson, verified July 4th, 1895, it is ordered that a writ of prohibition issued out of this Court to the said Sylvester S. Taylor, County Judge of Chemung County, and to the said Robert M. Benedict, commanding the said
539 County Judge to desist and refrain from taking any action whatever, as County Judge of the County of Chemung, acting as County Judge or otherwise of the County of Ontario, in respect to the petition of said Robert M. Benedict, dated

and verified on the 1st day of July, 1895, addressed to the Hon. J. H. Metcalf, Ontario County Judge, praying for a final order to remove the said Village of Canandaigua and the said relator, Charles F. Robertson, and the other persons named therein, and their agents, servants, and employees from the possession of certain premises described in the said petition, and from in any manner acting as the County Judge of Ontario County, or otherwise, in respect to the subject matter of the said petition, and commanding the said Robert M. Benedict to desist and refrain from further prosecuting before the said Sylvester S. Taylor, County Judge of Chemung County, acting as County Judge of Ontario County, or otherwise, the said petition and the proceeding thereby commenced, and the said writ to be returnable at the Special Term of this Court, appointed to be held at the Court House, in the city of Rochester, and County of Monroe, on the 29th day of July, 1895, at the opening of the Court on that day.

(Endorsed:) "Monroe Special Term, July 5, 1895. Granted and ordered entered in Ontario County. E. H. Slocum, Special Deputy Clerk. Filed July 5, 1895. Wm. G. Lightfoot, Deputy Clerk."

545 The following papers were read by the defendants in opposition to said motion :

SUPREME COURT—ONTARIO COUNTY.

546 THE VILLAGE OF CANANDAIGUA, BY CHARLES F. ROBERTSON, EDWARD G. HAYES, JOHN JOHNSON, JOHN H. KELLY, MATTHEW R. CARSON, AND MACK S. SMITH, CONSTITUTING THE BOARD OF WATER COMMISSIONERS OF SAID VILLAGE,

Plaintiffs,

547 against

ROBERT M. BENEDICT AND THE ONTARIO ORPHAN ASYLUM,
Defendants.

STATE OF NEW YORK, }
COUNTY OF ONTARIO, } ss.:

548 Robert M. Benedict, being duly sworn, deposes and says: That he is the defendant Robert M. Benedict above named, and is now, and has been for upwards of thirty-six years, a resident of the town of Canandaigua, in said County of Ontario, owning and residing upon a farm situate on the west shore of Canandaigua Lake,
549 consisting at present of about 134 acres of land. That deponent has been continuously in possession of his said premises during the period of his ownership thereof, and has devoted much time and attention, and has been at great ex-

pense in improving and beautifying the said 550
 premises, and making the same desirable as a
 country residence. That the house occupied by
 deponent is a commodious stone structure, situ-
 ate upon a commanding elevation, and on the
 west side of the highway, known and referred to
 in the moving papers in this proceeding as the
 Lake Shore Road, said house having a broad 551
 piazza fronting upon said highway. That to
 one looking eastwardly from said house and
 the surrounding premises across said high-
 way is afforded a beautiful and extensive view
 of the lake, its shores in each direction, and of
 the country adjacent thereto. That deponent
 has planted trees, shrubbery, and hedges, and 552
 has laid out and cultivated and maintained
 lawns of considerable extent, and has in all re-
 spects improved his said residence and premises,
 with the end and purpose of enhancing the
 beauty thereof and subordinating the whole
 plan thereof to the especial object of preserving
 uninterrupted and unimpaired the view from his
 said residence and premises; that the erection 553
 on and along said highway by the plaintiffs
 above named of the poles and pole line referred
 to in the moving affidavits herein has greatly
 interfered with and diminished the beauty of
 the premises of this deponent, and diminished
 their beauty and desirability as a place of resi-
 dence. That the poles and pole line so erected 554
 by the said plaintiffs in the said highway, pass-
 ing in front of deponent's residence, consists of
 large poles, erected in the highway at intervals
 of about 100 feet, projecting above the surface

555 of the highway at least a distance of twenty-five feet, to which poles are attached cross-bars, on which large wires are strung and attached; that the said poles, cross-bars, and wires make an unsightly structure, and greatly diminish the beauty of the premises of deponent, and the desirability thereof as a place of residence, and for 556 that reason, among others, seriously lessens their value.

That, as this deponent is informed and believes, the said plaintiffs, constituting the Board of Water Commissioners, determined upon the plans and specifications for the erecting of their proposed system of water works early in the 557 year 1895, which plans included the erection of said pole line in and along the Lake Shore Road aforesaid. That after the adoption of said plans by the said Board they proceeded with the construction of the said system, the plans for which were adopted by them as aforesaid, and deponent from time to time thereafter learned of 558 some of the further proceedings of said Board, including the advertisement for bids, the letting of contracts for the construction of said system, the disposition of pipe, and the beginning of excavations, both for laying pipe and constructing of their reservoir, which form parts of said water works system. That during all this time no mention of any attempt or desire to obtain 559 the right to enter upon the premises of this deponent was ever made to this deponent by or on behalf of said Board of Water Commissioners. That this deponent, being about to leave Canandaigua for an absence of some weeks, and being

desirous of having the terms upon which said 560
 plaintiffs should have the right to enter upon
 the premises of this deponent, for the purposes
 aforesaid, fixed and adjusted before his departure,
 after consultation with his said attorney, caused
 a notification of such desire to be given to the
 counsel for such Board of Water Commission-
 ers, and within a day or two thereafter and on 561
 the 25th day of April, 1895, this deponent met
 Mack S. Smith, one of said Water Commission-
 ers, on Main street in the village of Canandai-
 gua. Said Smith then said to deponent that
 Judge Smith, (the counsel for said Board of
 Water Commissioners,) had spoken to him, said
 Mack S. Smith, a few days ago, and said that 562
 he thought it would be wise to see deponent and
 see what arrangement could be made with him.
 Said Smith further said that the Board of Water
 Commissioners did not suppose that the ques-
 tion of individual rights in the highway would
 come up; that the Board thought that all it had
 to do was to get the consent of the Highway
 Commissioners, which consent they had ob- 563
 tained. Deponent then said to said Smith that
 he had owned his place on the lake shore, in-
 cluding the roadway, for thirty-six years, had
 paid taxes on it, and he thought he ought to
 have something to say about the use to which
 the highway was to be put. That his principal
 objection to giving his consent was that the 564
 Board proposed to put up a lot of poles. Said
 Smith replied in substance that to be sure the
 poles were unsightly things, and requested the
 deponent to consent to have them placed back of

565 deponent's house. Deponent said that to have the pole line run through his garden and fields would be nearly as bad as through the roadway.

Deponent then asked said Smith why they could not bury their wires, and said Smith replied that they could not think of it because it would be too expensive. Deponent then
 566 stated to said Smith the conditions upon which he would permit the placing of the pipes in the highway and erecting the pole line thereon, which were in substance that he should have the direction as to the position in which the poles were to be placed, and should have free use of water for his premises for domestic purposes, said Smith asked deponent how long he
 567 would demand the use of the water and deponent replied as long as the pipes and pole line remain there; said Smith said he could not decide that question himself and would have to submit it to the Board, and in reply to the question of this deponent as to how often said Board met he said almost every night. Deponent then
 568 said that he was going away on the next Thursday, and would like to have the decision of the Board before that, and said Smith replied that he thought there would be no difficulty about it. Deponent then said to said Smith that if it so happened that the Board did not arrive at its decision before Thursday he desired said Smith
 569 to let Mr. Robson, the attorney for this deponent know as soon as the decision was arrived at, as he, said Robson, represented deponent in the matter. Said Smith replied that he would as

soon as a decision was made, in case a decision 570
was not arrived at before Thursday.

That before said interview this deponent had been informed that the said Board of Water Commissioners had agreed to furnish to F. O. Chamberlain, the owner of property immediately south of and adjoining premises of this deponent, water for domestic purposes as part con- 571
sideration for the transfer by him of lands, easements and property purchased of him by said board. That the deed of said Frank O. Chamberlain of said property, rights and easements to the village of Canandaigua is dated the 3d day of April, 1895, recorded in liber 211 at page 172 and contains the following provis- 572
ions: "It is further mutually agreed and understood by and between the parties hereto, that as a part of the consideration of this conveyance the parties of the first part are to have and the party of the second part hereby covenants and agrees to furnish to said party of the first part, free of any charge therefor whatsoever, water for the use of the party of the first part at the 573
house and barns on the said Organ farm and also water for the following uses during the life of the said Frank O. Chamberlain, and of the said Elizabeth H. Chamberlain, his wife, and during the wife of the children of the said Frank O. Chamberlain (as long as either of them shall be the owners of said premises or any part there- 574
of) upon the premises now owned and occupied by the said Frank O. Chamberlain as a home-
stead, and known as the Chamberlain farm the water to be used on the Chamberlain farm for the

575 following purposes, namely: For kitchen use, bath room at the house and for water at the barn, together with water for the use of the occupants of the tenant house on said last mentioned farm. Such water privileges to cease as to either farm upon conveyances of the same to third persons, notwithstanding the party of
 576 the first part or their heirs may then be living."

That the proposition of this plaintiff aforesaid was made by him to said Mack S. Smith, representing said Board with the understanding and by reason of the fact to some extent at least, that said Board had made said agreement with said Chamberlain.

577 Deponent further says that he left Canandaigua on Thursday, May 2d, 1895, without receiving any further communication from said Smith, or from any member of the Board of Water Commissioners or their attorney or anyone assuming to represent them. Deponent was continuously absent from Canandaigua sojourning at New York and neighboring places, and deponent
 578 heard nothing further from any one in relation to said matter until the 23d day of May, 1895, he received a letter from his said attorney, James A. Robson, bearing date the 20th day of May, 1895, advising this deponent in substance that the said Robson, had until that day heard nothing whatever as to the action of the Board
 579 in relation to the proposition of deponent, and fearing deponent might attribute the fact of his, said Robson's, not having advised deponent as to the action of the Board in reference to said proposition to the inattention of him, said Rob-

son, he had that day personally sought and ob- 580
 tained an interview with Mack S. Smith, a mem-
 ber of said Board, in which said Smith advised
 him that the Board had declined to accept the
 proposition of deponent and would in no event
 agree thereto, that it was the opinion of said
 Smith that the incidental benefits to deponent in
 being able by reason of the fact that the propos- 581

ed water main would pass the residence of de-
 ponent to purchase water were greater than any
 damage which deponent would suffer by reason
 of the construction of the works.

Deponent returned to Canandaigua June 1st,
 1895, and was continuously in said village there- 582
 after until the 8th day of June, 1895, when de-
 ponent went to his farm on the shore of Canan-
 daigua lake and has since resided there continu-
 ously. That deponent saw and spoke to several
 of the Board of Water Commissioners after his
 return to Canandaigua, but no one of them men-
 tioned the subject of obtaining the right spoken
 of by Commissioner Smith. Deponent having 583
 also been advised that one of the reasons assign-
 ed by said Board for refusing to accede to the
 request of the deponent to furnish him water as
 requested by him in deponent's conversation
 with said Smith above referred to, was that they
 stated they were advised by their counsel that
 the compensation to be made by them for lands 584
 and easements taken could only be a money
 consideration, and that the law would not per-
 mit the said Board to agree to the proposition of
 deponent and furnish him water as considera-

585 tion for the transfer of the easements desired
by said Board, and deponent knowing that the
Board had already agreed with said Chamberlain
to do what they claimed they then had no legal
right to agree with this deponent to do, and be-
lieving, as he now believes, that their claim of
want of legal power to furnish water as depo-
586 nent had requested as one of the reasons for not
agreeing to his proposition was a mere subter-
fuge invented by said Board or suggested to it
by its attorneys, and deponent, knowing that
the contractors then had nearly completed lay-
ing the pipe in the village of Canandaigua, and
being informed that they intended, and would
587 immediately begin, laying the pipe in the high-
way leading from the village of Canandaigua to
the proposed pump house, through premises of
this deponent, without obtaining plaintiff's con-
sent, which said commissioners apparently con-
sidered an unnecessary formality, this deponent
instructed his said attorney to begin an action
for the purpose of restraining said commission-
588 ers from their proposed unauthorized invasion
and appropriation of his premises. That the
complaint in said action so begun by him was
verified by this deponent on the 4th day of June,
1895, and said Robson, as the attorney for this
deponent therein, on the morning of June, 5, 1895,
went to Rochester for the purpose of obtaining
589 a preliminary injunction. That about one
o'clock of said 5th day of June, while said Rob-
son was still absent for the purpose aforesaid,
but, as deponent is informed and believes, after
said preliminary injunction had been granted,

this deponent casually met Mr. Bennett, the at-590
 torney for said Board of Water Commissioners,
 who called out to this deponent: "Mr. Bened-
 ict, I am coming up to see you some day."
 Deponent replied: "All right, I shall be glad
 to see you." Bennett then said: "I am com-
 ing up to see you in regard to what you are
 going to charge us for that right of way." De-591
 ponent made no reply and passed on. Deponent
 further says that the above is the only interview
 he has had with said Bennett, and that he be-
 lieves the said interview to be the interview
 referred to by said Bennett in the moving affi-
 davit of said Bennett in this proceeding.

That, as deponent is informed by his said at-592
 torney, the said injunction order was vacated on
 motion of defendants' attorney in said action,
 and thereafter an order to show cause why the
 said order, vacating the said injunction order,
 should not be vacated, returnable June 15th,
 1895, was granted on the application of the at-
 torney for this deponent. That deponent was
 present at a hearing of said order to show cause; 593
 that after the submission of the matter by plain-
 tiff's counsel in support of the application to
 vacate the said order vacating said injunction,
 the Court announced his decision of the appli-
 cation, stating in substance that he agreed with
 the counsel for the plaintiff in their view of the
 law, that the statute gave the village no author-594
 ity to erect the proposed pole line, but that
 whatever injury the plaintiff might suffer could
 be made good to him by money compensation;
 that to grant an injunction would interfere with

595 a work of great public importance to the village of Canandaigua, and he would, therefore, deny the application, upon condition that the village, within ten days thereafter, should give to the plaintiff its bond in the sum of five thousand dollars to answer all damages he might suffer by reason of taking the easement required by
595 said village.

That the Court having in manner aforesaid declined to extend the protection of its equitable power to the recognized legal rights of this deponent by issuing its injunction order to restrain the said Board from entering upon and taking without statutory authority or color of right the
597 property and premises of this deponent, he, as the only means left him of protecting his property and personal rights from the proposed and imminent invasion of them by said Board, on Monday, the 17th day of June, and continuously thereafter, had stationed upon said highway, guarding said premises, employees for this deponent.

598 That prior to the said 15th day of June poles were distributed upon and along the highway on both sides of the premises of this deponent, but none of said poles were placed on deponent's premises. That on or about the 19th day of June said Board of Water Commissioners or their contractors drew a large number of poles,
599 and placed them in the highway near the line of the premises of this deponent in the highway on both sides of deponent's premises.

That on the morning of the 22d day of June this deponent was informed by one of his em-

ployees that there was a large body of men at 600
the southern end of that portion of the high-
way owned by this deponent, and deponent im-
mediately went with his said employees, three
in number, to the place indicated, which was
about one-third of a mile from deponent's house,
and there found one William O'Connor, a mem-
ber of the firm of William T. O'Connor & Co., 601
which firm had the contract for the erection of
said system of water works, one Randall, who
was the enigneer for the Board of Water Com-
missioners, and one Rodgers, who was the Sup-
erintendent under whose charge the said pole
line was being erected, with upwards of fifteen la-
borers, who were engaged in erecting a pole just 602
south of the line of this deponent. That this
deponent with his three employees stationed
themselves upon the line of deponent's prem-
ises. That said O'Connor thereupon had some
conversation in an undertone with the said
Randall and O'Connor soon thereafter got in to
his wagon and drove away in the direction of
Canandaigua. That this deponent had some 603
general conversation with said Rodgers, but the
subject of planting poles was not mentioned.
After the lapse of sufficient time for said
O'Connor to drive to Canandaigua, summon the
commissioners hereinafter referred to and for
said commissioners to return, Charles F. Rob-
ertson, Mack S. Smith and John H. Kelly, three 604
of said Board of Water Commissioners, appear-
ed driving along said highway from the direc-
tion of Canandaigua. When they came to the
place where deponent was standing, said Rob-

605 ertson after greeting deponent said to him that
 they had tried to be gentlemanly in this matter
 and that he was very sorry to have any personal
 feeling. Deponent replied that he had no per-
 sonal feeling in the matter, but would resist
 their planting poles, as it was an illegal act and
 a trespass, and that every one is incensed
 606 against the board, the way they have acted. Said
 Robertson replied that the Board had passed a
 resolution some time before authorizing Mr. Ben-
 nett get consent of the parties to lay the pipe
 and erect the pole line, but that Bennett had put
 it off, deponent then said "Mr. Smith promised to
 let me know or let Mr. Robson know the moment
 607 the board came to a decision, which he failed
 to do," Mr. Smith replied that he told Mr. Ben-
 nett the moment a decision was made to notify
 Mr. Robson. Deponent then said, "It must
 have been Mr. Bennett's fault." Deponent fur-
 ther says that in his judgment he was acting in
 this matter not only for his own interests but
 for the interest of every one passing along the
 608 highway; that a bare wire such as they intend-
 ed to place would be a constant menace to pass-
 ers-by. Smith replied that they were not going
 to have a bare wire, that the wire would be in-
 sulated, and appealed to Mr. Rodgers, who re-
 plied that the wires were to be insulated. De-
 ponent then said that would make a difference,
 609 but he should still resist their planting poles.
 Robertson then pulled off his coat, leaped from
 the wagon and said in an excited manner: "I
 will take charge of this matter!" Robertson
 further said that any assault, even so much as a

push, would be prosecuted to the full extent of⁶¹⁰ the law, and called to Mr. Rodgers to bring up his men. Robertson then asked deponent how he proposed to resist. Deponent replied that he should resist their digging holes and placing the poles. Meanwhile Rodgers had brought up his men, some fifteen in number, who were all armed either with shovels or iron bars, entered⁶¹¹ upon the premises of this deponent, and began, under the direction of said Robertson and Rodgers, the proposed location of the holes in which the poles were to be placed. Deponent then directed his employees, as soon as a place for digging a hole should be located, to stand upon that place and prevent their digging; that the employees of such contractors began digging in a number of places, and deponent's employees stationed themselves, one at each hole, to prevent the digging. That notwithstanding the efforts of the employees of deponent, the employees of said contractors continued to dig, under the direction of the members of the Board then present and of said Rodgers, and⁶¹² and immediately they had completed the digging of the first hole, a pole having meanwhile been brought, Robertson called for men to help raise the pole. Deponent then directed his employees to prevent their raising it, and deponent's employees took hold of the pole, and, clinging thereto, prevented the employees of the contrac-⁶¹³ tors from raising it. As soon as said Robertson found he could not raise the pole, with the assistance of the men he then had, he called for more men to come and help raise the pole. A

615 number of men then came running to the assist-
 ance of those already at the pole, and succeeded
 in raising it in spite of the opposing efforts of
 deponent's employees, and deponent then deter-
 mining that any resistance that he could offer
 with the force then at his disposal against the
 power of the multitude of people then present
 616 and assisting the said Robertson in the erection
 of said poles, and that further resistance must
 unavoidably result in a breach of the peace and
 possible bloodshed, withdrew the said employees
 and the poles were erected, the men engaged in
 the erection thereof, as deponent is informed and
 believes, not even stopping for dinner, and before
 617 this deponent could rally sufficient force to over-
 come the multitude engaged in the erection of
 said pole line, the erection thereof was com-
 pleted. That there were upwards of one hun-
 dred employees of the Board of Water Commis-
 sioners or their contractors, who were within
 call, a large body of whom were summoned and
 came upon deponent's premises to help in the
 618 erection of poles, as deponent and his said em-
 ployees ceased resistance and retired.

That thereafter this deponent, being advised
 by his said attorney that the forcible entry of
 the said Board of Water Commissioners, their
 contractors, agents, and servants in manner
 above narrated, with a multitude of people, and
 619 forcibly taking possession of and erecting said
 poles was a violation of the statute in such case
 made and provided, this deponent caused the
 summary proceeding referred to in the moving
 papers herein to be instituted.

That it is true, as is alleged in the moving 620
 affidavits herein, that since the erection of the
 said poles in such manner as is above set forth
 this deponent has not in any way interfered
 with them, nor attempted forcibly to remove
 them. That he has refrained from removing
 said poles by reason of the fact that he is a law-
 abiding citizen, and willing to submit his rights 621
 in the first instance to the judgment and deter-
 mination of the constituted authority of the
 courts, and does not choose to resort to a contest
 of brute force with the agents and officers, act-
 ing for the village of Canandaigua. That every
 action and proceeding he has taken in the mat-
 ter and controversy has been with the sole and 622
 single purpose of protecting to the extent of
 his ability by peaceable and lawful means recog-
 nized rights and property interests of this depo-
 nent from invasion by the plaintiff, without even
 color of right or authority, and no action or pro-
 ceedings has been taken for any purpose of har-
 assing, vexing, or annoying said plaintiff or of
 preventing any one of said Board from exercis- 623
 ing any right that he or said Board had author-
 ity to exercise.

R. M. BENEDICT.

Subscribed and sworn to before me this 27th
 day of July, 1895.

HENRY M. FIELD,
 Notary Public for said County. 624

625 SUPREME COURT—ONTARIO COUNTY.

THE VILLAGE OF CANANDAIGUA, BY CHARLES
 F. ROBERTSON, EDWARD G. HAYES, JOHN
 JOHNSON, JOHN H. KELLY, MATTHEW R.
 626 CARSON, AND MACK S. SMITH, CONSTITUTING
 THE BOARD OF WATER COMMISSIONERS OF
 SAID VILLAGE,

Plaintiffs,

against

ROBERT M. BENEDICT AND THE ONTARIO
 627 ASYLUM,
 Defendants.

STATE OF NEW YORK,)
 COUNTY OF ONTARIO,) ss.:

James A. Cavan, being duly sworn, deposes
 and says: That he is a resident of the village of
 Canandaigua, in the County of Ontario, afore-
 said, and is now and has been since March,
 628 1895, a constable of the town of Canandaigua.
 That on the 17th day of June, 1895, this depo-
 nent, Julian A. VanWie, and John Boyle were
 engaged to guard the premises of Robert M.
 Benedict, in that part of the Lake Shore Road
 on the west side of Canandaigua Lake in the
 town of Canandaigua, which passes through
 629 and is part of the farm and premises of said
 Benedict. That from the 17th day of June until
 the 22d day of the same month this deponent
 and his co-employees were constantly engaged
 in protecting said premises; that when deponent

went upon said premises there had been no dig-630
 ging or excavating of any kind whatever
 thereon, either for the erection of poles or laying
 of water mains therein, but that some iron pipe
 for water mains were strung along on the east-
 erly side of the highway, but no poles whatever
 were upon said premises; that poles were distrib-
 uted along the said highway from the corporation 631
 limits nearly to said Benedict's north line and
 also poles were distributed along said highway
 for some distance south of the south line of said
 Benedict's premises. That on the 18th day of
 June, one Rodgers, who was the superintendent
 of the erection of the pole line, was engaged in
 locating the positions where said poles were to 632
 be erected in the highway north of said Bene-
 dict's premises, indicating said position by driv-
 ing a pin or stake in the highway and in the af-
 ternoon of that day had so located the position
 for the poles up nearly to the north line of said
 Benedict's premises; that deponent and his co-
 employees were present guarding the premises
 of said Benedict at that time, and as said Rodgers 633
 drove the pin for the last pole before coming up-
 on the land of Mr. Benedict said Rodgers threw
 down the pins that he had in his hand and the
 implement with which he was driving them and
 said: "I guess I won't drive any more pins at
 present." That on the succeeding day employ-
 ees of the Board of Water Commissioners or their 634
 contractors, brought a large number of poles
 and piled them in the highway north of Bene-
 dict's land, and also in the highway south of
 said Benedict's land, but none of said poles were

635 placed upon the land of said Benedict, this deponent and his co-employees being there present for the purpose of preventing the placing of such poles upon said premises. That on the morning of the 22d day of June the said Board of Water Commissioners or their contractors, having completed the erection of the
636 poles for their pole line in the highway north and south of the premises of said Benedict, this deponent observed a large body of men at the southern end of that part of said lake shore road which is owned by the said Benedict, and deponent immediately informed said Benedict that the said contractors were apparently about
637 to begin the erection of the poles upon the premises of said Benedict ; that said Benedict, deponent, and his co-employees went immediately to the south line of said Benedict's premises in said highway, which was about one-third of a mile from the residence of said Benedict, and there saw present one O'Connor, a member of the firm of William T. O'Connor & Co., the contractors for the erection of the system of water
638 works for the village of Canandaigua, Walter Randall, the engineer of the Board of Water Commissioners, and one Rodgers, who had the direction and management of the erection of the pole line, together with a number of employees, who were engaged apparently in the erection of
639 the poles for said line immediately south of the premises of said Benedict.

That said Benedict, this deponent, and his co-employees stationed themselves upon the south line of said Benedict's land in said high-

way, and said O'Connor thereupon had some con-640
 versation in an undertone with said Randall,
 and said O'Connor soon thereafter got into his
 wagon and drove away in the direction of Can-
 andaigua; that after the lapse of sufficient time
 for said O'Connor to drive to Canandaigua, sum-
 mon the parties hereinafter referred to, and for
 said parties to return, Charles F. Robertson, 641
 Mack S. Smith, and John H. Kelly, three of the
 Board of Water Commissioners of the village of
 Canandaigua, appeared driving in said highway
 from the direction of Canandaigua. When said
 commissioners got to the place where Benedict was
 standing said Robertson said to said Benedict in
 substance that they had tried to be gentlemen 642
 in the matter; that he was sorry to have any
 personal feeling, and Mr. Benedict replied that
 he had no personal feeling in the matter, but
 would resist their planting poles, as he believed
 it was an illegal act and trespass. Said Rob-
 ertson replied in substance that the board had
 passed a resolution sometime before directing
 Mr. Bennett, their attorney, to obtain consent 643
 of the parties to lay pipes and erect the pole
 line in said highway, but said Bennett had put
 it off. Mr. Smith and Mr. Benedict had some
 conversation then, the substance of which de-
 ponent does not recollect, except that deponent
 remembers that said Benedict told said commis-
 sioners that he would resist their planting poles 644
 in the highway on his premises. Said Robert-
 son then pulled off his coat, jumped out of the
 wagon and said excitedly : "I will take charge
 of this matter !" He further said that any as-

645 sault, even so much as a push, would be prosecuted to the full extent of the law. "Mr. Rodgers, bring up your men!" Robertson also had asked said Benedict how he proposed to resist their erecting the pole line. Mr. Benedict replied that he should resist their digging holes and erecting poles as far as he could with the
646 number of men that he had. In the meantime Rodgers had assembled his men, all carrying either shovels or long iron bars, entered on the premises and under the direction of said Robertson and Rodgers, the same employees began the proposed location of the holes in which the poles were to be placed. Said Benedict then directed deponent and his co-employees, as soon
647 as the proposed location of a hole for the erection of the poles should be established, to stand upon that place and prevent the digging; that this deponent stationed himself at a place established for the erection of a pole, and a number of the employees of said contractors began digging the hole where deponent was standing,
648 digging the earth from beneath the feet of this deponent, and deponent attempted to prevent their digging to the extent of his ability, without committing a breach of the peace, and said digging was continued until it became apparent that further opposition to the digging of said hole would result in serious personal injury to
649 this deponent, and Mr. Benedict then directed deponent to withdraw. That as soon as the digging of said hole was completed, a pole having meanwhile been brought to the place, Robertson called for men to help raise the pole. Mr. Ben-

edict assembled his employees, including this 650
 deponent, and directed them to prevent the rais-
 ing of the pole. Deponent and his co-employees
 took hold of the pole, and, clinging thereto, for
 a time prevented the assembled employees of
 said Robertson and said contractors from raising
 the pole. As soon as said Robertson found he
 couldn't raise the pole with the assistance of the 651
 the men he then had, he called for more men to
 come and help raise the pole. A number of men
 then came running to the assistance of those
 already at the pole, and raised the pole in spite
 of the opposing force of this deponent and his
 co-employees, and it appearing that further re-
 sistance in behalf of said Benedict would be un- 652
 availing against the power of the multitude of
 people then present and assisting the said Rob-
 ertson in the erection of said pole, and that fur-
 ther resistance must unavoidably result in a
 breach of the peace and bloodshed, deponent,
 with his co-employees, by direction of said Ben-
 edict withdrew.

JAMES A. CAVAN. 653

Subscribed and sworn to before me this 27th
 day of July, 1895.

ROBERT F. THOMPSON,
 Notary Public,
 In and for Ontario County, N. Y.

654

655 SUPREME COURT—ONTARIO COUNTY.

THE VILLAGE OF CANANDAIGUA, BY CHARLES
F. ROBERTSON, ET AL., CONSTITUTING THE
BOARD OF WATER COMMISSIONERS OF SAID
VILLAGE,

656

against

ROBERT M. BENEDICT AND THE ONTARIO
ORPHAN ASYLUM.

STATE OF NEW YORK, }
COUNTY OF ONTARIO, } ss.

657 Julian A. Van Wie, being duly sworn, deposes
and says that he is a resident of the village of
Canandaigua, in the county aforesaid, and is now
and has been since March, 1895, a constable of
the town of Canandaigua, that on the 17th day
of June, 1895, this deponent, James A. Cavan,
and John Boyle were engaged to guard the
premises of Robert M. Benedict, in that part of
658 the lake shore road on the west shore of Canan-
daigua lake in the town of Canandaigua that
passes through, and is part of, the farm of said
Benedict.

Deponent further says that he has read
the affidavit of said James A. Cavan annex-
ed hereto, verified the 27th day of July, 1895,
659 and that the statements and allegations set
forth therein, as to the condition of said prem-
ises at the time this deponent went thereon, on
the 17th day of June, aforesaid, and thereafter,
as to the acts and conversations of one Rodgers,

on the 18th day of June, 1895, and as to the acts 660
of the employees of the Board of Water Commis-
sioners and their contractors in bringing and
piling poles in the highway, are true to the
knowledge of this deponent.

Deponent further says that on the 22d day of
June, 1895, the Board of Water Commissioners or
their contractors having completed the erection 661
of the poles for their pole line in the high-
way north and south of the premises of
said Benedict, this deponent observed a large
body of men at the southern end of that part of
the lake shore road owned by said Benedict, and
said Benedict, having been by said Cavan in-
formed that the said persons were apparently 662
about to begin the erection of poles upon the
premises of said Benedict, said Benedict, this
deponent, said Cavan and Boyle went to the
south line of said Benedict's premises and found
there present the persons stated in said affida-
vit of said Cavan, engaged as in said affidavit
stated, that said Benedict, this deponent and his
co-employees stationed themselves upon the 663
south line of said Benedict's premises in said
highway, and William O'Connor, referred to in
said Cavan's affidavit, who was there present,
after some conversation in an undertone with
one Randall, referred to in said Cavan's affidavit,
and also there present, got into his wagon and
drove away in the direction of Canandaigua; that 664
after the lapse of sufficient time for said O'Connor
to drive to Canandaigua, summon the parties
hereinafter referred to, and for said parties to re-
turn, Charles F. Robertson, Mack S. Smith, and

665 John H. Kelly, three of the Board of Water
 Commissioners of the village of Canandaigua,
 appeared driving in said highway from the di-
 rection of Canandaigua; that when said Board
 of Water Commissioners came to the place where
 Mr. Benedict, this deponent, and his co-employ-
 ees were stationed, said Benedict, said Robertson
 666 and Smith had a conversation, which is in sub-
 stance set forth in the affidavit of said Cavan,
 and also in the affidavit of Robert M. Benedict,
 hereto attached and verified this 27th day of
 July, 1895; that the statement of the facts and
 circumstances thereafter transpiring, set forth in
 the affidavit of said Cavan and of said Benedict
 and of said is correct and true to deponent's
 667 knowledge.

JULIAN A. VAN WIE.

Subscribed and sworn to before me, this 27th
 day of July, 1895.

ROBERT F. THOMPSON,

Notary Public,

In and for Ontario County, New York.

668

669

THE VILLAGE OF CANANDAIGUA, by CHARLES F.
ROBERTSON, ET AL., CONSTITUTING THE BOARD
OF WATER COMMISSIONERS OF SAID VILLAGE,

against

671

ROBERT M. BENEDICT, AND ONTARIO ORPHAN
ASYLUM.

STATE OF NEW YORK, }
COUNTY OF ONTARIO, } SS:

John Boyle, being duly sworn, deposes and 672
says that he is a resident of the village of Can-
andaigua in the county aforesaid, that on the
17th day of June, 1895, this deponent, James A.
Cavan, and Julian A. Van Wie were engaged
to guard the premises of Robert M. Benedict in
that part of the lake shore road on the west
shore of Canandaigua lake, in the town of Can-
andaigua, that passes through and is part of the 673
farm of said Benedict. Deponent further says
that he has read the affidavit of James A. Cavan
and of Robert M. Benedict attached hereto, both
verified the 27th day of July, 1895. That the
statements and allegations set forth in the affi-
davit of James A. Cavan as to the condition of
said premises at the the time this deponent went 674
thereon on the 17th day of June aforesaid, and
thereafter, and as to the acts and conversation
of one Rodgers on the 18th day of June, 1895,
and as to the acts of the employees of the Board

675 of Water Commissioners, or their contractors, in bringing and placing poles in the highway on the succeeding day, are true to the knowledge of this deponent.

Deponent further says that on the 22d day of June, 1895, the said Board of Water Commissioners or their contractors, having completed
 676 the erection of the poles for their pole line in the said highway north and south of the premises of said Benedict, this deponent observed a large body of men at the southern end of that part of the lake shore road owned by said Benedict, and said Benedict having been by said Cavan informed that the said persons were apparently
 677 about to begin the erection of poles upon the premises of said Benedict, said Benedict, this deponent, said Cavan, and Van Wie went to the south line of said Benedict's premises and there found present the persons stated in said affidavit of said Cavan, engaged as in said affidavit stated. That said Benedict, this deponent, and his co-employees stationed them-
 678 selves upon the south line of said Benedict's premises in said highway, and William O'Connor, referred to in said Cavan's affidavit, who was there present, after conversation in an undertone with one Randall, referred to in said Cavan's affidavit, and also there present, got into his wagon and drove away in the direction of Canandaigua.
 679 That after the lapse of sufficient time for said O'Connor to drive to Canandaigua, summon the parties hereinafter referred to, and for said parties to return, the three water commissioners referred to in said Cavan's affidavit, appeared driv-

ing in said highway from the direction of Can-680
 andaigua; that when said Water Commissioners
 came to the place where Mr. Benedict, this de-
 ponent, and his co-employees were stationed, said
 Benedict had a conversation with Robertson
 and Smith, which is in substance set forth in
 the affidavit of said Cavan and also in the said
 affidavit of Robert M. Benedict. That the state-681
 ment of the facts and circumstances thereafter
 transpiring set forth in the affidavit of said
 Cavan and of said Benedict is correct and true
 to deponent's knowledge.

Deponent further says that after he had sta-
 tioned himself upon the spot located in manner
 set forth in said affidavit for digging a hole in 682
 which to erect one of said poles, the employees
 engaged in digging the hole lifted this depon-
 ent bodily from the place where he was standing
 and forcibly removed him from the place located
 for the digging of the hole aforesaid.

JOHN BOYLE.

Suscribed and sworn to before me this 27th
 day of July, 1895. 683

ROBERT F. THOMPSON,

Notary Public,

In and for Ontario County, New York.

684

685 SUPREME COURT—ONTARIO COUNTY.

THE VILLAGE OF CANANDAIGUA, BY CHARLES
F. ROBERTSON ET AL., CONSTITUTING THE
BOARD OF WATER COMMISSIONERS OF SAID
VILLAGE

686

against

ROBERT M. BENEDICT AND ONTARIO ORPHAN
ASYLUM.

STATE OF NEW YORK, }
COUNTY OF ONTARIO, } ss.:

687

James A. Robson, being duly sworn, deposes and says: That he is an attorney and counselor-at-law, practicing his profession at Canandaigua, Ontario County, N. Y. That he is and has been the attorney for Robert M. Benedict, the defendant above named, in all the matters, proceedings, and actions in relation to the subject matter set forth in the moving affidavits in the

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above entitled proceeding. Deponent further says that he prepared under the direction of said Benedict, the affidavit of said Benedict, verified the 27th day of July, 1895, and hereto attached and personally knows the contents thereof; that the statements contained in said affidavit as to inquiries having been made by, and

689

conversations had with, and information obtained by, this deponent, and the communication thereof to said Benedict, and all information given to, and communications had with, said

Benedict, set forth in said affidavit, are true to 690
the knowledge of deponent.

Deponent further says that shortly after the service of the summons and complaint and injunction order referred to in the moving affidavit of Thomas H. Bennett in the above entitled matter, said Bennett had an interview with this deponent and said Bennett said to deponent in 691
substance that he considered the action brought by said Benedict unnecessary, and asked deponent to communicate with said Benedict and see if said matter could not be arranged without action, that said Bennett, at said interview, said nothing whatever as to the intention of the Board of Water Commissioners of beginning proceedings for the con- 692
demnation of said premises, "promptly," or otherwise. That the chief topic of said conversation with said Bennett, was an exposition by him of his views of the provisions of the Water Works Act. That, as requested by said Bennett, this deponent communicated to said Bennett the substance of the conversation with 693
said Bennett, and on the 7th day of June, 1895, after the conversation with said Benedict, this deponent sent to said Bennett a letter, of which the following is a copy:

"Canandaigua, N. Y., June 7, 1895.

"Thomas H. Bennett, Esq.

"My dear Sir:—Since our talk of yesterday 694
I have seen Mr. Benedict and am directed to say to you that, though he began the proceeding with reluctance, the action was taken after mature reflection, and as the only means left him

695 for protecting his property. He cannot there-
 fore, much as he regrets the unpleasant neces-
 sity that has forced him to take this course, re-
 trace his steps and abandon the proceeding. I
 called at your office this morning to advise you
 of the result of my interview with Mr. Benedict,
 and, not finding you in, concluded a note would
 696 reach you with less delay than if I waited an
 opportunity to communicate with you personally.

“Very truly yours,

“JAMES A. ROBSON.”

That the next interview deponent had with
 said Bennett was on the 12th day of June, 1895,
 when said Bennett served on this deponent the
 697 copy order vacating said preliminary injunction,
 at which interview said Bennett requested this
 deponent to say to Mr. Benedict that the Board
 of Water Commissioners were willing to pur-
 chase of said Benedict the property desired by
 said Board and said Bennett further said to this
 deponent that in the event they could not pur-
 chase said property at his “convenience” he
 698 would begin proceedings for the condemnation
 of said property.

Deponent further says that he had a subse-
 quent interview with said Bennett which is the
 interview referred to in said Bennett’s affidavit,
 as the interview occurring after the interview of
 June 12th, upon the day when said Bennett
 699 served upon this deponent a copy of the order
 denying the motion to vacate said order vacat-
 ing said injunction order, in which said Bennett
 requested this deponent in substance, to advise
 Mr. Benedict the Board of Water Commission-

ers were willing to purchase the property desired 700
by said Board, and said Bennett further said
that, in the event the Board could not purchase
said property, "In due time," he, said Bennett,
would begin proceedings for condemnation.

Deponent further says upon his information
and belief that no action, or proceeding taken by
or on behalf of said Benedict was taken for any 701
other pupose than that of protecting said Bene-
dicts rights in the premises by legal methods
and proceedings, and not for any pupose of vex-
ing, annoying, or harrassing the plaintiff herein
or its said Board, or to compel said Board to ac-
cede to any demand of said plaintiff.

JAMES A. ROBSON.

Suscribed to and sworn to before me this 29th 702
day of July, 1895.

ROYAL R. SCOTT,
Notary Public.

703

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705 SUPREME COURT—ONTARIO COUNTY.

THE VILLAGE OF CANANDAIGUA, by CHARLES F. ROBERTSON, EDWARD G. HAYES, JOHN JOHNSON, JOHN H. KELLY, MATTHEW R. CARSON, AND MACK S. SMITH, CONSTITUTING
 706 THE BOARD OF WATER COMMISSIONERS OF SAID VILLAGE,
 Plaintiff,

against

ROBERT M. BENEDICT AND ONTARIO ORPHAN ASYLUM,
 707 Defendants.

The above named defendant, Robert M. Benedict, answering the petition of the plaintiff, herein alleges:

First. Defendant admits the allegation in the first subdivision in said petition contained, which subdivision is marked and numbered "First."

708 Second. Said defendant further admits, upon his information and belief, that heretofore and shortly after the appointment of the Board of Water Commissioners, in and for said village, the said Board of Water Commissioners adopted a plan and specification for the construction of a system of water works in and for said village,
 709 consisting generally of a power house erected and located at the foot of Main street in said village of Canandaigua, from which it is proposed to transmit power by electricity to a pumping station located on or near the west shore of Can-

andaigua lake about three and one-half miles 710 distant, and which power is to be transmitted by means of a pole line erected along or upon a public highway in said county of Ontario, and known as the lake shore road; that water is to be there taken from said lake and pumped into a reservoir located about three hundred and twenty feet above the level of said lake and 3,500 711 feet distant therefrom; that the water from said reservoir is to be distributed therefrom by gravity pressure through iron pipes and mains to be laid from said reservoir and pumping station through and along said lake shore road and thence through and along the public streets of said village and from thence distributed, supplied, and sold to the said village and the inhabitants thereof; that said proposed pole line is to consist of the location at intervals along said highway of large poles such as are used by telegraph and telephone companies, with cross-trees, or cross-arms attached thereto, and at a height of twenty to twenty-five feet above the surface of the ground, and upon which are 713 to be strung, carried, and supported the lines of wire which the current of electricity is to be transmitted from the generator in said power house to the motors in the pumping station, respectively located as aforesaid; that the line of water mains proposed is to consist of a twelve inch cast iron pipe to be buried in the ground 714 along the said highway, and to follow the contour of the same, which is to be laid along said highway by making an excavation sufficient to receive the pipe and to bury the same; that the

715 said highway or road known as the Lake Shore
 Road is about four rods in width and runs in a
 northerly direction from said pumping station
 near the westerly shore of Canandaigua lake to
 said village of Canandaigua, and passes through
 the farm and premises owned and occupied by
 this defendant, which farm contains about 134
 716 acres of land; that the said highway known as the
 Lake Shore Road is the highway upon and along
 which the Board of Water Commissioners have
 assumed to determine, fix, and adopt for their
 in the line of pipe for water mains and pole line
 erection, construction and operation of said
 system of water works.

717 Third. Said defendant further admits the alle-
 gations set forth and contained in the sub-divis-
 ion of said petition, marked and numbered
 "Fifth."

Fourth. Defendant denies the allegations con-
 tained in the sub-division of said petition,
 marked "Seventh."

718 Fifth. Defendant further denies that he has
 any knowledge or information sufficient to form
 a belief as to each and every other allegation
 and statement in said petition contained not
 hereinbefore specifically admitted or denied.

SECOND.

719 For a second and separate answer to the peti-
 tion of the plaintiff herein this defendant, the
 said Robert M. Benedict, alleges:

First. Said defendant here re-states and refers
 to all the statements and allegations in his first

separate answer to said petition above set forth 720
with like force and effect, and in the same manner
as if the same was fully and at large herein set
forth.

Second. The said defendant alleges upon his
information and belief that the said village of
Canandaigua or its said Board of Water Com-
missioners, or any of them, or the said village 721
by its said Board of Water Commissioners or by
any other officer or officers, agents, servants, or
contractors, have not any rights, power, or
authority given to it or them, or any one or
more of them, by statute or otherwise, to insti-
tute, conduct, or maintain any proceeding or
proceedings for the condemnation of any lands
or title thereto, or lands or easements or rights 722
therein, which lands are in or form a part of a
public highway, not within the corporate limits
of the village of Canandaigua for the purpose
of erecting the poles and pole line therein or
thereon mentioned and described in said petition
or for the purpose of erecting or maintaining
therein or thereon any structure or structures 723
whatever, any part of which shall be or remain
above the surface of such highway.

THIRD.

For a third and separate answer to the peti-
tion of the plaintiff herein, this defendant, the 724
said Robert M. Benedict, alleges:

First. Said defendant here re-states and refers
to all the statements and allegations in his first
separate answer to said petition above set forth

725 with like force and effect, and in the same manner, as if the same was fully and at large herein set forth.

Second. This defendant, upon his information and belief, alleges that the map and order filed by said plaintiff by its said Board of Water Commissioners is defective and irregular, and does
726 not comply with the requirements of the statute in such case made and provided, and is by reason of such defects and irregularity, and by reason of its failure to comply with the requirements of the said statute, void and of no force or effect, and invalid for any purpose whatsoever as a map and order required by the terms and provisions of the statute in such case made
727 and provided. That the said map and order are irregular and defective in the following particulars among others:

1. In that the lands of this defendant, intended to be taken, are not accurately or sufficiently designated in said map or order.
2. In that no water or stream intended to be
728 taken, diverted, or affected is designated on said map.
3. In that no stream or water, intended to be taken or diverted, are described in said order or mentioned therein.
4. In that the particular location of the proposed poles and pole line in and along said high-
729 way is not designated, marked, or set forth in said map or order.

For a fourth and separate answer to the petition of the plaintiff herein, this defendant, the said Robert M. Benedict, alleges :

First. Said defendant here re-states and refers to all the statements and allegations in his first separate answer to said petition above set forth with like force and effect, and in the same manner, as if the same was fully and at large herein set forth. ⁷³¹

Second. That as stated in the said order attached to said map it is intended by the Board of Water Commissioners to acquire for said village the title and interest in the lands referred to in said order and condemnation of the title to the lands described in said petition is sought. ⁷³² That some portion or of all of the premises described in said petition are within and form part of a public highway in the town of Canandaigua, and all of said premises are outside of the corporate limits of the village of Canandaigua. That the statute of the State of New York in such case made and provided, authorizes and empowers such Board of Water Commissioners, acting for said village, to acquire the right to use only the ground or soil under any street, highway, or road within the county within which said village is situated, on condition that they shall cause the surface of such street, highway, ⁷³³ or road to be relaid and restored to its usual state, and all damages done thereto to be repaired. That said commissioners have the power only to acquire an easement in such high- ⁷³⁴

735 way, street, or road, and have not the power to acquire the title to the lands or any part thereof forming a part of a public highway or street.

FIFTH.

For a fifth and separate answer to the petition of the plaintiff herein, this defendant, the said 736 Robert M. Benedict, alleges:

First. Said defendant here re-states and refers to all the statements and allegations in his first separate answer to said petition above set forth with like force and effect, and in the same manner as if the same were fully and at large herein 737 set forth.

Second. This defendant further alleges that in his judgment the fair and reasonable value of the premises in question in this proceeding, the condemnation of which is sought therein is the sum of two thousand dollars.

738 Third. Said defendant further alleges, upon information and belief, that there is a defect of parties defendant in the above entitled action in that the commissioners of highways of the town of Canandaigua should have been made parties defendant therein.

739 Wherefore, this defendant, Robert M. Benedict, asks for the dismissal of said petition and the denial of the application of said plaintiffs therein contained, and for such other, further, or different relief in the premises as he, the said

defendant, Robert M. Benedict, may be entitled 740
to, together with the costs of this proceeding.

All of which is respectfully submitted.

R. M. BENEDICT,

Defendant in person.

JAMES A. ROBSON,

Att'y for defendant, Robert M. Benedict,

Office and P. O. Address,

Canandaigua, N. Y.

741

STATE OF NEW YORK, }
COUNTY OF ONTARIO, } ss.:

Robert M. Benedict, being duly sworn, deposes and says: That he is the defendant, Robert M. Benedict, above named; that he has read the foregoing answer, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true. 742

R. M. BENEDICT.

Subscribed and sworn to before me this 27th 743
day of July, 1895.

H. M. FIELD,

Notary Public for said County.

The counsel for the relators, having objected 744
to the affidavits presented by the respondents
as a return to the writ of prohibition, the Court
allowed the respondents to file a formal return

745 with said affidavits, which are with the traverse thereto filed by the relators as follows:

SUPREME COURT—ONTARIO COUNTY.

746 THE PEOPLE EX REL. VILLAGE OF CANANDAIGUA, BY CHARLES F. ROBERTSON ET AL., CONSTITUTING THE BOARD OF WATER COMMISSIONERS OF SAID VILLAGE, AND WILLIAM T. O'CONNOR ET AL.

against

747 SYLVESTER S. TAYLOR, COUNTY JUDGE OF CHEMUNG COUNTY, AND ROBERT M. BENEDICT.

To the Supreme Court of the State of New York:—

I, Sylvester S. Taylor, County Judge of Chemung County, to whom, together with Robert M. Benedict, the writ of prohibition, a copy of which is hereto annexed, is directed, do hereby
748 make return to said writ as follows:

First. Upon my information and belief, I allege that the papers, upon which said writ was granted, are not legally sufficient to warrant the granting of said writ and that upon the face of the papers no sufficient grounds for granting said writ appears and that on the contrary it sufficiently appears upon the face of the papers that
749 I, Sylvester S. Taylor, County Judge of Chemung county, was present duly and lawfully holding court at the Court House in the village of Canandaigua, in the said County of Ontario,

at the due request of Hon. J. H. Metcalf, County Judge of Ontario county, and had due power and authority to entertain the application set forth and complained of in the relator's papers herein, to issue the precept thereon, set forth in said papers, and thereon, set forth in said papers, and thereafter to hear and entertain said proceedings. 750

Second. I further allege that I, Sylvester S. Taylor, the County Judge of Chemung County, was duly requested by Hon. J. H. Metcalf, the County Judge of Ontario County, on the first day of July, 1895, to come to Canandaigua aforesaid, and hold court in said county, and thereupon I went to Canandaigua aforesaid, and on my arrival there held an adjourned term of the County Court of Ontario County, which has been duly adjourned to that time and place. That, while holding said adjourned term, the petition of Robert M. Benedict (a copy of which is set forth in relator's papers, upon which said writ was granted) was duly presented to me, then acting County Judge of Ontario County, and I thereupon entertained the said petition, and issued the precept thereon; which precept is also set forth in relator's papers. That the proceedings had before me, acting as County Judge of Ontario County, upon the presentation of said Benedict, and the action and proceedings by me thereon, and all of my proceedings thereon, acting as County Judge of Ontario County, as aforesaid, were in all respects legal, and within my authority and power, so acting as aforesaid, and that I had full power and authority, within 751 752 753 754

755 and by virtue of the provisions of the statute of the State of New York, in such case made and provided, to entertain said petition, to issue said precept, and to hear and entertain said proceeding to the due conclusion thereof.

756 Third. I, said Sylvester S. Taylor, further as a part of my said return, beg leave to refer to the affidavits of Hon. J. H. Metcalf, and of James A. Robson, both verified July 27th, 1895, of Hon. Edwin Hicks, verified July 22d, 1895, and the affidavit of me, the said Sylvester S. Taylor, verified the 24th day of July, 1895, which affidavits are hereto attached and made a part of this return. I further allege that the
757 statements in my affidavit are true to my knowledge, and I further, upon my information and belief, allege that the statements set forth and contained in the affidavits of said Metcalf, Hicks, and Robson are true.

In witness whereof I have hereunto subscribed
758 my name on this 30th day of July, 1895.
S. S. TAYLOR.

STATE OF NEW YORK, }
COUNTY OF CHEMUNG, } SS:

759 Sylvester S. Taylor, being duly sworn, deposes and says, that he is the Sylvester S. Taylor named in, and who executes and makes, the foregoing return, signed by him. That he has read the same, and knows the contents thereof, and that the same is true to the knowledge of this deponent except as to the matters therein stated

to be alleged on information and belief, and as 760
to those matters, he believes it to be true.

S. S. TAYLOR.

Suscribed and sworn to before me, this 30th
day of July, 1895.

M. O'CONNOR.

Notary Public.

761

The People of the State of New York :

To Hon. Sylvester S. Taylor, County Judge
of Chemung County, in said State, and to Rob-
ert M. Benedict, Greeting :

WHEREAS: Charles F. Robertson, of the vil-
lage of Canandaigua, in the County of Ontario,
has presented to the Supreme Court of the State 762
of New York, the fact upon affidavit and the
papers annexed thereto; that a paper purporting
to be a copy of a precept, dated July 1st, 1895,
and to have been issued and signed by Hon.
Sylvester S. Taylor, above named, County Judge
of Chemung County, acting as County Judge of
Ontario County, has been served upon the said 763
Charles F. Robertson, and the other parties
therein named, which precept recited the presen-
tation to such Judge of a petition of Robert M.
Benedict, above named, subscribed and verified
by him, setting forth that he is the owner of
certain premises therein described, subject only
to the rights of the public therein to use the same 764
only for the purpose of a public highway, and that
on the 22d day of June, 1895, he, as such owner,
was in the actual possession of the said premises,
subject only to the said right of the public

765 therein, and while he was in such possession, and on or about the day and year last aforesaid, the Village of Canandaigua, and the said Charles F. Robertson and others, constituting the Board of Water Commissioners of such village, and Willaim T. O'Connor and others, made and directed to be made a forcible entry into and
 766 upon said premises, and forcibly ejected the said Robert M. Benedict therefrom, and in like manner still hold him out of the possession thereof; that the said precept is addressed to said Village of Canandaigua, and the said Charles F. Robertson and the others, who are alleged in the petition therein referred to to have made such forcible entry, and required them and each of them
 767 forthwith to remove from said premises therein described, being a portion of the highway situate in the town of Canandaigua, County of Ontario, lying west of Canandaigua Lake, known as the Lake Shore Road, or show cause before said County Judge of Chemung County, at the County Court Room, in the Court House in the
 768 Village of Canandaigua, in the County of Ontario, on the 5th day of July, 1895, at 2 o'clock in the afternoon of that day, why possession of the said premises should not be returned to the said Robert M. Benedict, and alleging, upon the advice and belief of the said affiant, and upon other facts and circumstances set forth in
 769 the said affidavit; that said County Judge of Chemung County, when he made and issued said precept, had no jurisdiction to act in the matter to which said precept relates, and that said precept is null and void for the lack of

jurisdiction. Wherefore the said Charles F. 770
 Robertson, and the other parties to whom the
 said precept is addressed, have prayed relief of
 our said Court, and our writ of prohibition in
 that behalf. We, therefore, being willing that
 the laws and customs of our State should be ob-
 served, and that our citizens should in no wise
 be oppressed, do command you, the said Sylves- 771
 ter S. Taylor, that you desist and refrain from
 taking any action whatever, as County Judge of
 the County of Chemung, acting as County Judge
 of the County of Ontario, or otherwise, in re-
 spect to said petition of the said Robert M. Ben-
 edict, and from in any manner acting as the
 County Judge of Ontario County, or otherwise, 772
 in respect to the subject matter of the said pe-
 tition, and we command you, the said Robert M.
 Benedict, that you desist and refrain from fur-
 ther prosecuting before the said Sylvester S.
 Taylor, acting as County Judge of Ontario
 County, or otherwise, the said petition and the
 proceeding thereby commenced.

And that you and each of you show cause on 773
 the 29th day of July, 1895, at the opening of the
 Court of that day, before the Special Term of
 the Supreme Court of the State of New York,
 at the Court House in the city of Rochester,
 and County of Monroe, why you should not be
 absolutely restrained from any further proceed- 774

775 ings in respect to the said petition, and the proceeding thereby commenced.

Witness, the Honorable John M. Davy, one
of the Justices of the Supreme Court,
[L. S.] at the Court House in the city of
Rochester and County of Monroe, the
5th day of July, A. D. 1895.

776

THOMAS H. BENNETT,
Attorney for Relators,
Canandaigua, N. Y.

By the Court.

777

E. H. SLOCUM,
Deputy Clerk.

(Endorsed:) "The within writ of prohibition is hereby allowed this 5th day of July, 1895, by the Court. John M. Davy, J. S. C."

Filed July 5th, 1895.

778

779

THE PEOPLE EX. REL. THE VILLAGE OF CANANDAIGUA, CHARLES F. ROBERTSON AND OTHERS, CONSTITUTING THE BOARD OF WATER COMMISSIONERS OF SAID VILLAGE, AND WILLIAM T. O'CONOR AND OTHERS. 781

against

SYLVESTER S. TAYLOR, COUNTY JUDGE OF CHEMUNG COUNTY, AND ROBERT M. BENE-DICT.

STATE OF NEW YORK,)
COUNTY OF ONTARIO,) ss. 782

J. Henry Metcalf, being duly sworn, says that he resides in the village of Canandaigua, Ontario County, New York, and is the County Judge of said county.

That heretofore and in the month of June, 1895, deponent was retained as counsel in an action brought by Robert M. Benedict against 783 the Board of Water Commissioners of the village of Canandaigua and others, and, as such counsel, deponent assisted James A. Robson, Esq., the attorney for the plaintiff, in the preparation of a brief, and the argument of a motion to vacate an order vacating an injunction order granted in said action by Hon. William E. Wer-784 ner, Justice of the Supreme Court. That the said motion was heard before said Justice at the city of Rochester on the 15th of June, 1895, and the same was then denied.

785 That on the 10th day of June, 1895, deponent held the regular term of the County Court and Court of Sessions, in and for Ontario County, which was duly and regularly appointed to be held on the second Monday of June in each year. That said term continued from the 10th day of June until Thursday, the 12th day of June, and
 786 was then adjourned until Monday, the 17th day of June, and continued until Thursday, the 20th day of June, and deponent was continuously holding Court between said dates, with the exception of the adjournments so stated.

That on Monday, the 17th of June, 1895, an action was tried before deponent in the County Court, in which Howard E. Merrill was plaintiff
 787 and Justus O. Rupert was defendant; that said cause was given to the jury on the evening of the 17th of June, and about five o'clock in the afternoon of Tuesday, the 18th, the jury rendered a verdict for the plaintiff; that thereupon Edwin Hicks, Esq., one of the counsel for the
 788 defendant, asked deponent to entertain a motion for a new trial upon his minutes. That deponent consented so to do after the jury was discharged, and said Hicks was to notify the plaintiff's attorney, D. B. Backenstose, of Geneva, New York, and the defendant's attorney, J. H. Butler, of Penn Yan. That the jury was discharged on Thursday, the 20th of June, and thereafter deponent
 789 heard some appeals in County Court, and after the jury was discharged said Hicks applied to deponent to set the argument of the motion for a new trial down for some subsequent day, as he was unable to arrange with the attorneys for the

respective parties to be then present to argue 790
 the motion. That deponent consented so to do,
 and agreed to adjourn Court to the first day of
 July at two P. M., and said Hicks was to so
 notify the attorneys. That thereafter the said
 term of County Court was duly adjourned to the
 first day of July at two P. M., and the Sessions
 was duly adjourned to the second day of Sep- 791
 tember at 10 A. M.

That after said adjournment, and on the 22d
 day of June, 1895, as the deponent is informed,
 and verily believes to be true, Charles F. Rob-
 ertson, Mack S. Smith, and John H. Kelly,
 three of the members of the Board of Water
 Commissioners of the Village of Canandaigua, 792
 together with a body of laborers in their employ,
 forcibly entered upon, and took possession of
 the premises of said Robert M. Benedict, as is
 alleged in his petition, a copy of which is
 annexed to the relator's affidavits herein.

That subsequently thereto deponent had a
 conversation with James A. Robson, Esq., the
 attorney for said Robert M. Benedict, in said 793
 injunction action in which was discussed the
 forcible entry, and the remedy which should be
 invoked to protect the rights of said Benedict
 therein. That it was then agreed that, as the
 question was entirely a legal question, it could
 sooner be raised, and the rights of the parties
 determined with the least delay, by instituting 794
 summary proceedings under section 2233 of the
 Code of Civil Procedure as to forcible entry and
 detainer. That as the proceedings to be insti-
 tuted would necessarily involve the determina-

795 tion of a somewhat novel and difficult question
of law, it was not considered advisable to bring
the proceeding before a Justice of the Peace, and
as deponent was disqualified by reason of his
being counsel for Mr. Benedict, as aforesaid, de-
ponent offered to request a County Judge of some
other County to hold Court for deponent, at
796 which time the petition in such summary pro-
ceedings could be presented to said County
Judge of some other County, as is provided by
Chapter 11 of the laws of 1877. That said Rob-
son suggested that Judge Struble, of Yates
County, or Judge Sutherland, of Monroe Coun-
ty, should be so requested by deponent to hold
797 Court. That deponent then suggested Judge
Norton, of Wayne County. That deponent
stated he was willing to request either of them.
That deponent caused personal inquiry to be
made of Judge Struble if he would come here
and hold Court, and did not receive any answer
thereto until after deponent had communicated
with Judge Taylor, as hereinafter stated. That
798 subsequently and on the 24th day of June, de-
ponent was in attendance at the Monroe Special
Term, and there had a conversation with one of
the leading lawyers of Wayne County, whom
deponent asked whether, in his opinion, Judge
Norton, the County Judge, of Wayne County,
would be willing to come here and hold Court
799 for deponent. That for reasons then given to
deponent, deponent concluded that Judge Nor-
ton would not be willing to hold Court for de-
ponent, and he also learned that Judge Suther-
land was absent from home, and deponent was

unable to see him as suggested by Mr. Robson. 800

That on the 25th day of June, 1895, deponent was in the city of Elmira on a professional engagement, and there met Judge Taylor, the County Judge of Chemung County. That, in the course of a conversation with said Taylor, deponent mentioned the fact that there was a proceeding to be instituted in Ontario County, 801 in which deponent was disqualified, and he asked said Taylor if he would be willing to come here and hold Court for deponent. That said Taylor said he would be willing to do so if it did not conflict with his engagements.

That the said petition of Robert M. Benedict, though deponent was requested to entertain the same, was never, in fact, presented to deponent 802 for action thereon.

That, on the first day of July, 1895, deponent sent the following telegram to Judge Taylor:

“Canandaigua, New York, July 1, 1895.

“To Judge S. S. Taylor,

“Elmira, New York.

“Please come here this afternoon to hold 803 Court for me in case where I am disqualified.

“J. H. METCALF.”

That at two o'clock, P. M., on the first day of July, deponent convened said adjourned County Court duly adjourned over from the 20th of June, as hereinbefore stated, and the counsel in the said case of Merrill vs. Rupert, not then ap- 804 pearing to argue the motion for a new trial therein, as said Hicks had agreed to arrange with them to do, and deponent not having been informed that said argument was not then to take

805 place, and, having appeared there at that time
 for the express purpose of hearing said argu-
 ment, deponent thereupon adjourned Court to
 4.30 P. M. of the same day, at which time Judge
 Taylor was expected to arrive. That at the ad-
 journed hour, and after the arrival of Judge
 Taylor, deponent then requested said Taylor to
 806 hold the said adjourned term of Court, which he
 proceeded to do.

That the said petition was thereupon pre-
 sented to Judge Taylor, and a full explanation
 of the facts and circumstances connected there-
 with, being made to him by said Robson, and a
 precept, returnable on the 5th day of July, was
 then and there issued by said Taylor, and the
 807 said Taylor then and there adjourned the Coun-
 ty Court to said day and hour.

That since that time deponent has not in any
 way, manner, or form taken any action, pro-
 ceeding, given advice, or discussed the facts or
 the law connected with the said application of
 Mr. Benedict in said summary proceedings with
 808 Mr. Benedict, or either of his counsel, or with
 Judge Taylor. That he was not present on the
 return of said precept on the 5th of July.

J. H. METCALF.

Sworn to before me this 27th day of July, 1895.

H. M. FIELD,

Notary Public.

809

THE PEOPLE EX REL. VILLAGE OF CANANDAIGUA, BY CHARLES F. ROBERTSON AND OTHERS, CONSTITUTING THE BOARD OF WATER COMMISSIONERS OF SAID VILLAGE, AND WILLIAM T. O'CONOR AND OTHERS, 811

against

SYLVESTER S. TAYLOR, COUNTY JUDGE OF CHEMUNG COUNTY, AND ROBERT M. BENEDICT.

STATE OF NEW YORK, }
COUNTY OF ONTARIO, } ss: 812

Edwin Hicks, being duly sworn, says that he is an attorney and counselor at law, and resides in the Village of Canandaigua.

That on the 17th day of June, 1895, deponent assisted John H. Butler, Esq., as counsel for the defendant in the trial of an action in the Ontario County Court before Hon. J. H. Metcalf, and 813 a jury, wherein Howard E. Merrill was plaintiff, and Justus O. Rupert was defendant.

That the cause was submitted to the jury on that day, and the verdict of said jury was not rendered until late in the afternoon of Tuesday, the 8th day of June, when said jury rendered a verdict in favor of the plaintiff. That at the 814 time said verdict was rendered, neither D. B. Backenstose, attorney for the plaintiff, or J. H. Butler, the attorney for the defendant, was present in Court, and deponent thereupon requested

815 said J. H. Metcalf to entertain an application for a new trial upon his minutes. That said Metcalf consented so to do after the jury were discharged. That on the morning of Thursday, the 20th day of June, deponent was informed by Judge Metcalf that he would hear the application for a new trial that afternoon at 2 o'clock, 816 and requested deponent to communicate with said Backenstose and Butler; that deponent did so and was unable to arrange for their being present that afternoon, and so informed Judge Metcalf, and then requested him to adjourn the Court to such date as would meet the convenience of the counsel and the Court. That after 817 some consultation it was agreed to hear the argument of the motion on the afternoon of July 1, and said Metcalf then stated he would adjourn Court to that day at 2 P. M.

That on the first day of July, 1895, deponent having failed to arrange for the attendance of counsel at that time, the cause was not then heard, but deponent did not inform Judge Metcalf that he was unable to so arrange for the 818 hearing of said argument.

EDWIN HICKS.

Sworn to before me this 22nd day of July, 1895.

F. A. CHRISTIAN,
Justice of the Peace.

819

SUPREME COURT—ONTARIO COUNTY. 820

THE PEOPLE EX. REL. THE VILLAGE OF CAN-
 ANDAIGUA, CHARLES F. ROBERTSON AND
 OTHERS, CONSTITUTING THE BOARD OF
 WATER COMMISSIONERS OF SAID VILLAGE,
 AND WILLIAM T. O'CONOR AND OTHERS, 821

against

SYLVESTER S. TAYLOR, COUNTY JUDGE OF
 CHEMUNG COUNTY, AND ROBERT M. BENE-
 DICT.

STATE OF NEW YORK, }
 COUNTY OF CHEMUNG, } ss.: 822

Sylvester S. Taylor, being duly sworn, says that he resides in the city of Elmira, Chemung County, New York, and is the County Judge of Chemung County.

That on or about the 25th day of June, 1895, deponent met J. H. Metcalf, County Judge of Ontario County, in the city of Elmira, and, dur-823
 ing a conversation had between deponent and said Metcalf, said Metcalf suggested to deponent that there was a proceeding which would probably be instituted before him as County Judge of Ontario County, in which he was disqualified from acting, and he asked deponent if he would be willing to come to Ontario County to hear 824
 the same; that deponent replied that he would, if by so doing he would accommodate said Metcalf; that on the first day of July, 1895, deponent received a telegraph dispatch from said

825 Metcalf, which is hereto annexed and marked
 "A." That pursuant to the request contained
 in said dispatch on the afternoon of Monday,
 the first day of July, deponent went to Canan-
 daigua, and there met said Metcalf in the street,
 and with him went to the County Court Room
 in the Court House; that said Metcalf then and
 826 there formally requested deponent to hold an
 adjourned term of Court, which had been ad-
 journed, which deponent is informed, to the
 hour when they there met, and which depo-
 nent then proceeded to do by taking his seat
 upon the bench. That said Metcalf then di-
 rected the Clerk of said Court, who was then
 827 present, to make an entry in the Court minutes
 in relation to the summary proceedings insti-
 tuted by Robert M. Benedict before him, and as
 to said request of deponent to hold Court.

That thereupon James A. Robson, Esq., and
 John Gillette, Esq., who were then present in
 Court, presented to deponent the petition of said
 Robert M. Benedict in said summary proceed-
 828 ings, a copy of which is attached to the relator's
 affidavit in these proceedings, and said Robson
 then proceeded to explain to deponent the nature
 of the proceedings, and the facts set forth in the
 petition concerning the case, and which petition
 deponent then and there duly considered, and
 issued a precept returnable before deponent on
 829 Friday, the 5th day of July, at 2 P. M. That on
 Friday, the 5th day of July, deponent appeared
 at Canandaigua, and at the appointed hour the
 parties appeared before him, and deponent was
 thereupon served with a copy of a writ of prohi-

bition issued by Justice Davy, and the papers⁸³⁰ upon which the same was granted; that deponent thereupon adjourned Court until the first day of August, 1895, and took no further action or proceedings in relation to the said summary proceedings so instituted before him as aforesaid, and has in every way and manner fully observed the directions and requirements of said⁸³¹ writ of prohibition.

S. S. TAYLOR.

Sworn to before me this 24th day of July, 1895.

M. O'CONNOR,
Notary Public.

832

SUPREME COURT—ONTARIO COUNTY.

THE PEOPLE EX REL. THE VILLAGE OF CANANDAIGUA, BY CHARLES F. ROBERTSON AND OTHERS,

against

833

SYLVESTER S. TAYLOR, COUNTY JUDGE OF CHEMUNG COUNTY, AND ROBERT M. BENEDICT.

STATE OF NEW YORK, }
COUNTY OF ONTARIO, } ss.:

James A. Robson, being duly sworn, says that he resides in the village of Canandaigua,⁸³⁴ New York, and is the attorney for Robert M. Benedict, one of the defendants above named.

That deponent has been the attorney for said Robert M. Benedict during all the proceedings

835 mentioned in the relator's affidavits and therein referred to.

That deponent has read the affidavit of J. Henry Metcalf made herein, and verified the 27th of July, 1895, and the facts therein stated and set forth as to conversations had between said Metcalf and deponent, and the facts and
836 circumstances therein related in which deponent took part, as therein stated, were truly and correctly stated and set forth.

That the petition of said Robert M. Benedict in the summary proceedings, a copy of which is annexed to the relator's affidavits, was drawn by deponent on the morning of the first day of July, 1895; that the same was not verified by Mr.
837 Benedict until after the hour of four o'clock in the afternoon of July 1, 1895; that the said petition was never presented to Judge Metcalf for action thereon, and the same was never presented for any action or consideration by any Judge or official until the same was presented by deponent to Judge S. S. Taylor, after he had
838 taken his seat upon the bench at the adjourned term of the Ontario County Court, as mentioned and referred to in said affidavit, and at that time deponent then presented said petition, and proceeded to inform Judge Taylor as to the facts and circumstances thereof, as set forth in said petition.

839

JAMES A. ROBSON.

Sworn to before me this 27th day of July, 1895.

H. M. FIELD,
Notary Public.

SUPREME COURT—ONTARIO COUNTY. 840

THE PEOPLE OF THE STATE OF NEW YORK EX
REL. VILLAGE OF CANANDAIGUA, BY CHARLES
F. ROBERTSON AND OTHERS, CONSTITUTING
THE BOARD OF WATER COMMISSIONERS OF
SAID VILLAGE ET AL.,

against

841

SYLVESTER S. TAYLOR, COUNTY JUDGE OF CHE-
MUNG COUNTY, AND ROBERT M. BENEDICT.

To the Supreme Court of the State of New
York:

I, Robert M. Benedict, the party to whom, to-
gether with Sylvester S. Taylor, County Judge 842
of Chemung County, the writ of prohibition, a
copy of which is hereto annexed, is directed, do
hereby adopt the return of Hon. Sylvester S.
Taylor, County Judge of Chemung County,
hereto annexed, and rely upon the matters
therein contained as sufficient cause why the
said Sylvester S. Taylor, County Judge of Che- 843
mung County, acting as County Judge of On-
tario County, should not be restrained as men-
tioned in said writ.

In witness whereof, I have hereunto sub-
scribed my name on this 1st day of August,
1895.

R. M. BENEDICT. 844

STATE OF NEW YORK, }
COUNTY OF ONTARIO, } ss:

Robert M. Benedict, being duly sworn, de-
poses and says that he is the party who made

845 and subscribed the foregoing return, that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

R. M. BENEDICT.

846 Subscribed and sworn to before me this 1st day of August, 1895.

F. H. HAMLIN,
Notary Public.

SUPREME COURT—ONTARIO COUNTY.

847

THE PEOPLE, EX REL., VILLAGE OF CANANDAIGUA, BY CHARLES F. ROBERTSON AND OTHERS, CONSTITUTING THE BOARD OF WATER COMMISSIONERS OF SAID VILLAGE, AND WILLIAM T. O'CONNOR AND OTHERS,

848

against

SYLVESTER S. TAYLOR, COUNTY JUDGE OF CHEMUNG COUNTY AND ROBERT M. BENEDICT.

The relators above named hereby allege that they controvert the return of the defendants herein, by the affidavit of Charles F. Robertson, 849 hereto annexed, and they will read and use on the hearing herein for the purpose of controverting said return, the affidavits filed by the defendants in connection with said return and mentioned therein, so far as they tend to cor-

roborate and support the said affidavit of Charles 850
F. Robertson.

Dated August 3d, 1895.

THOMAS H. BENNETT,
Attorney for Relators,
Canandaigua, N. Y.

SUPREME COURT—ONTARIO COUNTY. 851

THE PEOPLE EX REL., THE VILLAGE OF CAN-
ANDAIGUA, CHARLES F. ROBERTSON AND
OTHERS, CONSTITUTING THE BOARD OF
WATER COMMISSIONERS OF SAID VILLAGE,
AND WILLIAM T. O'CONNOR AND OTHERS, 852

against

SYLVESTER S. TAYLOR, COUNTY JUDGE OF
CHEMUNG COUNTY, AND ROBERT M. BENE-
DICT.

853

STATE OF NEW YORK, }
COUNTY OF ONTARIO, } ss.:

Charles F. Robertson, one of the relators
above named, being duly sworn, deposes and
says, that he has read the return of the above
named defendants herein, purporting to have
been verified by the above named Sylvester S. 854
Taylor on the thirtieth day of July, 1895, and
by the above named Robert M. Benedict, on the
first day of August, 1895, and that, as deponent
is informed and verily believes, the said Taylor

855 was not requested by J. Henry Metcalf, County Judge of Ontario County, on the first day of July, 1895, to hold County Court in the County of Ontario, and the only request which he received from said Metcalf on that day was to go to Canandaigua, and, in his judicial capacity, to hear and dispose of the summary proceeding 856 mentioned in the affidavit presented on the application for the alternative writ of prohibition in which proceeding said Metcalf was disqualified, as was stated by him in making said request; that said Taylor, on arriving at Canandaigua, did not hold an adjourned, or other, term of the County Court of Ontario County, but that 857 he merely took a seat on the bench beside Judge Metcalf, while the latter held an adjourned session of the County Court at 4.30 o'clock in the afternoon of said first day of July, 1895, and that at such session, the only business transacted was the making of the order, a copy of which is annexed to the affidavit above mentioned; that the only petition of said Benedict which was 858 presented to the said Taylor while he was at Canandaigua, was the petition addressed to the said J. Henry Metcalf, as County Judge, a copy of which is annexed to the said affidavit; and that the proceedings of the said Taylor, in acting upon the said petition, and in issuing the precept mentioned in the said affidavit, were 859 wholly without jurisdiction, null and void, as deponent is advised and believes to be true.

Deponent further says that, as he is informed and verily believes, the said Judge Metcalf adjourned the County Court from two o'clock to

four and a half o'clock of July first, 1895, for 860
 the only purpose of continuing the said Court
 until Judge Taylor should arrive in Canandaigua, and that, as deponent is advised and believes, such action on the part of Judge Metcalf, so far as it tended to provide for his client, the said Benedict, a tribunal for the hearing of his petition, or to aid him in instituting the proceeding commenced thereby, or to facilitate its prosecution was an excess of jurisdiction on the part of Judge Metcalf, and was null and void; and further the deponent says not.

CHARLES F. ROBERTSON.

Sworn to before me this 3d day of August, A.
 D., 1895.

JOHN S. COE, 862
 Notary Public,
 Ontario Co., N. Y.

SUPREME COURT—ONTARIO COUNTY.

VILLAGE OF CANANDAIGUA, BY CHARLES F.
 ROBERTSON, EDWARD G. HAYES, JOHN JOHNSON, JOHN H. KELLY, MATTHEW R. CARSON, 863
 AND MACK S. SMITH, CONSTITUTING THE
 BOARD OF WATER COMMISSIONERS OF SAID
 VILLAGE,

against

ROBERT M. BENEDICT AND ONTARIO ORPHAN 864
 ASYLUM.

Proceedings under Chapter 23, Title I, Code
 of Civil Procedure, to acquire certain lands belonging to defendants.

865 Motion under Section 3379, Code of Civil Procedure, for a stay of certain proceedings and actions pending the above entitled proceedings.

Hon. James C. Smith and T. H. Bennett, Esq., for plaintiffs and motion.

John Gillette, Esq., and James A. Robson, Esq., for defendants opposed.

866

SUPREME COUNTY—ONTARIO COUNTY.

867 THE PEOPLE EX REL. THE VILLAGE OF CANANDAIGUA, CHARLES F. ROBERTSON AND OTHERS, CONSTITUTING THE BOARD OF WATER COMMISSIONERS OF SAID VILLAGE, AND WILLIAM T. O'CONNOR AND OTHERS,

against

868 SYLVESTER S. TAYLOR, COUNTY JUDGE OF CHEMUNG COUNTY, AND ROBERT M. BENEDICT.

Application under Chapter 16, Title II, Article 5, Code of Civil Procedure, to issue absolute writ of prohibition, after return filed to alternative writ issued by and out of this Court July 5th, 1895.

869 Hon. James C. Smith and T. H. Bennett, Esq., for relators.

John Gillette, Esq., and J. A. Robson, Esq., for respondents.

MEMORANDUM OF DECISION. 870

For the purposes of the several motions above referred to the Court holds and decides as follows:

First. That in the condemnation proceeding above set forth certain issues have been raised⁸⁷¹ by the petition and answer which are hereby referred to Abraham Benedict, Esq., attorney and counsellor at law, Rochester, N. Y., to hear, try, and determine.

Second. That by Chapter 181, Laws of 1875, as amended by Chapter 175, Laws of 1881, Chapter 255, Laws of 1883, and Chapter 211,⁸⁷² Laws of 1885, the Board of Water Commissioners of the village of Canandaigua are authorized not only "to use the ground or soil under any street, highway, or road within the county within which said village is situated, for the purpose of introducing water into and through any and all portions of said village, on condition that⁸⁷³ they shall cause the surface of such street, highway, or road to be relaid and restored to its usual state," but also to "adopt such plans as, in their opinion, may be most feasible for procuring such supply of water.

The last quoted portion of said section is held to be broad enough to give said Board of Water⁸⁷⁴ Commissioners the right to use electricity as a transmitting power, and for that purpose to erect the necessary poles and wires.

875 Third. That the entry of the said plaintiffs and their agents upon the lands of the defendants for the purpose of erecting said poles and extending wires thereon, and of depositing and laying water mains, was not unlawful or tortuous, but authorized by Section 5, Chapter 211, Laws of 1885.

876 Fourth. That such entry, for the purpose above set forth, being lawful, plaintiffs in said condemnation proceedings are hereby held entitled to an order authorizing them to continue in such possession during the pendency of such condemnation proceedings, and to a further order staying
877 all actions and proceedings brought against the plaintiffs on account of such possession.

Fifth. An order may therefore be entered continuing plaintiffs in possession of the premises described in the petition herein, for the purpose therein set forth, during the pendency of these proceedings; and staying all actions and
878 proceedings against said plaintiffs on account of such possession upon plaintiffs giving security in the sum of \$5,000 for the payment of the compensation which may be finally awarded to the owner therefor and the costs of said proceeding.

879 Sixth. The stay granted under Section 3379, Code of Civil Procedure, being sufficient to protect the interests of the plaintiffs during the pendency of said condemnation proceedings, the necessity of inquiring at this time into the merits

of the application for an absolute writ of prohibition is obviated. The proceedings upon said alternative writ of prohibition and the return thereto are therefore hereby continued until the further order of this Court; unless the defendants in this proceeding consent, in writing, to the entry of a final order absolutely dismissing the proceedings under said writ and return with-881
out the conditions provided by Section 2100, Code of Civil Procedure, for a final order against the relators. In case such consent is given the proceedings under such alternative writ of prohibition and return are dismissed, with \$25 costs and disbursements against the relators.

Let orders be entered accordingly, the same 882
to be agreed upon by the parties or settled by the court.

Dated August 13, 1895.

W. E. WERNER,
J. S. C.

883

884

885 At a Special Term of the Supreme Court, held at the Court House in and for the County of Monroe, on the 13th day of August, A. D., 1895.

Present, HON. WILLIAM E. WERNER, Justice,
Presiding.

886 VILLAGE OF CANANDAIGUA, BY CHARLES F. ROBERTSON, EDWARD G. HAYES, JOHN JOHNSON, JOHN H. KELLY, MATTHEW R. CARSON, AND MACK S. SMITH, CONSTITUTING THE BOARD OF WATER COMMISSIONERS OF SAID VILLAGE,
Plaintiff,

against

887 ROBERT M. BENEDICT AND ONTARIO ORPHAN ASYLUM,
Defendants.

On reading and filing the petition of the plaintiff herein, verified July 16, 1895, praying for the condemnation of the real property described there-
888 in, and that commissioners of appraisal be appointed to ascertain the compensation to be made to the owners of said property, and proof of service thereof, and of notice of the presentation thereof, upon all of the defendants, and upon reading and filing the answer interposed herein by the defendant, Robert M. Benedict, and after hearing Hon. James C. Smith, of Counsel for the
889 plaintiff, and John Gillett, Esq., of Counsel for the defendant, and after due deliberation thereon, now on motion of Thomas H. Bennett, Esq., Attorney for the plaintiff, it is

ORDERED, that it be referred to Abraham Ben-890
 edict, Esq., of Rochester, New York, Counselor at
 law, to hear, try, and determine the issues raised
 by the answer of the defendant, Robert M.
 Benedict, herein. Enter, W. E. W., J. S. C.

At a Special Term of the Supreme Court, held at
 the Chambers of Hon. W. E. Werner, at the
 City of Rochester, N. Y., on the 7th day of Sep-891
 tember, 1895.

Present, Hon. W. E. WERNER, Justice.

VILLAGE OF CANANDAIGUA, BY CHARLES F.
 ROBERTSON, EDWARD G. HAYES, JOHN JOHN-
 SON, JOHN H. KELLY, MATTHEW R. CARSON,892
 AND MACK S. SMITH, CONSTITUTING THE
 BOARD OF WATER COMMISSIONERS OF SAID
 VILLAGE,

Plaintiff,

against

ROBERT M. BENEDICT AND ONTARIO ORPHAN
 ASYLUM,893
 Defendants.

An order in the above entitled action, bearing
 date the 13th day of August, 1895, having been
 entered in the Clerk's office of Ontario county,
 on the application of the attorney for the plain-
 tiff above named, and the attorney for the de-894
 fendants above named having applied for a re-
 settlement of the order made and entered as afore-
 said, so that the same should be made to conform
 with the decision of the Court, heretofore made

895 and filed in said action, and James A. Robson, the attorney for said defendants, having appeared in Court in favor of said application, and Thomas H. Bennett, Esq., the attorney for the plaintiff, having appeared in Court in opposition thereto, after hearing the attorneys for the several parties, on motion of James A. Robson, attorney for
 896 the said defendants,

ORDERED, that the said order of August 13th, 1895, be, and the same is, hereby resettled so as to read as follows:

“At a Special Term of the Supreme Court, held at the Court House in the City of Rochester, in and for the County of Monroe, on the 13th
 897 day of August, A. D. 1895.

Present, HON. WILLIAM E. WERNER, Justice,
 Presiding.

VILLAGE OF CANANDAIGUA, BY CHARLES F. ROBERTSON, EDWARD G. HAYES, JOHN JOHNSON,
 898 JOHN H. KELLY, MATTHEW R. CARSON, AND
 MACK S. SMITH, CONSTITUTING THE BOARD
 OF WATER COMMISSIONERS OF SAID VILLAGE,
 Plaintiff,

against

ROBERT M. BENEDICT AND ONTARIO ORPHAN
 899 ASYLUM,
 Defendants.

“On reading and filing the petition of the plaintiff herein, verified, July 16th, 1895, praying for the condemnation of the real property therein

described, and that commissioners of appraisal 500
 be appointed to ascertain the compensation to be
 made to the owners of said property—notice of
 presentation thereof—proof of the due service of
 such petition and notice upon all of the defend-
 ants, and the answer to the said petition inter-
 posed by the defendant, Robert M. Benedict;
 and on reading and filing the plaintiff's notice 901
 of motion for an order staying all actions and
 proceedings brought or commenced by the defen-
 dant, Robert M. Benedict, against the said plain-
 tiff, or against its said Board of Water Commis-
 sioners on account of the said property, pursu-
 ant to the provisions of the Code of Civil Pro-
 cedure, together with the annexed affidavits of
 Thomas H. Bennett, Charles F. Robertson, and 902
 Mack S. Smith, severally verified, July 19th,
 1895, in support of said motion, and the affida-
 vit of Robert M. Benedict, James A. Cavan, Jul-
 ian A. Van Wie, and John Boyle, severally ver-
 ified July 27th, 1895, and of James A. Robson,
 verified July 29th, 1895, in opposition to said
 motion, and it appearing to the satisfaction of 903
 the Court, that the plaintiff is in the lawful and
 peaceable possession of the property sought to
 be condemned, and that the entry of the said
 plaintiff, and its agents, upon the lands of the
 defendants for the purpose of erecting poles and
 extending wires thereon to use electricity as a
 transmitting power, and of depositing and laying 904
 water mains, was not unlawful or tortuous, but
 was authorized by Section 5 of Chapter 211 of
 the Laws of 1885, and after hearing James C.

905 Smith, of counsel for the plaintiff, in support of
said motion, and John Gillette, Esq., of counsel
for defendants, in opposition thereto, and duly
deliberating thereon:

“Now on motion of Thomas H. Bennett, at-
torney for the plaintiff, it is

“ORDERED, That such motion be, and the
906 same hereby is, in all respects granted; that the
plaintiff, and its officers and agents be, and they
are hereby authorized to continue in possession
of the premises described in the petition herein,
for the public use and purposes set forth in the
petition, during the pendency of this proceed-
ing, and that all proceedings on the part of said
907 Robert M. Benedict and his attorney and coun-
selors in the action in the Supreme Court, com-
menced by him June 5th, 1895, against the
above named Board of Water Commissioners,
and William T. O’Conor, and others, defendants,
and in the appeal from the order made in said
action June 15th, 1895, also all proceedings on
908 the part of the said Robert M. Benedict and his
attorney and counselors, in the summary pro-
ceedings, instituted and commenced by him
July 1st, 1895, before the County Judge of On-
tario County, and sought to be continued before
the County Judge of Chemung County, against
the above named Village of Canandaigua, Charles
F. Robertson, and others, constituting the Board
909 of Water Commissioners of said Village, Wil-
liam T. O’Conor and others, defendants, and all
proceedings in any and every suit, action, or
proceeding brought or commenced by the said
Robert M. Benedict, against the said Village of

Canandaigua or against the above named Board⁹¹⁰
of Water Commissioners of said Village, on ac-
count of said property sought to be condemned
in this proceeding be, and the same hereby are,
stayed until the final determination of this pro-
ceeding, and until the further order of this
Court, upon the plaintiff's giving security by its
bond in the sum of \$5,000 for the payment of⁹¹¹
the compensation which may be finally awarded
to the owner therefor, and the costs of this pro-
ceeding. Enter, W. E. W., J. S. C."

Stipulated that the foregoing order was grant-
ed at the term above stated, and that the same
may be entered forthwith, and certificate of
Clerk of Monroe County to said order is hereby⁹¹²
waived and dispensed with.

Dated Canandaigua, N. Y., September 9th,
1895.

THOMAS H. BENNETT,
Attorney for Plaintiff.
JAMES A. ROBSON,
Attorney for Defendant.

913

914

915 At a Special Term of the Supreme Court, held
the at Chambers of Hon. W. E. Werner, at
the city of Rochester, on the 7th day of
August, 1895.

Present—Hon. W. E. Werner, Justice.

916 THE PEOPLE EX REL. VILLAGE OF CANANDAI-
GUA, BY CHARLES F. ROBERTSON, EDWARD G.
HAYES, JOHN JOHNSON, JOHN H. KELLY,
MATTHEW R. CARSON, AND MACK S. SMITH,
CONSTITUTING THE BOARD OF WATER COM-
MISSIONERS OF SAID VILLAGE, AND WILLIAM
T. O'CONOR, WILLIAM O'CONOR, AND SID-
NEY C. MACKAYE,

917

against

SYLVESTER S. TAYLOR, COUNTY JUDGE OF CHE-
MUNG COUNTY, AND ROBERT M. BENEDICT.

An order in the above entitled action, bearing
date the 13th day of August, 1895, having been
918 entered in the Clerk's office of Ontario County,
on the application of the attorney for the plain-
tiffs above named, and the attorney for the de-
fendants above named having applied for a re-
settlement of the order made and entered as
aforesaid so that the same should be made to
conform with the decision of the Court hereto-
919 fore made and filed in said action, and James A.
Robson, the attorney for said defendants, having
appeared in Court in favor of said application,
and Thomas H. Bennett, Esq., the attorney for
the plaintiffs, having appeared in Court in op-

position thereto, after hearing the attorneys for 920 the several parties, on motion of James A. Robson; attorney for the said defendants,—

ORDERED, That the said order of August 13th, 1895, be and the same hereby is re-settled and amended by striking from said order the following words: "That is to say: The defendants herein shall consent in writing to the entry of a 921 final order absolutely dismissing the proceedings under said writ, return and traverse, and also the summary proceedings instituted by the defendant Robert M. Benedict, and referred to in said alternative writ of prohibition and return thereto as well."

The said order being hereby re-settled so as to 922 read as follows:

"At a Special Term of the Supreme Court, held at the Court House in the city of Rochester, in and for the County of Monroe, on the 13th day of August, A. D. 1895.

"Present—Hon. William E. Werner; Justice Presiding.

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"The defendants having, by their counsel, appeared when the alternative writ of prohibition, made and issued in this matter on the 5th day of July, 1895, was returnable, and having read and filed the affidavits of J. Henry Metcalf and James A. Robson, verified July 27th, 1895, of 924 Edwin Hicks, verified July 22d, 1895, and of Sylvester S. Taylor, verified July 24th, 1895, and having moved for and obtained a postponement of the hearing of the matter with leave to

925 file and serve a return to said writ, as required by Section 2096 of the Code of Civil Procedure, and such return, having been duly served and filed, and the relator having controverted the same by the affidavit of Charles F. Robertson, verified August 3d, 1895, which is also served and filed.

926 “And the Court having read and considered the affidavit and papers on which writ was granted, and the said affidavits and return thereto, and also the affidavit controverting the same and having duly made and granted an order, in certain condemnation proceedings instituted by the relator as plaintiff, against the defendant Robert M. Benedict and another, as
927 defendants, bearing even date herewith, staying all actions or proceedings brought or commenced by the said Robert M. Benedict, on account of the property sought to be condemned, under the provisions of Section 3379, of the Code of Civil Procedure, thus obviating the necessity of inquiring into the merits of this application for an
928 absolute writ of prohibition, during the pendency of said condemnation proceedings.

“Now, after hearing John Gillette, Esq., of counsel for the defendants, and Hon. James C. Smith, for the relator,—

“It is ordered that the proceedings upon said alternative writ of prohibition, the return
929 thereto, and the traverse of such return be, and the same hereby are, continued until the further order of this Court; unless the defendants herein shall consent, in writing, duly filed and served upon the relator’s attorney, to the entry of a

final order absolutely dismissing the proceedings under said writ, return thereto, and traverse thereof without the conditions provided by Section 2100 of the Code of Civil Procedure for a final order against the relator.

“And it is further ordered that in case such consent in writing is given, the proceedings under said alternative writ of prohibition the return thereto, and the traverse thereof, be and the same hereby are dismissed, with the sum of twenty-five dollars costs and disbursements to be paid by the relators to the defendants.

“Enter W. E. W., J. S. C.”

Stipulated that the foregoing order was granted at the term above stated, and that the same may be entered forthwith, and certificate of Clerk of Monroe County to said order is hereby waived and dispensed with.

Dated Canandaigua, N. Y., September 9th, 1895.

THOMAS H. BENNETT,
 Attorney for Relator,
 Canandaigua, N. Y. 933
 JAMES A. ROBSON,
 Attorney for Defendants.

935 SUPREME COURT—ONTARIO COUNTY.

VILLAGE OF CANANDAIGUA, BY CHARLES F. ROBERTSON, EDWARD G. HAYES, JOHN JOHNSON, JOHN H. KELLY, MATTHEW R. CARSON, AND MACK S. SMITH, CONSTITUTING THE BOARD OF WATER COMMISSIONERS OF SAID VILLAGE,
 Plaintiff,

936

against

ROBERT M. BENEDICT AND ONTARIO ORPHAN ASYLUM,
 Defendants.

Gentlemen: Please take notice that the defendant, Robert M. Benedict, herein appeals to the General Term of the Supreme Court of the State of New York, Fifth Department, from the order of the Supreme Court herein granted at a Special Term thereof on the 13th day of August, 1895, and entered in the Clerk's Office of the County of Ontario on the 23d day of August, 1895, as re-settled by an order herein granted at a Special Term of said Court on the 7th day of September, 1895, and entered in said Clerk's Office on the 9th day of September, 1895, and from the whole of said order.

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Dated at Canandaigua, N. Y., September 20th, 1895.

Yours, &c.,

JAMES A. ROBSON,

Attorney for the Appellant,

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Office and P. O. Address,

Canandaigua, N. Y.

To the Clerk of the County of Ontario, and to Thomas H. Bennett, Esq., Attorney for the Respondents.

STATE OF NEW YORK, }
 COUNTY OF ONTARIO, } ss.:

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James A. Robson, being duly sworn, says that he is the attorney for the defendant and appellant in this action. That as deponent is informed, and verily believes to be true, no opinion was written or delivered by Justice Wm. E. Werner in rendering his decision herein, 941 other than the decision as hereinbefore set forth.

JAMES A. ROBSON.

Sworn to before me this 28th day of January, 1896.

JOHN S. ANDREWS,
 Notary Public.

942

STATE OF NEW YORK, }
 Ontario County Clerk's Office, } ss.:
 Canandaigua, N. Y.

I, Frederick R. Hoag, Clerk of the County of Ontario, in the County Court of said county, and of the Supreme Court, both being Courts of record, having a common seal, do hereby certify 943 that I have compared the annexed copies of notice of motion, moving affidavits, petition, notice of presentation, summons, complaint, injunction order, affidavits, undertaking on injunction, order vacating injunction, order to show cause, affidavit, order denying motion on return of order to show cause, notice of appeal there- 944 from, answer, petition in summary proceedings, precept, affidavits, order for writ of prohibition, writ of prohibition, affidavits, answer, return to

945 writ of prohibition, affidavits annexed thereto,
return, affidavits controverting the same, decision
of the Court, and orders thereon, affidavit, and
notice of appeal, with the originals filed in this
office, and the same are correct copies thereof
and of the whole of said originals.

In witness whereof, I have hereunto set my
946 hand and fixed the seal of said county and said
courts, this 21 day of February, 1896.

(L. S.) *Wm. G. Lightfoot*
Dep. Clerk.

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SUPREME COURT.

STATE OF NEW YORK,

APPELLATE DIVISION, FOURTH DEPARTMENT.

SUPREME COURT—ONTARIO COUNTY.

VILLAGE OF CANANDAIGUA, BY CHARLES F. ROBERTSON, ET AL, constituting the Board of Water Commissioners of said Village,

Respondents,

Against

ROBERT M. BENEDICT, impleaded, etc.,

Appellants.

Statement of Points for Appellant.

This is an appeal by the defendant Robert M. Benedict from an order made herein on the 13th

day of August, 1895, at a Special Term, as settled by an order made at the Special Term held on the 7th day of September, 1895, which order granted a motion made by the plaintiffs in condemnation proceedings, on application under the provisions of Section 3379 of the Code of Civil Procedure, and authorizing the plaintiffs to continue in possession of the premises described in the petition herein during the pendency of the proceedings, and staying all proceedings on the part of the said defendant in certain actions brought, and proceedings instituted by him, as will more particularly hereinafter appear.

STATEMENT.

The plaintiff herein by its Board of Water Commissioners in the spring of 1895, commenced the construction of a system of water works in the village of Canandaigua, which consisted of a power house erected at the foot of Main street in said village, from which power was to be furnished to the pumping station on the west shore of Canandaigua Lake, about three and one-half miles distant (by electricity generated at the power house), transmitted by means of a pole line erected along and upon the public highway, known as the Lake Shore road. According to the plan of construction water was to be there taken from the lake and pumped into a reservoir erected about 320 feet above the level of the lake, 350 feet distant therefrom, and the water from the reservoir was to be distributed by gravity pressure through iron pipes and mains to be

laid from the reservoir and pumping station through and along said Lake Shore road, and thence through and along the public streets of said village. The pole line was to be constructed in the usual way of constructing telegraph and telephone poles, with cross-trees attached thereto. The line of mains was to consist of a twelve-inch pipe to be buried in the ground along the highway, following the contour of the same, to be laid along the side of said highway out of the beaten line of travel, the pipe to be buried at an average depth of five feet and eight inches. The said highway is about four rods in width, and running in a northerly direction from the pumping station, along or near the westerly shore of Canandaigua Lake to said village. (Fols. 108-117).

The defendant has been for many years the owner of a farm of about 134 acres, the location of which is especially desirable and made valuable by reason of its being adjacent to the shores of Canandaigua Lake, and with its attractive surroundings affording a desirable view and outlook, and which he has occupied as a home and residence, and through which runs this highway (in and along which the plaintiffs determined to place the water mains and pole line) for about half a mile in length and four rods in width. That he is the owner of the whole of said highway, which passes through his premises, subject only to the easement of the public therein as a public highway. (Fols. 192-195).

After the making of the contract by the plaintiffs for the construction of said system of water

works, the defendant had a conversation with one of the members of the Board of Water Commissioners as to the terms and conditions upon which he would consent that the plaintiff should construct their pipe line through his premises. That subsequently the defendant's proposition was rejected by said Water Commissioners, and he has not granted any right, privilege or permission to the plaintiffs, or either of them, to enter upon the highway and lay their pipes, or locate, or erect their pole line. (Fols. 196-201).

On the 5th day of June, 1895, on the verified complaint of said defendant, and the accompanying affidavits setting forth in substance the facts so detailed, Justice William E. Werner granted an injunction order *pendente lite* enjoining and restraining the plaintiffs herein, and the contractors, together with their servants, agents and employees from entering upon the premises of the defendant, or upon that part of the highway above referred to, for the purpose of laying or constructing any pipe, or water mains, or digging or excavating any trench for the same, or digging any hole for the erection of said pole line, or erecting the same through said premises of this defendant, until the further order of this Court. (Fols. 225-240).

On the 11th day of June, 1895, upon an *ex parte* application of the plaintiffs herein, by their counsel, Justice Werner vacated the said preliminary injunction order granted by him on the 5th day of June, 1895. (Fols. 301-307).

On the 13th of June, 1895, upon the application of the defendant, by his attorney, said Jus-

tice Werner granted an order requiring the plaintiff to show cause before him on the 14th day of June, 1895, why an order should not be made vacating and setting aside the order made by him on the 11th day of June, vacating the injunction order granted by him on the 5th day of June, 1895. (Fols. 308-313).

On the 15th of June, 1895, the parties hereto appeared before Justice Werner. The motion to vacate the order of June 11, which vacated the injunction order of June 5, was denied by said Justice, upon condition that the plaintiffs herein execute a bond to the defendant in the sum of five thousand dollars, conditioned to pay such award as might be made to him in proceedings for condemnation of the right of way, and the defendant herein having asked that the injunction order be restored specifically as to the erection of the pole line, and stringing of the wires of the plaintiffs across the defendant's premises. That motion was also denied. (Fols. 332-342).

The defendant then appealed from last mentioned order. (Fol. 343).

The plaintiffs herein thereafter made and served their answer to the defendant's complaint in that action. (Fols. 348-358).

Prior to the 22d of June the plaintiffs having located and erected their pole line, both north and south of the defendant's premises, on the morning of that day, this defendant with his employees, James A. Cavan, Julian A. Van Wie and John Boyle, were on the highway in question in front of the defendant's premises,

near a point where the contractors were erecting a pole just south of the defendant's premises. The defendant, and his employees stationed themselves upon the line of defendant's premises when Charles F. Robertson, Mack S. Smith and John H. Kelly, three of the plaintiffs' Board of Water Commissioners, came to the place where the defendant was standing, and had some conversation with the defendant in regard to erecting the pole, in which the defendant stated to them that he would resist their planting poles upon his premises, as it was an illegal act, and a trespass, and after some conversation concerning this, the defendant informed them that he should resist their planting the poles, whereupon Robertson pulled off his coat, jumped from the wagon, and said in an excited manner: "I will take charge of this matter," and further said that any assault, even as much as a push, would be prosecuted to the full extent of the law, and called upon the contractors to bring up their men. Robertson then asked the defendant how he proposed to resist; defendant replied, that he would resist their digging holes and placing the poles. Meanwhile the contractor had brought up his men, some fifteen in number, who were all armed with either shovels or iron bars, entered upon the premises of defendant, and began, under the direction of Robertson and the contractor, the proposed location of the holes in which the poles were to be placed. Defendant then directed his employees, as soon as a place for digging a hole was located, to stand upon that place and prevent their digging; that

the employees of such contractors began digging in a number of places, and defendant's employees stationed themselves, one at each hole to prevent the digging. Notwithstanding the efforts of the employees of defendant, the employees of said contractors continued to dig under the direction of the said members of the Board of Water Commissioners, and when they completed digging the first hole, a pole having meanwhile been brought, Robertson called for men to help raise the pole. Defendant directed his employees to prevent their raising it, and defendant's employees took hold of the pole, and clung thereto, which prevented the employees of the contractors from raising it. Robertson then called for more men to come and help raise the pole, a number of men came running to their assistance and succeeded in raising it in spite of the opposing efforts of the defendant's employees. Defendant then concluding that a further resistance would unavoidably result in a breach of the peace, and possible bloodshed, withdrew the said employees, and the poles were erected under the personal direction of the Water Commissioners, who continued in their work, not even stopping for dinner, and before the defendant could rally sufficient force to overcome the multitude engaged in the erection of the said pole line, the erection thereof was completed. That upwards of one hundred employees of the Board of Water Commissioners, or their contractors, were during all this time within call, a large body of whom was summoned and came upon deponent's premises to

help in the erection of these poles, as the defendant and his said employees ceased resistance and retired. (Fols. 599-618).

These facts are corroborated by the affidavits of James A. Cavan (Fols 625-653), Julian A. Van Wie (Fols. 655-688), and John Boyle (Fols. 670-683), and are no where disputed or contradicted by the plaintiffs, or even referred to in the petition and moving affidavit for the order herein appealed from, nor in the affidavits made by the plaintiffs in any of the proceedings subsequent to said transaction.

No steps whatever had then been taken by the Commissioners for the condemnation of the rights which they sought to possess themselves of by violence.

On the first day of July, 1895, the defendant herein presented to J. H. Metcalf, County Judge of Ontario county, a petition in summary proceedings setting forth the facts of a forcible entry and detainer, as provided by Section 2233 of the Code of Civil Procedure, as hereinbefore related, as to the action of the plaintiffs, and their employees entering upon the premises of the defendant on the 22d day of June, 1895, and stating that in an unlawful manner, and against the will of said petitioner they made an unlawful and forcible entry in and upon the premises of the petitioner, and prayed for the issuing of a precept against the said plaintiffs directing them to show cause, as provided by the statute why they should not be summarily removed therefrom.

That on the first of July, 1895, when the said

petition was presented to the County Judge of Ontario county, who was then holding court, and Hon. S. S. Taylor, County Judge of Chemung county, was then present, at the request of the County Judge of Ontario County, pursuant to Section 15, Article 6 of the Constitution, for the purpose of holding said Court, the County Judge of Ontario county referred the said petition of the defendant herein to the County Judge of Chemung county, and requested him to act in the matter, as authorized by Chapter 11 of the Laws of 1877, as the County Judge of Ontario county was disqualified from acting therein. (Fols. 533-535).

That thereupon the County Judge of Chemung county, as acting County Judge of Ontario county, issued a precept to the plaintiffs herein, constituting the Board of Water Commissioners and to the contractors acting under them, to remove from the premises, or show cause before him, pursuant to the statute in such case made and provided, on the 5th of July, 1895, at 2 o'clock P. M. (Fols. 492-505).

That on the 5th day of July, 1895, upon the the affidavit of Charles F. Robertson, Justice Davy, at a Special Term of this Court, granted an alternative writ of prohibition commanding the County Judge of Chemung County, and this defendant to desist and refrain from taking any action whatever, or proceeding in the said summary proceedings so instituted as aforesaid, and directing that the said writ be returnable at a Special Term of this Court, on the 29th day of July, 1895. (Fols. 535-544).

Proceedings by petition and notice of presentation thereof were on or about the 16th day of July, 1896, instituted by the plaintiffs herein in the above entitled action to obtain the condemnation of the rights and interests in the property of the defendant which they sought.

That subsequently upon the moving affidavits herein and upon all the proceedings had, and papers served in the above named actions and proceedings, the plaintiff applied to the Special Term of this Court, held on the 29th day of July, 1895, which time the said writ of prohibition and the application upon the petition were returnable, for the order which was then granted, and which the defendant herein appeals (Fols. 915-933).

No appeal has been taken by either party from decision on the prohibition proceedings.

The memorandum decision of Justice Werner upon this motion is at folios 870-882.

Points.

FIRST.

The plaintiffs are not entitled to the relief asked for in their motion, as their entry upon the defendant's land was unlawful and tortious.

Section 3379 of the Code of Civil Procedure provides: "At any stage of the proceeding the Court may authorize the plaintiff, if in possession of the premises sought to be condemn-

“ed, to continue in possession, and may stay all
 “actions, or proceedings against him on account
 “thereof, upon giving security, etc.”

It was under this section of the Code that the plaintiffs sought the relief of the Court.

The Court of Appeals in *re S. L. & D. R. R. Co.* 133 N. Y. 270, where an application had been made and an order granted under this section of the Code, the Special Term having continued the plaintiff in possession after condemnation proceedings were instituted, reversed the order at Special Term, and in delivering the Opinion Judge Andrews at page 274 says :

“The circumstances under which the railroad
 “company entered into possession, as disclosed
 “in the affidavits presented to the Special Term,
 “leave no room to doubt that the entry was tor-
 “tious, under no claim or pretense of right, and
 “before any proceedings were instituted to ac-
 “quire the title by condemnation, and in defi-
 “ance of the will of the true owner * * * * The
 “company having taken possession by a pure
 “trespass, proceeded to construct its road-bed
 “across the lands in question, cutting down and
 “clearing away the trees and timber thereon,
 “and was so engaged when it for the first time
 “sought the intervention of the Court.

“The only justification for this violation of
 “the right of property suggested in the moving
 “papers, is that the lands were unoccupied, un-
 “improved forest lands, in the Adirondack wil-
 “derness, and that on searching the record tit-

"tle, the attorneys for the company had been
 "unable to ascertain in whom the title was vest-
 "ed, and further, that the public interests re-
 "quired a prompt and vigorous prosecution of
 "the enterprise and would suffer detriment from
 "delay. * * * * It must be regarded as an es-
 "tablished fact that the possession which the
 "plaintiff asserted in the moving papers origina-
 "ted in a trespass, known to the company to
 "have been such, and was taken under no mis-
 "take or misapprehension, and without color of
 "authority. We entertain no doubt that under
 "these circumstances the company was not,
 "when the motion was made, in possession of
 "the property sought to be condemned, within
 "the true meaning of section 3379, above quot-
 "ed, and that the case presented did not author-
 "ize the order granted."

Judge Andrews continuing, after speaking
 of section 21 of the general railroad act, under
 which possession was, under certain circum-
 stances awarded, further says :

"Section 3379, has, it is true, a broader
 "scope. It is not limited to cases of defective
 "title, Its language covers any case where the
 "company may be in possession when the con-
 "demnation proceedings are instituted, wheth-
 "er it has before attempted to acquire title or
 "not. But it would be unreasonable to sup-
 "pose that the legislature intended to legalize
 "a pure and intentional trespass, or to protect
 "a company in a possession so acquired.
 "Such a construction would offer a premium

“for disorder, and for acquiring possession of
 “the property to another by stealth, force or
 “fraud, and would attribute to the legislature
 “an intention to legalize the commission of
 “wrong, and deprive the party injured of the
 “right to resort to the courts for redress. It is
 “not difficult to imagine cases where a com-
 “pany may be in possession under a color of
 “claim, or have acquired possession in good
 “faith, although technically a trespasser with-
 “out title. To such cases only, we are per-
 “suaded, was the statute intended to apply.
 “The plea of public necessity set out in the
 “moving papers, even if well founded, is enti-
 “tled to no weight in support of the construc-
 “of section 3379, claimed by the company.
 “This has ever been the ready and common
 “argument to justify usurpation of authority
 “inconsistent with private rights.”

The facts shown by the defendant's affidavits clearly establish that the entry of the plaintiffs into the possession of the premises sought to be condemned, was forcible and in opposition to the protest of the defendant, and his agents, and before any proceedings had been instituted by the plaintiffs to permit them to legally acquire the right to enter the premises.

The plaintiffs are bound by the statement of facts alleged in their petition herein which fixes the date of their entry on the defendant's premises as after the 10th day of June, 1895, the day of filing the map.

It is impossible to reconcile these facts in the

petition with the sworn statements made by some of the plaintiff commissioners in the moving affidavits, as to the time when they claimed to have entered into the possession of these premises.

Chapter 181 of the Laws of 1875, is the Village Water Works Act, under which the plaintiffs were constructing their works. Section 5 of that act provides : “ Before entering upon, “ detaining, taking, developing or using any “ lands, streams, or water, or rights therein for “ the purposes of said act, said water commis- “ sioners shall cause a survey and map to be “ made of the lands, water or streams intended “ to be taken, diverted or affected, or in which “ a right is intended to be taken for any of “ said purposes, on which map, the lands, “ streams, or water of each owner, or occupant, “ shall be designated, and which map shall be “ signed by the President of the Board of Wa- “ ter Commissioners, and their said Secretary, “ and be filed in the office of the County Clerk “ of the county, or counties in which said lands, “ streams, or water are situated ; they shall “ also, in all cases, by an order made by them, “ and signed by said President and Secretary, “ to be attached to, and filed with said map, de- “ scribe the lands, streams or water, and the “ title and interest therein, which they intend “ to acquire for the purposes of such improve- “ ment.”

In the petition in this action, verified by Mr.

Charles F. Robertson, at folio 133, he testifies :

“ That before entering upon, detaining, taking or using said highway, premises or soil for the purpose above stated, the said Board of Water Commissioners caused a survey and map to be made of the lands intended to be taken for any of the said purposes, on which map the lands of each owner or occupant, including the said defendant, Robert M. Benedict, was designated, and which map was signed by the President of said Board of Water Commissioners, and by their Secretary, and was filed in the office of the County Clerk of Ontario county on the 10th day of June, 1895.”

In the accompanying moving affidavit of the plaintiffs' counsel, Thomas H. Bennett, at folio 21, he testifies :

“ That on about the 15th day of May last past the said Board of Water Commissioners, at a regular meeting, by resolution duly passed and entered of record in their minutes, specially charged this deponent with the duty of procuring all rights of way. * * * That deponent promptly acting in pursuance of such instruction caused the necessary deeds for such instruments and easements to be prepared and made ready for execution, and also caused Walter F. Randall, Esq., the consulting engineer of said board, having charge of the construction of said water works, to prepare the statutory map, showing how and in

“ what manner, and to what extent, the lands
 “ of each owner along said trench and pole line
 “ would be affected thereby, and to have the
 “ same in readiness for filing in case of failure
 “ to acquire the necessary easements by pur-
 “ chase.”

It appears from this that by the plaintiffs' own showing the date of entry was subsequent to the filing of the map, which was on the 10th of June, but in the moving affidavits, sworn to by the Commissioners Robertson and Smith, Robertson being the same person who verified the petition, and testified as hereinbefore stated, they state at folios 86-88, as follows :

“ That since the said month of April, 1895, the
 “ said Board has been in the actual, lawful and
 “ peaceable possession of the premises of which
 “ condemnation is sought in this proceeding,
 “ for all the uses and purposes of said Statute ;
 “ that at no time since the said board so depos-
 “ ited said iron pipes along the said highway,
 “ has it, or its agents, servants, employees, or
 “ contractors, or any other persons in its behalf,
 “ held possession of the said highway or prem-
 “ ises or soil thereunder by force, or violence,
 “ or with the show of either, but on the contra-
 “ ry thereof all that has been done in or about
 “ the construction of said pipe or trench line,
 “ or in or about the erection or construction
 “ of said pole line has been in all respects law-
 “ fully and peaceably done.”

The opposing affidavits coincide with the first

quoted statements of the plaintiffs, and make the date of entry June 22, which was done in the manner described by the defendant, (fols. 599-618), James A. Cavan, (fols. 635-653), Julian A. Van Wie, (fols. 660-667), and John Boyle, (fols. 675-683).

The facts as so detailed in these opposing affidavits are not contradicted, or disputed, in a single particular by the plaintiffs, and they clearly establish that the entry of the plaintiffs was forcible, and possession was acquired by violence and by a multitude of people.

Section 2233 of the Code of Civil Procedure provides: "An entry shall not be made "into real property but in a case where entry "is given by law, and in such a case only in a "peaceable manner, not with a strong hand, "nor with multitude of people."

Attention is directed to the astonishing recklessness with which the plaintiffs testified to contradictory facts within their own knowledge, in one instance swearing that they filed the map before entering upon the premises, and taking possession of the same, and that map was filed on the 10th of June, 1895, and within a few days after swearing with the same unre-served emphasis that since the month of April the plaintiffs have been in the actual, lawful and peaceable possession of these premises. No other criticism of this remarkable conduct is needed than to say that the exigencies of their case, and their determination to bring

themselves within the requirements of section 5 of the Water Works Act, which required that it should be shown before they entered into the possession of the premises, they had filed their map, and the requirements of section 3379, which necessitated that they should show that they were legally in possession of the premises demanded, that they should mold the facts to meet the law.

But it is enough to say that their double-sided emergency swearing does not relieve them from the false position that they are placed in, or permit this court to grant them their desired relief, which is neither warranted by the law, or the facts of the case.

By their own showing, which ever time their entry was, it was illegal. If it was on the 22d of June, then it was a forcible entry, as forbidden by law; if they entered in the month of April, it was also illegal, as the map as required by the statute was not filed by them until the 10th of June.

The mandatory provision of section 5 of the Water Works Act, above quoted, prohibits their so entering upon said premises until the map and order have been filed, as required.

Whichever day they did enter, it was an unlawful act in defiance of the defendant's rights, and that from that time they have been wilful trespassers upon the defendant's premises.

The stringing by the plaintiffs of their pipes along the surface of the highway through the defendant's premises in April, is not an entry for the erection of a pole line. The defendant

did not intend, and never intended, to contest the construction of a pipe line through his premises, provided the plaintiffs proceeded legally, nor would he have raised a single obstacle to the plaintiffs going through his premises if they had put their wires under ground, which the statute unquestionably gives them the power to do. The undisputed facts show that no entry whatever was made for the purpose of erecting the poles, or pole line, until it was accomplished in the forcible manner, and with a multitude of people on the 22d of June.

How is it possible to distinguish this case from the one we have quoted in 133 N. Y., and to ignore what Judge Andrews there says about attempting to legalize a pure and intentional trespass, or to protect the possession so acquired, under the plea of public necessity ?

SECOND.

The statute does not give the plaintiff the right to erect a pole line, and they cannot acquire that right by condemnation proceedings.

The plaintiffs cannot acquire by condemnation proceedings any greater rights than given them by the statutes under which they act.

City of Syracuse vs. Benedict, 86 Hun.,
343.

The only section of the statute which gives

the plaintiffs any right to acquire the relief asked for in the petition herein, is section 12 of Chapter 181 of the Laws of 1875. The portion of this section granting this right, is as follows:

“The said commissioners, and all acting under their authority, shall have the right to use the ground or soil under the street, highway, or road within the county in which such village is situated for the purpose of introducing water into or through any and all portions of said village on condition that they shall cause the surface of said street, highway or road to be re-laid or restored to its usual state, and all damages done thereto to be repaired, and such rights shall be continuous for the purpose of repairing and relaying water pipes upon like conditions.”

The Trial Court in its decision at folio 872, uses the portions of section 12, above quoted, and adds thereto, “But also to adopt such plans as in their opinion may be most feasible for procuring such supply of water,” and concludes, “The quoted portion of said section is held to be broad enough to give said Board of Water Commissioners the right to use electricity as a transmitting power, and for that purpose to erect the necessary pole and wires.”

The last quoted words which the court says is a portion of section 12, and is broad enough to give the Board of Water Commissioners this right, are not a part of section 12, as he states, but are found in section 4 of the act which de-

tails the duty of the commissioners in examining and considering the question of supplying the village with water, employment of engineers, adoption of plan, and defining what such plans shall embrace, and giving them general powers to contract and purchase by deed, or other instruments, lands, streams, water rights, etc.

It is manifestly unfair in a case calling for a legal construction of a statute, to insert into one section words and phrases which are used for another purpose, with a different meaning and other intent in another section of the statute under consideration, thereby attempting to give to the statute another construction, and different sense and meaning than could have been intended, or can be construed from a careful reading of it.

Section 12 alone defines the rights of the Commissioners to use the streets and highways in the county in which the village is located, and no where in the act can be found any other authority empowering them to acquire such right, and it is only under this section that they are permitted to invoke the power of eminent domain. Certainly the Board of Water Commissioners are not possessed of any greater, or further rights, than are granted to them by the statute, of which they themselves are the creatures. Their assumption of such rights is not a legal authority, although they have evidently presumed that it was. They have sought

to assume a power, and to grasp the rights and privileges owned by this defendant, thus totally ignoring the defendant's rights, and taking unto themselves privileges which the statute did not contemplate.

This right is, as the statute says: "The right to use the ground, or soil, *under* any street, highway, or road within the county in which the said village is situated upon like conditions."

This right to use the soil "*under the street, etc.,*" is limited by the express condition that they shall cause the surface of such highway, or road, to be *re-laid* and *restored* to its usual state, and then follows, "And such right shall be "continuous for the purpose of repairing and "relaying *water pipes* upon like conditions."

These last quoted words are a limitation upon the limited grant extended by the statute. Upon this limited grant so extended by the statute no other force, effect or construction can be given.

No where in the statute can be found any rights, or privileges granting, or extending to these plaintiffs a right to construct the obnoxious pole line, as set forth in the petition herein.

This statutory right of the plaintiffs to take the defendant's land for a public use, requires

a strict construction. This rule is well recognized by a long line of authorities.

Lewis on Eminent Domain, Section 238.
 City of Syracuse vs. Benedict, 86 Hun.,
 343.
 In re Poughkeepsie Bridge Co., 108
 N. Y., 483.

This rule is well stated by Judge Andrews in the latter case at page 490 :

“The power of eminent domain which resides
 “in the state as an attribute of sovereignty, is
 “nevertheless dormant until called into exer-
 “cise by an act of the legislature. Until a
 “statute authorizes an exercise of the power, it
 “is latent and potential merely, and not active or
 “efficient, and the state can neither exercise the
 “prerogative, nor can it delegate its exercise,
 “except through the medium of legislation.
 “Therefore it is that wherever an attempt is
 “made either by the officers of the state or by
 “a corporation organized for a public purpose
 “to take private property under the power of
 “eminent domain, the officer or body claiming
 “the right must be able to point to a statute
 “conferring it. In the absence of statutory au-
 “thority private property cannot be invaded by
 “this power, however strong may be the rea-
 “sons for the appropriation. In construing
 “statutes which are claimed to authorize the
 “exercise of the power of eminent domain,
 “a strict rather than liberal construction is the
 “rule. Such statutes assume to call into ac-

“tive operation a power which, however essen-
 “ tial to the existence of the government, is in
 “ derogation of the ordinary rights of private
 “ ownership and of the control which an owner
 “ usually has of his property.”

It is absurd to contend that the limitations of the original grant, as contained in section 12, can be extended beyond its limitations by the words quoted by the Trial Court, and taken from section 4 of the act.

This principle is well illustrated in *People ex rel Third Avenue Railroad Company vs. John Newton*, 112 N. Y., 396.

This case involved an application for a writ of mandamus to compel the commissioner of public works to grant a right to open and excavate in the streets to permit the construction of a cable railroad under their tracks, which were laid as a street railroad, held that the relator was not entitled to a mandamus directing the granting of such a permit, and that it acquired neither by its charter, nor subsequent confirmatory acts of the legislature a right to excavate, or use below the existing surface of the street, save for the temporary purpose of laying its tracks, and for necessary repairs thereof, and that the permit was properly refused.

Judge Dantforth at page 404 says :

“ A demand so extraordinary and subversive
 “ of necessary municipal control should be

“ yielded to only when required by the explicit
 “ direction of the legislature. We are referred
 “ to none. On the contrary the streets in the
 “ city of New York are so regulated and controll-
 “ ed by statute that the fee is in the corporation
 “ of the city, in trust indeed, that the same be
 “ kept open for the public. But subject to that
 “ obligation and the easement belonging to the
 “ abutting owner, it can be deprived of no use
 “ of its surface, or the soil beneath, or the air
 “ above it save by the action of the legislature,
 “ or by its own consent, and may retain the ex-
 “ clusive use and have protection against inter-
 “ ference with either *to the same extent that a pri-
 “ vate person might if he owned the fee.* But if the
 “ appellant’s claim is good this is all lost. If
 “ the relator may occupy so much of the
 “ space under the surface of the street as is
 “ now required, why may it not occupy the same
 “ depth under the entire surface of the street
 “ from curbstone to curbstone, nay, even to the
 “ inner edge of the sidewalk, and, if to the
 “ depth now claimed why not still deeper, to the
 “ entire exclusion of its use for the various pur-
 “ poses to which the city authorities now in
 “ fact apply to the streets, and such other pur-
 “ poses as the necessities of the city demand,
 “ and the invention of its people supplied, and
 “ thus the grant of an easement upon the sur-
 “ face of the street be so expanded as to take in
 “ whatever may be below its surface.”

The grant by the legislature to the Board of
 Water Commissioners to construct their system

of water works must be confined to the use of the soil *under* the highway subject to the limitations imposed by section 12, and this must be strictly construed. Judge Dantforth in his opinion in the case last above cited at page 399, further says :

“The terms of the grant conferring the right which is asserted are to be strictly construed, and the privileges it confers cannot be extended by inference; if there is any ambiguity, it must operate against the company, the general rule being that the grant shall be construed most strongly against the party claiming under it, and every reasonable doubt resolved adversely to it. Nothing is to be taken as conceded but what is given in unmistakable terms; and as was said in *Langdon v. Mayor*, 93 N. Y., 145, whatever is not unequivocally granted is deemed to be withheld, nothing passing by implication. The affirmative must be shown.”

It will be remembered that this section of the statute providing for the construction of village water works was passed in the year 1875. At that time this novel method of transmitting power by electricity conducted in the manner proposed by the defendants was never dreamed of. It could not therefore have been within the contemplation of the legislature in passing this statute that such a right to erect such a structure was to be given to the commissioners.

The authority “To use the ground or soil

under any street, highway or road within the county" is a restriction upon the manner in which they shall use the highway, and certainly prevents the erection of any pole line thereon. If said pole line was constructed in the street, or highway, it would be impossible for them to comply with the condition which is, "That they shall cause the surface of said street, highway or road to be re-laid and restored to its *usual state*, and all damages done thereto to be repaired."

The poles and wires will remain obstacles in the highway after their erection, preventing the restoration required by the statute.

If these words, "They shall adopt such plans as in their opinion may be most feasible," are construed to give them additional powers as to the use of the highways, as provided by Section 12, and exempts them from the limitations contained in that section, then they have the right to appropriate as much of the highways as they choose; they could build a viaduct, could erect a high board fence on each side of their pipe line, or make any other appropriation of the public highways of the county, "As in *their* opinion may be most feasible."

The distinction between this requirement of absolute restoration, and the provisions of section 12 of the railroad law which requires railroads to restore the highway "To such state as not unnecessarily to have impaired its usefulness," is significant, clearly showing that in the latter case it contemplates a structure above, along, or upon the highway, while in the form-

er case it requires the surface to be restored "To its usual state," thus prohibiting any structure above ground.

The legislature cannot impose any greater burden upon a country highway without the consent of, or compensation to, the owner of the fee, and the right of the public is merely a right of passage, and the fee of the land remains in the owner for all other purposes.

Bloomfield Gas Company vs. Caulkins,
62 N. Y., 386.

Eels vs. American Telephone & Telegraph Co., 143 N. Y., 133.

A village has no greater authority or right to take and use a public highway for any purpose, than would a private corporation.

Van Brunt vs. Town of Flatbush, 128
N. Y., 50.

THIRD.

The plaintiffs have no right to the possession of the premises under the condemnation clause of the Village Water Works Act.

Section 5 of said act provides for the survey and maps to be made, etc., and concludes with the following provision :

“ At any time within one year after the filing
 “ of any such map and order, or amended map
 “ and order, said water commissioners may take
 “ possession of said lands, streams or water, or
 “ have the right, title or interests therein intend-
 “ ed to be taken, as specified in said order, or
 “ amended order, or of any part thereof, and use
 “ the same for the purposes of such improvement
 “ without any suit, or proceeding at law, provid-
 “ ed, however, that within the time last afore-
 “ said they shall, if they do not agree with the
 “ owner, or owners thereof as to the compensa-
 “ tion to be paid therefor, commence proceedings
 “ provided in the next section to acquire said
 “ title.”

Section 6 provides for the practice and manner in which lands may be acquired if the commissioners are unable to agree for the purchase of the same.

This whole procedure for the condemnation of said rights has been expressly repealed by Chapter 23 of the Code of Civil Procedure which was enacted by Chapter 95 of the Laws of 1890, and known as the condemnation law.

Section 3383 Code of Civil Procedure.
 City of Syracuse vs. Stacy 86 Hun., 441.

This condemnation law expressly repeals the provisions of the Water Works Act, and so much of section 5 of that statute, which permits the commissioners to take possession of the prem-

ises and institute the proceedings of condemnation provided by the statute within one year thereafter.

Section 5 cannot stand alone, as the subsequent provisions having been expressly repealed, it is in no way analogous or conformatory to the procedure and practice provided by the present condemnation law, which by itself expressly provides the manner whereby possession may be awarded, or continued after condemnation proceeding had been instituted.

Sections 3379 and 3380 Code of Civil Procedure.

Under these sections of the Code the possession can only be awarded after the proceedings are instituted, and the right to such possession is determined and controlled by the Court upon the application of the parties.

The plaintiffs have recognized that these provisions of the Water Works Act have been repealed, as they instituted their proceedings under the Code of Civil Procedure, and made their application to be allowed to continue in possession of the premises under section 3379.

IN CONCLUSION.

The Court had not the right to award the possession of the premises sought to be acquired :

First. Their possession was illegal and tortious.

Second. The statute does not authorize the proceedings instituted.

For these reasons the order appealed from should be vacated with costs.

J. A. ROBSON,
Attorney for plaintiff.

J. H. METCALF,
Of Counsel.

Supreme Court.

Appellate Division,
Fourth Department.

VILLAGE OF CANANDAIGUA, BY CHARLES
F. ROBERTSON AND OTHERS, CONSTITUTING
THE BOARD OF WATER COMMISSIONERS OF SAID
VILLAGE,

Respondent,

against

ROBERT M. BENEDICT, IMPLEADED, &C.,
Appellant.

Points and Brief for Plaintiff and Respondent.

Appeal from an order of the Special Term, granted in condemnation proceedings under Section 3,379 of the Code of Civil Procedure, authorizing the plaintiff to continue in possession of the property sought to be condemned, and staying certain proceedings instituted by the defendant, Benedict, against the plaintiff, on account of such possession.

The order appealed from was dated the 13th of August, 1895, and was re-settled on the 7th of September, 1895, and as re-settled appears in the appeal book at fols. 891 to 912.

Facts.

The plaintiff is a municipal corporation, situate in the town of Canandaigua and County of Ontario, (App. Book, fol. 98.) On or about the 21st of December, 1894, the above-named Charles F. Robertson and others were appointed a Board of Water Commissioners in and for said village, pursuant to the provisions of Chap. 181 of the Laws of 1875, and the acts amendatory thereof (fols. 102-5.) Shortly after their appointment, said Board, after due consideration of all matters relating to supplying said village and its inhabitants with pure and wholesome water, adopted a plan and specifications for the construction of a system of water works for said village, as authorized and directed by said acts (Fols. 107-8.) The plan adopted was the most feasible in the opinion of the Board for procuring such supply of water (Id.) The plan (which is described in detail at fols. 108 to 117 of the appeal book) involved the transmission of power by electricity from a power-house at the foot of Main Street in said village to a pumping station on the west shore of Canandaigua Lake, about three and one-half miles distant, such power to be transmitted by means of a line of wire, erected on poles along a public highway in said town, running in a northerly direction, near the west shore of Canandaigua Lake, and known as the Lake Shore Road

(fols. 108-9.) The plan also involved the distribution of water from a reservoir, to be constructed near the pumping station, through iron pipes, to be laid from said reservoir and pumping station along said road to the streets of said village, said pipes to be buried in the ground along said road at an average depth of five feet, eight inches, with the surface of such pipe line or trench fully restored to its usual state (fols 110, 113-14.) The right to enter upon said highway, and to dig a trench there, and lay in it suitable pipes, and to erect and maintain there suitable poles and wires is indispensably necessary for the use of said municipal corporation as a part of said system of water supply (fols. 121-133.) The portion of said highway, which is so needed to be occupied by the plaintiff, is about 9,257 feet in length (fol. 22,) and it passes through the lands of several different owners, including a farm owned and occupied by the defendant, Benedict, which contains about 134 acres, and across which said highway extends for a distance of 1,017 feet (fol. 116.) The highway is about four rods wide (fol. 115.) The strip taken is on the easterly side of the highway (fol. 119,) outside of the beaten track of travel (fols. 111, 113) is twenty feet in width (fol. 119,) and the poles for the line of wire are erected within the easterly ten feet of said strip (fol. 120.) at intervals of about one hundred and ten feet from each other (fols. 111, 120,) and with especial reference to doing the least possible damage or injury to Benedict's premises or to the use thereof (fol. 90.)

The consent of the Commissioners of Highways of the town of Canandaigua was obtained for said Board to enter upon the premises covered by

said highway, and to use the soil there for the purposes aforesaid (fol. 81,) and, thereupon, the Board entered upon the premises along said highway, and caused the iron pipes for said water mains to be distributed along said highway, upon the surface of the premises covered by said highway, including the premises of said Benedict. That was done in April, 1895 (fol. 82.) Benedict made no objection to such entry and such use of his premises (Id.) Such entry, possession, and occupancy were peaceable, and without the use of force or violence (fols. 86 to 91.) Afterwards, and while the Board and its attorney were negotiating with the several owners of the lands covered by said portion of the highway, including said Benedict (fol. 28; 74 to 80,) for the purpose of obtaining the interests of such owners by purchase, if practicable, without resorting to condemnation proceedings, said Benedict commenced an action in this Court against the individuals constituting said Board and their contractors, praying that they be restrained from entering upon the premises of said Benedict, the highway aforesaid, and from laying water mains or digging a trench or holes for the erection of a pole line, or erecting the same thereon. On the 5th of June, upon an *ex parte* application in such action, Benedict obtained an injunction order to that effect (fols. 32-34.) June 11th, on motion of the defendants therein, said order was vacated, *ex parte*, by the Judge who granted it (fol. 302,) and on June 15th, the Special Term, presided over by the same Judge, denied a motion made on the part of Benedict, on notice, to set aside the *vacatur* (fol. 332.) The fact that the Board had previously placed their pipes upon said highway, the whole extent thereof,

through the premises of Benedict, was alleged in said complaint (fol. 201,) and also in an affidavit read upon the application for said injunction (fol. 281,) and neither the complaint nor the affidavit referred to alleged that the action of the Board in so placing the pipes was with force and violence, or without Benedict's consent. Thereafter, at all times, the Board remained in the actual possession and occupancy of the said premise, and used the soil under said highway from time to time, as became necessary in the progress of the work of constructing said system of water-works, for the purposes aforesaid (fol. 84,) and, in time, excavated the trench line and laid and buried the pipes therein without objection by Benedict, he having withdrawn all opposition thereto, after having failed to secure an injunction order in said action (fol. 89.) And said continued possession and occupancy were peaceable, and without the use of force or violence (fols. 86 to 91.)

As a condition of denying Benedict's motion to set aside the *vacatur*, the order required the Village to execute its bond to Benedict in the sum of five thousand dollars, conditioned to pay him any sum that might be awarded against the Village in proceedings to condemn the required right in Benedict's premises covered by said highway; and a bond in accordance with said order was executed and delivered to Benedict on June 19th, and was accepted and retained by him (fols. 32-42.) From said order, Benedict has appealed, and the appeal is now pending (fols. 343-6.) The Board has served an answer in the action for an injunction, and the issue joined thereby, is pending undetermined (fols. 42-4.)

The Board caused a survey and map of the lands intended to be taken, (designating the lands of each owner, including said Benedict,) to be made and signed, and caused the same, with a proper order, to be duly filed on the tenth of June, 1895, (fols. 133-4,) and afterwards commenced and completed the erection of their pole line on said premises.

The erection of the pole line was begun after the Special Term order denying Benedict's motion to set aside the *vacatur* of the injunction order had been made, entered, and duly served, and after Benedict had accepted the bond given by the Village in pursuance of such order. Benedict made some opposition to the setting of the poles, and after they were put up he caused summary proceedings to be commenced against the Village and the Board to compel them to remove from the said premises.

Said proceedings were commenced by a petition addressed to J. H. Metcalf, Ontario County Judge, alleging, among other things, that while said Benedict was in the lawful and peaceable possession of said premises, the said persons so proceeded against, made an unlawful and forcible entry into and upon said premises, with a strong hand and a multitude of people, and unlawfully and forcibly expelled said Benedict from said premises, and continued to hold possession of the same by force, and erected thereon the pole line aforesaid (fols. 460 to 491.)

Said Metcalf then was, and still is (fol. 521,) counsel for Benedict in the injunction suit; as such he appeared and argued the motion to set aside the *vacatur* (fols. 782-4,) and, subsequently,

he conferred with Benedict's attorney as to commencing the summary proceeding; advised that it be not brought before a Justice of the Peace; offered to request the County Judge of some other county to entertain such proceeding (fols. 793-6;) and procured Judge Taylor, of Chemung, to come for that purpose (fols. 802, 518-26, 'Ex. C,' fols. 531-4.)

Thereupon a precept was served upon the persons so proceeded against, purporting to be signed by Sylvester S. Taylor, County Judge of Chemung County, "Acting Judge of Ontario County," reciting, among other things, that said Benedict had presented to said Taylor his said petition, and commanding the said persons to show cause before said Taylor, at the Court House in Canandaigua, on a day therein named, why possession of said premises should not be returned to said Benedict (fols. 495 to 505.)

Thereafter, on the application of the persons so proceeded against, an alternative writ of prohibition was issued out of this Court, directed to said Benedict and Taylor, commanding them to desist from taking any action in said summary proceeding (fols. 506, 543, 761 to 778.) On the return day specified in the writ, the persons to whom it was directed appeared and read certain affidavits (fols. 546 to 706, 780 to 839,) and, subsequently, by leave of the Court, they filed a return to the writ (fols. 744 to 760, 840 to 846, which return was duly controverted (fols. 847 to 862.)

After the summary proceedings were commenced, and before the time fixed for the return of the writ of prohibition, the plaintiff herein, being unable to agree with Benedict for a purchase of the needed

easement or right in his said premises, for the reason that he declined to sell and convey the same, except upon the consideration that the Village would furnish water to his farm as required, so long as said pipe and pole line should exist (fols. 54-5; 74 to 80,) commenced a proceeding to condemn the same, by service of a petition, which is set forth at fols. 95 to 163, with a notice that the same would be presented to the Court, at a time and place therein specified (fols. 165-9,) which were the same time and place at which said alternative writ of prohibition was made returnable. The plaintiff also gave notice that at the same time and place it would move for an order staying certain proceedings of said Benedict (fols. 1 to 14.) In the meantime, Benedict served an answer in the condemnation proceeding (fols. 705 to 743.) The said several matters were brought on at one and the same time and place, and were heard together. The decision was reserved, and on a later day a memorandum of the decision (fols. 863-882) was handed down, and thereupon three several orders were entered, in accordance with the decision. One, referred the issues in the condemnation proceeding for trial and determination (fol. 885-890;) another, the subject of this appeal, stayed the proceedings of Benedict (fols. 891 to 923;) and the third related exclusively to the prohibition proceeding (fols. 915 to 933.) The last named order bears date the 7th of September, instead of the 7th of August, as stated in the appeal book by mistake. The only order brought up by this appeal is the order staying proceedings.

The Village has completed its system of water-works, the wires have been strung upon the poles

along the highway (fols. 137-8;) the Village has borrowed and paid towards the cost of the works about 110,000 dollars; in order to provide funds to repay said borrowed money and to pay for completing said works, it has entered into a contract to execute and issue its bonds for 130,000 dollars (fols. 141-4,) and it has received upon such contract an advance of 5,000 dollars (fol. 143.)

Points.

I.

It is provided by statute that at any stage of a proceeding, under the "condemnation law," (Code of Civ. Proc., Chap. XXIII, Title 1,) the Court may authorize the plaintiff, if in possession of the property sought to be condemned, to continue in possession, and may stay all actions or proceedings against him on account thereof, upon giving security * * * for the payment of the compensation which may be finally awarded to the owner therefor and the costs of the proceeding (S. 3,379.)

The order appealed from is authorized by the provision above referred to; in making it, the Court held that the plaintiff is in the lawful and peaceable possession of the property sought to be condemned, and that the entry of the plaintiff and its agents upon the lands of the defendant, for the purpose of erecting poles and extending wires thereon to use electricity as a transmitting power, and of depositing and laying water mains, was not

unlawful or tortious (fols. 903-4;) such holdings are well supported by the evidence; and the plaintiff has given the security required by said order.

II.

The entry of the Commissioners upon the premises in question in April, 1895, and distributing their pipes thereon, preparatory to laying and burying them in a trench, was neither forcible nor wrongful; although those acts preceded the filing of the map, survey, and order, under Sec. 5 of the Act of 1875. Section twelve of the same act, as amended by L. 1876, Ch. 134, and L. 1893, Ch. 124, provides that the Commissioners "shall have the right to use the ground or soil under any street, highway, or road within the county in which said village is situated, for the purpose of introducing water," etc. Moreover, the Commissioners, at the time of such entry, had the consent of the Highway Commissioners of the town to such use of the highway, and Benedict himself acquiesced in such action of the Water Commissioners by not objecting thereto. That he was aware of their action and acquiesced in it is apparent from the statement respecting it contained in his complaint in the action which he afterwards brought to obtain an injunction (fol. 201,) and in the affidavit of Beard, which he used in applying for the injunction (fol. 280.)

III.

The actual and lawful possession of said premises, which the Village acquired by the entry and subse-

quent acts above stated, followed by the laying of its pipes in the trench dug by it, all which were done without opposition on the part of Benedict, dates from the time of the original entry, and it has continued ever since. It was not a divided or partial possession—that is, a possession for one of the purposes of the improvement and not for another. It was a possession for all the necessary purposes and uses embraced in the plan adopted by the Commissioners for supplying the village with water. The setting of the poles and stringing them with wires, being an essential part of such plan, was a lawful and proper use of said premises and of the possession thereof, equally with the deposit of the pipes on the surface and the laying of them in the trench. Not only so, but at the time when the poles were set and strung, the map, survey, and order had been filed.

The case of the *Adirondack R. R. Co.*, (133 N. Y., 270,) cited by the counsel for Benedict, has no application to this case, the possession there having been wholly unlawful and tortious (Op. p. 274 and *seq.*), and upon that ground alone the decision was placed.

IV.

By the order of the Special Term, made on 15 June, 1895, denying Benedict's motion to set aside the order which vacated the preliminary injunction, the right of the Village to continue upon and use the premises in question for the purposes of constructing its water-works was thereby judicially declared. The Commission-

ers accordingly continued in possession, their iron pipes having been previously deposited upon the surface of the premises, and thereafter they caused their trench to be dug, the pipes to be laid and covered therein, and the poles for their electric line to be set, and the wires to be strung thereon.

The plaintiff, Benedict, apparently understood, when his said motion was denied, that the Village had the right to lay its pipes in a trench on said premises, and, accordingly, he did not interfere with the possession which the Village had theretofore acquired by distributing its pipes upon the surface, nor with the subsequent action of the Commissioners in digging the trench and laying and covering the pipes therein, but he seemed to suppose that the setting of the poles upon said premises and stringing the wires thereon was in excess of the rights of the Village, and constituted a forcible entry upon, or detainer of, the possession of said premises, and thereupon he commenced the summary proceeding above mentioned.

V.

The right of the Village to set its poles and string its wires was (as has been said) as perfect and complete as its right to dig a trench and lay its pipes upon the premises in question, each of said acts being an essential and a necessary part of the plan adopted by the Water Commissioners for furnishing a supply of water for said village.

The authority conferred by statute upon villages and their Boards of Water Commissioners, for the purpose of procuring a supply of water, is most

ample. It is not limited to any specified mode or plan of construction, but it extends to and includes any reasonable plan that the Commissioners, upon due consideration, shall adopt as most feasible for the purpose. This position is established, beyond question, by the following statutory provision :

“It shall be the duty of the Commissioners to examine and consider all matters relating to supplying the village with pure and wholesome water,
 * * * they *shall adopt such plans as, in their opinion, may be most feasible* for procuring such supply of water, and they may, at any time before the appointment of Commissioners of appraisal, as hereinafter provided, amend the same
 * * * and the Commissioners and their servants and agents are authorized, to enter upon any lands
 * * * for the purpose of making surveys, and to agree with the owners of any such property or right *which may be deemed necessary for the purpose of this act*, as to the amount of compensation to be paid such owner.” (L. 1875, Ch. 181, S. 4, as amended by L. 1881, Ch. 175, S. 1; L. 1883, Ch. 255, S. 1; L. 1885, Ch. 211, S. 1.)

VI.

Independently of the foregoing consideration, the map, survey, and order having been filed, in compliance with the act, the Commissioners had the right, at any time within one year after such filing, to take possession of the premises in question, or of the right or interest therein intended to be taken, as specified in the order, and use the

same for the purposes of the said improvement, without any suit or proceeding at law, provided, that within the year they commence proceedings to acquire said right or title (L. 1885, Ch. 211, S. 2, amending S. 5, of Ch. 181, of L. 1875.) The digging of the holes and the setting of the poles and stringing them with wires was not begun until after the map, survey, and order had been filed, and the proceeding to acquire such right, (in which the order under review was made,) was commenced within the year after such filing.

VII.

Even if the setting and stringing of the poles had been in excess of the rightful authority of the Commissioners, yet, as the latter were in actual and lawful possession, such acts would not have constituted a forcible entry or detainer, but would have been a mere trespass. To constitute a forcible entry or detainer, there must be proof of a wrong done to the public. A mere trespass will not sustain the proceeding. There must be, in the acts of him who is complained of, an element of force, or violence, or terror to others (*Wood v. Phillips*, 43 N. Y., 152, and cases there cited by Folger, J.)

Whatever attempt Benedict or his employes made to prevent the setting of the poles was a wrongful interference with the possession of the Village, and the Commissioners had the right to use so much force as was necessary to overcome such attempt. In fact, however, they used no violence or threats; the men who accompanied them were not a riotous assemblage, but were simply a

suitable number of laborers needed to do the work of raising and setting the poles, and the shovels and picks which they had, instead of being arms or weapons, as suggested by our opponents, were the tools usually employed by them, and the only use made of them was to dig the holes in which the poles were placed.

VIII.

The provision of Section 12 of Chapter 181 of L. of 1875, as amended, that "such right shall be continuous for the purpose of repairing and relaying water pipes," is not, as defendant's counsel contend, a limitation of the purpose for which the soil under the highway may be used. The provision is not exclusive. It does not take away the right of entry previously conferred by the act, for the purpose of carrying into execution whatever plan shall have been adopted as most feasible for furnishing a water supply. It simply declares that so far as the relaying and reparation of pipes are concerned, the right of entry is continuous. Whether such right is continuous for the purpose of replacing or repairing the poles or wires, is a question that does not arise in this case. We do not dispute that a statute giving authority to condemn is to be strictly construed, yet, as in other cases, such a construction is to be given to it, if possible, as will carry into effect the chief and manifest purpose for which it was passed. (Lewis on Em. Dom., S. 254; *Commonwealth vs. Fitchburg R. R. Co.*, 8 Cush., 240; *Matter of Com'rs of Wash'ton Park, Albany*, 52 N. Y., 131, 134, 136-7.)

The defendant's counsel cited upon this point, at Special Term, the cases of *Poughkeepsie Bridge Co.*, (108 N. Y., 403,) *People ex rel. Third Ave. R. Co. vs. Newton*, (112 N. Y., 396,) and *Van Brunt vs. Flatbush*, (128 N. Y., 50.) They have no application to the present case, for here, as has been shown, ample power is expressly given by the statute to the Village to condemn the soil under the highway for any purpose necessary to the plan adopted, or to any amendment of such plan. (L. 1885, Ch. 211, Ss. 1, 2, 7.)

IX.

The compensation to which the defendant will be entitled is but nominal. His premises are subject to the public highway. The water pipes, buried nearly six feet below the surface of the highway, can not appreciably lessen the value of his farm. The electric line is as innocuous as similar lines that may be seen in almost every city and village and on many country roads. The poles are 110 feet apart, the cross-trees, upon which the wires are strung, are from 20 to 25 feet above the surface of the ground, and the wires are insulated. How the defendant can be seriously injured thereby, either in the view from his premises, in the beauty and desirability thereof as a place of residence, or in his use of or access thereto, which are the only items of grievance catalogued in his answer, it is difficult to conceive. But whatever the amount of the damage, it will be fully compensated for in the condemnation proceeding.

X.

A reversal of the order appealed from would be inequitable and disastrous to the Village. The water supply, for the cost of which the citizens of the Village, with laudable public spirit, have taxed themselves, is an important public improvement, essential to the prosperity of the village, the convenience, comfort, and health of its six thousand inhabitants, and the protection of their property against fire. The work is completed and in successful operation. To accomplish it the Village has borrowed one hundred and thirty thousand dollars, for which it has issued its bonds. To compel it now to surrender the possession and use of defendant's soil beneath the highway, which it has peaceably and lawfully acquired, would be to deprive the Village and its inhabitants, for an indefinite period, of the inestimable benefits of its water supply, without any appreciable advantage to the appellant.

XI.

The counsel for Benedict asserted at Special Term that the sole purpose of asking for the stay was to continue the writ of prohibition. The proceeding begun by that writ can stand on its own footing. It is not now before the Court, but should it be brought here for review, we confidently expect to satisfy the Court that the summary proceeding to which it was directed was not only without merit, but also without jurisdiction. As was said by Selden, J., in the case of *Appo vs. The People*, (20 N. Y., 531, 542.) "the scope of the remedy" by pro-

