OFFICIAL EDITION

REPORTS OF CASES

HEARD AND DETERMINED IN THE

APPELLATE DIVISION

OF THE

SUPREME COURT

OF THE

STATE OF NEW YORK.

MARCUS T. HUN, REPORTER.

VOLUME V.

1896.

BANKS & BROTHERS.
NEW YORK. ALBANY, N. Y.

Cases

DETERMINED IN THE

FOURTH DEPARTMENT

IN THE

APPELLATE DIVISION,

April, 1896.*

NANCY M. BOYER, Respondent, *v.* THE VILLAGE OF LITTLE FALLS, Appellant.

Little Falls — destroying a private system of water works in introducing a village water supply — the non-user of corporate functions cannot be asserted collaterally — transfer of corporate rights to an individual who purchases all the stock — a grant and a title by adverse possession, presumed after eighty years — possession, sufficient as against a wrongdoer.

In an action brought to recover damages resulting from alleged trespasses committed by the village of Little Falls in destroying the water privileges and works belonging to the plaintiff in that village, it appeared that in 1806 William Alexander and others were incorporated for the purpose of supplying water from a spring in Little Falls by means of pump logs, and that the plaintiff, by various mesne conveyances, had acquired all the stock and the business of the corporation, and was in 1888 supplying a large number of customers with water.

In 1886 the defendant, which was incorporated as a village in 1826, took steps to create water works of its own, and in 1888, without making any compensation to the plaintiff, began the introduction of its own system, and in doing so it cut down a number of the plaintiff's penstocks, dug up and threw out a number of her pump logs, disconnecting her water system and uncovering pump logs which caused them to decay.

Held, that the action was maintainable;

That as the plaintiff and those under whom she claimed had been in substantial possession and control of the private system of water works for a period of over eighty years, the acts of the defendant in destroying the plaintiff's property without compensation were without authority of law or color of right;

---

*The rest of the cases of this term will be found in volume 4 App. Div.— [REP.

That the fact that the aqueduct association had not exercised any corporate functions since 1851 could not avail the defendant, as the association's rights could not be attacked collaterally, the privileges and franchises granted to a private corporation constituting vested rights which cannot be divested or altered without either the consent of the corporation or by virtue of a forfeiture declared by the proper tribunal;

That the aqueduct association was merely a business corporation whose property interests could be transferred to an individual, who, by becoming the owner of all its stock, would become the substantial owner of all the property of the corporation;

That while it is true that corporate powers or franchises can be transferred to an individual only by legislative sanction, yet they may be vested in an individual by his purchase of the stock in such a manner that the transaction cannot be attacked collaterally;

That it was too late to object that there was no proof that the aqueduct association ever paid for the land used in connection with its franchise as it was required to do by its charter, as after the lapse of eighty years a grant from the owners or a title by adverse possession or prescription would be presumed;

That the plaintiff's title could be supported upon the ground of adverse possession alone, as the defendant was a wrongdoer, and that possession alone was a sufficient title in such a case;

That the rights of the public in the lands in question were not in controversy, as the right of the plaintiff antedated the incorporation of the defendant, and there was no proof that the fee of the village streets was in the defendant.

APPEAL by the defendant, The Village of Little Falls, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Herkimer on the 21st day of May, 1895, upon the report of a referee.

The judgment was for $2,564.40, damages and costs. The action was brought to recover damages for an alleged trespass in destroying the water privileges and works of the plaintiff in the village of Little Falls.

J. D. Beckwith, for the appellant.

J. A. Steele, for the respondent.

WARD, J.:

The plaintiff in her complaint alleged she was the owner of certain springs of water situate in and near the village of Little Falls, and a system of water works leading from said springs into the said village, consisting of logs and other conduits and penstocks by which the inhabitants of Little Falls, or a large portion thereof, were

supplied by the plaintiff with pure, wholesome water from said springs, and from which she derived a large revenue, in the sum of about $1,200 annually; that on or about the 1st day of May, 1887, the defendant by its agents wrongfully and unlawfully took up and destroyed said logs and other conduits, cut off said penstocks and removed the same, and wholly destroyed the said system of water works and the value of the use of said springs, to the great damage of the plaintiff; that the defendant was a municipal corporation, organized under the laws of this State.

The defendant answered, denying the allegations in the complaint, except that of its incorporation, and alleged that in the beginning of the year 1886 it commenced, within its corporate limits, the construction of a system of water works, and continued such construction during said year and the three years following; that in constructing said system of water works it became necessary to remove any and all obstructions found in defendant's streets, in order that the work of laying the mains, conduits and pipes constituting said system might be properly and efficiently done; that it had been duly granted a franchise for that purpose by the Legislature of the State; and that the plaintiff was never granted any right to construct the system of water works set out in her complaint by the defendant, or any party of competent jurisdiction having the right to confer the same.

The action was commenced in March, 1890, and was referred to a referee for trial, who, after a patient hearing, found that the plaintiff was entitled to recover from defendant damages to the amount of $1,400, with interest from August 1, 1888. Upon the trial, after the plaintiff had given her evidence, and the defendant had sworn a single witness, the parties rested and announced the evidence as closed, with right to submit briefs on either side. The defendant moved for a nonsuit for several reasons, which was denied. Soon thereafter the defendant, upon affidavits, moved to reopen the case before the referee to give further testimony, which motion the referee decided to grant conditionally. He allowed the case to be reopened, so as to permit the defendant to offer additional evidence upon the value of the plaintiff's system of water works, and to show that the interference of the defendant with those works did not take place earlier than 1888, and that the plaintiff's pump logs

were rotten or defective; that the defendant had put in a system of water works in the village, and that the customers of plaintiff's system ceased to be such and became customers of the defendant, and that the defendant was not responsible for the acts of the persons who destroyed the plaintiff's system. Considerable proof was given under this permission.

The referee in his decision made findings of fact and law; the second finding of fact states that in 1805 William Alexander and others formed themselves into a voluntary association for the purpose of supplying themselves and others with water from a spring which was located at the eastern part of the village of Little Falls, by means of wooden conduits known as pump logs, and proceeded to introduce a system of water supply. He finds further that in 1806 the Legislature passed an act, being chapter 45 of the laws of that year, entitled an act "To incorporate an aqueduct association in the village of Little Falls, in the county of Herkimer," and created the said William Alexander and others a body politic with the power to enter upon and make use of lands for the purpose of conducting a supply of water to and through the village of Little Falls, provided the consent was obtained from the persons through or over which pipes or aqueducts might pass; that this corporation organized, appointed its officers and enacted by-laws, adopted a seal, issued scrip certificates of stock, held stated meetings, and kept regular minutes of its meetings up to 1851; that prior to 1851 one William Usher had purchased some of the stock of the corporation, and in that year he purchased all the remainder of such stock and became the sole owner of the water supply system and carried on the business, supplied the people with water, for which he received water rents; that from the said William Usher, through various mesne conveyances subsequently and prior to 1888, the said spring and the lot upon which it was situate, with the appurtenances, which included the pump logs and penstocks above stated, were conveyed to this plaintiff, all of which conveyances were duly recorded, and in the summer of 1888 the plaintiff was the sole owner thereof; that for several years prior to 1888 the plaintiff had maintained the said water supply system and had supplied a number of the inhabitants of the village of Little Falls with water in the way heretofore indicated and for which she received water rents which resulted in a con-

siderable net income to her; and the seventh finding sets forth that "these pump logs were laid in the ground and covered at various depths as the soil permitted, some places at a depth of two feet or more, and when rock came near the surface some portions of the logs were not wholly covered and penstocks were erected at various places, to which most of the customers resorted for water, but some were supplied in their houses by means of iron pipes from the pump logs. Some of the logs had been laid for many years, and some were comparatively new, and they were in various stages of preservation, some reasonably sound and some considerably decayed. While kept intact, covered and undisturbed, such logs would last for many years, but when taken out or exposed to air, or air allowed to enter the logs from the ends, by reason of their being disconnected, they were exposed to more rapid decay."

The eighth finding of fact was as follows: "In the early summer of 1888 the plaintiff was supplying water to her customers in Little Falls from her said supply system, and for that purpose had her pump logs laid along several streets in way hereinbefore indicated, and had several penstocks located at different places for such use. At that time the village of Little Falls, under statutes giving due authority for that purpose, had determined to put in a water system on large scale and at great cost, and in the summer of 1888, commencing in June or July, the street commissioner of the village and men in his employ, under the direction of the president of the village, cut down a number of the plaintiff's penstocks and dug up and threw out a number of the plaintiff's pump logs, thus disconnecting her water system, and allowing air to enter the remainder of her logs to a considerable extent, and such action was, at least in part, either directed to be done or sanctioned by the board of trustees of the village; the contractor employed by the village to construct its water works also, in the necessary prosecution of that work, tore up several of the plaintiff's pump logs with the same effect. For considerable time the plaintiff's business was thus interrupted by the acts aforesaid, and her revenue for water rents cut off. In some instances she attempted to repair her broken system which had been interfered with as above stated, when the repairs were torn out by the street commissioner by order of the president of the village. The plaintiff's spring or source of water supply was not interfered

with, nor was her whole system of logs or conduits interfered with, but the interference consisted of breaking through the system and taking out logs in several places, and in cutting down the penstocks, and in plugging plaintiff's logs. Such acts totally destroyed the penstocks and the logs taken out, and damaged the remainder of the logs to a considerable extent by allowing air, etc., to enter them. The extent of the last-mentioned item of damage is necessarily somewhat problematical, but I think certain, and taking all her damages together I think $1,400.00 will not more than fairly indemnify her, and I find she has sustained damages by reason of such acts in the sum of $1,400.00."

The evidence discloses that from the time of the incorporation of the water company in 1806 down to the time of the commission of acts of which the plaintiff complains, the plaintiff and those under whom she claims had been in substantial possession and control of the system of water works of the plaintiff without hostility or hindrance from any source for a period of over eighty years.

The village of Little Falls was first incorporated by chapter 276 of the Laws of 1826, but no steps were taken by the village to create water works of its own until 1886. The defendant then attempted to establish its water works through the village without in any manner compensating the plaintiff for her property interests or procuring condemnation thereof, claiming the right to do so under the power given it by statute to establish water works. The findings of the referee above quoted are fully sustained by the evidence. The act of the defendant was without authority of law or color of right so far as it interfered with the plaintiff's property rights in the matter.

Upon this review it is insisted by the learned counsel for the defendant that the acts of the president and street commissioner of the defendant were not authorized by the defendant, at least the proof did not disclose that authority. We cannot assent to this view for the proof is abundant that this corporation not only authorized the acts complained of, but adopted them for its own benefit in the construction of its water works.

The appellant further contends that the water company incorporated in 1806, by its failure to exercise any corporate functions since 1851, about thirty-seven years prior to the alleged injury, and

by the death of the principal incorporators, forfeited whatever corporate rights, franchises or privileges it ever had or possessed, and that no competent evidence was given upon the trial showing any transfer of any corporate rights, franchises or property from said aqueduct association to William Usher. Whatever might be held in a direct proceeding by the proper authorities to dissolve this corporation and dispose of its property, the corporation or its property rights cannot be attacked or adjudicated upon collaterally. The privileges and franchises granted to a private corporation are vested rights and cannot be divested or altered except with the consent of the corporation or by forfeiture declared by the proper tribunal. (*McLaren* v. *Pennington & Others*, 1 Paige, 102; *In the Matter of the Reformed Presbyterian Church of the City of New York*, 7 How. Pr. 476; *The People* v. *The President, etc., of the Manhattan Company*, 9 Wend. 351; *Bank of Niagara* v. *Johnson*, 8 id. 645.)

The defendant, a wrongdoer, assailing the plaintiff's title in this action, can neither assert that the old corporation is destroyed or that its franchises are forfeited, nor can the property of that corporation be confiscated by a trespass. The evidence that the property interests of this corporation had passed to Usher was received without objection, and is not contradicted in the case and is sufficient to sustain the referee's finding upon that subject. The corporation whose rights we are considering was simply a business corporation, and we see no reason why its property interests could not be transferred to an individual or at least why an individual by becoming the owner of its stock should not become the substantial owner of all the property of the corporation.

It is well said in *People* v. *O'Brien* (111 N. Y. 41) that "the laws of this State had made such interests taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain and invested them with the attributes of property generally. * * * The implication arises not only that the State intended to invest these franchises with the character of property, but also to enable their mortgagees, purchasers and assigns to enjoy their use under an indefeasible title."

It is not intended here to assert the proposition that corporate

powers or franchises can be transferred by the corporation officers to an individual or to a private person; that can only be done by legislative sanction. What we do affirm is that the property of a business corporation merely can be vested in one or more individuals to such an extent at least that it cannot be assailed collaterally. In a direct proceeding to dissolve the corporation and distribute its property the fact that the corporation has ceased to discharge its corporate functions and permitted its property and business to pass into the hands of individuals may be a good reason for the State to withdraw the franchise which it had granted and to distribute its property, but in that event the property of the corporation is not lost or forfeited. Upon the dissolution of the corporation the claims of its creditors must first be satisfied out of its property and what remains must go to the bondholders, if any exist, or to the stockholders of the corporation as the case may be.

The appellant also objects that it does not appear that the old corporation ever paid for the land used in connection with its franchise as required by its charter. This objection comes rather late after an occupancy of eighty years. It would seem from that length of time we may presume a grant from the land owners or that a title has matured against them by adverse possession or prescription.

But it is unnecessary to found the plaintiff's right to recover in this action upon a valid or any transfer from the old corporation of the water privileges which she possessed. The long and unchallenged occupancy and use of these premises and privileges that the plaintiff and her grantors have enjoyed has ripened into a perfect and complete title as against the defendant. (Washb. on Ease. [3d ed.] 114.)

Indeed, possession alone gives a sufficient title to the possessor as against a wrongdoer, nor can the defendant avail itself of the position asserted in many cases that no adverse or proscriptive right can be obtained by occupation and claim of title in a highway as against the public. The controversy here is not between the plaintiff and the public, but between parties who are having a controversy over the right to convey water under the surface of the highways for those who reside upon them. The right of the plaintiff antedates the incorporation of the village of Little Falls. It is not

found by the referee or alleged in the defendant's answer, nor have we discovered in the evidence that the fee of the streets of Little Falls was in the village.

The appellant also contends that the referee erred as indicated by his eighth finding of fact in the basis he adopted for fixing the damages, for it is claimed that the referee finds that the plaintiff is entitled to and that he allows her for three distinct kinds or elements of damage. *First*, by direct injury to the works. *Second*, by interruption of her water supply to consumers and consequent loss of revenue. *Third*, by the more rapid decay of her whole system of logs resulting from air being allowed to enter the system at places where the logs were taken up. From an examination of this eighth finding as above set forth it will be difficult to sustain the construction given it by the appellant in this regard. The plaintiff's evidence spread the whole situation before the referee without objection. The opinion of a witness was given as to the value of the plaintiff's water rights at the time they were invaded. Evidence was also given of the number of customers she had, the rent they paid and the effect upon the pump logs that were exposed to the air, the penstocks and pump logs destroyed or rendered useless and other pertinent facts bearing upon the damages which the plaintiff had sustained. The referee was, therefore, at liberty to pass upon all this evidence in fixing upon the plaintiff's damages, and we see no error in this. The plaintiff was entitled to recover such damages as naturally and necessarily flowed from the injuries complained of.

The appellant makes a point that the damages are excessive. The evidence abundantly sustains the referee's findings in this regard, and, indeed, if the respondent had appealed from the judgment on account of the insufficiency of the damages allowed, a more serious question would have been presented.

A glance at some of the evidence as to the plaintiff's damage will show the extent of her business and interests that was substantially destroyed by the defendant. One witness testified that in the year 1887, the year before the injuries complained of, the plaintiff was supplying water to four hotels in Little Falls at a yearly rental in the aggregate of $450. She was furnishing water to 128 other customers who paid a yearly rent in the aggregate of $1,019. Another witness testified that her water rents charged in 1886 was $682.56.

Of course the expenses and repairs should be taken out of these rentals. There was considerable evidence given as to the net profits of the business. One intelligent witness, who had been a water commissioner of the defendant, testified that an investment of capital which would yield an annual income of but $100 was worth $1,666. Many hundred feet of the plaintiff's pump logs were destroyed or rendered useless by absolute interference by the defendant.

It is not contended but what the defendant had a right to establish water works in the village of Little Falls, but if in doing so it interfered with the vested property rights of others, it must make due compensation. Whether the defendant would be permitted in any event to interfere with the plaintiff's system of water works by destroying any portion of it, even upon paying compensation, is a question not necessary now to determine.

It only remains to consider certain exceptions taken to the rulings of the referee in regard to the exception of evidence.

One George W. Shall was sworn as a witness and he testified that he changed from the plaintiff's water to city water while they were putting in the city water, and he was asked the question: "Why did you discontinue the use of the Boyer water and put in city water?" It was objected to by the plaintiff as not admissible under the pleadings and not within the order allowing the case to be reopened. The objection was sustained and the defendant excepted. The inquiry was after the operation of the witness' mind upon the subject, and was not competent for that reason, nor was it within the permission given to the defendant in reopening the case. In no event could it affect the question of damages, in view of the great mass of evidence upon that subject.

Error is also claimed in the court not permitting the witness Burrell to give an opinion as to the value of the Boyer pump log system about June, 1888, at the time when the village water works was substantially completed. On returning to the question really asked, it was whether, if the witness had a judgment as to the value of this system which was rejected upon the ground that the witness had not shown himself competent to give an opinion upon the subject. If any possible error could arise from that it was cured by his subsequent answers which were permitted and one of them was to the

effect that the construction of the city works had superseded the Boyer system and rendered it valueless.

Another error alleged is the refusal of the referee to permit the witness Babcock to show the supply of water for the defendant system. This was clearly immaterial as there was no controversy upon that question and it was of no importance in determining the questions in the case.

The other exceptions urged by the appellant we do not deem worthy of consideration.

We find no reversible error in this case.

The judgment should be affirmed, with costs.

All concurred, except HARDIN, P. J., not sitting.

Judgment affirmed, with costs.

JOHN MILLS, Respondent, *v.* THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, Appellant.

Contributory negligence, when properly decided by the court as a question of law — evidence.

The circumstances considered, under which a passenger is guilty of such contributory negligence as to make it the duty of the court to determine that question as one of law, where he leaves a railroad train and takes a route along a railroad track so obstructed by a pumping station and a coal trestle, between which and the track there is only a space of three feet and seven inches, that in order to get out of the way of an approaching train he must walk a distance of some ninety-five feet, unless he happens to be opposite to a three-foot door leading into an engine room of the coal trestle, or opposite to the steps of the train on which he has arrived.

A question whether a railway postal clerk has any other certificate of any kind issued by the government, which entitles him to ride on the defendant's railroad, is improper, where no such certificate is produced, as the question calls for a mere conclusion of the witness.

APPEAL by the defendant, The New York Central and Hudson River Railroad Company, from a judgment of the Supreme Court in favor of the plaintiff, entered in the office of the clerk of the county of Wayne on the 29th day of June, 1895, upon the verdict of a jury rendered after a trial at the Wayne Circuit, and also from