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Supreme Court.

GENERAL TERM.

FOURTH DEPARTMENT.

SUPREME COURT.

Herkimer County.

NANCY BOYER,
Respondent.

v/s.

THE VILLAGE OF LITTLE FALLS,
Appellant,

Case, Etc., on Appeal.

J. A. STEELE,
Attorney for Plaintiff and Respondent,
Herkimer, N. Y.

E. J. COFFIN,
Attorney for Defendant and Appellant,
Little Falls, N. Y.

Supreme Court.

General Term--Fourth Department.

SUPREME COURT—HERKIMER COUNTY.

NANCY M. BOYER,	}
<i>Respondent.</i>	
<i>vs.</i>	
THE VILLAGE OF LITTLE FALLS,	
<i>Appellant.</i>	}

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Action commenced by the service of the summons and unverified complaint about the month of March, 1890, and issue joined by the service of defendant's unverified answer about the 5th day of June, 1890.

The pleadings are contained in the judgment roll, which is hereinafter set forth.

The action and issues therein were duly referred to J. B. Rafter, Esq., as referee, to be by him tried and determined.

The trial of the action was commenced before the referee about April 22, 1892, and hearings were had before him from time to time down to about April 19, 1894, at which time the evidence was closed and a time fixed within which briefs and requests for findings were to be filed.

Shortly afterwards and about May 28th, 1894, and before the referee had rendered any decision or report an application was made by defendant to reopen the case generally, and the application was

granted in part, as appears by the order of the referee of date June 5th, 1894. The papers on which
 4 said application was made and the order granted thereon are hereinafter set forth.

After the case was reopened hearings were had from time to time down to about March 6th, 1895, when the case was finally argued and the case finally submitted by written briefs and requests for findings on March 21st, 1895.

Thereafter and on the 8th day of May, 1895, the report of the referee in favor of plaintiff and against defendant was filed in the Herkimer County clerk's
 5 office and judgment was entered thereon in Herkimer county clerk's office May 22d, 1895.

SUPREME COURT.

NANCY M. BOYER

vs.

6 THE VILLAGE OF LITTLE
 FALLS.

J. A. STEELE for Plaintiff.

E. J. COFFIN for Defendant.

Nancy M. Boyer, sworn for plaintiff, says: I am plaintiff and wife of Hiram Boyer, and live in Little Falls. I am at present the owner of logs and a conduit for water in Little Falls.

7 Paper shown, marked for identification Ex. No. 1.

Paper purports to be a contract between plaintiff and Johanna Smith, administratrix, etc. (Paper offered.) Received on condition, the original to be hereafter produced, Pliffs'. Ex. No. 1.

Plaintiff offers certified copy, letters of adminis-

tration to Johanna H. Smith upon estate of James T. Smith.

Received and marked Plffs'. Ex. No. 2.

Plaintiff offers record of assignment Wm. Usher to Henry P. Alexander. Received, Plffs'. Ex. 3. 8

Plaintiff offers record of deed, Henry P. Alexander to James T. Smith. Recorded in Herkimer county, book No. 82, at page 146, dated Jan. 1, 1863. Also deed James T. Smith and Johanna, his wife, to Wm. H. and Geo. B. Dale, dated Feb. 16, 1880, recorded Herkimer county, Book 113, page 444. Received; Plffs'. Ex. 4.

Also deed Wm. H. and Geo. B. Dale and wives to Nancy M. Boyer, dated Jan 10, 1882, recorded book 127, page 371. (Conveys Spring lot, north of Northern Ave. or Plank Road.) 9

Received Plaintiff's Ex. No. 5.

Witness continues: I am still the owner of lot conveyed to Wm. H. and Geo. B. Dale and wives, and known as the Spring lot, and live near it. I now occupy it, and it is known as Spring Lot. It faces what was old plank road and later called Northern Ave. and now called Loomis street. I know where the Hardin Spring is located; it is located east of said Spring lot, about four or five or six lots east on same street and same side of street. There is a high hill or mountain north of the street, and out of which these springs run, out of solid rock. In May, 1886, and prior to that time, there were pump logs from these springs, through which water was conveyed down to the village of Little Falls, carried down Northern Ave. in logs into the village and then branched out through various parts of the village. About May 1, 1887, I was in possession of these water logs and conduits supplying water from the springs to inhabitants of the village and for which I received rent from the inhabitants so supplied. Such rent was paid by some 10 11

quarterly and by some yearly. Hiram Boyer, my husband, acted as my agent in the matter of the water works generally, keeping logs in repair and collecting rents. Prior to May 6, 1886, I had an interest in the water works, logs, etc.; I owned one-half of it before that. I owned the water and Smith
 12 the pump logs and materials, penstocks, etc. The old spring, known as the Smith spring, was on the lot adjoining and west of the lot upon which the spring now is. It was on what was the Dale lot, which we afterward bought. It was about 100 feet west from the present spring.

The lot on which the spring is now, I bought from Hanna Van Voorhees, and my husband opened a stone quarry on this lot, and in quarrying the stone struck the vein of water which supplied the other spring so that it cut off the old spring on the Dale
 13 lot and formed a spring on the Van Voorhees lot where the quarry was opened, and then an arrangement or agreement was made with James T. Smith. The agreement was in writing.

(To be produced or contents given.)

Under that agreement I was to receive one half water rents. The pump logs ran from the street to Dale lot before it was dried up, and at that time I had no interest in it. When I bought the Dale lot
 14 the spring there did not run. I owned the Van Voorhees lot some time before the spring was dried up on the Dale lot. When the Dale spring gave out the logs were connected with the spring on my lot I had of Van Voorhees. The logs were connected with the new spring on Van Voorhees lot, I should think fourteen or fifteen years ago, I think it was not longer. Before the logs were connected with the spring on the Van Voorhees lot they were connected with the Hardin spring. The main logs were laid in the street or road as far as the Hardin
 15 spring. That was further out from the village east, than the Dale spring. Branch logs were laid from

the main logs to the Hardin spring and the Dale spring. (The spring on Van Voorhees lot is now called the Boyer spring.) I hold an assignment of a lease to the Hardin spring and supply water, and did in 1887, and supplied water from that spring also in the same pump logs. I made the agreement with Smith as to my interest before the logs were connected to my spring. That was made at Smith's expense, and I furnished water from my spring and he the conduits, and each to have one-half of water rents.

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Hiram Boyer sworn for plaintiff: I am husband of plaintiff and reside in Little Falls. I am sixty-four years old. I have lived in Little Falls all my life. I recollect the pump logs and conduit spoken of by plaintiff, running along the plank road and street, for the past fifty years, and on the plank road, they lay in the same place still, except as the old ones decayed, new ones have been put in their places, and they were in the same position in 1886 and 1887. Before my wife had an interest in the water works, I and Mr James T. Smith had it alone,¹⁷ for three years. I became interested in it by striking this spring. I owned the Van Voorhees lot, and after I owned the works with Smith, the Van Voorhees lot was sold and my wife took the title. I struck the new spring three years before my wife took the title to the lot. The agreement made with James T. Smith spoken of by my wife, was first made with me while I owned the Van Voorhees lot. My agreement made with Smith was for three years and then it expired. Then there was an agreement made between my wife and said Smith's estate, administrators and heirs.¹⁸

The Northern avenue is now known as Loomis street. All the plank road within the village limits was called Northern avenue and the whole of Northern avenue is now called Loomis street. Loomis street extends easterly and westerly. Loomis street

down to the street running north and south past the Academy.

- 19 Deed from Van Voorhees to Boyer, dated March 22d, 1864, recorded April 6th, 1864, Book 83, page 121. Plaintiff's Ex. 6.

Sheriff's certificate of sale to Amos Keller, dated April 15th, 1879. Redemption by Hiram Boyer, July 14th, 1880 and signed over to plaintiff.

- When I first knew of these water works, Charles Hinchman and the Aqueduct association owned and were in possession of the water works, and afterwards Wm. Usher was the owner and in possession.
- 20 I judge he was in possession twenty years. At the time I speak of, the logs and conduits run through the same streets as in 1886 and 1887. (Map shown.) This is a map representing the portions of streets through which the system was laid (The above fact is conceded.)

- Map offered and received. Marked Plaintiff's Ex. No. 7. The blue line running through the streets represents where the logs or water mains were laid. This plan on the upper right hand corner represents the extension of Loomis street, running out to the
- 21 location of the springs. The little round circles represent where penstocks stood in 1886 and represent all that then stood there, except those that are still standing.

- There are only five pen stocks now standing on the whole system and those are not shown on this map. Two are on Loomis street and two on Garden street and one on Burwell street. The penstocks represented on the map were standing there in April, 1887. During that spring, May or early summer of
- 22 1887, they were cut down.

It is conceded that in the spring of 1887, the village of Little Falls was engaged in putting in a system of water works pursuant to Chap. 181 of Laws of 1875, or by commissioners appointed by Chap. 13 of Laws of 1886.

It is conceded that the village of Little Falls in 1886 and 1887 contained about 7,000 or 7,500 inhabitants.

(Witness continues.)

It was when the water works were constructing 23 for the water system, that the penstocks were cut down. In the construction of these mains, the plaintiff's water logs or conduits were taken up.

The logs were torn up on the corner of Albany and Main streets. They tore up the logs there and put in a couple of sand boxes. That was at the corner of the Eastern Park. Eastern Park lies between Waverly Place and Alexander street and Burwell and Main. The logs were torn up on the park by the Academy. They tore the whole line up to Burwell street from the corner of Main to Burwell streets, 24 up Alexander street. They took out the penstocks on the corner of Main and Alexander street, on John street, in front of Mrs. Perry's place on the corner of John and William streets. They tore the logs out about one hundred feet easterly from William street, commencing in front of Mrs. Perry's lot, and on John street, also cut down penstocks on the corner of John and William streets. They tore up logs by Carryl's barn on Garden street at corner of Garden and Salisbury streets. They tore up logs on Loomis street near my house, in front of Moses 25 Byron's house. That is all the places that I know of that the logs were torn out. The logs were taken out by Amos Rankins, Mike Connelly, Dick McCarthy and Mr. Sullivan, assisted by some Italian workmen.

I was then a resident of Little Falls and voter, and familiar with the offices of the village.

Q. In 1887 was Amos Rankins acting as street commissioner of the village of Little Falls?

A. Yes, he was, and was so acting when he tore 26 up the logs at the corner of Albany and Main streets and put in two sand pits.

- The sand pits were put there to receive sand and keep it from running in the gutters under the street. At the place where they put in the sand pits, my logs were taken out. The logs passed through the place where the pits were put in. At that time Isaac B. Richmond was acting president of the village.
- 27 It was along in June, 1887, when the sand pits were put in, and while the sand pits were being put in I went down where Mr. Rankins was at work putting in the pits and had a talk with Rankins on the subject of cutting the logs off. Some of the logs had been taken out, they had taken out three lengths of logs before I got there. The lengths were eleven feet each. I told Mr. Rankins then that if he cut those logs off it would deprive families from taking water that lived on Albany street. He said, I've either got to do it or lose my job. He said, I don't
- 28 mean to do your wife any injury, but I have got to do what the trustees direct me or I lose my job. I then told him I would go and see Timmerman, and I told him Timmerman was the chairman and he could stop it, if he would, that was all that was then said. I then went and saw Timmerman, I think Lyman Timmerman is his name. He was an acting trustee of the village, and was at that time acting chairman of the street committee. Mr. Timmerman told me that he would go up and see about it right away. That was just before dinner. After dinner
- 39 I went there again and saw Rankins there. I asked Mike Connelly and McCarthy if Mr. Timmerman had been there, and they said he had, and they said that Mr. Timmerman had told them to tear the logs up and the corporation would stand between them and all harm, that if I wanted to sue the village, to sue. Rankins was not there then, but he came before I came away. They went right on with the work and continued to tear the logs out. After these logs had been torn out at the corner of Main and Albany streets, I put in new iron pipe. While I
- 30 was doing that Isaac Richmond came there while I was there and while Rankins and his men were at

work. After I had put the iron pipe in Mr. Richmond told Mr. Rankins not to allow me to put them in. He said as fast as I put them in, for him to throw them out. They, the men there, Rankins and his men, threw the pipes out. Connelly and McCarthy were at work for Rankins on the streets. One of the sand boxes they put in near the junction of Albany and Main street and the other on Waverly Place. They were about fifteen feet apart. They were about four feet square and about four feet deep below the surface and below the bottom of the water pipe. In laying the new pipe I laid it around the³¹ sand boxes, by putting elbows on it, and laid it around the sand boxes. They tore all the pipe out on Alexander street to Burwell street so that they cut off all the water on John street. They tore up the logs at corner Main and William streets. Mr. Sullivan tore them up there in putting in the city water works. The penstocks were cut off right after this occurrence, a day or two afterwards, or shortly after. Rankins and the men working under him, cut off the penstocks. I had a talk with Mr. Richmond about that time, about cutting the³² penstocks. I asked him what he wanted to cut the penstocks down for, and he said he was afraid teams would run away and do some damage, and that was the reason he wanted to cut them down. The penstocks were upright pieces, same as the pump logs. They were set in the ground and connected with the water pipe below and the water flowed from the water logs in the ground up into the penstock and the penstocks were tapped by means of a faucet into the penstocks. In drawing water the faucet was turned and the water flowed from the penstock. The³³ families living in the vicinity of the penstocks took the water for domestic purposes, culinary purposes and drinking, from the penstocks, and paid my wife a water rent for the privilege. So much a year for each family. At the time the logs were taken up and the penstocks, the people in the vicinity of the penstocks were supplied with water from them and

they were all in good condition. Their supply was then cut off. Some families were supplied with
 34 water by means of iron pipes running from the mains into the dwellings. They paid a water rent by the year. At the time the water was cut off at the junction of Main and Albany streets, the Metropolitan stood at the corner of Main and Mary streets. The cutting of the pipes at Main and Albany streets, cut off the water from the Metropolitan Hotel and all along that street. At the time Brigham was in possession of and running the hotel. We were receiving from the hotel a water rent of \$200 a year.

35 In June, 1887, the Grand Central Hotel was situate on Main street and the water was cut off from that. Plaintiff received \$100 per year rent for that water for that hotel.

The Beattie House was also a hotel, then situate on Main street. Plaintiff was receiving \$60 per year rent from that house.

The Hinchman House was a hotel located on Main street at that time and water was cut off from that. Plaintiff received \$90 per year from the Hinchman House as water rent.

36 The following additional persons were continuing water from plaintiff's water works in 1887 or at the time the pipes were cut, and paying the annual water rent stated below at that time and were wholly deprived of water from that source from the cutting of the water pipes and taking down the penstocks, and resided on the streets set opposite their names, viz:

NAME.	STREET.	RENT.
P. H. McEvoy	Main	\$3 00
C. Fleming.	Second.....	4 00
37 J. W. Ingalls	"	35 00
Mrs Dr. Hawn.....	Cor. Main & Wm.....	4 00
Henry Whittemore...	John	4 00
W. H. Waters	"	4 00
M. Reddy.....	"	4 00
O. Loucks.....	"	4 00

Mrs. Rust.....	Cor. John & Mary.....	4 00	
W. H. Cronkhite. . .	John	5 00	
A. King.....	"	4 00	
S. M. Richmond.....	"	4 00	
Mary Girvan.....	"	4 00	
J. M. Walrath.....	"	4 00	38
W. H. Dorr.....	"	10 00	
Mrs. Reed	"	4 00	
W. D. Ingham.....	Main	7 00	
J. H. Timmerman.....	"	3 00	
J. P. Harvey.	"	3 00	
M. S. Snell.....	"	4 00	
L. R. Klock.....	"	3 00	
A. Golden... ..	Garden & Main... ..	10 00	
Geo. Failing... ..	Main	10 00	
C. Judd.....	"	4 00	
H. Sharp.....	Main & John... ..	7 00	39
J. E. Groff.....	Main	10 00	
P. G. Dengler.....	"	3 00	
Skinner & Co....	"	10 00	
E. B. Youker.....	"	3 00	
Williams & Son.....	"	3 00	
D. C. Bangs.....	"	3 00	
J. E. Senior.	"	3 00	
A. Spohn.....	"	3 00	
Jacob Zoller.....	Cor. Mary & Garden... ..	5 00	
Bramer Estate....	Main & Waverly Place.	15 00	
William Beattie . . .	Garden & for Brewery	25 00	40
E. J. Nelson.....	Main	12 00	
D. H. Burrell.....	Garden	5 00	
S. Newell.....	Second.....	3 00	
A. Haight.....	Garden	4 00	
P. G. Dengler....	Albany	4 00	
Dan Aberly.....	Main	3 00	
Geo. Baker....	"	3 00	
A. Loomis Estate.....	"	3 00	
Dale Bros	Alexander	15 00	
Chas. Benedict.....	Garden & Main & Mary	30 00	
Newell, Loomis & Ives.	Second	30 00	41
John Bradley.....	Main	3 00	
John Selcer	Second	3 00	

	Mrs. N. Perry.....	John	8 00
	William H. Williams.	"	4 00
	D. Collins.....	Main	12 00
	Pat'k Kehoe.....	"	4 00
	J. J. Butman.....	"	8 00
	T. Conboy.....	"	3 00
42	John McCauley.....	"	3 00
	Leary & Co.....	"	6 00
	Dr. W. D. Garlock...	"	4 00
	Mrs. J. C. Clark.....	Garden	4 00
	Philip Jones.....	"	4 00
	S. J. Waters.....	"	4 00
	Joseph Saunders.....	"	4 00
	C. Benedict.....	"	5 00
	M. Penoyer.....	Main	5 00
	Mrs. Ward.....	"	5 00
	M. Switzer.....	Albany	5 00
43	D. Snell.....	"	10 00
	J. H. Bucklin.....	"	6 00
	W. T. Buddle	Second	3 00
	William Fox.....	"	15 00
	J. Gilliland	"	6 00
	Jas. Churchill.....	"	50 00
	Wm. Beaumont.....	"	4 00
	H. McChesney.....	"	8 00
	Mrs. Klock.....	Garden	3 00
	R. Roof.....	John	3 00
	G. A. Oppel.....	Main	3 00
44	Howell & Taylor.....	Second and Albany...	3 00
	A. Haight.....	John	5 00
	H. Brigham.....	"	10 00
	Mrs. Loban.....	Main	35 00
	John Dreisley.....	John	9 00
	H. Burch.....	Second	18 00
	R. H. Smith.....	Albany and Main.....	4 00
	S. S. Lansing.....	Albany	4 00
	Y. M. C. A.....	John and Second.....	5 00
	J. E. Gage.....	Main	7 00
	J. H. Yost.....	"	5 00
45	A. Keller.....	"	3 00

[Ex. of H. Boyer Suspended and afterwards
Resumed.]

John H Smith.....	Main and Albany.....	10 00	
Wm. H. Abbott.....	Main	4 00	
John Selcer.....	“	3 00	
Wm. Selcer.....	“	3 00	
Dr. Isham.....	Albany ..	8 00	
Catholic School.....	John	10 00	
Chas. Smith.....	Albany	4 00	
Mrs. Shepardson.....	John	3 00	
Terry Smith.....	Cor. Second & John..	50 00	
J. Quackenbush.....	Second.....	4 00	46
Jas. Leahy.....	John	4 00	
Irving Snell.....	Main	3 00	
C. T. Croft.....	“	3 00	
Mrs. Beniens.....	“	12 00	
G. C. Fleming.....	Second	3 00	
E. Wiley.....	Main	3 00	
L. Bellinger.....	Garden	3 00	
Benton Estate.....	“	4 00	
L. Timmerman.....	Albany ..	5 00	
P. A. Conyne.....	Second	8 00	
J. S. Barnet, Tannery..	Mill.....	60 00	47
J. H. McChesney.....	4 00	
Jas. Churchill.....	Second	50 00	
Geo. Shall.....	Albany	10 00	
William String.....	“	4 00	
John Dart.....	“	3 00	
Mrs. Clark.....	Garden	6 00	
B. Doxtater.....	“	4 00	
A. Doxtater.....	“	4 00	
L. F. Academy.....	Alexander.....	12 00	
S. B. Merriam.....	Main	10 00	48
Mrs. Benson.....	“	6 00	
John Koehler.....	“	4 00	
O. Tefft.....	Albany	4 00	
Wm. Kingston.....	“	4 00	
Mrs. Gregory.....	John	5 00	
Jas. Kearney.....	“	6 00	
Leonard Boyer.....	“	8 00	
Bogert Wizzle.....	“	8 00	

(Examination of witness suspended.)

Henry Souls, sworn for the plaintiff, says: I re-
 49 side in Little Falls and have for twenty-eight years.
 I am sixty-seven years of age and I have been a ma-
 son. I know Amos Rankins. I worked under him
 in 1888 while he was acting street commissioner, the
 last year he was acting street commissioner, I think.
 In the spring of that year I worked under him as
 commissioner upon the streets of Little Falls. I
 had often seen a number of penstocks at differ-
 ent places in the streets of Little Falls. These
 penstocks connected with Mr. Boyer's water
 works at that time. I cut down one of those pen-
 50 stocks some time that season. I can't tell what
 month it was in. Rankins told me to take the axe
 and cut down the penstock. It was on Main street.
 I think it was before Amos Keller's or one further
 up the street or east. I then went and cut it down
 after what Rankins said. At that time I do not
 recollect any other conversation with Rankins on
 the subject of the penstocks. At that time I was
 working for and receiving pay for my labor from the
 village of Little Falls. When Rankins told me to
 cut down the penstock I was at work putting down
 51 sidewalk near the Park, Eastern Park. It was near
 the frog. I was then helping in putting in a place
 for the city water works, or village water works.
 We call it a frog because the place is shaped like a
 frog. Mr. Rankins employed me. I know nothing
 about tearing out the logs.

Cross-examined:

The penstock I cut was on Main street; I won't
 be positive whether it was at Keller's or further east.
 I can't say. After I cut the penstock I don't re-
 52 member what was done with it. I don't remember
 the month I cut the penstock down. It might have
 been in July, I will not be positive. It was in 1888
 I think. I fix the time because I have not done
 much work since then. I have been blinded. I can't
 think of any other reason for fixing that date. I

had not been employed on the corporation before 1888. I only cut down one penstock. The water was not then running at the penstock when I cut it down. I can't say if it had been for some time.

Re-Direct :

53

I cut it as low as I could cut it without cutting into the stones.

Richard Duke, sworn for plaintiff, says : I reside in Little Falls and have for eleven years past, last November. I am thirty-six years old. I am a laborer. I knew Amos Rankins in his life time. In 1888 I worked under him while he was acting street commissioner of Little Falls. I was employed by him in working upon the streets of the village and I was paid by the village. In the spring or summer of 1888, I and other men working on the street took 54 down some of the penstocks. We did not cut them down, we pushed them over. I think it was either one or two penstocks. I know we got down one, but am not certain about two. I don't know who the other other person was who helped me. He was at work for the corporation. When this was done there were six men working on the streets, in squads of two each. Before going to the penstocks he told me to go and dig the holes to put the sand boxes in; before I dug the sand box hole we took the penstock down or pulled it over, up there at the Academy. 55 That was done by Mr. Rankins' order. We left the penstock there on the ditch. In pushing it over we broke it off where it went into the log. It was kind of rotten, we thought. After we pushed that over I went to digging a sand box hole. These holes were one at each end of Eastern Park. While the pits were being constructed, Rankins was there from time to time. Where this sand pit was put there was no water log. I don't remember if I worked where there were logs. I saw some logs taken out but not where the sand pits were. I put in a sand 56 box on Albany street near the hay scale. I had seen these penstocks situated around through the

village. I saw other penstocks which had been taken out, while I was at work on the corporation. They were either cut down, or broken off and thrown down. They were afterwards taken away from the streets, but I don't know where they were drawn to. There was another I think that I and my partner took
 57 down, but I don't know where it was located. I know I was present when two of them were taken down. I also saw one as you go past the Beattie House, opposite Burrell's, taken down by one of the men at work on the corporation. I don't remember who nor how it was taken down. I know where the Basin is. I saw one water log taken out up at the Academy. It was the same day I helped take down two or one penstock. The log was taken out by men at work on corporation, and Amos Rankins was there present when they were taken out. I only
 58 saw one log taken out. It was thrown on the side of the gutter with the penstock.

Cross-Examined :

This log was taken out the same day the sand pit was constructed and the penstock taken out. It was as I recollect, in the spring of the year 1888. I can't tell if the log was decayed on account of the dirt being around it. When the log was taken out water was not running through it. The log taken out was on the street running up the hill past the
 59 Academy. The penstock I pushed over was right there at the corner. That penstock did not look as if it was new wood. There was two of us pushed it over. One had a pick-axe. I don't think there was any water running there at all because the log was dry at the bottom. The other penstock pushed over when I was present, I can't now tell where it was. That was this same day. I am sure no water was running out of that penstock when it was pushed over. I was employed on the corporation off and on all summer that year. At stated times I received
 60 pay for my services from the corporation. The money was paid us on a check given me by Mr.

Rankins. I saw other penstocks lying down about the village. That was in 1888, when I was employed on the corporation. The only one I saw down was one beside what I helped take down. When I saw the one down, the water had been running there shortly before because we got water there, but don't remember exactly whether it was running when it was pushed down. Mr. Rankins is now dead.

Henry Souls recalled, says: I saw one penstock lying near Mr. Horace Rankins', on a lot or place where the village had stored sand and cobble stones 61 for paving and flagging for cross-walks. It was a lot occupied by the village for storing. I saw one of these penstocks there and took particular notice of it. That was while I was at work on the corporation. I was off and on at the work for more than two months I think.

Michael Connelly, sworn for plaintiff, says: I live in the village of Little Falls. I have lived there since 1856. I am about sixty-six years of age. I am a laborer. I worked upon the streets of Little Falls. I recollect when Amos Rankins was street 62 commissioner, and Mr. Richmond president of the village. I worked for them that year. I did some paving for the village on John street. It was about the middle of the summer. It was the year Richmond was president and Rankins commissioner. I knew where the logs of Boyer's water works were laid on John street, and have seen the penstocks I was doing the paving. I was paid for the paving by the corporation. I was the boss of it myself. Mr. Rankins, the street commissioner, sent me there. 63 While I was at work there I took up some of the pump logs, water logs. I took up four pieces of logs. The logs were about ten or twelve feet in length. They were bored logs and connected together. I left them there on the street when I pulled them out. In paving I found the logs in there and took them out. Mr. Richmond, the president of the village, told me to take those logs out. He

told me to pull the logs out when they came in my way in paving and the corporation would stand between me and all damages. The paving was just in the gutter along the street. I paved over where the logs were.

Crossed-Examined :

Mr. Richmond was president of the village at that time. That is the only way I fix the time. Mr. Richmond had been president of the village two or three times. I think he had been president of the village before that. I can't tell how many times. I think he has also been president since then. I can't
65 tell the year it was that I done the work. The only place I took the logs out was on John street, and then only four. There was no water running when I took them out. The logs were sound enough to carry water if it had been running in them. The logs lay along on the edge of the gutter. The logs were not as deep as the bottom of the gutter. It was in front of Sharp's or Mrs. Perry's property where I took out the logs.

Re-Direct :

66 It was on the south side of the street where I took up the logs. It was the same year Amos Rankins was street commissioner. This was three or four years ago. Rankins was only commissioner once. The logs were just under the surface of the ground. While I was there taking up the logs, Hiram Boyer came there. Boyer said I ought not to take up the logs. He told me not to take them up. He did not say anything to me about having water running there. The new gutter was enlarged and made wider. The old gutter was small and this was made about
67 three feet wide.

W. H. Robinson, sworn for plaintiff, says : I am fifty-five years old and have lived in Little Falls about forty five years. I am generally acquainted with the streets and people and was during that time. I was well acquainted with what was known as the

Boyer water works or the Smith water works. They were formerly owned by James Smith and subsequently by Nancy Boyer. She bought James Smith out. I was acquainted with the line of logs and penstocks and with the location of the springs. In 1888 and prior to that time, I was the owner of a spring⁶⁸ and the owner of another line of logs running over some of the streets in the village. I was then furnishing some of the inhabitants with water. I owned the Emerald spring, four hundred or five hundred feet this side of the Boyer spring. I ran a line down Garden street and along Loomis street and my logs ran across the park and connected with Garden street, and ran my line as far as the Girvan House barn on the corner of Ann and Garden streets. None of my penstocks were cut down and my logs or penstocks were not interfered with. I saw them cut⁶⁹ Mr. Boyer's penstocks down. They were Rankins and some of the men. Mr. Rankins was acting street commissioner, and was there. I did not see Mr. Richmond while the work was going on. I saw two cut down on Main street, two on Second street, one on Albany street. That is all I recollect. I saw those five cut and then they went up by the park and dug down to put in sand boxes and cut those pump logs off. The cutting of those logs stopped the water from going to Albany street and John street. I was there by the park when they cut the logs off. Rankins was there with his men when the work was being done. Mr. Boyer came there shortly after the logs were taken out. He was not there while the logs were being taken out. I heard a conversation between Mr. Boyer and Mr. Rankins. Boyer said to Rankins, "What did you cut my logs off for?" Rankins said I wanted to put in there two sand boxes and the logs ran right where I wanted to put them in. Rankins told Boyer that the president had ordered them to cut them off and Mr. Boyer asked him if he was going to put them back again, and he said no, that he had orders to cut his penstocks down. Mr. Boyer said, "I forbid you⁷¹

touching any of my penstocks." Rankins said to him, "you must go to the board of trustees or the president of the village; I have had my orders to cut them down." Mr. Boyer then went away. Mr. Boyer afterwards laid pipes around those sand boxes. The water then ran through these logs to Albany
 72 and John streets. After they cut the penstocks Mr. Rankins went and tore up the logs Boyer had laid around the sand boxes and plugged them up. He asked me where I had better plug the log. I told him if he was going to plug it he had better put an iron band around the end of the log and then drive a plug into it. He put a band on the end of the log and then drove a plug in the end. When the penstocks were cut the water was running. After the penstocks were cut down they took the iron pipe out and plugged the pipe. When the penstocks
 73 were taken down the water ran out into the gutter and the street. The log was plugged the same day they took the penstocks down. These sand boxes were put in on the west side of Eastern Park at Waverly Place. They tore up one log just as you turn to Main street. The branch that run down Garden to Main that fed Main street. That branch runs down Salisbury street. That is a street running from Garden street to Main. The logs run on the west side of Salisbury. They took out one log there and plugged up the log above and that set the
 74 water back up to Garden street. This was done by Mr. Rankins and his men. That was done the next day after the penstocks were cut down. I think it was the last of June, 1888. I don't know of any other place where Boyer's logs were torn up. The log was taken up to plug the log so the water could be stopped from flowing to Main street. Those penstocks and logs had been there, at the same place substantially and on the same streets within my recollection for about forty-five years.

75 No Cross-Examination.

Testimony of Hiram Boyer resumed: At the time

all the water works were torn up, all the people that I have mentioned were taking water at the prices mentioned, and the places and people named had been taking water as long as I can remember; the people changing but the places had been taking water as long as I can remember. Since the penstocks have been cut we have not taken any money for the water from the persons or places I have mentioned as being supplied from their lines which were torn up. After being torn up I repaired Loomis street. For about ten days the work interrupted the flow of water on Loomis street. Then I put in about fifty feet of iron pipe on Loomis street, and that carried water on Loomis street. Before it was cut off it was carried across the park and on Garden street to Main. Soon after I repaired on Loomis street, they tore it up at the park and that cut it off from Main and Garden streets and it was cut off John street. 76

Plaintiff offers Chap. 45 of Laws of 1806. Plaintiff's Ex. 8.

(Ex. of Witness suspended.)

77

W. D. Newell sworn for plaintiff says: I reside in Little Falls. I am Clerk of the Village of Little Falls and have charge of the Books of Records of the meetings, acts and resolutions of the Board of Trustees of the Village of Little Falls, and have the book in court which I produce. The book is Journal K. (Turning to page 25.) The president at the time of the entry on page 25, Tuesday March 27th, 1888, was Isaac B. Richmond. Other officers, trustees, Thomas McDermott, Fred H. Gowan, John Kane and Thos. Bailey. They were the four elected that year. There were four other trustees who held over. They were, Emory Devendorf, Warner Edick, Fred M. Kenyon and Lyman Timmerman. These eight trustees and president composed the President and Board of Trustees in 1888. 78

I have the record of the appointment of the street

commissioner on page 29. It appears by the record on this page and books that Amos Rankins was 79 appointed street commissioner. The meeting was held April 3d, 1888. The record of that meeting was signed by the clerk, W. I. Shepard. I know his signature; that is his signature signed to the minutes of that meeting. The record also shows that said Shepard was appointed clerk. Record of the election of president and trustees as appears on page 25 offered in evidence. Ex. No. 9. Record of meeting on page 29, April 23, offered showing appointment of commissioner, also clerk. Record marked Ex. 10.

80 It is admitted that the other four named were also trustees at that time.

That was a special meeting of president and trustees, May 15th, 1888, the record made of the proceedings of that meeting on pages 48, 49, 50 and 51 of the same journal and pages 52 and 53. The record shows, present, the president and six trustees and the record is signed by the clerk, W. I. Shepard. On page 51 there is a resolution entered relating to Hiram Boyer and William Robinson. The resolution was offered by Trustee Gowan and is as follows: 81

Resolved, that the clerk serve notice on Hiram Boyer and W. H. Robinson to remove from the streets, penstocks belonging to them which are not in use, within ten days, and if not so removed that they be removed by the street commissioner.

Adoption.

Resolution and action is offered, received and marked. The object of meeting and resolution and adoption received. Ex. No. 11. 82

Cross-examined by Mr. Coffin.

I am acquainted with the handwriting of W. I. Shepard. I have seen him write. I am not able to recall any particular time, not positive. I can't tell you for a certainty the place I saw him write The

record does not show that all trustees voted for that resolution. Simply the word "Adoption" appears. It was a special meeting May 15th.

April 3, 1888, was the meeting at which the commissioner was appointed; that was a regular meeting, a stated meeting. I was appointed clerk April 3d, 1892, I think. I am now clerk. I have served as such since my appointment, and have the custody of journals. I take minutes on tablet and transfer them to regular book.

Hiram Boyer recalled.

On Loomis street there was about four hundred feet torn up and I put in fifty feet of iron pipe, and if I said there was fifty feet taken up, I meant I put in fifty feet iron pipe to replace what was taken up. 84 The fifty feet of logs when I put in the iron pipe was destroyed and the balance of the four hundred feet the logs were left in condition to be put back and I put them back where they were before. The whole of the water that comes to the village comes through that line of pipe on Loomis street. After this was torn up the notice was served on me by Isaac Richmond, the president of the village. After the logs were torn up I had to wait until after they got their iron pipe through before I could replace my pipe.

(Examination of witness suspended.)

85

Wm. H. Robinson recalled for plaintiff says:

At the time I was owner of the logs and conduit, I bought logs and posts and put them in and I know what they were worth in 1888. The penstocks were worth ten each. The length of logs were ten to twelve feet, some ten and some twelve. The logs were worth twenty-five cents per foot each of two inch bore, one and one-half bore was worth twenty cents per foot. Boyer had some three inch bore and some two inch and some one and one-half inch. The 86 three inch bore would be worth a little more than the two inch bore. I saw some of the logs of Boyer

which were taken away by Amos Rankins and he drew them down by the old basin. That was the vacant lot used by the corporation for storing purposes. I could not tell how many there was. Quite a little pile of them, penstocks and all. I estimated the value before being laid, and if laid I should add 87 to value about twenty cents per foot.

Cross-Examination.

There was more logs than penstocks.

William A. Usher sworn says:

I reside in Little Falls, I am fifty-two years old. I am a son of William Usher, who formerly owned the water works in Little Falls brought from springs within the village. I have not always lived here. I left here in 1860. I have lived here off and on since 1872. My father was a resident of the village 88 and had been for many years. My father died in 1879, March 30. He was sixty-nine years old. He had lived here since he was twenty or twenty one years old. The books and papers which he left have been at our house since he died. I have looked over his old papers and books to some extent. I found among his old books and papers the books now shown me. This purports to be a record of the proceedings of the Little Falls Aqueduct Association. At one time my father was interested in the Association as part owner of the property of the 89 Association. I have looked over this book to some extent. I find some of my father's handwriting on page 144 of this book purporting to be September 27th, 1847.

At or about 1851 my father became the owner of these springs, logs and conduit and continued to own it. I understand he bought up the whole of the outstanding script or shares besides what he owned. Some of the old script is still among my father's papers. While my father was the owner, I some- 90 times collected water rents. Can't say how long my father owned it. He owned it when he made an

assignment to H. P. Alexander or to a short time before that. It was very near that time. I think my father made the assignment in 1860 or 1861. I think it was in 1861. After my father, James T. Smith ran the water works. I know there are more papers among my father's papers which were left by him. There is a book of his collections of water rents. (Paper produced by witness.) This is a paper I found among my papers purporting to be a certificate of script of a share of the corporate stock of the water association.

91

Marked for identification Ex. No. 6, July 19, 1892.

Sylvanus J. Waters, sworn, says: I reside in Little Falls. I am in my eighty-second year. I have lived here since 1841. I am acquainted with many of the old inhabitants here, and I know a great many of them. I knew Clark Shurtleff. I knew Eben Britton. I knew Nathaniel S. Benton and was well acquainted with him. I knew Robert Beasley. I have seen Robert Beasley's writing. I also knew J. C. Pann, and I knew his writing; he was a merchant and Benton was a lawyer. I was acquainted with the signature of N. S. Benton. I have seen him write.

92

Pages 62 and 63 shown witness.

Q. In your opinion is the signature N. S. Benton, Clerk, there in the handwriting of N. S. Benton?

A. I should think it was in his hand writing.

Q. In your opinion is the body of the page in his handwriting?

A. I should doubt it.

93

Page 74 shown witness. Signatures in two places on page 74, "N. S. Benton, Clerk."

Q. In your opinion are these the signatures of N. S. Benton?

A. Yes, sir, I think they are.

Q. In your opinion is the writing on page 74,

over the signatures, in the handwriting of N. S. Benton?

94 A. Yes, I think the writing above is his handwriting. I think the writing on pages 74 and 75 is in his handwriting, and also the following pages, 76, 77, 78, 79, 80, 83, 85, on 86 the page, except the signature, N. S. Benton, appears to be in the handwriting of some other person, and so on page 87. I knew Gould Wilson well. All the people I mentioned are dead. Charles Hinchman is dead; I knew him. I knew Robert Steward; he is dead. I knew Robert Hartman; he is dead. I knew John Phillips; he is dead. I knew Geo. H. Feeter; he is dead. I have seen him write and know his signature.

Page 97 shown witness. Those are his signatures. I think the writing above the signature is the writing of Feeter. I knew J. C. Dann and have seen him write. Pages 114 and 115 shown witness. In my opinion the signatures on these pages are in the writing of J. C. Dann. I knew Frederick Lansing, and knew his signature, and have seen him write. Page 122 shown. The signatures are in Lansing's writing; he is also dead. I knew Geo. Petrie; he is dead. I knew his writing and have seen him write. Pages 138 and 139 shown. There is no question, the signature and the writing above signature is in the handwriting of George Petrie. I knew Philo Reed and have seen him write. I knew his writing; he is dead. Page 144 shown witness. That signature is Philo Reed's, is in his handwriting, and I consider the writing above it is also, and also the page 143. The signature is in his writing. On the last page, which is page 148, (not paged), is the signature of Fredering Lansing, is in his handwriting. I knew H. P. Alexander; he is dead. I knew James Monroe; he is dead. Page 146 shown. I think the signature is in the handwriting of H. P. Alexander.

Book of record offered in evidence. Marked Ex. No. 12.

William A. Usher, re-called, says: (Book shown witness.) This a book I found among my father's old papers, which relates to the water works.

Marked for identification No. 7. I have examined this book to some extent. This was my father's individual account of the rent of the water works. (Page 9 shown.) The writing on that page of the account from June 8, 1852, to June 8, 1862, is in my father's writing. The most of the book is in my father's handwriting. Some of it is in my writing. I find no writing in the book except the writing of my father and self. The book is a book of account of rent due for water furnished by William Usher to several subscribers who took water. The last charges in the book are January 1, 1863. After my father's assignment, he still continued to collect and make entries in this book. From the entries in this book, I should think he became the owner of the works in 1852, using the book to refresh my recollection, but I can't remember the fact, and he continued to own it until he made the assignment.

Book offered in evidence. Received and marked Ex. No. 13.

Since my former examination I have made a further examination among my father's papers, and those books and those certificates or transfers of stock are all I could find.

Hiram McChesney, called for plaintiff, says: I live in Little Falls. I am seventy-two years old. I have lived here nearly fifty seven years. I recollect these water works ever since I have lived here. I live on corner of John and Second streets. I have lived there always on that block except about six months. There was a penstock near the corner of John and Second streets, near my gate. I went out one day and it laid in the street. I inquired about it but do not remember of whom I inquired. It had been standing there and I had used it before it was taken down. James T. Smith put it there on that

corner about twenty years ago. Prior to that it was opposite Hill & Leahy, on the same block. They left that there and put up one near my gate.

No Cross-Examination.

102 Johanna Smith sworn says: I reside in Little Falls I am widow of James T. Smith. I am sixty-eight years old. I was married I think in 1857, about thirty-five years ago. During all that time I have lived in Little Falls. He died in January 1882. At the time of his death he was the owner of and was running what was known as the water works here in the village of Little Falls. I am administratrix of his personal property. I continued to carry on the water works as administratrix until I sold to Mrs. Boyer. I don't remember the year Mr. Smith bought or took the water works. 103 It was several years before he died. I think it was after our marriage, but am not sure. My house was not supplied with this water. I never used the village water. As such administratrix, I became possessed of his business papers and books which he had. During his life time I knew nothing about this business. After his death I did the business. I don't know from whom he bought the water works. I understood he bought them from H. P. Alexander and Wm. Usher. I don't remember when the spring lot was conveyed to my husband. 104 During the time I carried on the water works, as administratrix, I don't know as I went up to the spring; I have been there. There was no water on the lot when we sold to Dale. The spring had been dried up.

I now produce all the papers and books I have found, which Mr. Smith left or which I have in my possession. I produce book upon which are entered the water rates from 1867 to 1881, both inclusive, excepting 1877 and 1878. I suppose that book to be 105 lost. Also the book upon which the water rents were kept when Mr. Boyer became interested. I

think in 1882. For some time before Mr. Smith's death, he and Mr. Boyer were jointly interested in the water works. In the canvass back book I produce, are entries of water rents when I and Mrs. Boyer were together and covering that time, and I presume continued until I sold to her. I continued interested as administratrix with Mrs. Boyer until I sold my interest to her. The transfer of my interest as administratrix to Mrs. Boyer was drawn at the office of Mr. Loomis, either by Mr. Loomis or Mr. Fitzgerald, and since that time I have had nothing to do with the water. I have never noticed any script or certificate of the water stock in Mr. Smith's papers.

No Cross-Examination.

Evidence of Hiram Boyer continued: I recollect when Mr. Smith purchased the spring lot from Mr. Alexander and I remember when the spring lot was owned by Frederick Lansing estate and deeded to Alexander by the executor of that estate. In 1862, before January 1st, I had some talk with H. P. Alexander about buying this spring lot and water works. That was about a month before he deeded it to Smith. I had negotiated with Mr. Alexander for the purchase of the water works and the spring lot, and during that negotiation he told me he had given Mr. Smith a refusal of it. I offered him \$1,000 for the water works and the spring lot before Smith bought, afterwards and about the time the deed bears date, he deeded the water works and spring lot to James T. Smith. The conveyance was by the deed dated January 1st, 1863; Henry P. Alexander to James T. Smith. Mr. Smith went into possession of the logs and water works January 1st, 1863, and had the rents from that time until he died.

Hiram Boyer's Examination suspended.

E. T. E. Lansing, sworn for plaintiff: I am a civil engineer residing at Little Falls, N. Y. I made the map No. 1, May 18. I made it on scale 100 feet

109 to inch. Upon that scale I have scaled the length
of the line of logs as the line was pointed out by
Hiram Boyer. The total length of the line of logs
is 15,735 feet and those figures are on the map. The
line of logs on Loomis street is 1,210 feet in length
and that is included in the 15,735, and deducting
that leaves 14,525. This measurement extended up
as far as the Boyer spring. I have always lived in
Little Falls. I had some knowledge myself of where
the line of logs ran and on what streets. I knew the
logs ran on all streets pointed out to me of my own
knowledge, except perhaps, two or three streets.

Cross-Examined :

110 I am also a surveyor. I have been civil engineer
and surveyor about nine or ten years. I am a grad-
uate of Union College. During my college course
civil engineering and surveying was a part of the
curriculum of the course. Since my graduation I
have practiced my profession as civil engineering.
I have laid lines of sewers, water works, &c., and
have the necessary instruments for that business.
Before making this map I went over the ground with
him ; starting at the corner of Main and Second
streets, from thence we proceeded down Second
111 street to John, locating the relative junctions from
street lines and the location of the penstocks. Boyer
indicated where the pipe was. While on Second
street locating the conduits, I located those penstocks
and they are indicated on the map by circles and the
word "Penstocks." This map shows all the pen-
stocks Mr. Boyer indicated to me and shows no
other. From the intersection of Second and John
streets, we went easterly and located logs as before,
and located at each line street where the junction was
and also penstocks. We went to the junction of
112 Alexander and Burwell streets, past the Academy.
Then we went to the corner of Ward and Burwell,
and located penstocks and line, and noted the inter-
section of other streets. Then returned to the cor-
ner of Alexander and Burwell streets and Mr. Boyer

indicated to me the line of direction across the park. After crossing the park we proceeded through Garden street and proceeded to Main street at intersection of William, and located the junction of the lines with the Main street line.

We proceeded thence westerly along Main street, 113
 locating junctions and penstocks, and the Main street
 line, terminating in front of James Feeter's store,
 where a penstock was located. I have now circum-
 scribed the boundaries of my map. I procured from
 my drawings a map known as the Ward map. That
 map is co-extensive with district described in this
 map and with the scales of that map, I proceeded to
 lay out the ground plan of this map and with the
 tracings of the Ward map I was able to construct
 the map confined within the boundary I have given 114
 here. I made no field measurements of Loomis
 street. I got the measurement of Loomis street from
 another map. That was another Ward map made
 by J. French. I have the original map. I think
 there are copies of it on file in Herkimer. That map
 was on a scale of 200 to the inch. The other Ward
 map was a scale of 100. With these two maps and
 scalings I constructed this map, Ex. No. 1.

Re Direct Examination :

I have drank water out of these penstocks in my 115
 younger days. Some of the penstocks indicated on
 the map were still to be seen when we went over the
 line.

Hiram Boyer's testimony resumed: I correctly
 pointed out to Mr. Lansing the location of the line
 of the logs and of the penstocks. During the time
 James T. Smith ran the water works, I took water
 and used it. Purchased it from him. Prior to that
 time I used the water. I once helped him connect
 the springs. I helped him at times repair the water
 works, in his employ, before I was interested in the 116
 works. After I had the talk with Alexander in
 negotiating for the purchase of the works, I saw him

again a few days after he had deeded it to Smith, and he told me he had sold he logs and spring lot altogether to Mr. Smith. When Dale purchased the spring lot the spring had dried up and had been transferred to the other lot by the opening of this quarry, and that was on the Van Voorhees lot, east of the spring lot. The spring was struck on my lot in 1877, August, or it might have been 1878. It was about three and one-half years before Mr. Smith died. The logs were put to my spring and for the water, until January, he paid me \$25.00. After that we made a contract that I was to furnish water and he was to keep the logs in repair and each to have one-half of the avails, and I was to pay the rent for the Hardin spring. We were jointly to collect the rent. The contract was for three years. We had a written contract and it was left with James Hart. This was a contract between me and Mr. Smith and it was left in possession of James Hart. He is now dead. I have not been able to find this contract. After Mr. Smith's death my wife continued the arrangement with his widow and administratrix of Smith, until my wife bought from Mrs. Smith in 1886.

Hiram Boyer, cross-examined by Mr. Coffin :

I came into possession of the Van Voorhees premises, I can't tell the exact time. As near as I can recollect it was in 1862 or 1863. I am not certain. A deed was delivered to me of these premises. After I came in possession of the deed, I had it recorded in the Herkimer County Clerk's office. This property was bought by me because of the stone quarry on it. That property was on the same lot my house is now on. I built the house on it after I purchased the lot of Van Voorhees. I built the house about eight or ten years after I bought the lot. I have lived on the same since I built the house. I cannot tell the year judgment against me upon which the premises were sold, was recovered. Amos Keller recovered that judgment. The premises were sold

on the execution on that Amos Keller judgment sometime in July, but I can't recollect the year. Upon the sale of the property under that execution, Amos Keller bid in the property. It was subsequently redeemed. I redeemed it from Keller and my wife took the deed. The deed was executed to my wife from the sheriff. That deed was put on record. Before my wife took the deed I struck the spring on the Van Voorhees property. The spring was struck while I had title to the property and before the sale on the execution, but after the judgment was recovered. In striking the spring on the Van Voorhees lot, I don't think I struck the whole vein that ran to the Dale lot. The water flowed to the Dale lot after I struck the spring, and does yet. My wife purchased the Dale lot in 1881 or 1882, while they were putting the West Shore road through the rocks below here. The Dale lot was conveyed by H. P. Alexander to James T. Smith. This conveyance from Alexander to Smith was about a year after Alexander bought of the Lansing estate. Jas. T. Smith conveyed to William and Geo. Dale. Geo. and William Dale conveyed this lot to my wife in 1881 or 1882. She paid \$800 for the Dale lot. The deed from the Dales to my wife is on record. After I bought the Van Voorhees lot and before the purchase of the Dale lot, my wife and I entered into a contract with Jas. T. Smith for three years, and the substance of that contract was, I was to furnish the water, he to keep the logs in repair for three years and I to have one-half the avails and he one-half. He was to do the collecting or we would pick a man to collect. Jas. T. Smith done the collecting while he lived. The contract was carried out to the time of its expiration. It expired shortly after his death. Then an agreement was made between Mr. Smith's administratrix and my wife. That contract was in writing. This contract between my wife and the administratrix, I think there was no time set in it how long it should run. In that contract it was substantially agreed that Mrs. Boyer was to supply

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123

124 the water and the Smith's estate to supply the logs
and keep them in repair, and each to have one-half
the avails. We were to agree on a collector and we
agreed John Feeter was to collect. Sometime after
that agreement, Mrs. Boyer purchased the logs, con-
duits and entire system from the Smith estate. That
purchase was by a written contract. The consider-
ation paid for it was \$300. Mrs. Boyer now owns
the entire system and water mentioned in this con-
tract with Smith estate, except water from Hardin
spring. Before Mr. Smith died he had leased the
Hardin spring, so known. That spring is further
east than the spring on the Dale lot, so she now
owns the entire system of water works and the spring
125 on the Van Voorhees lot, and assumes the lease of
Mr. Smith of the Hardin spring, and also all there
is of the water on the Dale lot. The logs are now
taken out of the Dale lot, but the logs were in the
Dale lot, and the Dale and Van Voorhees springs
were connected. At the time of the purchase from
the Smith estate, we assumed the supplying of five
or six houses with water free of rent, which they,
the Smith estate, were obliged to furnish by the lease
of the Hardin spring.

126 Re-Direct by Mr. Steele :

I say my wife is now the owner and was at the
time of the injury complained of in the complaint,
the owner of the springs and water system of logs,
&c., as I have testified above.

Re-Cross by Mr. Coffin :

127 The first logs torn out were torn up by the Acad-
emy, that is on Alexander street, running north and
south. They were taken out in July, 1887, I think,
the fore part of July. It was the lower part of the
street, near where it connected with the penstock.
Mr. Rankins and the men in his employ tore up the
logs and took the penstocks down. The penstock
was then standing. That was near the corner of
Alexander and Main streets. From that point they

were taken up north, at that time to Petrie street. Petrie street intersects Alexander street. I did not have logs on Petrie street. At that time the village had waterworks in on Alexander street. They had the mains down. My logs ran on the eastern side of Alexander street, and the village water pipes in the street were west from my logs, and I think a little west of the center or very near the center. Nearly all of Alexander street, from Main to Petrie street, is all rock in the road bed, so in putting in the village water works the village blasted out Alexander street up to Petrie street. It was blasted down about five feet. My logs lay nearly on the surface, part of the way not covered up. All the logs were thrown out on Alexander street, from Main to Petrie street. The water did not continue to run from Petrie to Burwell street after they tore up the logs. I turned the faucet at Burwell street. At the time these logs were torn out the water was flowing through them. This was about July 1, 1887. I am quite positive it was July, and that this was the first of taking up my logs. The next place logs were taken up was on John street, near Mrs. Perry's on Alexander street. This was a short time after the first were taken up and in the month of July. These logs were taken up by Mike Connelly. At that time about sixty or seventy feet were taken up. The length of the logs were eleven feet clear of the joint in length. They took all the logs up in front of Mrs. Perry's lot, which is sixty feet front, and one or two logs on Mrs. Girvan's. I did not measure the width of the Perry lot. The street was parked out in the street, and my logs lay nearly in the center of the space parked out. At the time the logs were taken up on John street the village water main had been laid on Main street. My logs were on the southerly side of John street, near the gutter. The village water mains were north from my logs and nearly in the center of the street; I think eight or ten feet north from my logs. My logs were about two feet from the gutter before the parking was

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done, as the gutter then was. This parking, I think, was carried out about ten feet from the curb. From where the parking stops the street is guttered and paved. On John street my logs were about eighteen inches below the surface. Mrs. Perry resided on the south side of John street. (Paper, blue print, Ex. 7, shown witness.) Mrs. Perry's residence, where the logs were taken out, was between Mary street and Second street, where they intersect John street. The next logs were torn out on William street, but near the corner of William and Main. They were torn out during the same month, July. Mr. Rankins and his men working with him took these logs out. I think they only took out one log there. The village had at that time constructed its system of water line down William street. My logs were there laid on the north side of Main, but the logs were torn out on William street. The log was taken out on the westerly side of William street. The village water main on William street runs nearly in the center of William street and about five feet below the surface. My logs along there were about $2\frac{1}{2}$ feet below the surface. My logs were about $3\frac{1}{2}$ feet from the curb at that place. That log was the usual length, eleven feet in the clear. The next logs were taken out near Mr. Oyston's corner, near the park. Mr. Oyston's premises are at the intersection of Albany and Main streets. This is the place where the sand boxes spoken of were placed. These sand boxes are placed on either side of Main at the intersection of Albany street and Main street. What is called Waverly Place intersects it there. Waverly Place is a street running from Burwell street to Main street on the west side of the park. There logs were torn out, one on Waverly street and one on Main street, passing down to Albany street. The logs were taken out across Main street to where the sand box was on the southerly side where Albany intersects Main street. At this place they took out six lengths of logs, and it was along some time in July. These logs were twelve feet long, laid eleven feet.

At this time the village had constructed their water works down Waverly Place and had also been laid on Albany street at that time, and had also then been laid on Main street at the intersection of Waverly Place and Albany street with Main. The water mains along there were five feet deep. My logs on Waverly Place were about twenty inches below the surface, and the sand boxes were placed about three feet below the surface. These sand boxes were placed right in the line of my logs coming down Waverly Place and Albany street. Mr. Rankins and men employed with him took up these logs.

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The next place logs were taken up was on Burwell street. They were taken up where Burwell intersects Alexander, near the corner. At that place three logs were taken out. It was along in July. They were taken out by Rankins and the men working for him. The village had a system of water mains laid on Burwell street, and they were laid when the logs were taken up. At that time the village water works were constructed on Alexander street to the intersection of Loomis street. My logs were on the westerly side of Burwell, and cut across. My logs were taken out. One of them was taken out on Burwell street, east of Alexander, and on the northerly side of Burwell. But one log taken out there. The next log was taken out after you cross Alexander street and on the Park boundary of Alexander street. On Burwell street this log was about two feet below the surface, and on the Park side of Alexander street, it was near the surface, not over eight inches below the surface. On Burwell street where the logs were taken up the logs were plugged.

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Q. Where next in respect to your system of water works, as represented on the map Ex. No. 1 of May 18, were your logs taken out?

A. On Loomis street. It was just below where I reside and westerly of where I reside, near where Ives lives, and about 150 feet west from my house.

At that place I should judge they took out 100 feet; it was on the southerly side of Loomis street. They were near the surface. Not over six or eight inches below the surface. As the line is represented on the map the logs are on the northerly side of the street, but the logs were in fact on the southerly side. The Boyer spring is just east of the house where I live. I judge twenty feet east of the house. The Hardin spring is about five hundred feet east from the Boyer spring. I don't claim my logs were disturbed east of my house. The limit of the corporation at present, is about one thousand feet east from my house. Both the Hardin and Boyer springs were within the corporation limits and were when this action was commenced. There were logs taken up on the corner of Salisbury street and Garden street. Salisbury street intersects Main street. None of my system as appears on the map, lies on Salisbury street north of Garden street. My water works on Salisbury street were on that street between Garden street and Main street. Mr. Carryl's barn stands on corner of Salisbury street and Garden street. My logs were on the east of the center of Salisbury, and they were about three feet below surface. Two logs were taken up there.

At the point of intersection of Salisbury and Garden streets two logs were taken out. These logs were taken up by Mr. Rankins and his men at work for the corporation. I think that was along about September, 1887. I was there when the logs were removed, it was about nine or ten o'clock in the forenoon. The water was then running in that part of the system, coming to that place across Waverly Place. The city system of mains had at that time been laid in Salisbury street. The logs were left lying near the place from which they were taken, the logs there were about three feet below the surface. The logs were in good condition when taken out. I put in an iron pipe in the place where these logs were taken out, the second day after. Then the

water flowed through Garden street to the corner of Second street and to Zoller's house. There was a penstock near the intersection of Salisbury and Garden street. This penstock was in use. Water was flowing there. The penstock was not then disturbed. At that time the water was not flowing on Salisbury street from Garden street to Main street. The water never flowed down Salisbury street to Main from Garden. 143

Q. Is the representation on the map in evidence of May 18, offered and received as Ex. 7, correct when it purports to show that that part of the plaintiff's system of water works was a line of pipe or conduits running on Salisbury street between Garden and Main street?

A. Not when it shows a pipe from Garden to Main along Salisbury street. I accompanied Mr. Lansing when he made the preliminary survey for the map showing the plaintiff's system of water works. At that time I did not state to Mr. Lansing that plaintiff's pipe ran on Salisbury street between Garden street and Main street. The logs taken up by Mr. Rankins and his men were my wife's logs, they were on Garden street where Salisbury street crosses it and near Carryl's barn. No logs were ever laid up and down Salisbury street. 144

The logs lay on the south side of Garden street where it crosses Salisbury. The penstock represented to be on Salisbury is on the corner of Garden and Salisbury streets, on the east side of Salisbury street, where it crosses Garden. There is no penstock on Salisbury between the south line of Garden street, and the north line of Main street. 145

The first logs taken up were at the intersection of Alexander and Main street, near the Academy, and after they were taken up I repaired them. The logs were taken up from the intersection of Main to the intersection of Petrie street, along Alexander street. There was about three hundred feet of pipe taken 146

up there. I afterwards repaired that three hundred feet. I repaired it right away after they took it out. A short time subsequent to that and about that time the logs were taken up, up Alexander street, from
 147 Petrie to Burwell street. I never repaired the line along Alexander street from Petrie street to Burwell street after it was so taken up, but they were repaired between Main street and Petrie street, about three hundred feet. The line running down Alexander street, crossing Main, supplied John street. The next place the logs were taken up after being taken up near the Academy was on John street, in front of Mrs. Perry's residence. At that point some sixty or seventy feet of logs were taken up. These logs were taken up by
 148 Mike Connelly. The logs were taken up by Mike Connelly, I think in July or August, in the year—I don't now recall the year. I recollect it was Mike Connelly who took them up. I am positive it was in July or August of some year. I did not afterwards repair that sixty or seventy feet.

The line of pipe was left intact northerly and southerly of these sixty or seventy feet on John street. The next place the logs were disturbed was at the corner of William street and Main street.
 149 They took out one log there. Mr. Rankins and his men took that log out; it was along in the fore part of July, I should judge. I can't tell exactly. It was after they took them out on John street in front of Mrs. Perry's. I now think they were taken out in the fore part of July. The penstock was taken out the same time. After the log was taken out I did not repair it. After the penstock was cut down I did not replace it. It was cut down and taken away.

The next place the logs were taken out was at
 150 Waverly Place and corner of Main street at Mr. Oyston's. I fixed it up there. There was no penstock located there. After the repairs were made the water flowed down Albany street and supplied

my customers on that street. I can't tell the year exactly. I think these were the last logs taken out. No penstocks were taken out after that. They did after that take down a penstock on John street. We had three penstocks on John street. The three penstocks on John street are not represented on the map. I accompanied the engineer and pointed out the line of logs as they appear on the map except as to Salisbury. I don't think I accompanied him when the penstocks on John street were located. I don't know as there are more than two penstocks represented on the map on John street. I guess they are only two. I can't see by examining the map whether there are two or three penstocks represented there. If the map represented only two penstocks on John street it is incorrect. The penstocks which were cut down on John street are the two represented on the map. They were cut down some time after the sixty or seventy feet of logs were taken out in front of Mrs. Perry's. The penstock near Mrs. Rust's corner was cut down first on John street.

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The line lays southerly of the center of John street, partly on one side and angles across the street. The penstock cut was on the northerly side of John street, near Mrs. Rust's and nearly in front of Mrs. Cronkhite's place, right on the corner. This penstock was cut down in May or June or along in May. I think it was in 1888. Rankins and his men at work for him cut it down; when it was cut water was not running in it. I think it was in 1888 that the logs were taken up in front of Mrs. Perry's. The logs were taken out on John street in front of the residence of Mrs. Perry some time in July or August, 1888. They cut the logs off near Mrs. Perry's and the penstocks were cut down on John street before that. When I stated that the logs were taken up in front of Perry's before the penstock was cut down in front of Cronkhite's, I was mistaken. Rankins and his men cut it down. The next penstock on John street

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154 was cut near the priest's house. I guess that is not on the map. There is no penstock now standing on John street. The last penstock on John street was cut last summer and since this action was brought. On Burwell street, the street crossing Alexander street, and then down across the park, pipes run diagonally to Waverly Place. Rankins and his men took up the logs where they ran across Alexander street. They took out one log there at Burwell street in June, 1888, I think; I can't say when in June; along in the fore part of June. When I said it was taken out in July, 1887, I was mistaken as to the time. I put that log back after it was taken out; 155 after putting the log back the flow of water continued on Burwell and down across the park and across Waverly Place and on Garden street.

I can't now say where I testified the next logs were taken out. I testified the logs were taken out on Loomis street; it was in 1888; I think it was along in June, or about that time. I can't tell exactly what time in June. Rankins and his men working for him took these logs out. They took out eight or ten lengths of logs on Loomis street. It was near widow Smith's on Loomis street. Widow Smith 156 lives about 200 feet west of our house and on the opposite side of the street. We live on the north side of the street, and the log was laid on the south side. I repaired that. The logs remained up maybe two days before I put them in. After I replaced the logs the water flowed from my place on Loomis street to Ward street and Burwell street and across the park for a spell.

157 I said on my direct examination that the water commissioners took up the logs on Loomis street, the water commissioners took up probably three hundred feet of plaintiff's pipe on Loomis street. That was about in front of my house and along by the spring. Van Voorhees spring is east from my house about fifty feet. They blasted in front of the house and went about 200 feet west and about 100

feet east of the house and took them up. The water commissioners took up this pipe in 1888. It was in 1887 I think that the water commissioners took it out, but I won't be positive, but that is what I think. I think they tore it up in the fore part of July. The logs were up in the summer of 1887, about two months, when the water commissioners took them up; I think Mr. Sullivan was a contractor and had charge of the men. After they got through with that, I replaced my water line. Sullivan and his men also took up some logs near the Academy, that was in 1887. I don't know of any other place. I stated on direct that the logs at the corner of William and Main were taken up by Sullivan and his men. I did not state that those were the only logs taken up by them. In 1887 the logs were taken up at the corner of William and Main streets by Sullivan and his men along in July or August, or about that time. I think they took out three logs there. I replaced them.

(NOTE.—Hiram Boyer suggests he desires to make correction in his testimony regarding pipes on Salisbury, and referee states he will allow correction at close of cross-examination.)

Of my own knowledge the logs were first torn up, that I saw myself, right there at the Academy. I was an eye witness to the transaction. I saw them tearing them up. That is the first I saw. The next I saw them torn up was by Chas. Oyston's, corner of Waverly Place and park. I was present there and saw the transaction. The next place where I was an eye witness, was next to Carryl's barn on Garden street. I was present at that time. The next I was an eye witness to was at corner of Main street and William. I was present at that time. The next place I personally saw them took up, was opposite Oppel's jewelry store, on Main street. The next place I saw them tear up logs was below my house on Loomis street, in front of Moses Byron's place.

Q. When next to any place you testified to on direct examination did you personally see the logs taken up?

162 A. On John street, front of Mrs. Perry's house. I was personally present when they were taken out. I think that was the last place I personally saw them taken out. I won't be positive of that, but I think that is the last place.

Q. In your direct examination you have testified as to persons and streets where they resided, who took water in 1887; was P. H. McEvoy taking water of you in 1887?

163 A. Yes sir; a part of the year but not the whole year. The city main was laid on Main street at that time.

Q. Was C. Fleming taking water of you on Second street in 1887?

A. I think he was a part of the year. I think he took one-quarter that year, but won't be positive. I think the city main was laid on Second street at that time.

164 Q. Was J. W. Ingalls taking water of you in 1887?

165 A. I think not. Mrs. Dr. Hawn was taking water of me in 1887. The city line was laid on Main street at that time. Henry Whittemore was not taking water of me in 1887. W. H. Waters was taking water of me in 1887, a part of the time. The city main had at that time been laid on John street. Mr. Reddy was taking water of me part of the year 1887. He lives on John street. He did not connect with city main as soon as it came down there. Mr. O. Loucks was taking water of me in 1887. He resides on John street. He took water of me as long as I furnished it on John street.

Q. Was Mrs. Rust taking water of you in 1887, corner of John and Mary?

A. Yes, she did take water of me then. She took of me as long as water was supplied on that street. W. H. Cronkhite was taking water of me in 1887 and he took water of me as long as I supplied water on that street. Mr. A. King took water of me part of the year 1887. The city mains had been laid on that street. As soon as the city water was in he put in city water. S. M. Richmond took water of me part of 1887, till they put in the city water. Mary Girvan was taking water of me in 1887; not all through the year, I think. I think one quarter. 166 She connected with city main I think as soon as they were put in. J. N. Walrath was taking water of me I think in 1887. I think he took of me the entire year. W. H. Dorr's widow was taking water of me in 1887; I think she took water during the whole year. Mrs. Reed was taking water of me in 1887 and took the entire year. W. D. Ingham was taking water of me in 1887, and took during the year. J. H. Timmerman was taking water of me in 1887 and did through the year. J. P. Harvey was taking water of me in 1887 and did take the entire year. 167 Mrs. S. Snell took water of me in 1887 and took the whole year. L. R. Klock was taking water in 1887 and took part of the year. I think he took nine months and after that connected with the city main. A. Golden was taking water of me in 1887; the city main had been laid on Garden street at that time. He took of me during the year 1887. George Failing took water of me part of the year 1887, till they put in water. I think he took water of me one-quarter and then connected with the city main. C. Judd was taking of me in 1887, and all through the year. 168 H. Sharp took water of me in 1887, all through the year. J. E. Groff was taking water of me in 1887, and took all through the year; paid for a year. P. G. Dengler took in 1887 and took all through the year. Skinner & Co. took water from me part of the year 1887; I think they paid for one quarter; they then connected with the city main. E. B. Youker took water in 1887 from me through

the year. Williams & Son took water of me in 1887 and took through the year. D. C. Bangs was taking in 1887 and took through the year. J. E. Senior took water in 1887 and took during the year. A. Spohn I think did not take water of me in 1887. Jacob Zoller was taking water of me in 1887 and took the entire year. Bramer's estate was taking in 1887. The city main I think was laid at the corner of Waverly Place and Main street; I won't be positive, but I don't think it was. They took of me until they put in the city water; they took through the entire year. William Beattie took of me in 1887, the entire year. E. J. Nelson took of me in 1887, the entire year. D. H. Burrell took water of me in 1887 and took the entire year. The city line was then laid on Garden street. S. Newell was taking water of me in 1887 and took the entire year. That was on Second street and the city line was laid on Second street in 1887. Alfred A. Haight was taking water of me in 1887 and took the whole year. P. G. Dengler took water from me on Albany street, also in 1887 and took the entire year. The city main had then been laid on Albany street. Dan Aberly was taking water of me in 1887 and took the entire year.

Geo. Baker took water of me in 1887 and took the entire year. Arphaxed Loomis estate took of me in 1887, took of me part of the year on Main St., I think one-quarter. Dale Bros. were taking of me in 1887 and took the entire year. The main at that time had been laid on Alexander street. Chas. Benedict took water of me part of the year 1887. I think he took six months. He afterwards connected with the city main. Newell, Loomis & Ives took water of me in 1887, and took, I think, the entire year. John Bradley took water of me in 1887 and took the entire year. John Selcer took water of me in 1887 and took the entire year. Mrs. N. Perry took water of me in 1887 and took the entire year. Mrs. W. H. Williams took water in 1887, all the year. D. Collins

took water of me in 1887 the whole year. Patrick Kehoe took water in 1887, and took the entire year. J. J. Butman took water of me in 1887. Mrs. T. Conboy took water of me in 1887 and took the whole year; he was dead. John McCauley took water in 1887 all the year. Leary & Co., took water part of the year 1887, I think one-quarter of this time. Dr. Garlock, I think, took water one-quarter in 1887. Leary & Co., and Dr. Garlock connected with the main. Mrs. J. C. Clark took water part of the year 1887, I think one-quarter and then connected with city water. Phillip Jones took water part of season of 1887. I think one-quarter and then connected with city mains. S. J. Waters took one-quarter in 1887 till they got city water in and he then connected with city water. Jane Saunders took water one-quarter in 1887, and then her landlord connected with city main. C. Benedict did not take water of me on Garden street in 1887. M. Penoyer did not take water of me in 1887 on Main street. Mrs. S. Ward took water of me in 1887, and part of the year, about one-half, and then connected with water main. D. Snell did not take water of me in 1887. M. Switzer did not take water of me in 1887. J. H. Bucklin took of me in 1887, and part of the year, one-half year, and he then connected with the city main. W. T. Buddle was not taking water in 1887. William Fox was not taking water of me in 1887. J. Gililand was not taking water of me in 1887. James Churchill was not taking water of me in 1887. William Beaumont was not taking water of me in 1887. Hiram McChesney was not taking water of me in 1887. Mrs. Klock on Garden street was taking water in 1887 and she took about one-half the year, and then connected with city water. R. Roof was not taking water of me in 1887. G. A. Oppel was not taking water of me in 1887. Howell & Taylor did not take water of me in 1887. Alfred Haight was not taking water of me on John street in 1887. H. Brigham was not taking water of me in 1887 on John street. Mrs. Loban was not taking water of me in

1887. John Driesley was not taking water in 1887 of me. H. Burch was not taking water on Second street in 1887 of me. R. H. Smith did not take water of me in 1887. S. S. Lansing did not take water of me in 1887. Young Men's Christian Association did not take water of me in 1887. James E. Gage did not take water in 1887 of me. J. H. Yost on Main street did not take of me in 1887. Amos Keller did not take water on Main street in 1887. Metropolitan Hotel did not take water of me in 1887. Grand Central Hotel did not take of me in 1887. Beattie House was not taking water of me in 1887. Hinchman House was not taking water of me in 1887. J. H. Smith, cor. of Main and Albany, was not taking water of me in 1887. W. H. Abbott, on Main street, was not taking of me in 1887.
- 177
178 John Selcer on Main street was not taking of me in 1887. William Selcer was not taking water of me in 1887. Dr. Isham on Albany street was not taking of me in 1887. Catholic school was not taking of me in 1887. Charles Smith on Albany street did not take of me in 1887. Mrs. Shepardson on John street did not take of me in 1887. Terry Smith, corner of Second and John, did not take water of me in 1887. John Quackenbush on Second street did not take water of me in 1887. Jas. Leahy on John street did not take water of me in 1887.
- 179 Irving Snell on Main street did not take water of me in 1887. C. T. Croft did not take water of me on Main street in 1887. Mrs. Beniens did not take water of me on Main street in 1887. G. C. Fleming on Second street did not take of me in 1887. E. Wiley did not take of me on Main street in 1887.
- 180 L. Bellinger on Garden street did not take water of me in 1887. The Benton Estate on Garden street did not take of me in 1887. L. Timmerman did not take of me in 1887. P. A. Conyne did not take of me in 1887. J. S. Barnet did not take of me in 1887. J. H. McChesney did not take of me in 1887. James Churchill did not take water in 1887. Geo. Shall was not taking water in 1887. William Stroup was

not taking water of me in 1887. John Dart was not taking water of me in 1887. Mrs. Clark was taking water on Garden street in 1887, and had for years. She took about one quarter year and then connected with city water. B. Doxtater took water on Garden street part of the year, about one-quarter, and then connected with city water. Adam Doxtater took water of me part of the year; he took about one quarter then connected with city. Little Falls Academy took of me in 1887, the whole year. S. B. Merriam took water of me about one-half the year 1887. He is on Main St. He then connected with city water. Mrs. Benson took water in 1887, the entire year. John Koehler took of me in 1887, the entire year. O. Teft took water of me in 1887, the entire year. William Kingston took water of me in 1887, the entire year. Mrs. Gregory took water of me in 1887, the whole year. James Kenna took water of me in 1887, the whole year. Leonard Boyer took water of me in 1887, through the year. Bogart Wizzle took water of me in 1887, through the year.

I said on my last examination that J. W. Ingalls did not take water of me in 1887. Henry W. Whittemore took water of me part of the year, till they tore the logs up. I think Daniel Snell took water all through 1887.

Q. Did you state on your cross-examination that W. T. Buddle did not take water in 1887?

A. I think I said then that I thought he did not. I don't remember of saying William Fox did not take water of me in 1887.

Q. Did you state on your cross-examination that J. Gilliland did not take water of you in 1887?

A. I said I didn't think he did. I probably said on my cross-examination, James Churchill did not take water of me in 1887. I might have said on my cross-examination that William Beaumont did not take water of me in 1887. I might have said on my cross-examination that H. McChesney did not take

184 water of me in 1887. If I stated on my cross-examination that G. A. Oppel did not take water in 1887 I was mistaken. If I stated on my cross-examination that John H. Smith did not take water in 1887 I was mistaken about it. I think I said on my cross-examination that William H. Abbott did not take water only part of the year 1887. I was mistaken if I said he did not then take water. If I said on my cross-examination that John Selcer did not take water in 1887 I was mistaken. I did state on my cross-examination that Dr. Isham did not take water of me in 1887. If I stated on my cross examination that the Catholic School did not take water in 1887, I was mistaken. If I stated on my cross examination that Chas. Smith was taking water in 1887, I was correct. Chas. Smith did take it then but "Chris" Smith did not. I think I probably might have said on my cross-examination, Mrs. Shepardson on John street did not take water of me in 1887. I think I stated on cross-examination that Terry Smith did not take water of me in 1887. I think I stated on cross examination that J. Quackenbush did not take water of me in 1887. I stated on my cross-examination that James Leahy did not take water of me in 1887. If I stated on my cross-examination that Irving Snell did not take water of me in 1887, I was mistaken, for he did. If I stated on my cross-examination that C. T. Croft did not take water of me in 1887, I was mistaken, he did. If I stated on my cross-examination that Mrs. Beniens did not take water of me in 1887, I was mistaken, she did. If I stated on my cross-examination that G. C. Fleming did not take water of me in 1887, I was mistaken, he did. I think I stated on my cross-examination that E. Wiley did not take water of me in 1887, and I think he did not. If I stated on my cross-examination that L. Bellinger did not take water of me on Garden street, I was mistaken, he did take water. I think I stated on cross-examination that the Benton estate did not take water of me in 1887. If I stated on cross-examination that P.

A. Conyne did not take water, I was mistaken; he did. If I stated on cross-examination that J. S. Barnet did not take water in 1887, I was mistaken, he did take water. I don't know anybody by name of J. H. McChesney at all. The only McChesney I furnished water to was Hiram, and I furnished to him on Second street, at two places, that is, his home at \$5.00 and shop on other side of same street at \$3.00. I might have said on cross-examination that James Churchill was not taking water in 1887. Jas. Churchill did not at any time take water of me at more than one place and that was his barn. He paid \$50.00 a year for that. If I stated on cross-examination that Geo. Shall did not take water of me in 1887, I was mistaken, because he did take in 1887. I said on cross-examination that William Hess did not take water of me in 1887; I was mistaken, because he did. If I said on cross-examination that John Dart did not take water in 1887, I was mistaken.

I knew in his life time Leonard Boyer. I know Theodore Boyer and Edward Boyer; they are my sons and sons of plaintiff in this action. They did not assist me in repairing the logs I have spoken of, when I was present.

Q. How many penstocks did the plaintiff own as represented by this map?

A. I could not tell exactly.

Q. About how many?

A. I think in the neighborhood of twelve or fourteen.

Q. Did plaintiff own a penstock at the foot of Second street?

A. Yes, sir.

Q. Who cut that down?

A. I don't know; I wasn't in the village at that time. At the time that penstock was cut down, I don't remember whether water was running there or not. I was away at work in the country. There

192 was another penstock further north on Second street. That was cut down. I did not see it cut down. I don't know if there was any water running there when it was cut down. There was another penstock owned by plaintiff represented on the map, on that street, between Albany and John, (on Second street). That penstock was cut down. I did not see it cut down. When it was cut I cannot tell if water was running there. Still north from there and on Second street, between Albany and Main, there was another penstock. That was cut down. I did not see that penstock cut down. Water was running there at the time that was cut down. At the corner of Main and Second streets, on the northerly side of Main street, there was a penstock belonging to plaintiff. That was cut down. I did not see that cut. 193 Water was running from it at the time it was cut down. On Garden street, at the foot of Jackson street, there was a penstock of plaintiff's. That penstock I think was cut down; I won't be positive about that. That is as strong as I will put that because I do not know. Next easterly from that on Garden street, there was a penstock belonging to plaintiff. That was not cut down. On John street, near the intersection of Mary street, near Priest's place, there was a penstock of plaintiff's. That 194 penstock was cut down. Water was flowing from it at the time it was cut. Northerly from that on Mary street, between Albany street and Main, there was another penstock of plaintiff's. That penstock was cut down. I did not see it cut. Don't know as water was flowing from it at the time it was cut. Northerly from that, and on Main street, where Mary intersects it from the northerly side, there was another penstock. That penstock was cut. I did not see it cut. I can't tell if water was flowing from it when it was cut.

195 Q. At the foot of William street, near where John crosses it, was there a penstock?

A. Yes. I did not see it cut. I think I did,

come to think, but will not be positive. That is as strong as I will put it. Northerly from that and situated on William street, near the line of Albany street, there was a penstock there, near Reed's place. That was taken away. I think it was dug up. I did not see it dug up or taken away. I can't tell whether water was flowing from it when it was dug up. Next northerly from that on William street, near the northerly line of Main street, there was another penstock. That was cut down and carried off. I did not see it cut down. There was water flowing through it at the time. 196

Q. Next northerly from that on Garden street, near the foot of William street, or near where it crosses Garden street, was there a penstock?

A. There was, and it still stands. On Albany street, between William and Main street, there was a penstock of plaintiff's, opposite of widow Green's. That penstock was cut down. I did not exactly see it cut down. Water was not running at that penstock then, It was shut off at Oyston's corner at Waverly Place. Standing on Burwell street, near where Ward street intersects it, there was a penstock belonging to plaintiff, where it turns to go up to Loomis street. That was not cut down. I did not see the penstocks which I have now testified, cut down, except as I have stated. I did not see anybody cut them. Hank Souls told me he cut them down. He told me he cut them down under the direction of Rankins. 197

Defendant moves to strike out witness' evidence in relation to all the penstocks which he has testified to as having been cut down, on the ground that it is incompetent, immaterial, irrevelant and hearsay. 198

Objection by plaintiff.

Motion denied with leave to renew and without prejudice. Exceptions to defendant.

Re-Direct by Mr. Steele :

199 Some of the penstocks which I have testified to as
 200 having been cut down, I heard about it and went
 right down there and saw that they were cut down.
 I saw four right away and shortly after they were
 cut down.

Q. There was a penstock represented on the map
 on Second street, below John street, was there a
 penstock there?

200 A. That is the one McChesney spoke of; it was
 in front of McChesney's house. That was the last
 one down there, this side of the railroad. There was
 one more down below the railroad, on Second street,
 opposite or near Mrs. Leahy's place, now MacKin-
 201 non's store house. That penstock was removed in
 1887. I think in July or August. I won't be posi-
 tive exactly as to date. It was torn up when the
 arch was put in. I saw it shortly after it was done.
 That arch was a stone arch crossing the stream. The
 street is carried along over that arch. Below that
 there was one penstock, below that at the factory,
 in the ground, at King's mill. I don't know whether
 that is still standing. That was at the end of the
 line of logs on Second street and near the river.
 202 When the logs were torn up on John street the pen-
 stock down by King's mill was being used. The
 water then only went down to Leahy's. It did not
 then go down to King's mill. After they put in the
 arch the water did not go to King's mill, but before
 they put the arch in the water went there. Mr.
 Rankins was street commissioner in 1887 as well as
 in 1888. I was there several times when the arch
 was being put in. Col. L. Boyer was inspector of
 the work and the C — Bros. were the contractors
 who did the work.

(Map shown witness.) Ex. No. 7.

202 Q. You testified on your cross-examination that
 the map was incorrect in representing a line of logs
 on Salisbury street, between Garden and Main. Do
 you wish to correct that statement?

A. Yes.

Q. How ?

A. There was a line of water logs down Salisbury street till it struck the McCauley building, the Hardin houses and Bramer place and stopped at Bramer's place at the water fountain. Up to the time the water was cut off it was in use in the Hardin houses and on the Bramer place. 203

I am acquainted with the nature of the ground through which these logs were laid, and for about one year prior to 1887 and 1888 I had been connected with the water logs. Prior to that time I had not worked on the water works in repairing the water works. We came in possession in 1886 and before that we had nothing to do with repairs. I have knowledge of digging ditches and trenches in Little Falls in 1887 and 1888, and after May, 1886, I employed men to dig ditches for the water works from time to time, and have done it myself, so that I was familiar with the value of such work. 204

Q. What was it reasonably worth per rod to excavate, lay the pump logs and cover them one foot under the surface at the places where the logs were taken out ?

A. I should estimate it \$8.00 per rod. That is just the labor, not including the logs. 205

Q. When they were laid two feet under the surface what was it worth ?

A. About ten dollars per rod and about two dollars per foot for each additional foot deeper.

Q. What was the whole system of water works worth at the time the logs were torn up and penstocks cut down as you have stated, or immediately before ?

A. I estimate it worth \$20,000. After plaintiff purchased the system there were no repairs made up to May, 1887, to amount to much. Plaintiff purchased the logs and conduits of Mrs. Smith in May, 206

1886, and we carried on the work up to May, 1887. Our water contracts were by the quarter year with our customers, all but four who had contracts by the year. In the summer of 1887 the village began putting in the city water works. They commenced in the spring of 1887 and completed in 1888. My logs were first interfered with by the village in 1887. During the year 1887 the village put in the water mains in connection with the city water works, and in doing that plaintiff's water pipes, mains and logs were interfered with in various places. The logs were taken out in various places and I put the biggest part of them back. So my water works continued over into the year 1888. 1888 was the year in which the logs were taken up, sand boxes put in and penstocks cut down as I have testified to. When I testified from time to time it was in 1887; I was mistaken as to the year.

Evidence of plaintiff continued: Book produced. It is conceded that this book is Journal K. of the proceedings of the Board of Trustees of the village of Little Falls. Plaintiff offered record of meeting of July 16th, 1889, on page 169 of the journal. Plaintiff offers the following record: The petition of Nancy M. Boyer praying that she might receive her due, was referred to E. J. Coffin, village attorney. Objection on the part of defendant, that if there was a verified petition presented, the petition itself is the best evidence and should be produced or its absence accounted for. That the Journal evidence is secondary, incompetent, immaterial and irrelevant. No proper foundation laid for the proposed evidence. Objection overruled and exception. It is admitted Charles R. Petrie was the president of Little Falls on July 16th, 1889, and E. J. Coffin was the village attorney of said village, and that William Reed was the clerk of said village.

W. H. Robinson, called by defendant, says: In 1885 and subsequent, I was the owner of a water water system in Little Falls, and supplied customers

with water from my system. My system was on Garden street, Ann street, Church street, and across on Bridge street, Main street, running east to Second street, and down Second street to Skinner block. The water in my system was taken from a source in the village of Manheim, from the Elim spring and the Whitman spring, which was at the head of Main street. The other spring was in the town and village of Little Falls. I owned this system ten years, and during that time it frequently became necessary to dig trenches to repair and to lay pipe and logs. I am acquainted with plaintiff's system of water works in Little Falls and know about all the streets through which it was laid, and am acquainted with the nature of the ground upon which the system was laid and pipes and conduits. I have personally labored at digging the ditches connected with my system, myself.

211

Q. What was it reasonably worth per rod to excavate, lay pump logs and cover them one foot under the surface, of plaintiff's system of water works?

212

A. To dig a ditch two feet wide, one foot deep, six dollars a rod, to say nothing of laying the logs.

Q. What was the whole system of the plaintiff's water works worth at any time from 1887 to 1889?

A. It was worth \$8,000, and cheap at that.

Cross-Examined by Mr. Steele:

In my estimation of \$6.00 per rod, I did not include the value of the logs.

Re-Direct :

213

No part of my system was torn up by the street commissioner nor any of my penstocks cut down.

Re-Cross :

The village bought my iron pipe across the park.

It is conceded that the meeting of July 16th, 1889,

214 was held by the Board of Trustees of Little Falls,
and that pages 196 and 197 of Journal K. is a cor-
rect record of the proceedings of that meeting.

Same objection was interposed to the record as before.

Objection overruled and exception.

Plaintiff's attorney requests the attorney for the village, E. J. Coffin, to produce the petition referred to, and Mr. Coffin is to produce paper if it can be produced at next hearing, otherwise, secondary evidence may be offered.

215 Hiram Boyer, re-called for plaintiff :

Q. What was the effect of the letting of the water out of these logs, and air in ?

A. They rotted away quick. They lay near the surface. They would become useless within two years, letting air in and dirt in would spoil them for further use within the period of about two years.

Cross-Examination :

216 I have examined some of the logs since then. I
took up some on John street near the penstock, they
were near the surface. I took up a few but they
were of no use. I took them up about July, last
summer. I only took up about three of them. I
examined them and they were all in about the same
shape. I opened the trench to get some logs to lay
in on Loomis street to patch in. I opened the trench
to the extent of about two lengths of logs. I did
not open any further than two lengths on that street.
I know nothing of the condition of the rest except
from those I took out except I could see some others
without taking them out, they were near the surface.
217 I did not open the trench on any other trench than
John street.

Re-Direct :

As long as the water is running the logs are pre-

served, but they rot away quick when the water is out.

EVIDENCE CLOSED.

Case submitted by defendant. Brief and Requests for findings to be filed within fifteen days. 218
Mr. Steele reads brief for plaintiff.

Upon the submission defendant made the following motions :

1.

Motion by defendant to strike out evidence of Hiram Boyer, the plaintiff's husband, concerning the transactions with Isaac B. Richmond and Amos Rankins, both of whom were dead when said evidence was given, on the ground that the same is incompetent, improper, immaterial and irrelevant in that the defendant by its officers and agents, to wit, its president and street commissioner, is the survivor of said deceased persons. That said Hiram Boyer being the husband of said plaintiff and the father of her children, is interested in the event of this action and therefore comes within the mischiefs which Sec. 219
829 of the Code of Civil Procedure aims to prevent.

2.

The defendant moves for nonsuit of the plaintiff on the ground that she has failed to establish her succession to the corporate franchise of the so called Aqueduct Association as provided by Chap. 45 of the Laws of 1806, or otherwise. That there is no competent evidence that William Usher and others were the successors of said Association or that it was in being and not dormant, at the time they claimed to succeed to the rights and privileges thereof. That said corporation or franchise being an entity, an incorporeal hereditament, it could only be transferred, if at all, with the consent of the sovereign power by which it was created, and that the only certificate or script belonging to said Usher, 220
221
after it was turned over, did not avail to transfer

222 any part of said body corporate under the general
 223 assignment of Wm. Usher to H. P. Alexander, and
 224 that in consequence of the foregoing failure of proof,
 225 plaintiff has failed to establish her right to damages
 226 as against the defendant in this action by, through
 227 or under said Association, as being its successor to
 228 the extent of the whole or any part thereof by,
 229 through or under said general assignment or other-
 230 wise.

3.

231 Defendant moves to nonsuit the plaintiff on the
 232 ground that it does not appear that she ever pre-
 233 sented her claim to the Trustees of the Village of
 234 Little Falls pursuant to Sec. 56 of defendant's char-
 235 ter, for damages alleged to have been sustained and
 236 for which this action is now pending.

4.

237 Motion for nonsuit on the ground that it does not
 238 appear by the evidence of the plaintiff that the presi-
 239 dent of the village at that time, to wit, Isaac B. Rich-
 240 mond and the street commissioner, Amos Rankins,
 241 were in any way or manner authorized by the gov-
 242 erning power of said village, to wit, the trustees
 243 thereof, to take up, remove or destroy any of the
 244 pump logs or conduits claimed by the plaintiff.
 245 That the plaintiff's action being in trespass, the vil-
 246 lage is not liable in damages for said unauthorized
 247 acts.

5.

248 Motion for nonsuit on the ground that it does not
 249 appear by the plaintiff's evidence that said village
 250 by its said trustees, its said governing power, in any
 251 way or manner ever ratified or confirmed the un-
 252 authorized acts of trespass of said president or street
 253 commissioner in taking up, removing or destroying
 254 said pump logs or conduits claimed by the said plain-
 255 tiff, and said village is not therefore liable for the
 256 injury complained of.

All the foregoing motions denied, with exceptions to defendant separately to each of said denials.

Case called on defendant's motion to re-open.

Appearances:

MR. J. A. STEELE for plaintiff,

MR. E. J. COFFIN for defendant,

J. D. BECKWITH of counsel for defendant.

Plaintiff objects to motion being entertained upon several grounds stated, which motion was overruled with exception to plaintiff.

226

Mr. Beckwith of counsel for defendant read affidavits and argued for motion and Mr. Steele, attorney for plaintiff, argued in opposition.

SUPREME COURT—HERKIMER COUNTY.

NANCY M. BOYER

vs.

THE VILLAGE OF LITTLE
FALLS.

227

You will please take notice that at the office in Mohawk, N. Y., of J. B. Rafter, Esq., the referee herein, on the fifth day of June, 1894, at eleven o'clock in the forenoon, an application will be made upon the affidavits hereto annexed and upon all papers and proceedings in the action and upon the trial thereof, including the evidence, to re-open this case generally before said referee.

228

Dated May 28, 1894.

Yours &c.,

E. J. COFFIN,

Attorney for Defendant,

Little Falls, N. Y.

To J. A. Steele, Esq., Att'y for Defendant.

SUPREME COURT—HERKIMER COUNTY.

229

NANCY M. BOYER

*vs.*THE VILLAGE OF LITTLE
FALLS.

HERKIMER COUNTY—SS.

Edward J. Coffin being duly sworn deposes and says that he resides and has his office at Little Falls, N. Y., that he is a duly licensed and practicing attorney of this court and is attorney for the defendant in this action.

230

Deponent further says that this action was commenced about the month of March, 1890, and issue was joined herein by the service of defendant's answer about the 5th day of June, 1890. That the action was duly placed upon the calendar of the December, 1890, Herkimer Circuit for trial and was upon plaintiff's request put over the term, and that the action was again placed upon the calendar of the April, 1891, Herkimer Circuit for trial but was not tried thereat and was postponed and referred at plaintiff's request. That the first hearing before the referee was had April 22, 1892, and thereafter about thirteen hearings were had, the last hearing herein being fixed for and had April 19th, 1894, at which time the evidence in the action was closed and fifteen days given in which to file findings and briefs.

231

That early in May the committee to investigate and report as to actions to which the village is a party, called upon deponent and requested from him the papers, proceedings and evidence in this case and that deponent then informed said committee, which was the fact, that shortly before his office had been rendered untenable by fire and nearly all his papers including the papers in this case had been bundled together and taken by him to his home about four miles from the village, and that it

232

would take deponent some time to sort out said papers and produce them for the committee; that deponent thereupon did as soon as he could, sort out said papers from a large mass of legal papers and documents and give them to said committee about May 10th, 1894.

233

That shortly thereafter deponent had a conference about this case and about re-opening the same, with J. D. Beckwith who is now acting as counsel herein, who then requested deponent to make application to said referee to re-open the case, and after discussing the same and due consultation had, such an application was decided upon and deponent without delay, wrote to said referee requesting him to fix a time and place for hearing such application, and deponent after waiting a few days and receiving no reply, again wrote to said referee to the same effect and thereafter received from said referee a communication fixing the same at his office on June 5th, at ten or eleven o'clock to suit the convenience of deponent, and deponent thereupon decided to bring on said application at eleven o'clock at said time and place. That owing to deponent's necessary absence from his office at Little Falls, he did not receive said communication until late in the afternoon of May 26th, 1894, nor communicate the same to said Beckwith until the morning of May 28th.

234

That deponent's attention has recently been called by said Beckwith to the facts and matters set forth in his affidavit hereto annexed in the statements of fact 1st to 9th inclusive, which facts and matters are as deponent verily believes material to the defense herein and constitute a complete defense to the cause of action set forth in plaintiff's complaint.

235

That the reason this action was submitted upon the trial without any further or other defense than that interposed by deponent, was that deponent believed that for the reasons and matters set forth in his motion for a non-suit and dismissal of the complaint herein, that plaintiff had wholly failed to es-

236

237 tablish a cause of action against defendent and was not entitled to recover, and owing to the further fact that deponent had made careful search and inquiry of many persons in said village of Little Falls, whom he thought likely to have knowledge of the said matters, and that owing to their reluctance to becoming witnesses herein or to other causes unknown to deponent, deponent was unable to ascertain from them any facts or matters which he deemed of sufficient importance at the time to warrant his prolonging this action by calling them as witnesses and undertaking to establish by their evidence a defense herein.

238 That this application is made in good faith and not for the purpose of delay.

E. J. COFFIN.

Sworn to before me, this }
28th day of May, 1894. }

M. G. BRONNER,

NOTARY PUBLIC.

SUPREME COURT—HERKIMER COUNTY.

239 NANCY M. BOYER,

vs

THE VILLAGE OF LITTLE
FALLS.

HERKIMER COUNTY—SS.

240 John D. Beckwith being duly sworn deposes and says that he is a duly licensed and practicing attorney of this court, who resides and has his office at Little Falls, N. Y., and that he now is and for upwards of a year last past, has been attorney for the village of Little Falls.

Deponent further says that early in April, 1894, and not long after the annual village election for the

present year, Charles King, Esq., who was at such election elected president of the village for the first time, came to deponent and inquired of him concerning the status of litigation to which the village of Little Falls was a party, and particularly as to the above action, and deponent then informed said King that according to the custom pertaining in said village, the above action had been continued with Mr. Coffin as attorney for the defendant, and that deponent knew but little of the action and nothing whatever as to what had taken place upon the trial thereof; that the action having been commenced to recover some \$25,000 from defendant was a very important action to the village, and demanded that the interests of the village therein be most carefully looked after, and every defense and every fact in litigation of damages available to the defendant fully and carefully presented upon the trial. Thereupon President King requested deponent to inquire into the same and report to him fully as to said action, and deponent thereupon wrote to the referee herein asking for such information as the referee could properly give in regard to said action, and shortly afterwards deponent received from said referee a letter which deponent has mislaid, in which, according to deponent's best recollection, he was informed by said referee that the action had been tried before him, that the evidence therein had been closed and that a date, April 19th, 1894, had been fixed for the submission of the action, all of which deponent reported to President King.

That at the time deponent was busily engaged at the Herkimer Circuit, which continued until about the middle of April. That on said 19th day of April, or upon the date fixed for said final submission, deponent was engaged elsewhere and was unable to be present, and deponent was unable prior to said time by reason of professional engagements, to fully examine said case and inform himself as to the status thereof and the evidence presented. That as soon

as he could after said date, deponent went to the office of said referee in Mohawk, N. Y., for the purpose of examining the proceedings and evidence herein but found said referee absent, and again shortly afterwards deponent went to said office for the same purpose but was informed that said referee was at the office of Messrs. Steele & Prescott in Herkimer, N. Y., where deponent found said referee and had some talk with him about the case, and was informed by said referee in a general way of what had taken place upon the trial and that as said referee understood it, Mr. Coffin, defendant's attorney, had a copy of all or nearly all of the proceedings upon the trial, including the evidence.

That thereafter and at the next regular meeting of the Board of Trustees of the village of Little Falls, held on the 1st day of May, 1894, a resolution was adopted empowering the president to appoint a committee to investigate and report on all litigation to which the village is a party and deponent was employed as counsel in this action, and that thereafter and within two or three days, said committee consisting of the president, trustee Crowley and deponent, requested Mr. Coffin, defendant's attorney herein, to submit to said committee all papers and proceedings in this action including the evidence upon the trial thereof and was thereupon informed by Mr. Coffin, that by reason of a disastrous fire which had lately nearly destroyed the building in which his office was located and rendered his office untenable, all the papers herein together with his other papers had been bundled together and taken to his residence about four miles from the village, and that as soon as he could do so he would sort out said papers and submit them as requested, but that it might take him a few days to do so, and thereafter and about may 9th, 1894, said papers, including the evidence with the exception of the evidence on the last hearing or so, were submitted by him as requested. That said papers and evidence

were hastily and somewhat illegibly written and difficult to read and deponent was unable to read some portions thereof, and deponent thereupon at once caused typewritten copies of said evidence to be made which were completed within three or four days. That the evidence upon said reference was voluminous, a large amount of documentary evidence and a large number of exhibits having been presented, none of which and no copies of which were contained in the papers or minutes submitted by Mr. Coffin. 248

That deponent thereupon and at once proceeded to examine said case and that such examination involved an examination of said papers and evidence submitted and of said documents and exhibits, in so far as the same were accessible, and also inquiry from a large number of persons residing in Little Falls who were claimed to have been consumers of plaintiff's water or familiar with her water works, and of the records of the village of Little Falls extending over a large number of years, most of which records were not indexed and had to be examined page by page, and also an extended examination of the records in the office of the Board of Water Commissioners of the village of Little Falls, and deponent upon such examination became thoroughly satisfied that there is a large amount of evidence both documentary and otherwise of the highest importance to defendant upon the trial of this action and without the benefit of which defendant cannot safely submit the same. 249 250

That deponent wrote to said referee in regard to an application to re-open this case and asked him to withhold his decision herein, and deponent either in the same letter or in another letter written about a week or ten days ago, but of which deponent kept no copy, requested said referee to fix a time and place for this application, but received no reply, and a few days afterwards telephoned to said referee who then suggested to deponent that he thought 251

252 such request for fixing such time and place should properly come from Mr. Coffin, the attorney of record herein, and thereupon deponent at once requested Mr. Coffin to write the referee asking him to fix said time and place, and as deponent is informed and verily believes, said Coffin at once did so, and received from said referee a memorandum under date of May 24th 1894, fixing the same, but that the same was not received by said Coffin owing to his absence from Little Falls to attend professional engagements until late in the afternoon of May 26th, that thereupon and on the morning of May 28th, the preparation of these papers was commenced.

253 Deponent further says that if this case shall be re-opened, the facts which he expects to show by the evidence which he has discovered in his examination of this case by the documentary and other evidence above referred to and by the further examination or cross-examination of the witnesses sworn upon the trial, and by other witnesses, are briefly as follows:

254 1st. That the disturbance of plaintiff's system of water works claimed to have been made by defendant's street commissioner Rankins and men in his employ, did not take place, if at all, earlier than July, 1888.

255 2d. That at and prior to the time of such disturbance if any, plaintiff's pump-logs were in such a rotten, broken and imperfect condition that the water escaping therefrom almost constantly caused the streets and grounds of the village through which the same were laid to be in a wet and muddy condition and to such an extent as to interfere with the beneficial use and enjoyment thereof and to constitute said system a public nuisance, and that plaintiff had prior to said time, been repeatedly notified to repair or remove the same but had failed properly so to do.

3d. That nearly a year prior to July, 1888, de-

fendant, by its Board of Water Commissioners, had constructed in the village an expensive, elaborate and complete system of public water works, extending to all parts thereof and furnishing to all the inhabitants thereof at moderate cost, a reliable and wholesome supply of water, and that nearly all of the consumers of plaintiff's water had ceased to use the same and had supplied themselves with city water prior to July, 1888.

4th. That the disturbance of plaintiff's system, if any occurring in 1887, or during the construction of said village water works, was done by the contractor who was putting in said village water works and that he was putting in the same as an independent contractor and under a contract which made him solely responsible for the same and relieved the defendant from all responsibility therefor. 256

5th. That by reason of the condition of plaintiff's said system and the inadequate supply furnished by it and of all the foregoing facts and matters, and of the loss of income therefrom, said system was wholly worthless. 257

6th. That a large number of the persons named as consumers of plaintiff's water, never used or consumed the same, that a large number of others were merely tenants and temporary consumers, and that a large number of others did not pay the prices claimed nor more than one-fourth to one-half said prices.

7th. That plaintiff had no right to maintain her said penstocks in the public streets or grounds of the village, and that the same were a public nuisance. 258

8th. That plaintiff never succeeded to the rights granted by the statute of 1806, and had no right or franchise to maintain her said water works.

9th. Such other incidental facts and matters as may properly be adduced in support of the foregoing general facts.

259 That deponent expects to be able to make such
 proof on the part of defendant among other ways by
 said persons who are named by testimony herein in
 plaintiff's behalf as consumers of her water in 1887,
 or nearly all of said persons; by the books and
 records in the office of the Board of Water Commis-
 sioners of said village; by the contract for the con-
 struction of the conduit system of said works made
 with T. D. Sullivan & Co., the contractors who con-
 structed the same; by S. E. Babcock, constructing
 engineer and engineer in charge of said water works,
 E. T. E. Lansing, assistant engineer upon the same,
 and since for a good part of the time village engi-
 260 neer; by the several water commissioners of the vil-
 lage who have served from time to time since 1887;
 by the records of the Board of Trustees of said vil-
 lage for many years last past contained in the
 several journals kept thereof, and by many other
 persons residents of said village and familiar with
 said works and the construction and maintenance
 thereof, or with the condition of the streets and pub-
 lic grounds of said village as resulting from said
 works and the water which from time to time leaked
 therefrom, or who were consumers of said water or
 261 who lived along and adjacent to plaintiff's said line
 of pump-logs and each and every of whom and of
 the foregoing persons now reside in the village of
 Little Falls; and deponent further says that the
 reason that he expects to be able to make such proofs
 by said records, papers and documents and by said
 persons, is that he has examined said records, papers
 and documents and has talked with a large number
 of such persons, including all or nearly all of the
 principal and larger consumers of water, or alleged
 consumers of water from plaintiff's said system and
 they have stated said matters to him as facts and
 262 have stated to him that they were ready and willing
 to testify to the same.

Deponent further says that he has carefully ex-
 amined the case and has made himself familiar with

the facts pertaining thereto, and that defendant cannot safely submit this case without the benefit of the evidence and of the testimony of the witnesses hereinbefore set forth and of the facts established thereby, and that the interests of defendant and of its citizens and taxpayers require a reopening of this case and further hearings herein, to the end that defendant may fully and properly establish its defenses herein by duly submitting such evidence. 263

Deponent further says that he is acquainted with the defendant's case herein and with the facts thereof, and that the defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint.

Deponent further says that he expects to be able to prove the foregoing facts and matters set forth in the foregoing statements of fact, 1st to 9th, inclusive, except as the same shall be established by documentary evidence by the following and other witnesses, viz: Watts T. Loomis, David H. Burrell, Charles King, S. E. Babcock, E. T. E. Lansing, Jas. H. Churchill, W. H. Cronkhite, John W. Ingalls, Joseph Mullen, William Beattie, Thomas Sheridan, William McWenie, J. S. Barnet, John McCauley, John H. Smith, William H. Robinson and Irving W. Shepard, all of whom reside in the village of Little Falls, and that deponent expects to make such proofs by said witnesses, and each and every of them, by reason of conversations had with them and statements made by them to deponent. 264 265

Deponent further says that since the commencement of this action in 1890, the office of president, which is the chief executive office of the village, has been filled by a different incumbent every year, and that the composition of the Board of Trustees of the village has changed every year, and the village attorney nearly every year, and that for several years it has been the custom to allow every village attorney to continue and close up all business coming into his hands during his term of office, and that in 266

accordance with that custom, this case has been continued under the charge and management of the present attorney for the defendant.

267

J. D. BECKWITH.

Sworn to before me, this }
28th day of May, 1894. }

H. C. BROWN, Police Justice.

SUPREME COURT—HERKIMER COUNTY.

NANCY M. BOYER

vs.

268

THE VILLAGE OF LITTLE
FALLS.

HERKIMER COUNTY—SS.

Charles King being duly sworn deposes and says that he is president of the village of Little Falls and has been since about April 28th, 1894.

Deponent further says that he has heard read the affidavit of J. D. Beckwith hereto annexed and that the same is true to the best knowledge, information and belief of deponent.

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Deponent further says that he had no knowledge of this action or of the matters involved therein until after his said election, but that shortly thereafter his attention was called to the same and he at once set about investigating the same and directed an investigation thereof by the acting village attorney, and that he has since that time become familiar with the action and with the facts and matters pertaining thereto and with the defendant's case herein, and that as deponent verily believes, and as he is advised by the village attorney, the interests of the village and of the citizens and taxpayers thereof require the re-opening thereof and the giving of further evidence on the part of the defense.

270

That deponent has fully and fairly stated the case in this action to J. D. Beckwith, who is a practicing attorney, and who resides and has his office at Little Falls, N. Y., and that defendant has a good and substantial defense upon the merits to the cause of action set forth in the complaint, as he is advised by said attorney after such statement so made as aforesaid and verily believes, and that said attorney is counsel for defendant herein.

CHAS. KING.

Sworn to before me, this }
28th day of May, 1894. }

271

H. C. BROWN, Polic Justice.

SUPREME COURT—HERKIMER COUNTY.

NANCY M. BOYER,

vs.

THE VILLAGE OF LITTLE
FALLS.

272

HERKIMER COUNTY—SS.

William H. Robinson being duly sworn says that he resides in Little Falls and was a witness upon the trial of the above action before J. B. Rafter, Esq., referee.

Deponent further says that among other things he gave testimony as to the value of the Boyer water works and pump logs (sometimes known as Smith water works) in said village, putting the value thereof at about \$8,000, and deponent further says that in fixing said value at said sum, he gave his best judgment as to the value thereof prior to the establishment in said village

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of the village system of water works and without taking into consideration the competition of said village system and the effect thereof upon the value of said Boyer system. Deponent further says that he has been for a long time familiar with said Boyer system of water works and has had experience in managing and maintaining a similar system of from one-half to two-thirds the extent of said Boyer system in said village of Little Falls, and that according to deponent's best judgment the expense of running and maintaining said Boyer system of water works, of collecting the water rents and looking after said system and making necessary repairs thereto, would amount to not less than \$400 to \$500 per year, and as deponent verily believes would exceed either of said amounts.

That when deponent gave his said testimony as to the value of said system of water works, he was simply asked to state the value thereof and his attention was not in any manner called to said system of said village water works or to the effect thereof and of the competition resulting therefrom upon the value of the said Boyer system.

Deponent further says that if it were the fact and was so made to appear, that the said Boyer system had lost a large proportion of its consumers before July, 1888, when it is claimed that said system was interfered with and destroyed by the officers and employes of the village of Little Falls, so that the water rents from the remaining consumers would not amount to more than \$300 or \$400 per year, that said system would not be self-sustaining and no one could afford to undertake to continue the same on the proceeds and income thereof.

WM. H. ROBINSON.

Sworn to before me, this)
18th day of May, 1894.)

H. C. BROWN, Police Justice.

SUPREME COURT.

NANCY M. BOYER

*vs.*THE VILLAGE OF LITTLE
FALLS.

278

June 5th, 1894.

Application on the part of the defendant to reopen the case generally for the purpose of giving additional testimony, &c.

E. J. COFFIN for Motion,
J. D. BECKWITH of Counsel,
J. A. STEELE, **opposed.**

Mem. opinion by referee.

279

J. B. RAFTER, Referee.

This is undoubtedly a case of considerable importance to both parties. The plaintiff claims a large amount of damages, the answer puts in issue the plaintiff's claim, but does not allege her system of works to be a public nuisance. Considerable time has elapsed since the commencement of the trial before the referee, and the trial has occupied many days.

The defendant has had ample opportunity to marshal and present such testimony and evidence as it desired to do, and has been represented by an able and faithful attorney. The evidence has been **fully** closed and the case was submitted on the part of **the** defendant, and argued and "summed up" on **the** part of the plaintiff on the 19th of April, 1894, and the defendant was then given fifteen days after April 19th, 1894, in which to file requests to find, at the expiration of which time, the case was to be considered finally submitted and in the hands of the referee.

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On the 18th day of May the proposed findings of

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the defendant, of fact and law, were received and filed by the referee.

282 This motion is now made on the part of the defendant, for leave to reopen the case generally, and to be allowed to give additional evidence, and to re-examine and cross-examine the witnesses who have already been sworn and examined in the case, and to show, among other things, "that prior to the disturbance, if any, (of the plaintiff's logs) the plaintiff's pump logs were in such a rotten, broken and imperfect condition, that the water escaping therefrom almost constantly caused the streets and grounds of the village through which the same were laid, to be in such a wet and muddy condition, &c., as to constitute said system a public nuisance, &c." And also to be permitted to show 382 that some contractor, in putting in a system of water works for the defendant, disturbed and injured the plaintiff's system, if such disturbance and injury occurred; and the plaintiff's penstocks in the streets of Little Falls, were a public nuisance; and also to prove that the system of the plaintiff was of little or no value; "and such other incidental facts and matters as may properly be added in support of the foregoing general facts."

482 This application to reopen the case is strenuously opposed by the plaintiff; and the referee's power to reopen the case, for the purposes asked, is challenged.

582 The affidavit submitted on the part of the plaintiff in opposition to the motion, shows that if the case is reopened or the motion granted, it will impose considerable additional labor upon the plaintiff's attorney, but to my mind this consideration goes only to the question of terms.

582 I have no doubt of the power of the referee to open the case at this stage and to allow additional proof to be given; but I am constrained to believe it would be an abuse of a sound and reasonable discretion, at

this time, to allow the case to be opened to the extent asked for in moving papers; for while reasonable liberality should be allowed, still the salutary rules of the practice of this Court should not be wholly departed from.

The strict rules of practice were somewhat relaxed by the tacit consent of both parties upon the trial, each party giving evidence as the case proceeded as seemed to be convenient for each and without regard to whether the other had fully closed; and the attorney for each party evidently offered such evidence, in the course of the trial, as to him seemed pertinent and material, and no application was made for further time to procure other testimony. 286

I have concluded, however, under the circumstances disclosed in the moving papers, to exercise my discretion in favor of the defendant, to the extent of allowing the case to be reopened, so as to permit the defendant to offer additional evidence upon the value of the plaintiff's system of works; and to show if that is deemed material, that the interference of Mr. Rankins and his men, did not take place earlier than 1888; and also to show, for the purpose of bearing upon the value of the plaintiff's system of works, that her logs were rotten or defective; and that the defendant, about the time stated in the moving affidavit, constructed and put in a system of water works in said village, and to offer evidence that customers of plaintiff's system of water discontinued the use thereof, and supplied themselves with water from the defendant's system, and also to offer in evidence the contract under which the defendant constructed its system; and also to allow the defendant to offer evidence that the plaintiff's system was interfered with or destroyed by persons for whose acts, in that particular, the defendant was not legally responsible. 287 288

To the extent indicated above, I will allow the case to be reopened, upon condition that the defendant, within five days after the attorney shall receive

289 this memorandum or a copy thereof, shall pay the
 plaintiff's attorney \$10, costs of that motion, and
 \$20 to compensate him for additional labor which
 will be imposed by such reopening, and shall pay
 within the same time to the referee, his fees for two
 days in hearing and determining this motion, \$20,
 so that the plaintiff in any event, shall not be bur-
 dened by the payment of such fees, and shall also
 stipulate that the time of the referee in which to de-
 cide this action shall not commence to run until the
 case is re-submitted.

290 If these terms and conditions are not accepted and
 complied with, the motion will be denied with \$10
 costs, and the referee will proceed to decide the case
 upon the evidence given.

An order may be entered, if that be necessary, in
 accordance with the foregoing.

J. B. R., Referee.

SUPREME COURT.

291 NANCY M. BOYER
 vs.
 292 THE VILLAGE OF LITTLE
 FALLS.

July 3d, 1894. Case as re-opened at trustees'
 rooms, Little Falls.

Appearances:

For Pl'ff, J. A. STEELE, Attorney, and A. B.
 STEELE, of Counsel.

For Deft., E. J. COFFIN, Attorney; and J. D.
 BECKWITH, of Counsel.

Defendant calls Hiram Boyer for further cross-
 examination.

Plaintiff objects to Mr. Boyer being examined because he had already been examined and cross-examined, and defendant's motion to re-open the case for the purpose of re-examining and cross-examining plaintiff's witnesses was denied. 2d. It is a re opening of the case not authorized by the order made. 293

Objection sustained and exception to defendant.

It is conceded that Mr. Rankins was street commissioner in 1887 and 1888. Mr. G. F. Crumby was president in 1887 and Mr. Richmond was president in 1888.

Defendant calls Mr. Boyer for the defendant.

Examined by Mr. Beckwith, says:

Q. In giving names of consumers of water in 1887 for your wife's system you named a Mrs. H. Burt or Mrs. H. Rust, at the corner of John and William or John and Mary streets, which was it, Mrs. Burt or Mrs. Rust? 294

Obj. As re-opening the case and not within the decision of the referee and is not evidence of any of the questions or subjects, which under the decision is permitted to be inquired into. Objection sustained and Ex.

Q. You gave in your list of consumers, Burrell, Loomis and Ives, Second St., \$30 per year. Can you state who were the members of that firm? 295

A. The name I gave was Newell, Loomis & Ives.

Q. Was the Loomis of that firm Watts T. Loomis?

A. There was no firm but each one owned portions of the Petrie block. The Loomis was the father of Watts T. Loomis. I will not be positive if Arphaxed Loomis was alive in 1887.

Q. In the list as you gave it, the name of James Churchill, Second St., \$50 per year, appears twice. Were there two James Churchill's on Second St., who consumed your water in 1887? 296

A. No, only one, and that was James H. Churchill, the livery-man.

297 Q. Who was Mr. J. Gilliland and where was his place of business?

A. John Gilliland was a barber and kept a place in the Petrie block, Second St. Mrs. Benson was the wife of a tailor on Main street. I do not know her name or her husband's name. She lived up stairs in what is now the Beniens block. I do not know William Clark. That was evidently intended for Mrs. Clark. She was on Garden street. There was one Mrs. Clark on Garden street. I do not know John Derby. William Fox kept a saloon in the Petrie block, corner of Second and Main streets. 298 J. E. Judd was a tailor and lived on Main street, over what was Timmerman's grocery store. Leary & Co. were saloon keepers. Used to be Stauring & Leary, on Main street. Terry Smith was a hotel keeper, proprietor of the Smith House, corner of John and Second streets. By W. Ward is meant Mrs. Ward.

Paper shown witness, (Blue print of map, Ex. 7; in evidence.)

299 Q. Before Mr. Lansing made this map did you indicate to him the location of your wife's pump logs?

Objection upon the ground that is not within the order re-opening the case and the witness has been examined and cross-examined upon that subject.

Objection sustained and Ex.

Q. Did you indicate to him the location of the logs on Alexander, between John and Burwell?

Objection same, same ruling and exception to defendant.

300 Q. You spoke of re-laying several pump logs. Indicate what portion you re-laid?

Objection same, same ruling and exception.

Q. Did you relay the pump logs on Alexander street, between Main and Burwell streets?

Objection same, same ruling and exception.

Q. In re-laying the logs which you re-laid on Loomis street, did you re-lay them where they formerly were?

Objection same, same ruling and exception.

Q. John Quackenbush has a brick building on the west side of Second street, above the Smith house? 101

A. Yes, sir.

Q. How long after 1887 did you continue to furnish him water?

Objected to on the same ground; he has been examined and cross-examined before on that subject.

Objection sustained and exception.

Q. What was the smallest bore of the pump logs in use in plaintiff's system. 302

Objection on the same ground. Objection sustained and excepted.

Q. Do you know who did the work of repairing the logs, before they came into your wife's hands, and if so, who?

A. George Adam- Pross, and after Pross it was George Keller.

Q. Do you remember the time when the village water works was put in?

A. Yes, sir. I knew Timothy Sullivan, the contractor, who put them in, and did at the time, and I knew the water commissioners, William I. Skinner, Watts T. Loomis, D. H. Burrell and C. J. Palmer, and I know S. E. Babcock, the engineer in charge. Chas. Oyston was an inspector on part of the work. Mr. E. T. E. Lansing assisted when the village works were put in as an assistant engineer. 303

There was a short time when I run water across the Eastern Park in Robinson's pipe.

304 No Re-Direct Examination.

George H. Failing, sworn for defendant says: I reside in Little Falls. I own a brick block on the north side of Main street, about half way between Second street and Mary street. Opposite the old Central Hotel. In the spring of 1880 I carried on a bakery, and continued to carry it on about seven years myself. I commenced about May, 1880, during part of that time I used what was known as the Boyer water, water from this system. I got it from the logs on the street. I carried it into my bakery
305 by iron pipes which I put in myself.

Q. What do you say as to the supply of water furnished?

A. It did not run much more than half the time. Sometimes this water was so roily and muddy I could not use it in my business. I constructed a rain water tank in the fourth story of the capacity of eighty hogsheads. The Boyer water was quite hard water. I think I paid six dollars per year for the use of the Boyer water. The use of that water
306 was continued until they put in the city water, I forget the year.

Q. Give us your best recollection as to the date when the city water was put in your block?

A. My best recollection is that it was in the summer of 1887. When the city water was put in I stopped using the Boyer water. I have never used the Boyer water since. I have talked with Mr. Boyer upon the subject of the water.

Q. What did he say about the water supply or
307 about the condition of the logs?

Objection; incompetent, improper and hearsay.

Objection sustained and exception.

Q. Was anything said to you by Mr. Boyer in

the conversation mentioned by you as to the condition of the logs ?

Objection ; incompetent, improper, indefinite and hearsay.

Objection sustained and exception.

308

Q. Did Mr. Boyer say something to you as to the logs being in a leaky condition, when you complained to him of the service rendered ?

Objection on the same ground as last question, and upon the ground, the question assumes he had complained, when there is no such thing proved.

Same ruling and exception.

Book shown witness, (Book of Permits. Permit No. 83 shown witness.)

That is signed by me.

309

Q. After looking at that permit and refreshing your recollection, can you state when the village water was put in ?

A. In less than a week after June 8th, 1887, the water was running in my building.

Cross-examination.

I think I paid \$6 per year. I will not swear I did not pay \$10. I did not pay Smith \$10 per year. I might have paid \$10 toward the last. I have forgotten when I paid the last water rent to Mrs. Boyer. I tapped the Boyer logs with an iron pipe and carried it in at my own expense. I carried on a bakery. Soft water is just as good as hard. I do not say the water was always muddy. It was on occasions when there was a shower. I put the tank in the bakery in the spring of 1881. Charles Eagan built the tank and a Utica plumber put the lead in. I used the water from the tank for washing hands and for cooking purposes. I used it from a faucet. Sometimes used it for drinking, but not generally. I applied for permission to tap the city main, while it was going through and before it was covered. My

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312 object was to save the expense of tapping it after it was filled. It is rock there. I tapped the Boyer water in the spring of 1881. The city water is not frequently roily. I only saw it so once or twice. I ceased using the Boyer water within ten days after I used the city water. I did not look at the date of the permit when I signed it.

Q. If you did not look at the date how does it aid your recollection?

A. It is refreshed by the date of the death of my wife. It was put in in the summer of 1887. The date in the book preceding it is in 1891. This permit signed by me is No. 83.

313 Q. The permit immediately preceding it, No. 82, is dated Jan. 24th, 1891, is it not?

A. It so appears here in the book.

Re-Direct:

The condition of the Boyer water, not running all the time and being roily, continued about the same all the time I used it, no more so in 1887 than the rest of the time.

314 Q. Down to about what time did the water continue to run through the Boyer pump logs on Main street?

A. In the neighborhood of two years after June, 1887, when the city water was put in. The Boyer water would only run up to my sink on the first floor. It would not run to the second floor of my bakery. The Boyer water was considerable harder than the city water. I noticed the city water being roily about a week after it was put in.

Q. Was the pressure of the city water sufficient to carry the water to any part of your building?

315 A. It was.

Re-Cross :

I never had trouble with the people using the

Boyer water. I do not remember of their complaining of their wasting water. I still kept paying for the Boyer water as long as I used it. I don't think the Boyer water was roily in winter, it was so only when it stormed. I can recollect the circumstance of the penstocks being cut down. I think the water stopped running before they were cut down. I cannot swear to the date they were cut down. I think the water ran through the logs two years after I took city water. I will not swear to dates, I can't recollect. I will not swear it was a year.

316

S. E. Babcock sworn, says:

I reside in Little Falls. I am a practicing civil engineer and am a hydraulic engineer and sanitary engineer, hydraulic and sanitary engineering is my special profession. I have had about thirty years experience; during that time I have been constructing or consulting engineer on a number of systems of municipal water works. I was constructing engineer of the Little Falls water works. I designed and constructed the works as engineer. The work of distribution system was done under contract by T. Sullivan & Co., of Syracuse. The works were fully completed in the spring of 1888. Water was commenced to be supplied in the spring of 1887. I filled the pipes and put them in use as I laid them. Since the construction of the works I have been engineer in charge, and am yet. As such I am familiar with the rules and regulations of the commissioners and the books and records of the department, and with the schedules of water rates and charges which have from time to time been adopted by the commissioners, and with the rules governing the making application for and putting in city water when it is supplied to consumers.

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Q. Are the persons who took city water required to make an application in writing in this book or other books?

A. Yes, sir; they are, in books kept in the office of commissioners, and part of the records.

Q. After the application is made for city water, state what is done in the way of keeping records and granting permits and of the date of turning on the city water.

A. Parties desiring water come to the office and a written application is filled out, stating just the use the water is to be put, and designating the licensed plumber to be allowed to do the work. Two permits are then issued. A tapping permit designating the size and kind of pipe and the depth to be laid together with a new work permit which specifies each specific use in the building to which the water is to be put.

(Examination of witness suspended.)

George W. Shall, sworn for defendant, says:

I reside in Little Falls and have for a number of years and was for years the owner of the Hinchman House, afterwards Rockton Hotel. I ran the hotel down to the spring of 1886 or 1887. I was in eight years and about six months. Knew the Boyer or Smith water works here in the village. When Smith owned the system of water works I had the water put in, and was then under control of James T. Smith leading from the spring through Main street and some other streets. We did not always have what water we needed.

In the summer when the water was low, we frequently had not sufficient water for hotel purposes. I built a large tank in upper story of hotel in which I took rain water from the roof. The Boyer water was used for the bar and cooking and drinking purposes. The water would flow up in the pipe two or two one-half feet above the first floor. I noticed this failure of supply more or less every season. In a wet season we were bothered less than in a dry season. I think we had no failure at any other season of the year. It may have frozen up once but I won't be positive. I paid for the use of the Boyer water when we first took it \$20 per year and after

that \$40. I never paid more than \$40 per year. My property extended from Main to Albany streets, fronting on Main street. There were buildings on this property on Albany street. What I paid for water was for property on both streets. I paid for no other water to them. I think I owned no other property at that time. I changed from the Boyer water to city water while they were putting in the city water. Cannot tell date. About the time I signed an application for city water. After the city water was put in I can't say if I used the Boyer water. I now remember I did not use the Boyer water after the city water was turned on at my premises. I did not use the Boyer water because I used the same pipes for the city water.

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Q. Since that time how have you found the supply of city water ?

324

Objection ; improper, immaterial, incompetent and not within the order opening the case.

Objection sustained and exception.

I consider the Boyer water was hard water, but am not an expert. It was used to wash bar glasses.

Q. Since you have had the city water in, you have used that water for different washing purposes ?

Objection ; incompetent, improper, immaterial and not within the order opening the case.

325

Objection sustained and exception.

Q. State how the city water compares with the Boyer water, for hardness or softness ?

Objection same as to last question and witness is not shown competent.

Objection sustained and exception.

Q. How does the city water service compare with the service from the Boyer system ?

326

Objection same. Same ruling and exception.

Q. Why did you discontinue the use of the Boyer water and put in city water ?

327 Objection same and not admissible under the pleadings, and not within the order allowing the case to be re-opened.

Objection sustained and exception.

The pressure of the city water was sufficient to carry it to any part of my hotel. I knew a little of the location of the logs. I knew the location on William street, Garden street, Main street, Albany street, Second street and another street called Loomis.

Q. Did you notice at any time a wet condition of the street where these logs were located, when other portions of the street were dry ?

328 A. I did. When I was in the Board of Trustees, I went and looked at the streets when they were wet. I examined for the purpose of finding out what caused the wet places. Some of the pump logs were so near the surface we could see them. I think this was in 1881, or 1882, or 1883. I was trustee only two years. One place was the corner or near the corner of William and Garden streets. A place on Main street, near the Metropolitan Hotel, or nearly opposite Dennis Collins'. One place on Second street, near Selcer's. It was very wet and leaky from the logs and we notified him to fix them or steps would be taken. At points the logs were near the surface, and some places not entirely covered.

Q. Have you noticed any such condition of the streets within the past four or five years ?

329 A. I have not. I have noticed the Boyer penstocks, an upright piece with an iron faucet or what might be termed a faucet. For the past few years I have owned a horse and have driven about the village more or less, and have been more or less familiar with the streets during that time.

330 Cross-Examination by Mr. Steele :

The Hinchman House property extended through

to Albany street. It was originally all the Hinchman House property. I bought first sixty-eight feet and seven inches on Main street, and about seventy-one feet on Albany street. Then there was just a barn on Albany street. In 1886 there was a dwelling house and store on property. I afterwards bought from Hinchman property. The barn was used in connection with hotel. That barn used the water which ran into the trough. It was principally used to water horses and some to use for washing over wagons. We could get water there when we could not in the bar, because this was lower. There was generally water enough for the barn, but sometimes in a dry time, for two or three months we did not have water at the barn, except what we got nights, when it ran we gathered and saved it. In the Hinchman House we used it at the bar and in kitchen for cooking purposes. Whoever had charge of the water, ordered me to lock up the water or it would be taken away from me during the period of scarcity of water. The locking of the water was to lock the cover on the trough. That was about 1886, but I can't tell what year it was, it was a number of years before I put in the city water. I ceased running the hotel, I think, February 1st, 1886 or 1887. I paid Boyer or his representative for water. That is my recollection. John Kane occupied the hotel after I left it. He bought the furniture and leased it. I can't say if I paid water rates to Keller. Kane leased the barn. I did not as I recollect pay Boyer water rent after Kane leased the barn. I paid Mr. Boyer \$40 one year. I do not recollect what year it was. I have the impression Boyer leased the system. I do not know if I now have his receipt. I think I paid him in money. I do not know how much the rent of the hotel aside from the barn.

Q. When you paid Mr. Boyer \$40 water rent as you have stated, was any part of the water rent paid for the hotel?

A. I presume it was part for hotel and part for barn.

Q. After you ceased paying for the hotel, how much did you pay him for water for the barn?

334 A. I do not recollect any such occurrence took place. I did not, to my knowledge, pay Mr. Boyer water rent after Kane took possession of the hotel. I can't recollect whether it was 1886 or 1887. I continued to take water from Mr. Boyer at the barn, till I put in city water. Kane keeps a restaurant here. I have no recollection of paying Boyer \$10 at one time, but I might. I think he collected quarterly. I had a house on Albany street. There was no water in the house. I only paid the amount I have stated for all my property. I don't know what Kane paid Boyer for water. Don't know if Kane paid \$90 for water to Boyer.

Q. Was there a question between you and Kane as to what part of the water tax each was to pay?

A. Not as to my recollection.

Q. Do you recollect if Mr. Boyer raised the rate to Kane?

336 A. I do not. I am speaking of whom took charge of it before I got out of the hotel. I do not know what was paid after I got out of the hotel. When I was trustee it was not my business to look after the street except when something occurred. I went on the streets as trustee and examined the places. Where I saw the logs exposed was a street running towards Dolgeville. The upper parts of the logs were bare, some portions of them. I could see some portions of the logs. We did not cut into the logs to see if they were then in use or not. I should say they were logs then in use, water was running in them, but whether there were two sets of logs that I cannot say. The leak at that place was in the joint. I can't now say I saw the logs exposed at any other place. On this occasion I did not see water coming from any other part of the log except the joints. These places were afterwards repaired by whoever had charge of them. I am not able to

say whether it was the Boyer or the Robinson system. I should think these logs had not been deeply covered, but were uncovered by gradual washing from the grade of the street. I think they could not have been more than 6 inches deep. I put the cistern in the Hinchman house and raised it in 1880 or 1881. I used it in kitchen and for bed rooms and for basins in rooms. On each floor we had sink and faucets. We did not often use the cistern water for cooking purposes, but sometimes filtered it and used it. 338

Re-direct :

(Records shown witness.) I was trustee in 1884 and 1885. Only one term and the term is for two years.

Thomas Sheridan sworn, says : I reside in Little Falls and have for about fifty-two years. I knew Terry Smith in his life time and knew the Smith house which was run by him, corner of Second and John streets, in the village of Little Falls. I remember the fact of Smith's death: he died Jan. 16, 1886. After his death I went into the same hotel Jan. 26 of the same month and have been in it ever since as proprietor. 339

Q. Since you have been in that hotel have you ever paid to Hiram Boyer or his wife any sum of money for a supply of water for that hotel ? 340

A. I have not; I put in city water in that hotel.

Q. When did you put in city water ?

A. I can't give the date I signed an application for it. I knew Terry Smith for several years before his death. He had another place at corner of Second and John streets (but not) for a few years before I took it. A hotel was on that corner which he run, that burned down and he built the Smith house.

Cross-Examination :

I don't believe any administrator has been appointed for his estate. I understood that Smith's 341

wife Elizabeth owned the hotel. I am sure Smith died in 1886, not in 1887. I think I went into the house nine years ago last January.

342 James H. Churchill sworn for defendant: I live in Little Falls and have for a number of years. I knew Hiram Boyer and plaintiff by sight. I have a livery stable on Second street and have been located there in business nineteen years. I used the water at my stable from the Boyer system and used it until they put in city water. I then changed from the Boyer works to the city water. I don't remember the date. About the time I put in the city water I signed an application for it. I was one of the earliest to put in city water. I used Boyer's water for watering horses and washing wagons.

343 Q. State the facts as to the service of the Boyer system as to whether it was a constant supply or otherwise.

344 A. It was not a constant supply. Sometimes we had to go elsewhere for water to wash wagons; to Stauring's, and to water our horses at George Shall's. They afterwards put a lock on it at the Hinchman house barn. During the last year or so this water was used, the water would flow in the Boyer system about two or three feet above my floor. During the summer in a dry time there would be a failure of supply, that would occur about every year unless it was a wet season.

Q. How much did you pay per year for that water?

A. \$30. I never paid or agreed to pay as high as \$50 per year. I have not used the Boyer water since I put in the city water.

345 Q. Since you put in the city water what has been the fact as to the supply?

Objection; Immaterial, incompetent, improper, not within the scope of the order opening the case; not within the issue made by the order or pleadings.

Objection sustained and exception.

Cross-Examination :

I can't tell the date I used the Boyer water to. I used it till they put in city water. There was no faucet for stopping the flow at my barn. I suppose I was at the end of the line. There was a penstock on Second street, lower down, by McChesney's. That was on lower ground. My barn is higher; I cant tell how many feet. If I should guess at it I should guess it was about ten feet lower, and the line of logs ran from Main street along the east line of Second street, and there was a penstock at the east side of the street, opposite my place, and one down by McChesney's, and the water was carried across from the line on the east side to my line on the west side. I have seen it run at McChesney's when it did not run at my place. There would be water at Shall's Hinchman house barn when there was not at my place.

346

Lyman Timmerman, sworn for the defendant, says:

I reside in Little Falls and was trustee of the village in 1887 and 1888, and in 1887 or 1888 I was chairman of street committee. I now remember it was the year Mr. Richmond was president and Mr. Rankins was street commissioner. I think it was in 1888. I was familiar with the Boyer system of pump logs, portions of it. My attention was called to portions of the pump logs in 1888, when I was trustee. I know a Michael Connelly and one McCarthy. I can't say if they were at work on the streets.

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Q. Did you say to Michael Connelly or Dick McCarthy to tear the logs up and the corporation would stand between them and all harm?

348

A. No, sir.

Q. Not that if he wanted to sue the village, to sue?

A. No, sir.

349 I resided at that time on Albany street, where for
 some time I had used water from the Boyer system,
 while Boyer was in charge and while Smith had it.
 350 I used the water as long as I could get it, and after-
 wards put in city water. I can't give the date I put
 in city water, it was in May, but I can't give the
 year, I think it was 1888. The water from the Boyer
 works stopped along in the winter and did not run
 in the spring until I put in city water. The supply
 of water from the Boyer system was not constant,
 a great deal of the time in summer it just dripped
 and every season, or nearly every season, in a dry
 time it was slack on our street. It in summer season
 it ran slow, and had a woody taste like a rotten log.
 351 I can't say I talked with Boyer about it. I had a
 little talk with Mr. Boyer about the time the water
 ceased about his continuing the water.

Q. State what was said on that subject ?

Objection ; incompetent, improper and immaterial
 and not within the order opening the case and no
 proper foundation laid for the evidence ; hearsay.

Objection sustained and exception.

351 Q. Did Mr. Boyer say to you at that time that
 he did not think it would be worth while to continue
 the supply of water through the Boyer system, ow-
 ing to the expense of repairs and maintenance, and
 to the fact that most of his consumers would take
 city water as soon as it was put in ?

Objection same ground as before.

Objection sustained and exception.

Q. During the summer of 1888 was your atten-
 tion called to Boyer penstocks taken down or Boyer
 pump logs taken out ?

352 A. Yes, sir.

(Map, Ex. 7, shown witness.) The penstock at
 the corner of John and Mary streets was one my at-
 tention was called to. It was before it was down,

but while they were ready. It had then been dry some time. My attention was also called to a penstock between William and Main streets on Albany street, near where I reside. I live on Albany street, about three lots from Main street. I saw that before it was taken down. Water was not running in that penstock and had not been for some time. I saw it when it was taken down. I think it was in September. That had been dry since about the January before. I did not notice any of the others particularly. The season before, in the summer, my attention was called to the logs on Garden street, Loomis street, the center of the park and John street, and near Academy on Alexander street. I made some examination of them at that time and I found some of the logs at some places half way out of the ground. I found bad leaks. The logs were checked and water coming out of the top on Loomis street, the water came out and washed and on Garden street. I examined the logs on Loomis street in one or two places. The first place a little east of Ward street corner, there I found a very bad leak. The log was split or checked lengthwise of the log. The water escaped freely. The outside was decayed considerably. At that place the log had been buried about six inches and had been washed off. It was washing the street and I saw Mr. Boyer about it on account of the disturbance of the street.

Q. State what was said between you and Mr. Boyer upon the subject at that time?

A. I called upon him and said the logs were in bad condition then and the water was making bare the logs and it was running down the hills and was washing both the streets, and he replied he had been busy; that he knew it leaked bad, and he would take care of it. Nothing further said at that time. He agreed to fix it. I can't tell just when, but in August or September of that year. I was street commissioner. I think it was in 1888. At that place the dirt was

off about half the length of one log. The check at the joint.

357 Q. How far lengthwise along Boyer's pump logs and in the immediate location did you notice the wet condition of Loomis street, near the corner of Ward, at the point indicated?

A. Perhaps the length of two or three logs; the principal part of the water I saw escaping flowed toward the center of the street. The logs were located more towards the north side, the upper side of the street. About that time there was another leak, but not so bad, east of this near Cleary's place. I made no examination then, but I spoke to Mr. Boyer about repairing it. In the fall I spoke to Mr. 358 Boyer about putting in an iron system, about taking up the wooden pipe and putting in iron pipe. I was then on the street committee.

Q. State the conversation you had with Mr. Boyer upon that subject?

A. We were talking about the leakages, I said I thought it would pay to take up the logs and put in iron pipes. He replied he thought it would not pay him, that the village was talking of putting in water and there would not enough pay him. I think of nothing special further said upon that 359 subject. I said I had talked with Mr. Smith upon the same matter and that Mr. Smith was in favor of it, before he gave up the system. I said to him some of the logs were rotten and it caused a bad taste to the water, and if he had iron pipes he would get rid of the bad taste and would get rid of the leakage. He said water would be more liable to freeze in iron than in wood and he thought he would have more trouble with it in winter on account of not getting it down deep enough.

360 When I was committee, in front of my house on Albany street the log was about two-thirds out of the ground. The rock came so near the surface. The pipe along there was on the south side of the

street near the gutter. About that time I saw some of the Boyer logs after they were taken up. I saw three logs and the penstocks that had been taken out on Albany street. Only three logs were taken out there. Only those which projected out of the ground were removed. These were nearly all out of the ground. Those were only a little on the ground, about two-thirds on the surface of the ground. They were between the traveled part of the street and the gutter.

Q. In such position as to prevent the flow of surface water from the street into the gutter? 361

Objection same as to the last question.

Objection sustained and exception.

I think these logs last spoken of were the year following the year I was on the committee, and I think in 1889. I don't know if the penstock was taken out the same time they were repairing the street.

Q. State what the condition of the logs was at that time? 362

A. When the water was running two of the logs leaked in front of my house, and they had been repaired by putting in an iron pipe to carry the water past those two logs and the iron pipe entered the pump log before the line entered the penstock. The logs were badly decayed and checked. I lived on Albany street eighteen or nineteen years. During that time I was on the street nearly every day and along it. During that time the line of logs was not re-laid by new logs, to my recollection, on that street. 363

Cross-examined by Mr. Steele:

The logs on Albany street were just outside the gutter. The street was not then parked out there, but it is now. The parking now comes out to where the logs were. That was done last season; that will measure about seven feet from the walk or about

five feet from where the curb was. At that point the rock comes very near the surface. I can't say that in 1888 there were many places where iron pipe was laid.

Q. Who took out the logs on Albany street near your house?

Objection. Not material, and incompetent to establish a new liability, and plaintiff cannot be permitted to show it was done by defendant or defendant's authority.

Objection overruled and exception.

A. I could not say; as I came up to dinner I saw they had been taken out. I did not see them taken out. A log would rot quicker if exposed than if buried and would check a great deal quicker. I do not remember of logs being put in there in eighteen years, so that these logs have lasted for eighteen years exposed to sun and storm there, I think. I am not positive as to repairs there.

Q. Was there anything as to the condition of the logs, in your opinion, which was not capable of being repaired?

A. In some places they were obliged to put in new logs and in other places where the leak was in the joint, they repaired it by driving an iron hoop on the end of the log and plugging it. I was not there when the penstock near my house was removed. I took water from the Boyer system every year since I lived there except one, as long as it ran. At first we got it at the penstock, but for the last two or three years we took it into the house in iron pipe. It flowed up to the sink on the first floor. I think the water stopped running in February, 1888, or about that time. It was during the cold weather. I learned afterwards the cause of the stopping. The line of logs comes down on the west side of the park. No sand boxes put in at that time. A sand box has been put in since January, 1888. When the sand

box was put in I think Isaac Richmond was president. After January or February, 1888, water did not flow to my house. It did not flow after that break up from my house to the penstock, the ground descends from Main to William street. I got permission to put in an iron pipe in my house and Switzer's house and tapped the log with iron pipe near the line between Judge Sheldon's and Switzer's and it was carried by iron pipe to Judge Sheldon's. It was then Ward's, and from Ward's to Switzer's, and from Switzer's to my house, and then to the pump log below my house. Feeter's is the next place below me on Albany street. The penstock stood nearly opposite Feeter's. The iron pipe returned to pump log above the penstock. The water in the house was controlled by faucets. There are four more houses besides Feeter's on that street, and then we come to William street. William nearly runs at right angles to Albany. A line of logs runs along William street. I can't say if the other residents below us took water, except I have seen them at the penstock for water. The names of the parties residing below me on Albany street are, first, a tenement house; second, Mrs. Green; third, Dr. Garlock; fourth, Mrs. Rawdon, (owned by R. H. Smith.) In the following spring they called my attention to the trouble. It was a leak at the joint of the logs up near Judge Sheldon's. I can't say if it was above or below where my iron pipe tapped the log. After January, 1888, no water flowed through my house. After the pipe was put in I think no water flowed along the pump logs opposite them. The pump logs were plugged up where the iron pipe was put in. I opened the pipe to ascertain what was the trouble. No water has run through my pipe since. I do not know if Connelly and McCarthy worked for the corporation in 1888. I think a sand box was put in at Ann street. Mr. Boyer may have come to see me about the sand box. But I will not say he did not. I do not re-call going to talk with the men putting in a sand box. I will not say I did not. I

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talked with Mr. Rankins in front of Mr. Perry's when they were at work there.

372 Q. Did you visit any of the places in 1888 where they were taking up the logs on request of Mr. Boyer?

Objection ; improper and immaterial and not within the order re-opening the case, and case not opened for the purpose of allowing plaintiff to give evidence in support of his original case, and also is indefinite.

Objection overruled and exception.

373 A. I visited John street ; no men were then there at work. It was at the noon hour. I can't say what time it was. They were not putting in sand boxes there.

374 Q. Did you tell Connelly or McCarthy to take up the logs and the corporation would stand between them and all harm ?

A. No, sir.

375 Richmond was not there when I was there at noon. I can't say what year the iron pipe was put in by Boyer. I am not certain that Boyer put in the iron pipe, it was done by whoever had charge of the system at that time. When Boyer said he did not think it would pay it was later. That was a year or so before the city water was put in. I don't recollect the year the city water was put in. I think the conversation I have given about Mr. Boyer saying he did not think it would pay to put in iron pipe, was when he was repairing the line near Sheldon's, and we were talking about it. I can't tell when it was, positively.

Timothy Sullivan, being duly sworn, says :

376 I live in Syracuse; in 1887 and 1888 I was nearly all the time in Little Falls. I was a member of the company having the contract to put in the Little Falls water works. The contract was by T. Sullivan & Co, myself and D. F. Wilkinson, of Syra-

cuse. At that time I was a practical contractor, and have had similar experience in contract work. During the work of putting in the Little Falls water works I was here nearly all the time, all but about four or five weeks, and broken time altogether. My longest continuous absence was about ten days. That was, I think, in the fall of 1887. At that time I do not remember where the men were at work in putting in the water works. I think we then had one gang at work on E. John street, near the Catholic church, and one out towards the Skinner farm, and one across the river. I personally superintended opening the trenches. I was about on the works daily, going from one ditch to another each day. I had a number of men engaged under me while I was engaged in that work. These men were selected and employed by myself and were under my control and direction.

376

Q. Did the village authorities at any time exert any control or authority over the men in your employ ?

A. They did, to a number of men. They employed teams. On one occasion Mr. Babcock, the engineer, discharged one of my men, who I would not discharge.

377

(Book shown witness.) Contract between Sullivan & Co., and the Water Commissioners of the village of Little Falls.

Contract offered in evidence and particularly Sec. 28, at page 41.

Received and marked defendant's exhibit 1.

Map shown witness, who says this is the original map of the distribution system of the city water works and the one referred to in defendant's exhibit 1.

378

(A blue print of the same map is offered in evidence to be marked when produced.)

I knew Hiram Boyer and did when I was here

379 putting in the water works. When I was putting
 in the water works my attention was called to the
 Boyer system of water works. That commenced at
 springs in the eastern part of the village and ran
 down Loomis and Alexander, Main street, Garden
 street and William street and Albany street. When
 excavating for the city water nearly or more than
 one-half of our trenches ran parallel to the logs in
 the Boyer system and sometimes across it and at
 some places on the line of these logs and took it
 where these logs laid.

380 Q. While you were engaged in putting in the
 city water works did you have some conversation
 with Mr. Boyer about re-laying the pump logs in the
 Boyer system in case they were disturbed by yours ?

A. I did. That was when I first got to working
 where the Boyer system was.

Q. What was the conversation ?

381 A. Mr. Boyer found fault with the way my men
 put back his logs and he said he had been to see the
 inspector and he sent him to me. I asked him what
 the fault was and he took me and showed me the
 points where the trouble was. He took me to four
 or five places where the logs were leaking, where
 they were put together, when they had been dis-
 382 turbed by my men. I told him to send a competent
 man to fix them as he wanted them and I'd pay him.
 He said all right, and he said he would send a man.
 And afterwards Adam Pross came to me and said
 as I recollect it that Boyer sent him there. I had
 him repair the logs and I paid him for it. I saw
 Mr. Boyer two or three times and he complained
 that my men interfered with his logs and I told him
 each time that I would fix it. I can't say as I told
 383 him Pross fixed the logs. I think the places he
 called my attention to and made complaint about
 were on Main street and Salisbury street, around
 these corners. I think I got Pross to fix them. I
 think there was some leaking caused by my men be-

fore Pross fixed them. I do not know as Boyer complained after Pross fixed those places. There was no complaint by Boyer to me after that. Some places where my men interfered with the logs I had fixed without any complaint from Mr. Boyer. I did that whenever we discovered leaks until we got on Alexander street and there we had to remove the logs altogether in order to make our trench. We took in the line of the logs. We took up the line of logs along in front of the Academy and blasted out our trenches where the logs formerly lay. Along there the logs were laid on the top of the ground. There was a bed of solid rock where the logs lay on top of the rock for 400 or 500 feet or more. That work was done by us, I think, in the early part of 1887, in the summer, I think. I afterwards saw some men hauling off the logs with a team and a lumber wagon. Some of them had them. About four hundred or five hundred feet had been drawn away. I did not personally know the man.

We took up the logs on a part of Loomis street and were re placed by us. We laid these logs within a few feet of the top and covered them. We put the joints together as best we could. The water was shut off at the spring and because no water was running to test the joints we could not tell as well if the joints were tight. I did not pay Mr. Boyer for re-laying them or for superintending the re-laying. McDonald was my foreman in charge of nearly all of the village where the Boyer system was until we got to the east end of Loomis street, and then I took charge of it. The Boyer logs at places where there was sufficient dirt, the logs were about three feet deep on all streets. Where rock was it would be near the surface. In John street, between Second street and William, I don't remember of finding Boyer pipes, nor in Albany, between Second and Mary streets, or on Second street from Garden to Main.

Cross-Examination:

387 The logs I threw out on Alexander street I did not
 put back, there was about four hundred feet of that.
 That was in the summer of 1887. In Loomis street
 I think we did not take out the logs. I think we
 protected them there. The two inspectors were em-
 ployed by the village. The work was done under
 the direction of Mr. Babcock. Boyer did find fault
 after Pross had fixed pipes about other places and
 did so four or five times. After coming four or five
 times, after Mr. Pross came, he did not come again.
 I think Pross said Mr. Boyer sent him. I think
 also that Mr. Robinson complained about his pipes
 and I got Pross to repair that. I saw several places
 where there were leaks after they had been fixed by
 my men and I had them go back and fix them. No
 388 place except Alexander street, where they did not
 put them back. Sometimes we took out logs and
 put them back. In some of these instances they were
 out several days and in some cases several weeks. Mr.
 Babcock was around from day to day. The line of
 distribution was surveyed and laid out and a map
 made before I took the contract.

Re-Direct:

After I had repaired the logs I think they were
 better than before, except on Alexander street.

389 Rollin H. Smith, sworn, says :

I reside at Little Falls, and have from 1838, except
 about three years. I have been a water commis-
 sioner of the village for about three years. I was
 appointed to fill a vacancy caused by the death of
 William I. Skinner. For seven years I have lived
 at the corner of E. Main street and Waverly Place,
 in a house formerly belonging to Mr. Bramer. Mr.
 Bramer died years ago, leaving that property. He
 left no other property at that corner. I bought an
 adjoining lot before I went there, and my lot adjoins.
 390 I went there in January, 1887. City water was not
 then on that property.

Q. Was the city water afterwards put in by you ?

A. Yes, it was in the summer of 1887, or at the same time the main was put in. I made the connection before the trench of the main was put in.

Q. Since that time has the Boyer water been used there?

A. So far as my knowledge extends it has not. I knew nothing about the water before the city water was put in, nor where it came. I took the city water into the Bramer residence.

Q. Have you used Boyer water on the lot you bought, or paid Boyer for water since you bought it? 391

A. I think I bought the lot November, 1886. It was not occupied much while I owned it. I never to my recollection have been asked to pay for water for that place. I had the house moved off by contract. I do not know whether the Boyer water was used there. I don't think I paid him for water there.

Q. Since 1886 have you consumed water from the Boyer system or paid for it at the corner of Ann and Main street, or any other place on Main street? 392

A. I have not. I have not owned or leased property on either corner of Ann or Main street. For a number of years I have known more or less of the streams and springs of water in the village of Little Falls.

Q. State whether during that time there had been a gradual diminution or fall of the quantity of water coming from springs flowing in streams in the vicinity of Little Falls?

A. I think in the last twenty years there has been a diminution of water, but before that time it would be a matter of speculation. 393

(Map Ex. 7 shown witness of Boyer works.)

I have been familiar with the portions of Little Falls and streets upon which the Boyer logs were laid, as indicated by the red lines upon this map. I should say the density of population has increased

some, particularly in the east end it has increased.

394 Q. By whom was the line of logs laid down
Waverly Place or through a part of Waverly Place
and a portion of Albany street, from about the in-
tersection of Waverly and Garden to a point in front
of Dr. Garlock's residence on Albany street?

A. It was constructed and laid by Jas. T. Smith.
This was not far from 1850, and I saw part of it laid.
I was there part of the time and heard it talked over
by some of the parties interested, and I obtained
further information by talking with Jas. T. Smith,
by which he stated to me how it was.

395 Q. State what you know and have learned in the
manner you have indicated as to the construction
and ownership of the portions of logs above in-
dicated?

396 A. In order to answer it I will state about 1850 my
father owned and occupied the corner lot on the S. E.
corner of Albany and William streets. Isaac Small
owned and occupied the next lot, and Asa Smith the
house and lot next east of Small's, which is now the
Garlock property. There was no way of getting
water near there then and these three persons, own-
ers of these three lots agreed among themselves to
try and furnish a supply of water and put it into
their respective lots, and after making an effort they
went to James T. Smith and made this agreement
with him: That he should put in a line of logs from
the intersection of Garden and Waverly Place and
bring it down in front of then Asa Smith property
on Albany street; then Asa Smith was to take it
from the street at his own expense into his premises
to the discharge post, and Asa Smith was to keep
that section in repair at his own expense, I mean
from the street into his premises. 397 Mr. Small was to
conduct the water from Asa Smith's discharge post
into his premises where he wanted it at his expense
and keep it in repair, and my father was to take it
from Small's discharge post and keep that in repair.

They were each to pay James T. Smith \$5 per year. My father's name was Christopher Smith. James T. Smith had a right to put a penstock or discharge post in the street east of the Asa Smith property in the street. All that arrangement was carried out, the logs put in and the water kept running for years. The water came to my father's premises by the end of the pump log being put through a wall between Small's lot and ours. The water then discharged and run for a number of years and flowed away as waste water. It was that way for twenty or twenty-five years. After that Smith undertook some sort of a connection there with Rust or some one. After 1862 I paid \$5 for my father's premises under that arrangement until 1869, and after that my tenants until it was shut off by Smith. I repaired the line from Small's to mine several times. I succeeded to my father's or mother's property. I am somewhat acquainted with the supply and the demand for water in that portion of the village through which the Boyer water passed as indicated on the map from 1885 to the present time. I think the first action to put in city water was in 1885 by a vote taken or an organization. I only give the date from memory. Since the city water has been put in use I have paid no attention to the other water supply. For a few years before the city water was put in there was a deficiency in the supply of water for the village, and particularly in the summer, and I have seen persons come from quite a distance to get water at the penstock on John street, and sometimes several persons at once. Prior to the time the water was put in at the Bramer place, I have seen my servant girl go for water to the Groom place. All the spring water here is hard water, limy water, and I understood the Boyer spring water was of that same character. I have used that water and also city water.

Q. How does the Boyer water compare with city water as to hardness ?

Objection ; incompetent, immaterial, not within the issue, upon the same ground as to like questions heretofore put to witness for defendant and excluded by the court.

Objection sustained and exception.

As water commissioner I became somewhat familiar with the city water and the supply from it.

Q. What do you say as to the sufficiency of the supply per annum or the quantity of water furnished by the city system ?

A. As far as the supply is concerned, I think it is at present sufficient. The pressure is abundant for all desirable purposes and the water is very good. As water commissioner I knew some of the consumers of city water. Whether the residents of the village along the line of the Boyer system as indicated were all or nearly all of them using city water during the time you were commissioner ?

A. I cannot state that. I knew something about the value of real estate in Little Falls in 1888. I had been for a long time to that time somewhat familiar with the Boyer system of water works, that is, I understood the location. Can't say I ever looked at it with a view to fix its value.

Cross-Examination :

I remember of this system since I was a boy. There was a system of that pump log work since I was a boy, and it has continued down, and I do not know of any interruption. The eastern part of the village I think has grown more than the western part, but I do not include the north part nor Church street. The part of the village in Manheim is in the eastern part of the village. I do not know the Hardin spring or a spring known as the Hardin spring. I know about where the Boyer spring is. I have been there if is where it was when I was there. I think its location has been changed some. I don't think I have seen what I understood to be the Boyer

spring in four or five years. I suppose there is a spring there called the Boyer spring. A spring was on the Davis lot and a quarry was worked there, and a spring gushed out there which used up the original spring. I think Smith got water into his system from the Loomis lot. I don't think I saw a spring east of the Boyer spring used to supply water to this system. I have made no investigation as to the quantity of water flowing in this system. The spring on the Davis lot was there as early as 1850, and probably earlier. It was there as early as I can recollect. I have no more knowledge of the quantity of water flowing than what I got from observation. I have my view of the diminution upon the apparent difficulty of supplying the demand, and because I have been at the spring. I can't say when I was there, but it was probably in the summer during the dry time. So far as the Hardin spring is concerned, I say I do not know a spring by that name. I do not know that Judge Hardin has a spring.

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Q. Do you know a spring about eighty rods east of the Boyer spring, or what you called the Davis spring?

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A. I understood the Davis spring was dried up. I think there is a spring eighty rods east of the Boyer spring, but whether this is called the Hardin spring or not I do not know. I do not know of a spring east of the Boyer system that has supplied water to it. I do not know whether it has or has not.

Q. If there is a spring there which has supplied water to the spring or Boyer system for twenty-five years, can you say whether the supply from it has diminished or not?

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A. I can't say as the spring has diminished, but I think that spring would diminish springs further west. I think the diminution of water is caused by, or my theory is, that clearing up of the land has in-

creased evaporation and has caused the soil to retain less water, and that this cause has its effect here, and I think it has the same effect all over the country. I know the Davis spring years ago furnished a never-failing supply. Ordinarily in swamps, before the timber is cleared off, there is a spongy substance or soil from which the water percolates gradually, and when the timber is cut off and swamps cleared up the water is not retained so much.

Q. The clearing of the timber in the swamps would effect, would it not, a surface stream, more than a spring with a deep source?

A. The fact that the source of a stream is not sufficient to make a living stream of it, is evident that the supply is not sufficient for it. I am not prepared to say it depends on depth. I do not know as I learned the facts about my father and others getting water from James T. Smith from any other person than James T. Smith, interested in the water. I do not think there is any difference in the facts I learned from my father and others, and what I got from James T. Smith. When James T. Smith came to me to get his rent, he told me the arrangement as I have related it. I take my information from both of these sources about that arrangement. I think I last paid water tax to Smith about 1868 or 1869. I have not owned property on Main and Albany streets. I was attorney for Petrie estate, who owned a store. I have no recollection of paying Mr. Boyer for water. I can't say positively I have not as attorney or otherwise paid him for water, but I don't think I have. I do not know whether Bramer lot paid water rent or not before I went there.

Re-Direct :

There was a spring on a vacant lot fronting on Waverly Place called the Petrie spring. The spring near Loomis' lot was opposite Smith's lot. I have not for a period of years, paid water rent to either Boyer or Keller.

Re-Cross :

I paid to Smith on my Albany street property for a few years.

William H. Robinson, re-called for defendant :

Q. Did the pump logs of your system extend 413
from Burwell street down Alexander to Main street ?

Objection ; incompetent, improper and immaterial and not within the order opening the case.

Objection sustained and exception.

Q. Do you re-call the length of your system ?

Objection same, same ruling and exception.

I gave evidence before as to the value of the Boyer system of water works.

Q. In giving your estimate of value did you take 414
into consideration the fact of the construction of the village system of water works and of its effect upon the value of the Boyer system ?

A. I did not.

Charles King, sworn for defendant, says :

I reside on John street in Little Falls, and have since 1872. I am president of defendant. My father's name was Amos King. He and I lived together in the same family until about three years ago, the time of his death. Since 1887 I have had charge of the household matters. I have known something of the Boyer system of water works ever since I have lived on John street. The Boyer water was used in our family up to the time I put in city water. Since that time water has not been used from the Boyer system, neither I nor my father have had it in either place on John street since 1877. 415

Q. For the last five or six years you used Boyer water on John street; what do you say as to the supply of water ?

A. It was dried up in the summer and frozen up 416
in the winter. That was so in different years. We

417 used the water for drinking and cooking purposes. The water was very hard. Sometimes surface water would enter the pump logs and affect the taste of the water and the water would be roily in rain storms. In the summer when the water was low the water tasted of wood naturally.

Q. How would the supply of Boyer water compare with the supply of city water furnished since?

Objection; incompetent, improper, not within the order opening the case.

Objection sustained and exception.

418 I drew it from a penstock which stood since 1877 at the corner of John and Mary streets. Before that it was at the corner of John and William streets. That was just one-half block east from my residence. The flow of water in the penstock was controlled by faucet. Most of the time an open spring faucet. I was familiar with the line of logs through John St. They were laid on the south side of John street, or they were since 1877, partly on the surface and partly in the surface. Some places in that street the logs lay in spots wholly on the surface, I do not mean the whole length but in V shape and partly under the surface. The logs were so exposed in places that I could see them and see their condition. 419 On John street the logs would carry water without pressure. At times there were leaks on John street. I can't indicate any particular places. In 1885 I remember when the movement was started to put in water in 1885 or 1886. In that time I knew the needs of the people on John street and in the vicinity, and of the supply that was furnished. The supply of water was very inadequate, and on Monday's I drew water from the mill for washing purposes, and frequently did so, and have at times got 420 water from other places for drinking and cooking purposes. During the last year or two that I used the Boyer water I talked with Mr. Boyer about the supply. I don't know as I remember the particular

language used. When he brought bills for water I objected to pay for water I did not have. It was either Boyer or Smith. About 1886 I did not know of the system in other parts of the village except in a general way.

Cross-Examination :

Not all my evidence was based on my best belief but on facts.

Q. Some parts of your evidence which you have given here has been based simply on your best belief, not upon what you know ? 421

A. Some part of it was, that part as to the conversation with Boyer was my best belief, and the rest of it was facts. I never saw any surface water running into the logs. When the water was roily it was during a part of a day when the storm continued. I can't tell the difference between surface water and spring water by tasting it. I detected there was surface water in it by the taste and color. I do not mean it to be understood the surface water entered the logs along the line of logs. Since 1877 we lived between Second and Mary streets, near the depot. The water ran down Second street, across the railroad to our mill and we used the water at our mill. We used it at the mill since 1872 until the city water was put in. I have seen places on John street where the penstock water was frozen up and also at the mill. I have thawed out the water at the penstock with hot water. Sometimes the faucet would be frozen and sometimes the penstock. I mean the water in the penstock was frozen and not the water in the logs. Did not always get water when the penstock was thawed out. Freezing in the main line would burst the logs. 422 423

Re-Direct :

While I lived on John street the whole line of logs was not taken up and new ones laid. These logs were old logs in the main. There may have been some new ones, some were good hard logs and others

424 soft, punkey logs. The bills were made to A. King, that was my father, but they were paid by me down to the time we commenced using city water.

Q. Have you paid any bills for Boyer water since that time?

A. No.

Hiram Boyer, re-called by defendant:

Q. These \$3 rates you charged, was that for the use of water from the penstocks spoken of?

Objection: not within the order re-opening the case.

425 Objection sustained and exception.

Q. Some of the consumers of your water used it did they not, for domestic purposes?

Objection same, same ruling and exception.

Q. Did Dr. Wm. Garlock use your water for domestic purposes or other purposes?

Objection same, same ruling and exception.

426 The referee holds that this witness having been examined and cross-examined, may not be further cross-examined upon the subjects upon which he has been so examined, and sustains the objection. Exception to defendant.

Q. Did William H. Dorr of John street use your water for domestic purposes or other purposes?

Objection same, ruling same and exception.

Q. Is it not true that William H. Dorr died a long time prior to 1887?

Objection same, same ruling and exception.

427 Defendant calls James O. Jackson, who being duly sworn, says: I lived in Little Falls in 1887. I was one of the proprietors of the Grand Central Hotel. The Boyer system of water was used for a time in that hotel. We used the Boyer water down to the time we put in city water. I do not remember the

date of putting in the city water. We put in city water in the hotel right away after the main was laid on Main street.

Q. After you put in city water did you use or pay for Boyer water?

428

A. No.

I do not remember what I paid for the Boyer water. The highest we raised the Boyer water was in the bar on the first floor. I went out in 1887. During the time I was in the hotel the supply of Boyer water bothered some, but not a great deal. I can't say what season of the year it bothered. I can't say how it was in the dry season. It bothered a little at different times, but I can't say just when. My business was partly outside the hotel.

429

Cross-Examination :

I can't say if the Boyer water was cut off when I took the city water. The Grand Central Hotel was on Main street, between Second street and Mary street, about midway on the block.

Re-Direct :

I do not recall having any particular difficulty about getting Boyer water about the time I put in city water.

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George C. Fleming : I reside in Little Falls and have been engaged in the fancy grocery business for some time.

In 1887 and for some time before I was in the Skinner block on the west side of Second street, three or four doors below Main street. City water was put in there by Skinner about as soon as it was put in the mains. Before city water was put in for four or five years we used the William Robinson water. I paid him taxes. During that time we used water from the street, but during the time we used the Robinson water, we did not use or pay for the Boyer

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water. I did not then live on Second street. I lived on Alexander part of that time.

Cross-Examination :

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I got water on the lot previous to using Robinson's water once in a while. I lived on Alexander part of the time. I moved there ten years ago and lived there soon after I bought it, and have lived there since, on the east side; Alexander is east of the park.

Q. Did you take the Boyer water on Alexander street ?

Objection ; improper, immaterial. Re-opening plaintiff's case, not within the order re-opening, not cross-examination.

433

Objection overruled and exception.

A. For a short time, I don't remember how long. I understood at the time it was Boyer water, and afterwards learned it was not. I paid for it once or twice, or possibly three times. I might have paid four times, I can't say how many times.

Q. How much did you pay a year ?

Objection same ; it does not appear that plaintiff makes any claim for use of water on Alexander street, or give proof that this witness used water on Alexander street.

434

Ruling same and exception.

A. I think about \$5 per year.

My grocery was on the west side of Second street. My mother lived on Second street and Albany street, on the corner. My mother is a widow. I did not live with her for four or five years before living on Alexander street. Her name is Catherine Fleming.

Q. After the purchase of the Alexander street property did you pay for Boyer water for your mother ?

435

Objection same as before, and to any payments prior to 1887.

Objection overruled and exception.

A. No, sir.

Prior to taking Robinson's water we sometimes got water from the street, but after taking Robinson water I have no recollection of getting water from the street.

Re-Direct :

The house I bought on Alexander street was one of the Hardin houses, corner of Alexander and Burwell streets. The house I bought is the third house from Burwell street. There were three Hardin houses, and I think four, then. 436

Q. What do you say as to the quality of water furnished there at the house ?

A. The water was dark colored or roily the biggest share of the time, and by spells it stopped running all the time. I put in the city water in the house after I could not use the Boyer water any longer, it was so poor. When I went there I found the Boyer water running into the house. I think the payments I made Boyer for water were yearly payments. 437

Re-Cross Examination :

After putting in the city water I did not offer to continue to use the Boyer water at half rate. I will not say I did not.

George A. Pross, sworn for defendant, says: I live in the corporation of Little Falls. I knew the James T. Smith or the Boyer system of pump logs in Little Falls, and also the Robinson pump logs. (Map shown witness.) I knew the streets through which each of the systems run. 438

Q. Did the Robinson system run through any of the streets shown on this map indicated by the red line as the location of the Boyer pump logs, and if so, which ?

A. They do on some streets, on Loomis street as

439 far west as Alexander, and then down Alexander
street and across the park, from there to Garden
street, and on Garden to Jackson street, and ran up
440 Jackson as far as the S. E. corner of the western
park, near the Presbyterian Church. Robinson's
logs did not run in any other of the streets the Boyer
logs did. I have been employed to repair the Boyer
or Smith line of logs and also the Robinson line. I
worked at different times for about eight years in
making repairs on the Robinson line, and I was em-
ployed at different times on the Smith or Boyer
system about six years. I first worked on the
Smith system in 1876 or 1877, and continued to a
441 time about a year after Mr. Smith died. I think he
died in 1882.

Q. Describe what you did in the way of making
repairs on the Smith system during the time indi-
cated ?

441 A. I relaid some logs and put in some new ones
and stopped leakings wherever there were any. That
was about all. I do not know of any one else who
had anything to do with repairing the system dur-
ing that time except those who assisted me. We
put in new logs from the corner of Pross Bros. store
on Loomis street to the Boyer spring, that is about
600 feet. We put in new logs on Ward street, about
half the logs on Ward street. We put in new logs
about a third or more of the way over Eastern park.
At other places we put one or two or three new logs
here and there where they were needed. During the
time I have indicated no other new line of pipe was
laid on this system. I can't tell how frequently I
went to other places to repair the line, but I spent
the most of my time in the summer season at this
work. At different times I dug down to the logs
442 and examined them to learn their condition.

Q. Describe the condition of the logs when you
examined them in this way ?

A. Generally when I found a leak caused by a

loose joint or a plug out, I never dug except when
 I saw indications of a leak, or I was trying to dis-
 cover a leak in cases when we were short of water.
 Sometimes we found a stoppage. Other ways the
 logs were in good shape. Some of them had been
 laid quite a while, some not so long. Only a few of
 the streets on which the line was laid in digging
 down a short distance we found rock, and in these
 streets the depth in which the logs were laid, some
 of them were very shallow, but they were calculated
 to be covered up, but there were a few places where
 they were exposed. On the upper end of Alexander
 street they were covered well, but at the lower end
 they were somewhat exposed near Main street.
 When I took out old logs and put in new ones I did
 so because the old logs were decayed to that extent
 that they failed to hold the water. I did not find
 any split or cracked, except sometimes a hole was
 worn. Where the logs were exposed they wore a
 little by wheels running alongside of them. I was
 employed by Timothy Sullivan to make repairs on
 the Boyer logs, that was about the time Sullivan
 was putting in the water works. I was familiar
 somewhat with this line of water system from the
 time I stopped working until the city water was put
 in. I don't remember of new lines of logs being put
 in during that time, but there might have been.
 When I worked there the Loomis spring was con-
 nected with the Boyer water as long as I had any-
 thing to do with it. I live in the Manheim part
 of the village and on Loomis street and about 600
 feet from the Boyer spring and have lived there
 about fourteen years in that place. I know the
 location of the Boyer spring and of the Hardin
 spring, that is about 400 or 500 feet east of the
 Boyer spring, but I never measured it. I know how
 water was furnished on the Boyer system. It was
 mostly furnished from logs or penstocks. In some
 places it was run into the houses. I do not know
 the length of the Robinson system in feet. I judge
 that the Boyer system was by far longer than the

Robinson system. I should think it was one-third longer. I had worked upon and was thoroughly familiar with the Robinson system and knew the condition of the logs, and was acquainted with the system and the portion of the village through which it ran.

Q. What do you say as to whether it was as thickly populated as the portion of the village through which the Boyer system ran?

Objection: Incompetent, immaterial, not within the order opening the case, and it does not appear that either system is populated alike.

Objection sustained and exception.

Q. Through what other streets than those you have named did the Robinson of pump logs or works run?

A. Through part of Lansing street and the whole length of Ann street, a small portion of Gansevoort street—the west end, about fifty feet on Gansevoort—and it used to go down Third street to the old M. E. church, or about three-fourths the length of the street, and as far as the Skinner opera house through Main street, and through the Girvan house and to William I. Skinner's residence.

Q. How did the Robinson system of logs compare with the Boyer system as to their condition?

Objection: Incompetent, improper and immaterial and not within the order reopening the case.

Objection sustained and exception.

We did not in repairing the Smith system take out any except defective logs or such as would not carry water. We did not leave any logs that we could not carry water through.

Q. How much did you charge a day for your services in repairing this system?

Objection : Incompetent, improper and immaterial.

Objection sustained and exception.

Cross-Examination :

I had general oversight of the logs after Mr. Smith's death, and before his death I was employed the greater part of the time in the summer months. Some in winter, but not much. I worked some years more and some less. When there was a leakage or a defect there was no difficulty in repairing it if we had materials. It was carried into some houses; it was connected by iron pipe attached to the logs. I know the lot where the Boyer spring is. 451

Q. What is the distance from the highway to the spring ?

A. About 125 feet. I was employed by Mr. Sullivan to repair the logs while the city water works were being put in. In a few places where the logs were taken out, while the city water was put in, I did not put them back. I do not know who took them out. I fixed some on the corner of Salisbury and Garden streets, and one place on Main street where the logs were taken away or leaked; this was for Sullivan. I was not a consumer of the Boyer water. I frequently saw it and saw the condition of the water. The water was pure except in the spring of the year or when we had a freshet, then it got roily. It would sometimes remain roily half a day and sometimes a day or two when we had a freshet. Pross Bros. are my sons. Their store is on the north side of the street and west of Smith street, about seventy-five feet west of Smith street. In making repairs I put in a new log wherever I thought proper and necessary. The logs are calculated to measure 11 feet in length. Some logs will last longer than others. Under the ground a heart log would last a great many years. Some logs I examined had been in a great number of years and were still in good condition. 452 453

Re-Direct :

454 All I know about the length of the time the logs were in, is, that when I first went to work, I saw logs in there that indicated that the logs were not new logs. I do not know how long they had been there. They did not decay enough to attract my attention during the time I had them in charge. I mean by a heavy freshet, a heavy rain. When I say it cleared up, I mean that if the spring was taken care of it cleared up along the whole line in from 6 to 24 hours.

Re-cross.

455 I could tell by digging in above a log whether it had been recently dug or not, that is within three or four years.

Re-Direct.

By digging I can't say that I can tell any further back than four or five years.

456 William H. Keiser sworn for defendant says: I live in Little Falls. I have a place of business in the Petrie Block on Second street, south of Main, on the east side of Second street, formerly occupied by John Gilliland. Gilliland died I think in about 1887, I think it was in March, I can't give the day. Shortly after his death I succeeded to the place. I commenced doing business there for myself on May 1st, 1887. City water was put in in the June following. Since that time water from the Boyer system has not been used there and since then I have not paid for the use of the Boyer water. I was employed by Gilliland there for some time before his death and I knew that Boyer water used to be in that place. It was obtained from a pump log on Second street. It ran into the building. There were times when water would not run in the shop. I had to carry water a great many times from other sources than the Boyer system. The shortage occurred in different years. All the time I was em-

457

ployed there, I worked for him about 15 years. This was a barber shop. It used to be roily at times and it was hard water. When it was roily it would remain so sometimes a day or sometimes a half day. Often sediment would come out of the faucet from the logs, fine woody like. I think I have talked with Boyer about the shortage and asked him what the trouble with the water was and he replied that the logs were broken apart or disconnected or something of that sort,—repairing them. 458

Cross-Examination.

That Boyer furnished me with water I can't say at any time. I think the water did not run much in the shop after I took from May to June. When I spoke to Boyer about the water he said he would fix it. I suppose he fixed it. The pipes were connected and I took the Boyer water from May to June. I was with Gilliland about fifteen years. I recollect that when the penstocks stood on Main street. 459

Q. Do you recollect when they were cut down?

Objection: Incompetent, immaterial and not cross examination, and not within the order reopening.

Objection overruled and exception.

A. I do one, the one in front of the shop. 460

Q. When was that?

Objection same, ruling same and exception.

A. I think it was after June, after the city water was put in. I am sure about that. The water was taken in by a pump log across the side walk and then by an iron pipe in the house. The connection with the line of pump logs was by an iron pipe. Above the penstock from the line running along the street into the log running toward the building. I frequently carried water from Main street penstocks. From Main street down second the descent is rapid, while Main street was nearly level. 461

Re-Direct.

From Second street for a distance east Main street ascends.

462 Charles Benedict being duly sworn says: I reside in Little Falls and have since 1850. I have lived on Garden street since 1860. I knew the Smith system of water and I used it up to within about two years before the city water was put in.

Q. Did you afterwards put in city water?

463 A. Yes sir; I can't give the date. I made an application for water to the commissioners. Since about two years before the city water was put in, I have not used the Smith or Boyer water. I have not used it since I commenced to use city water. I used the Robinson water about two years before the city water was put in. I did not use Boyer water after I commenced to use Robinson's. I have not paid for water to Boyer for any water used, since I attached to Robinson's pipe, but after that I paid him a balance for the water I used up to the time I took Mr. Robinson's water. I have not paid him for any other water since.

Q. What was the fact as to the supply from the Boyer or Smith system?

464 A. The supply was very uncertain; it would dry up in a dry time in summer and freeze up in winter oftentimes. The quality of the water was good except when it was roily. When it rained it would be roily for a day or two. There were one or two places in some streets, the logs were upon the surface, but I do not know as it was on Garden street. I observed some leaking places on the logs on Garden street and also I noticed that on other streets. I have driven about the streets a good deal for a number of years.

465 Cross-Examined:

I have lived here since 1850 and I used the water from the Smith system all the time up to within

two years before the city water was put in. I have a shop on Mary street, near Main street. We used some of the Boyer water at this shop. I have a block of stores there. I used the Smith water there in a small way up to the time I put in city water. I employed from 12 to 25 men. This was carriage works. I think I paid for that water as long as I used it. I think I paid Mr. Boyer for water on Garden street, one little bill. I know where Robinson's logs are on Garden street, but not on other streets. Robinson's logs lay along the gutter on the south side of the street and Smith's logs within two or three feet of Robinson's; I don't know if they were laid in the same ditch. The leaks I saw might have been from Robinson's logs for all I know.

466

Re-Direct :

In 1886 or 1887 I was not paying Mr. Boyer \$30 per year. I might have paid a fraction of that. When I was notified that he put his price up to that I took Robinson water. I can't tell the street I saw the leak on.

467

Re-Cross :

There were three stores in my block where water was taken. I paid for my shop, I can't tell how much. It was from \$3 to \$5 per year. We had soft water for general purposes.

Sanders M. Van Alstine sworn for defendant, says: I reside in Little Falls on John street. On the corner of William and John, in 1880. I moved there in 1880 and remained there until 1884 and then moved in the second house east on John street. I knew William H. Dorr; my wife is Dorr's daughter. Mr. Dorr died in 1882.

468

No cross-examination.

Dennis M. Leary: I live in Little Falls. In 1886 and 1887 I was a member of the firm of Stauring & Leary, with a restaurant and saloon on Main street, west of the Skinner block. I used water from the

469 Boyer system for a time. I carried it from the corner of Main and Second streets. It did not run in the place. I used the Boyer water on the 20th of Nov., 1886. I think that was the last payment made for Boyer water. About that time I connected with Robinson's water and ran it into the saloon and used that till I put in city water. I put in city water as soon as I could get it after they put it in on Main street. N. Garhardt, my landlord, made the application for it. I do not remember just when it was. It might have been some time after the water was in the street. Since I put in Robinson's water I have not used or paid for Boyer water.

470 Cross-Examination.

I took and used the Boyer water up to the time I put in Robinson's water. I looked at my book to see when I paid Boyer last. That is the last payment that appears on my book, Nov. 20th, 1886. I am not swearing from recollection about the payments, it is from the book and receipts.

Re-Direct.

471 I keep a cash book and have for years, and in 1886 and 1887 I did. I have kept receipts for bills paid and have examined the cash book and receipts to see if there was anything to indicate payments for Boyer water since Nov. 1886. I have no recollection of any payment independent of the book or receipts since 1886.

472 William Beattie sworn for defendant says: I reside in Little Falls and lived for 18 months on Garden street, after my father died. I am a son of William Beattie, he died June 7th, 1888. He owned and ran a brewery in Little Falls on William street. That brewery was last operated in the spring of 1883. It laid idle after its use as a brewery was stopped. I was in the building at different times after it was stopped. Water was not used after that for brewery purposes. There was no use for water there for any purpose, but whether it was

running or not I do not know. I really don't remember.

Cross-Examination:

My father had a malt house across the road from the brewery. 473

Q. Was water used at the malt house by Mr. Beattie or for the malt house purposes in 1886 and 1887. .

Objection; incompetent, immaterial, not proper cross-examination; there is no evidence that it was or was not used as a malt house.

Objection overruled and exception.

A. No, sir.

Q. Did your father have tenants there at the same time? 474

Objection on the same ground. Objection overruled and exception.

A. I think he did; I do not know whether they used water or not. I think water was used on Garden street. I do not know that my father had made any agreement about using water at these places.

Q. Have you paid Mr. Boyer for water since your father died?

Objection, same ground; it does not appear for what purpose. 475

Objection overruled and exception.

A. I have. I was the executor of my father's estate. The water bill I paid to Boyer was a bill presented against the estate.

Motion to strike out the evidence of the payment of this claim for water, as it does not appear what the amount was nor for what place the water was used, and further that the bills and receipt are the best evidence. 476

Motion denied and exception.

Re-Direct :

477 My father's use of water on Garden street was for household or domestic purposes. He took water from the penstock at the corner.

John W. Ingalls, called for the defendant, says : I reside in Little Falls, and am in business on Second street. I have been on Second street for a number of years, about ten years I should think. I used water from the Boyer system on Second street for a time. I used the Boyer water not long, and I had city water put in as soon as it was put in on the street.

478 Q. After you put in city water did you use Boyer water or pay for the use of Boyer water or used it after that time ?

A. No, sir. The supply of water from the Boyer system was not sufficient for my use at all times.

479 Walter D. Ingham, sworn for defendant, says : I resided in Little Falls until 1886 and was in business here until that time. I sold out my business about May 2d, 1886. My business was on the corner of Main and Mary streets, and I resided over that store. I used water from the James T. Smith system of water works. I did not use or pay for water from that system after I stopped business about May, 1886.

Cross-Examination :

Q. What did you pay for the water per year ?

480 A. I think from \$4 to \$6, but I am not just now very certain as to the amount paid. I think I paid \$4 for the house and I think something for a horse. I sold the business to Charles Benedict and his son-in-law, Fred Gowen. It was hardware and grocery business.

Hiram Sharp, sworn for defendant, says : I reside

in Little Falls and have for a long time. I have had a meat market on Main street, second door west of Mary street, now. It used to be the 4th or 5th. I have resided on John street, between Mary and William streets. I used water from the Boyer system both at my store and house, and afterwards used city water at both places. I put it in at my house the same season it was laid through the street. I can't tell the date.

Q. Did you use or pay for water used at your house after you put in city water there? 181

A. No, sir. My store was in the Dennis Collins block. City water was put in that building shortly after the time the main was laid in Main street.

After the city water was put in by Mr. Collins I used city water. After that I did not use or pay for the Boyer water used at the store. I had used the Boyer water for years. I used it when Smith was in charge and Mr. Boyer afterwards. The supply of water was very fair on Main street unless something gave out, but on John street there were lots of times we could get no water at all, especially in the winter. Sometimes in the summer there might be a week or two when we could not get it on John street in times of low water. It was about the same thing every year almost. The water seemed to be all right when I had it. It would very often be roily. 182

Henry A. Skinner, sworn for defendant, says: I reside in Little Falls and am a member of Shepherd, Skinner & Co., on Main street, just west of Second St. I knew the Boyer system of water. I knew it ran through the streets and in penstocks. There was a penstock at Smith's store, corner of Second and Main street. Our firm used water from the penstock at the store for sprinkling and for drinking. We used water there down to the time when the village water was put in. We put in city water as soon as the water went by there. I think it was 1887. After 183

that we did not use Boyer water nor pay for Boyer water used after that time.

484 Q. How much during 1885, 1886 and 1887 did you pay for this Boyer water?

485 A. On December 29, 1883, we paid Mr. Smith water tax, \$2. From January, 1883, to January, 1884. On January 25, 1886, we paid Mr. Boyer \$1.50 for water to January, 1886. We paid on December 28, 1886, Boyer, \$1 for water to January 1, 1887. This is the last payment I paid to Boyer. I have examined my cash book from 1883 to 1888, July 28. I have kept the cash book, and these entries are in my hand writing, except the entry for city water was in Mr. Shepherd's writing. My firm to my knowledge did not at any time pay Mr. Boyer as much as \$10 per year for the use of water. My firm never used the Boyer water for any other purpose than what I have stated, and we had no other place of business in the village.

James L. Aldridge, called for defendant:

486 I reside in Little Falls and have all my life. I know H. Burch. His full name is Horace Burch. He was for a long time senior member of the firm H. Burch & Co., with a place of business at the corner of Main and Second streets. The firm consisted of Mr. Burch, James S. Aldridge, who is my father, and myself. Mr. Burch left the firm in 1892. The business was continued by my father and myself as Aldridge & Co. H. Burch & Co. owned property on the corner of Second and Main street. A store and three families in the building north of the store. Burch owned no other real estate on Second street. I know the Boyer pump log system of water works. Water from that system was used for a time by families in these apartment houses and we used it for drinking purposes in the store. Water was not running at the store, but I would not say positive about the house, but I think not. City water was introduced into the house as soon as it was into the

city water works and we used that water in the store after that. After that the Boyer water was not further used there. I have not paid for Boyer water since that time. Our firm never paid as much as \$18 per year for water from the Boyer system. I have looked over the papers of our firm for the purpose of finding papers from Boyer or receipts. I found a statement and a receipt given for the use of that water. (Paper shown witness.) This is the paper I found. I knew Henry Sherman, he was for a long time Justice of the Peace of this town and was along in 1886, 1887 and 1888. I have no personal knowledge that Mr. Boyer's attention was afterwards called to this paper. It is conceded that the signature is in the handwriting of Sherman, the justice.

Since Jan. 27th, 1886, our firm has not, to my knowledge, paid for any Boyer water. I have made some examination of the books kept by our firm prior to that date. I examined the ledger account of the real estate transfers. We kept a separate account with the houses. For the store the water was got at the penstock at the John H. Smith corner. We were not always able to get water at that penstock. Sometimes we could and sometimes we could not. At the houses they also had to go elsewhere for water. I can't say as it was confined to any year. I should say it was off and on each year. I noticed nothing as to the condition of the water. I can't swear positively about the water whether it was roily or not. Mr. Burch is an old man and quite feeble.

Cross-Examination :

He lives here in the village. I am not related to him.

Q. How did you know Mr. Burch did not own other property on Second street ?

A. From what I have heard. I have testified to

the best of my knowledge and belief. Burch & Co. owned the real estate in 1885, 1886 and 1887. I was not one of the owners of the real estate. Mr. Burch was not himself individually the owner of it. I have not had any interest in the real estate, but I did in the business. I did not have any particular line of business. The real estate was owned by Horace M. Burch and my father, J. S. Aldridge. My father is still living here in the village. Burch & Co was the name of the firm before I went in, and it was afterwards H. M. Burch & Co. I can't tell if water was used from the penstock for our store or building after December 1st, 1885. I can't tell because I don't know. I was in the store during 1885, 1886 and 1877. I can't say whether I went to one of the penstocks in 1886 and got water or not, or whether I did in 1885. I can't tell whether I ever got water there. I presume I did in 1884. About all I know about the scarcity of water was what someone else said that went after it. I can't say water was used in the building in 1884 and 1885.

Re-Direct :

No particular member of the firm had charge of the real estate. I am familiar with the ownership of some of the property on Second street.

James S. Aldridge, called for defendant : I reside in Little Falls and have for a long time; was a member of Burch & Co., Mr. Burch and myself, and afterwards Burch and my son and I. Have been in business at the corner of Main and Second streets for a long time. Mr. Burch and I owned the store and a building consisting of three apartments north. For a time we used water in the store from the Boyer system and it was used for the tenants back of the store. I remember the putting in of the city water. After the city water was put in the Boyer water was not used. I do not remember the date exactly when the city water was put in. An application was

made for it and signed. (Paper shown.) I know something of the adjustment of this bill. It was arranged between I and Mr. Boyer. Since that time my firm has not made any payment for the use of the Boyer water. I did not know of any other property on Second street of Mr. Burch's. He never owned a foot except what he and I owned together. My firm to my knowledge never paid Mr. Boyer \$18, or that rate per year for the Boyer water. Up to 1892 when Burch went out of the firm, both Mr. Burch and I gave attention to the business and were both there during business hours nearly every day and so far as I know never had any outside business. The supply of the Boyer water was not constant.

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Cross-Examination :

In 1886 we did not use the water. In 1886 I should say it was not constant. I know that would be my recollection. I cannot specially specify, but I think it was not constant in 1887. I know it was not in 1884 and 1885. We used the Boyer water up to the time the city water works was put in.

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Wallace B. Newell, called for the defendant:

I reside in Little Falls and am a son of Selim Newell. He owns property on Second street. We own it together. It is now one store. We have owned that store from about 1886 or 1887 when the property was divided. Before that my father, Arphaxed Loomis and Mr. Jas. H. Ives and I owned a property on Second street, on the east side. It was five stores commencing at the corner of Second and Albany streets, known as the Petrie block. The division of these stores was made before the death of Mr. Loomis. During the time these five stores were so owned we had charge of them there at our store. I did not have more charge than my father had except I did most of the business. I kept an account of all transactions had by me with reference to these stores. I knew what was called

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499 the Boyer system of water works. Some water was
 used in the store or buildings from that system. It
 was got by going to a penstock on Second street,
 near the property. That water continued to be
 used up to the time the city water was put in. I
 do not remember the date when the city water was
 put in. We put the city water into the block in our
 part and Mr. Ives put it in at the same time in the
 same trench. The property was divided, Ives took
 the two lowest stores and Loomis took the two up-
 per stores and we took the middle one. I have had
 charge of the Ives stores and have collected part of
 the rent. The Boyer water has not been used in our
 500 store or the Ives store since the city water was in-
 troduced. I don't think the city water was put in
 in the Loomis stores at the time we put it in, but it
 has been put in. I do not remember the date it was
 put in. In 1886 or 1887, I can't swear that I did or
 did not pay Mr. Boyer for water in these years.

Q. In 1887, according to your best recollection,
 did you pay Mr. Boyer for water for the whole five
 buildings?

A. I don't think I did. In 1887, not to my best
 recollection.

501 Q. Did you ever pay to Boyer on account of
 these five buildings as much as the rate of \$30 per
 year for water?

A. I can't tell from recollection whether I paid
 \$30 per year or not. I do not know of any one pay-
 ment of \$30. I have refreshed my recollection by
 examining an account kept by me of the receipts
 and disbursements on account of this building. In
 that account were entered all the receipts and dis-
 bursements made by me and correctly entered.

502 Q. After refreshing your memory as indicated,
 state the number of payments made by you for the
 Boyer water for the five buildings?

A. One payment I think was made in 1884. A

good deal of the time there was a shortage of water. I should not think it ran over one-half of the time. I mean there were times when we could not get water at all. That occurred right along all the time extending over a period of years.

To the Referee :

I speak with reference to the water at this particular penstock. We never went to any other place for water. We only used it for drinking purposes.

Cross-Examination :

The division was made before Mr. Loomis' death. Since that I have had nothing to do with the Loomis stores. I can't tell when in 1884 the payment was made. I can't swear I made the payment, I made the entry in the book. I have no recollection of ever making the payment. I have no recollection of anyone making such payment only as I find it entered. It was \$20. I know the payment was made for water tax.

Q. If you did not make the payment yourself, how do you know the payment was made ?

A. If it had not been made the record would not have been there.

Re-Direct :

I don't know what was paid for water at our store after the division.

Chester P. Judd, sworn for defendant, says:

I reside in Little Falls and am a tailor and have carried on tailoring business here for about thirty years. My shop is 547 E. Main street, Wheeler & Hardin block. I have been there since 1879, when the block was built. Before going there I was at the corner of Main and Second streets, up stairs. I live in the Timmerman block or over the Timmerman store. I have lived there 22 years last 8th of July. I know the Boyer pump log system and used water for a time from that system both in the family

and at my place of business. I used that until the water works were put in in the village and then I used city water in my family, but not at my place of business till last year. After the city water was put in the building I did not use the Boyer water. By the building, I mean the Loomis building, 618-620 Main street. I can't tell when it was put in, I do not think it was put in the same year it was put in the street. This building is in charge of Watts T. Loomis and has been for some years back. In 1886 or 1887 I don't remember the amount I paid for Boyer water. There was no other family by the name of Judd living in the block I have spoken of in 1884 to 1888. I know of no other tailor by the name of Judd except B. F. Judd, and until two or three years ago he lived with me in my family. I have never paid Mr. Boyer as much as \$7 per year for the use of water. The supply of water furnished by the Boyer system was very good. I occasionally found difficulty in getting water in a dry spell. I can't say whether that was in one season except from the best of my recollection. It was so from year to year.

Cross-Examination.

I do not recall how much I paid for water in 1886 or 1887. I do recollect of paying Mr. Boyer something.

Selim Newell, sworn for defendant, says:

I live in Little Falls and am father of Wallace Newell and have been engaged in business on Second street since 1875. I and my son, Mr. Loomis and Mr. Ives owned a building known as the Petrie block to the time of the division. That was in 1879 and before Mr. Loomis' death.

Q. Did you ever pay to Mr. Boyer \$30, or at the rate of \$30 per year, for the use of the Boyer water for that property.

A. I did not, I had nothing to do with the payment, my son did that. From the time of the divi-

sion, we used the Boyer water in our store till the city water was put in and not after that, I have not used it or paid for it since the city water was put in. The supply was poor; part of the time it ran all right and part of the time there was none. I own a residence on Alexander street, and formerly owned a house now occupied by George C. Fleming as his residence. I knew of a spring called the Hardin spring. I know two houses, the one I own and the Fleming house, I bought them from Judge Hardin and he gave me a warranty deed, it was about 1878 to 1880, along there. They used to be called the Hardin houses. The water from the Boyer system was in the house and used by us. No charge or bill was ever presented to me. The water went into my house by a pipe and the same pipe connected with the Fleming house, as I understand it. At the house the water was brought up to the sink, but was not always constant there, but I could most generally get water by going down into the cellar. The sink was on the ground floor and about seven or eight feet above the street. I mean Alexander street in front of the house. I was one house below Burwell street. I have lived there since about 1858 to 1859.

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Cross-Examination :

I have not got my deed.

Jonas S. Barnet, called for defendant, says :

I reside in Little Falls, and am one of the proprietors of Barnet's tannery. I have had charge of the tannery since 1883. For a time we used the Boyer water at the tannery, or what was some spring water. I suppose it was Boyer water. We used that until we put in city water as soon as we could get it. I think 1886 or 1887. We used Boyer water for a few years. After we put in the city water we did not use the Boyer water. We used the Boyer water or spring water during July and August. We preferred cooler water than the creek water. When we could not get the spring water when it was warm

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we had to use ice. The supply of the Boyer water was very limited and was not at all constant. Very often we did not get any, not a drop. We had the same trouble every year. I do not remember how much we paid for the Boyer water, without referring to my books. I would not say as it was as high as \$60 a month or not. We have not paid for Boyer water since I began to use city water.

Cross-Examination :

In July and August was all I had use for the Boyer water, during the hot months, or it might run into September if the weather was hot. We got drinking water from a spring near the tannery at other times. The tannery is below the railroad. The pipe was led right into the tannery. The water was not cut off during the rest of the year that I know of, I don't suppose it was. We then had about forty men. I do not remember whether the men got water to drink during the rest of the year or not. I do not know if they drank Boyer water during July and August.

William McWenie, sworn for defendant, says :

I reside in Little Falls and am proprietor of the Beattie House and have been for some time, since February 1st, 1888. City water was in there when I went in, but other water was running there and they used to go down and take a drink of it occasionally until they cut down the penstock across the street. I have paid for no water but city water since I went there. Before I went into the hotel Joseph Murphy was there.

Cross-Examination :

I think the Boyer water was better drinking water than the other. It quit running there when they cut the penstock down.

Henry Beniens, sworn for defendant :

I reside in Little Falls and have a title to property on Main street. Store 582 and where I live

up stairs is 584. It is next east of the Failing, it is on Main street, between Second and Mary streets, on the north side. I am married and I and my wife live there. My wife does not own property on Main street to my knowledge. I know the Boyer water works with penstocks in streets before the city water was put in. I used water from the penstock for a time. I used it down to the time they put in city water, but for two or three months I could not get a drop. Then I called Mr. Boyer's attention to it and he said he would see to it. He did not tell me the difficulty. After I put in city water I did not use Boyer water. I paid for Boyer water different prices. I think first \$3 per year, and then I paid \$5, and I paid Boyer by agreement \$6 per year. I never paid more than \$6 per year for the use of it. As to the supply it often happened that I could not get water. It was stopped sometimes for two or three days and sometimes for a week. I could not get a drop. The Boyer water was carried into the building in pipes. It came into the rear from Garden street to the pipe. It was carried into the first floor and up to the second floor. Garden is higher than the second floor of my building. It was brought down in iron pipe. Those times when I could not get water was in the winter, and sometimes in the summer, and that happened in different seasons. Sometimes the water was not clear, or it was roily when there was a heavy rain.

Cross-Examination :

Just before I put in the city water there was two or three winters that I could not get water. I think I put in the city water in 1888. From Garden street to Main is 250 feet and the boundary is 60 feet, and the pipe came about 20 feet into the building. I own the whole property. The pipe did not run through the rest of the building. I laid the pipe under ground and connected it with the logs on Garden street. I think it was half inch pipe. It might be bigger. It was laid I think about three feet under

ground. I don't believe it was over eighteen inches deep on Garden street. I have not cut off the pipe or done anything to it. After I put in city water I did not run it in this pipe. I put in city water from Main street. I have a building on Garden street, next Mr. Benedict's. I took water there from the Boyer system. I took it there by a pipe carried into the house. I did not own property except on Main and Garden streets. I paid for water. I don't think my wife paid. Maybe if I was not at home my wife paid.

John Koehler sworn for defendant says: I reside in Little Falls and own a brick block on Main street, west of Second, or it is in my wife's name. I used water there for a time from the Boyer system. I used it until I used city water. After that I did not use it at the premises. I do not remember the date when I put in city water, nor how long it was after the water was laid in Main street. I made an application for it at the commissioners' office. I have been carrying on a boot and shoe business in the property for about twelve years now.

John H. Smith sworn for defendant says: I reside in Little Falls and have a store at the corner of Main and Second streets, just across from Burch's store, north side of Main street, called the Fox block. For a time I used at that store and at my residence on Albany street the Boyer water, and afterwards put in city water. I put in the city water in the house the next year after it was put in the street and I have not used the Boyer water since at the house. The city water was put in my store by the landlord. City water was put in my store at the time it was in the Fox building. I have not used the Boyer water there since that time. I can't remember when J. M. Walrath lived on John street.

Peter A. Conyne sworn for defendant says: I reside in Little Falls and have for years. I am one of the Trustees. Up to a couple of years ago I resided

on Second street, first house below Albany street. I knew the Boyer system of water works. I used water for a time from that system, and I afterwards put in city water. Since I have put in city water I have not used or paid for the use of the Boyer water. I put in the city water when they were putting down the main. I put it in May 14th, 1887. When I used the Boyer water I think I paid \$5 per year, but I am not certain, I have no account of it. I used it to drink at the shop and to drink at my house. I did not that I know of or to my recollection pay extra for water at the shop. I do not recollect that I used Boyer water at the shop after I put in city water in the house. The supply from the Boyer water was that it did not run much on the street to the penstock when I used it. I do not think one third of the time. I mean the three years just before I put in city water. There was a penstock right at my house and I had the water run into the house. I had it put in when Smith owned the system. I know nothing about the condition of the pump logs.

Cross-Examination :

My house is on the east side of Second street, and my shop opposite. I got water for the shop from the penstock. Water was carried in the house by a pipe and I drew it by a faucet. The waste water was discharged back into the system. The quality was some of the time good and some of the time roily. The shop was 20 to 30 feet square. It is a wagon shop. We used water for drinking and some for grind-stone. I think I paid Boyer \$5 a year, I will not be positive. I do not know whether I paid Keller or not. I do not recollect of paying Boyer anything, I do not know as I did.

James H. Ives, sworn for defendant, says :

I reside in Little Falls and have for years. Since the division of the five stores on Second street I have owned the two lower stores and buildings. The division between Newell, Loomis and myself was

529 before the death of Loomis, 1885. Since Mr. Loomis' death I have not paid Smith or Boyer anything for the use of the water for either of these buildings. I had city water put in right away. I do not know of any other water used there since the introduction of city water. I have known of the Boyer system and the Robinson system, and the kind of logs laid. I saw some pump logs used in the Boyer system. I have seen logs where they repaired them. I have bought pump logs for myself here. I have never bought any logs such as his logs here in Little Falls. I did not lay any round pine logs. The logs I laid were spruce, mostly. I have laid a great many spruce logs. I do not know what pine logs like Boyer's were worth. For six or eight years I never bought any. We paid for spruce logs laid in the ditch at Fairfield and Salisbury and Manheim, 75 cents to a dollar per rod as the pipe was laid, but this does not include the ditching or covering of the logs. Last year I bought and laid pine logs one and a half and some two inch bore. They were good pine logs, termed hearts. They are coated with tar and some preparation to preserve them. I bought them delivered at Little Falls. They were bought at Elmira.

531 Q. What did these logs cost ?

Objection : incompetent, improper and too remote.

Objection sustained and exception.

532 I cannot answer how my logs compared in quality with the Boyer logs. I believe my logs are of good quality.

Cross-Examination :

I did not myself occupy those two stores. They were rented. I will not say there was not water used in these stores after I got them. The upper rooms were used by families before we divided, after that the upper rooms were used as a restaurant.

Q. Did you use the Boyer water in the village at other places ?

Objection; incompetent, immaterial and no evidence water was used at any other place since 1885.

Objection overruled and exception.

A. I think the tenants have.

Re-Direct:

I do not remember of paying for any water used by the tenants.

Oscar Taylor, sworn for defendant, says:

I have resided in Little Falls for a long time. I was for a time interested in business in Little Falls, gents' furnishing goods, on the south side of Main street, second door east from Second. That was part of the time conducted by Griffith & Taylor and the last year by myself. That business was discontinued about 9 years ago as near as I remember. I sold out to William C. Goff. That store is in the Petrie block, I think. No, I think it is in the Nelson block. I paid rent to Yost. I do not know what block it is in. Since that I have not been interested in any business on Main street. I am a member of the firm of Howell & Taylor. That firm has not had a store or place of business on Main street. I have never known of any other firm of that name in town.

Cross-Examination:

Our place of business is on the corner of Second and Albany streets. Mr. Goff purchased the goods and ran the store on Main street. I think it was about nine years ago, as near as I can remember. I would not be positive it was not in 1886 that he purchased it. It may have been in 1886. I used the Boyer water while in that store.

Q. Did you use the water at the corner of Second and Albany streets?

Objection; incompetent, immaterial, not proper cross-examination and no claim that water was used there in 1886 or 1887.

Objection overruled and exception.

537 A. I do not remember, I cannot tell as to dates. Part of the time we did, but for the last year the logs were there we did not. There was no water there within a year before the city water was put in. We used it when it was there up to the time the city water was put in. It did not run into the building. We obtained from a penstock, the penstock was in front of Conyne's.

Re-Direct:

538 The two or three years I speak of was when we took the city water; we put in the city water as soon as we could get it. I put it in about the time Conyne put it in his house. For a year before we put in city water we did not have any water from the Boyer system. Before that we only had it a part of the time. I think no water ran at the penstock for a year before I put in city water. Before that year sometimes there was water and sometimes not.

Re-Cross:

539 I think we used no Boyer water at all for a year before the city water was put in, we got it from a pump and a well at the Arcade. I did not myself get the water at the Arcade. I only know the boys said they got the water there from a pump.

540 Q. Did you pay Boyer for water at any time in 1886 or 1887?

Objection same as before and no claim that any payment was made in that year, except Main street, no place.

Objection overruled and exception.

A. I can't tell. I kept a cash book in 1886 and 1887.

Re-Direct:

540 I should say I made no payment for Boyer water at any time within a year before I put in city water.

Re-Cross.

I am not saying I did not pay for the water in

that year, I mean to say I have no recollection of paying for it in that time.

O. F. Loucks, Jr., sworn, says :

I live on John street, and have for a number of years since 1875. My mother and myself and others owned the property on John street. There was originally two places, a single house and a double. They used there the Smith-Boyer water. Afterwards city water was put in. I do not remember the date city water was put in. It was put into both places at the same time. The Boyer water to my knowledge has not been used at either place since the city water was put in. I lived right there all the time. The supply of Boyer water was quite irregular within the last few years and likely to be roily and extremely warm, I remember in summer. In those years I used to draw water from the penstock, and I remember there were days when we could not get any water, and in the winter it was frequently frozen up. I used to thaw it out with hot water and sometimes went to the neighbors to obtain water from a private well. The system of logs on John street was exposed to the sun. I remember it leaked at one place, there was a hole and the water spurted out of it. I do not know of any new logs or repairs being made there. There might have been, of course, but I don't remember it. I am a son of O. F. Loucks. He is employed out of town.

Cross-Examination :

I am 27 years of age. I never examined the logs only as a casual observer. When the water spurted out, I can't tell how long it continued. It was near the penstock. It was when I was a little boy and went there bare-footed. I presume when the water was roily it was after a hard storm. I don't know. The property is on the north side of John street, between William and East Main street.

Patrick Kehoe, sworn for defendant, says :

I have until lately resided on Main street. I used

544 water there for a time from the Boyer system, and I afterwards put in city water. I can't tell the date but it was when mains were being laid through that part of Main street. Since then I have not used the Boyer water. I think I have not since then paid for Boyer water or used it since I put in city water.

Cross-Examination :

My building is about opposite the Zoller block on the north side of Main street, about two-thirds of the way east between William and Mary streets.

James H. Bucklin, sworn for defendant, says :

545 I reside in Little Falls. I own a store on Main street which has for a number of years been occupied by Mr. Lintner and son. They have been there about 16 or 17 years. I believe I do not own any other property on Main street. I have no place of business on Main street, and have not within the last ten years. Within the past ten years I have not paid for the Boyer water, nor used it at my building on Main street. I have seen the pump logs used in this Boyer system when Mr. Smith bored them up where he lived. I can't now tell whether they were spruce or pine or hemlock logs. I could not swear 546 positively what they were. I know pine, hemlock and spruce lumber one from the other when I see it.

Cross-Examination:

This building is between Ann and Second street, on the north side of Main street. It is the store Lintner has occupied for sixteen or seventeen years. I know they did not use water there at that store from the Boyer system. They took the water in from another system. I was there occasionally but not always. I mean I never saw them use any 547 Boyer water. I have other property in the village. In 1886 and 1887, I think I had no other buildings on Main street.

Q. Did you pay Mr. Boyer for the use of water since Mr. Boyer was the owner of the works?

Objection same as before to a like question.

Objection overruled and exception.

A. Yes I have since 1886 or in 1886. I did not pay him in 1887. I never used any of the Boyer water. I did not occupy the house myself. I am assessed for city water whether I take it or not. I am seventy years of age. 548

Q. How long have you known this water works ?

Objection ; improper and immaterial, not within the order re-opening case and not proper cross-examination.

Objection overruled and exception.

A. I have known it but do not know how many years. I should say twenty-five to thirty-five years perhaps. I would not be certain. 549

Wm. H. Cronkhite, sworn for defendant, says :

I reside on John street in Little Falls, at the corner of William street. I have lived there about twenty-five years. I know something of the log water system called Boyer system. Water from that system was used in our family. I afterwards connected with city water. It was in September, 1887, we connected with the city water. Since that time I have not used the Boyer water or paid for Boyer water used since that time. I have another house on John street. For the last ten years we have paid for Boyer water for that house. City water was put in that house in October, 1887. To my knowledge Boyer water has not been used there since. I have not paid for Boyer water used there since October, 1887. For the last few years the supply was very irregular, and it was scarcely no supply for the last year before the city water was put in. The quality of the water was good ordinarily. At times it was affected by the showers and was roily a little. I think it was very hard water. I knew of the line on John street, and in that street the logs in places were on the surface exposed. And 550 551

the line was not in good condition at all or any times. At times there were leakages. During the time I lived on John street I did not know of the line being taken up or re-laid with new logs. In 1886, 1887 and 1888 I kept a horse and drove around a good deal in different streets in the village. I knew the location of the Boyer logs in some of the other streets other than John street. I have noticed the wet and muddy condition along the line of the streets near the line of Boyer logs when other portions of the same street were dry. I have seen the road so wet on Garden street. I don't remember of any other places.

Cross-Examination:

I know the wet came from the Smith or Boyer system. I did not know of any other system on Garden street. If there was another system close to it, I could not say from what system the wet came from. I went and spoke to Boyer and gave him \$5 to fix it and he did fix it. I do not know if the water ran to my house from Garden street.

Re-Direct :

I had several talks with him about repairing the logs. We had no water and I saw Boyer and told him I would give him \$5 if he would get us some water down there and I think he fixed it so we got some. I don't think of anything that was said about the condition of the logs at that time. I used often to talk with him about the supply being short. I can't recall any other conversation. I can't say as he said anything about the reason of the failure of the water. During the last fifteen years I have known John street.

Cross-Examination by Mr. Steele:

In 1886 or 1887 when I had the conversation I speak of it was in the summer months, I can't tell just what month. It was at his house. I drove up there.

Stephen E. Babcock, re-called for defendant:

A record was kept in the office of water commissioners of applications for water by different persons and of the date water was turned on at different places in the village. That record is kept in the books which I produced. That was kept under my supervision and has been in my custody since the beginning of the water works, the commencement of this record. By referring to the record I can give the dates when persons made application for city water and when it was reported by the plumbers the pipes were ready. And I can tell within twenty-four hours when water was turned on by an assistant in the office. I know parties using city water have paid for the water. Those books are kept in the office as a public record. I can tell by referring to the record to which water was supplied.

Examination suspended.

George A. Hardin, sworn for defendant, says:

I reside in Little Falls and have for upwards of forty years. I knew the Smith-Boyer system of water works when under the supervision of Usher, Smith, Keller and afterwards Boyer. I knew what are known as the Boyer and Hardin springs and which are the sources of supply of this system. In 1880, or about there, I bid off the Fleming lot on which the spring known as the Hardin spring is. I bought the Terry Smith property. One of the lots is known as the D. C. Fleming lot. I sold by contract to Fleming the house and principal part of the lot and reserved the spring and the water that might come to it except water to supply the house. The spring is twenty or thirty feet east of the house under the hill, and is a large spring with a liberal flow and is a durable spring perennial. I have seen the Smith or Boyer spring west of the Hardin spring both at the foot of the said range of hills. In a general way and from such information as I have I suppose the Hardin spring is the better or more re-

559 liable spring. There is a large hill back of both of the springs. About the 28th of August, 1880, a contract was made between myself and Smith. I have the original contract in my hand.

Paper offered in evidence, received and marked defendant's exhibit 2.

560 There are houses mentioned here to which water is reserved. Before executing this I bought property near the old Catholic church on the side owned by Dale Bros., and I have built four houses and I think before this lease was signed I had sold two of them, and then I owned the houses now occupied by Newell and G. C. Fleming. They are the two spoken of in the contract. W. T. Wheeler and I owned four houses on the corner of Salisbury and Main streets which we had bought of John McCauley. Of these four houses one has disappeared, having been purchased by Judge Smith and removed. In the third subdivision the two houses I owned and the four Wheeler and I bought were to be supplied with water in addition to the money rental. They had a house service, particularly the two I built, in distinction to penstock. I was familiar with the movement to supply city water here. Early in 1885 the trustees named a committee of twelve citizens of which I was chairman. I spent about six weeks' time with that committee. The committee examined several sites and sources of supply and finally agreed upon the source from which we now get water from Beaver Creek. We had some surveys made by engineers to see what water could be got. While the surveys were being done Mr. W. T. Loomis, of the committee, and I, arranged and sent samples of six springs to Prof. Deecke, of Utica, for an analysis made of the water. In that six was a bottle taken from the Hardin spring, the bottle was marked and the key was kept by Loomis and I. About the time we got a report from Prof. Deecke of the analysis of water.

Q. State the result of Prof. Deecke's analysis of

the sample of water of the Hardin spring, so called ?

A. It was fifteen and a fraction grains carboniet of lime to the gallon. The water of the Hardin spring is a very hard water.

Q. How does the Beaver Creek water compare with the water from the Hardin spring as to hardness and softness? 563

Objection on same ground as before.

Objection sustained and exception.

I have used the city water and use it every day. I use it a good deal of the time without a filter. In the course of putting in the work an election was held in August, 1885. There were two boxes, a tax payers box and an electors box. I had a talk with Hiram Boyer upon the subject of this water on the day of the election. Mr. Boyer said I ought to vote against it as I had a spring and it would destroy my spring, and I said, Hiram the spring is not large enough to hold me, I am for the good of the people. 564

Cross-Examination :

The water works were inaugurated in 1885. I should say the water was taken from the spring for Deecke in July or August for the analysis, I think in July, however ?

Re-Direct:

I was born in Herkimer County. I have noticed that a shrinkage of the streams and springs has been going on for the past forty years. I should think the Mohawk river was navigable with boats from Schenectady to Rome with boats drawing twenty inches of water, and I think now it could not be drawn by boats carrying seven inches. There are some exceptions. Some springs hold out and some have dried up entirely. 565

Testimony of Mr. Babcock resumed :

The records are kept as follows : We have a record book of applicants which is a ledger account, 566

because charges are posted into it. A tapping permit book, the applications are signed by the applicants, which must be the owners of the property. A new work permit book which designates the specific
 567 uses inside each building to which the water is to be applied. An extension permit book which designates additional uses required subsequent to using the new work permit. The plumbers return, which states just what uses he has plumbed for and which must agree with the permit and which he is required to return to the office duly signed within forty eight hours after the time the work is completed. Plumber for water is only done by a particular plumber designated to do the work. Every plumber has to be licensed and to give bonds to do the work according
 568 to the permit. The water is turned by some one from the water commissioner's office after the return of the plumber, and a record is not kept of the precise time the water is turned on, except it is turned on after the plumber's return within forty eight hours. By referring to the books witness says Daniel Aberly took city water May 22, 1888, premises 734 E. Main street. W. H. Abbott, in the Hardin & Wheeler block, took city water May 12, 1887, 545 E. Main street. Beattie House took city water May 16, 1888, 637 Main street. Mrs. H. Rust took city
 569 water September 15, 1887, 598 John street. D. C. Bangs, tenant in Petrie block, took city water June 23, 1887, S. E. corner of Main and Second street. D. H. Burrell took city water June 27, 1887, 584 Garden street. Chas. Benedict took city water June 25, 1887, S. E. corner of Mary and Main streets. W. T. Loomis took city water June 13, 1888, premises 321 Second street, Petrie block. James H. Ives took city water February 7, 1888, 333 S. Second street. S. Newell & Son took water June 11, 1887, 327 S. Second street. W. T. Loomis took city water October
 570 18, 1887, 556 E. Main street. W. T. Buddle took city water May 16, 1888, 317 Second street, (Pepper block.) H. Burch or Burch & Co. took city water May 24, 1887, N. W. corner of Second and Main

streets, put in basement of tenement houses supplied for use of store and building from this one tap. H. Beniens took city water February 2, 1888, 582, 584 Main street. Leonard Boyer took city water January 3, 1888, 621, 623 John street, double house. R. H. Smith took city water April 5, 1888, N. W. Main and Waverly Place, (Bramer estate and residence.) W. H. Cronkhite took city water September 1, 1887, John street. Charles D. Collins, November 7, 1887, N. E. corner John and Ann streets. James H. Churchill took water May 16, 1887, Second street livery stable. P. A. Conyne, May 20, 1887, 339 S. Second street. P. A. Conyne took water at store corner of Second and Albany streets, May 20, 1887. Ada M. Dorr took water September 7, 1887, John street and William street, two dwellings. George Failing took city water June 22, 1887, premises E. Main street. G. C. Fleming, (Gilbert property), July 27, 1887, 307 and 309 S. Second street. James O. Jackson, Grand Central Hotel, June 15, 1887, 565 E. Main street. Dennis Collins made application June 6, 1887, took water July 3, 1888, premises 600 E. Main street. Mrs. J. M. Barber, owner, took water (Gregory tenant) October 18, 1887, 585 John street. Geo. W. Shall, (Hinchman House,) June 15, 1887, East Main street. J. W. Ingalls (Mrs. M. A. Ingalls owner,) took water June 22, 1887, 309 and 311 Second street. W. D. Ingham took city water November 4, 1887, N. E. corner of Mary and Main streets. A. Snell and Mrs. F. J. Burroughs, October 8, 1887, 572 and 574 E. Main street. L. R. Klock took water May 20, 1887, 115 Main street. Mrs. Ellen Kehoe, 588 to 594 Main street, August 27, 1887, where Patrick Kehoe resided. John M. Koehler, 521 E. Main street, December 7, 1887. William Kingston, 508 Albany street, December 18, 1887. Board of Education, Little Falls Academy, December 16, 1887. Estate of O. F. Loucks, 614 John street, February 25, 1888. Mrs. O. F. Loucks, 620 and 622 John street, February 25, 1888. W. T. Loomis, 676 E. Main street, his dwell-

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ing house, June 27, 1887. Joseph Mullen, S. W. corner of Main and Mary streets, June 21, 1887, Metropolitan Hotel. C. Judd, (W. T. Loomis owner) 574 December 14, 1887, property 618 E. Main street. It used to be J. H. Timmerman's store. S. B. Merriam, store, June 17, 1887, 584, 586 Main street. E. J. Nelson, January 25, 1888, 539, 543 E. Main street. S. Newell & Son, feed store, June 11, 1887, 337 S. Second street. Mrs. Mary Perry, September 27, 1887, 573, 575 John street, double dwelling. Michael Reddy, December 2, 1887, 623 John street, dwelling. Hiram Sharp, October 26, 1887, 583 John street. Shepherd, Skinner & Co., (Geo. A. Hardin, agent), June 22, 1887, 532 Main street, store. John Selcer, June 4, 1888, and tenant above, 313, 315 S. Second street. John Selcer, Dec. 24, 1887, 772 E. Main street, dwelling. Irving Snell, (W. T. Loomis owner), November 4, 1887, 550 E. Main street, and dwelling overhead. J. H. Timmerman, 618 E. Main street, December 14, 1887, 618 Main street, dwelling above. Henry Whittemore, November 8, 1887, 600 E. John street, dwelling. P. A. Stauring, October 26, 1887, 540 John street, dwelling. I knew Peter A. Stauring, he had resided there when the line was laid through there, that is the brick house with pillars, the second house east of Second street. Jacob Zoller, May 10, 1888, 553 Garden street, dwelling corner of Garden and Mary streets. 575

EVIDENCE SUSPENDED.

William H. Robinson, re-called by defendant:

I know where the Metropolitan Hotel is and I know Joseph Mullen, the owner. I remember when the city water works were put in in Little Falls.

Q. Some time before that did you make an arrangement with Mullen to furnish water to the hotel? 577

A. I did. That was about one year before the city water was put in. I led my water from Garden street down Mary street into the Metropolitan Hotel. I do not know of any other line of logs on

Mary street except the one I put there for that purpose. I furnished water to the Metropolitan Hotel up to the time the city water was put in. I know O. H. Brigham, and he at one time ran this hotel, and I think he did at the time. Yes, I know he did. There was a time when Boyer ran his water across the Eastern Park in my pipes. (Map shown witness.) Attention of witness called to the line of pipe. That is the line indicated on this map; he had an old line of pump logs near my pipe. The corporation wanted him to repair or fix his pipe, and he made an arrangement to run his water through my pipe. I had a two inch iron pipe there. About that time he discontinued his line of pump logs and ran his water through my line. Water from my line and his both ran into the pipe, and he had a connection on Garden street, and ran it into his other branches down on Main street, and a branch went down on to Albany street. He commenced running water across the park in my pipe I think two years before the city water was completed.

Q. Sometime after the water works were put in did you sell to the village your line spoken of running across the park?

A. I did. I do not now remember the date.

Q. Did you after that sale by direction of the water commissioners cut and plug that line of pipe at the upper end so as to cut off the supply of all water through it?

A. I did under the direction of S. E. Babcock, the engineer. I cut it off and plugged it. At the time it was cut water was running across the park through the line. The water was then running from both mine and the Boyer supply.

Cross-Examination :

I notified Mr. Boyer that I had sold the pipe to the water commissioners and he would have to look for some other way to get water across the park. And he said: if that is the case I will have to fix up

my old logs again and run it through them, so I helped him fix up the old logs and we ran all the water into that. I helped him fix up the pump logs.
 582 Immediately after selling the pipe I notified him and we then fixed up the old logs. We plugged the pipe first and the water ran out on the park, and on the same day the old logs were repaired and the water turned into that line.

Q. In repairing the old logs what did you do ?

Objection ; incompetent and immaterial, does not appear it was before the commencement of this action, and is a long time subsequent to the plaintiff's claim.

Objection overruled and exception.

583 A. When we came across an old log that leaked bad, Mr. Boyer got some iron pipe and we put that in place of the log.

Q. Do you know why Mr. Boyer cut off the water from the Metropolitan Hotel, and if so, why ?

Objection ; incompetent and immaterial.

Objection overruled and exception.

A. Because he could not get his water tax.

584 Q. Was it part of the agreement between you and Boyer that you were to have the surplus water for the privilege of running his water through your pipe ?

Objection ; incompetent, immaterial and not proper cross-examination, and it is subsequent to the matters alleged in the complaint, if it is competent for any purpose the arrangement should be stated.

Objection overruled and exception.

A. Yes, sir, I was.

585 I cannot tell the date I made the contract with the village. It was after the city water was running in the village.

Re-Direct Examination :

Boyer did cut off his water from the Metropolitan Hotel at the time I commenced running my water there. The sale I made of my line across the park was by a written instrument.

(Paper shown marked for identification Defendants No. 1 of August 17.)

Plaintiff now moves to strike out the evidence of the witness as to the purchase of the line to the water commissioners, as it appears the sale was in writing, and the writing is the best evidence. 186

Motion denied and exception.

Defendant now offers the written contract in evidence, Defendant's No. 1, for identification, of August 17th.

Objection; incompetent, improper and immaterial, that is something that occurred since the commencement of this suit.

Objection sustained and exception.

Defendant now offers it for the purpose of fixing the date of the transaction spoken of by the witness Robinson, viz: January 17th, 1891. 187

Plaintiff admits that the transaction spoken of by the witness Robinson, was at the time stated in the paper, January 17th, 1891, and objects to the paper for the purpose offered.

Objection sustained and exception.

In repairing the line when it needed a new log we put in a short piece of iron pipe.

Mr. Babcock re-called: 188

Mrs. Arnold Petrie, in Petrie block, June 23, 1887, S. E. corner of Main and Second streets. Water was put in the dry goods store, saloon and restaurant and barber shop and the Lyceum up stairs. The village water works were put in from 1886 to 1888. The original survey was in 1885. The last about June, 1888. Most of the work was done in

1886 and 1887 and was closed up in 1888. The distribution system was completed about July 1, 1888. The supply is obtained from Beaver Creek about nine miles away. Water is brought in pipes to a point about 1,600 feet and aerating canal to the reservoir, which is about a mile from the center of the village. The capacity of the reservoir is about 25,000,000 gallons, and it is erected above Main street about 475 feet and about 540 above the river, more than 300 feet higher than any place on the map showing the location of the Boyer pump logs.

Q. What is the daily supply of water ?

Objection ; incompetent, immaterial, not within the order opening the case.

Objection sustained and exception.

Q. Was the daily supply upwards of 2,000,000 gallons per day ?

Objection same, same ruling and exception.

Q. Has the supply since the system was established, since July 1st, 1888, been amply sufficient for all domestic purposes ?

Objection same, same ruling and exception.

The water main or distribution system was extended from E. Main street to Burwell street in May or June, 1888, and from Burwell to Loomis street in the fall of 1887. I was in charge of the work. Water mains were put in on Main street, from Second street easterly early in the summer of 1887, in April, May and June. Easterly from Ann street it was all put in on Main street that spring of 1887, the water was turned on as fast as a block was laid and the valves were ready to control the water. The distribution system was extended through Second street in May, 1887, right up to Garden street from the railroad. On John street, from Second to William street east and was put in in September, 1887. Some of John street, from William up was put in in October. It was put in in December, 1887, from the east line of

Mary street to Eastern avenue along Albany street. In June, 1888, from Second street to Mary street. It was put in on a piece of Garden street from Jackson to Second and down Second to Main was put in in November, 1886. A short piece was put in in December, 1886, on William street, and from William to Salisbury in May, 1887. From William street to Jackson was put in in August, 1887. There is no city pipe laid on Garden street from Salisbury to Waverly Place. Down Mary street from Garden to John the pipe was laid from July, 1887, to December, 1887, in short pieces at different times. The last of Mary street was put in between Albany and Main in June, 1888. In William street it was laid in August, 1887. Salisbury street, from Garden to Main street was completed in May, 1887. The city pipe is not in Waverly Place. It was put in Loomis from Ward street east, a portion of it in June, 1887. I think the whole of it was completed in June, 1887. Along Ward from Loomis to Burwell it was done in October, 1887. On Burwell, from Ward to Alexander, we put it in in the same month, October, 1887.

(Blue print shown, showing distribution system, date January, 1890.)

This is correct, except such additions as have been since made. It is a correct map of the distribution system as it was in 1890. That represents the entire system on this territory, which was covered by the Boyer system. The water mains of the city works are laid at a point which is one-third the width of the street, from one side or the other, except in Lock street, where there were sewers at that time, and in such cases the mains were laid in the same trenches as the sewers. Those were located at the center of the street. The location of the city water mains in the street I have mentioned is correctly shown in this blue print and the size of the mains.

(Map offered being blue print, Defendant's Ex. No. 1, August 17th.)

597 In 1887, 1888 and 1889 William I. Skinner, D. H.
 Burrell, C. J. Palmer and W. T. Loomis were water
 commissioners of the village. The city water main
 from East Main to Burwell street was laid in Alex-
 598 ander street twenty-one and seven-tenths feet north-
 erly from the south line of Alexander street, prac-
 tically one-third of the width from the south side of
 the street. I made the preliminary survey, locating
 the line of the pipe. The line of the city water main
 was not located on the line of the Boyer pump logs.
 On Alexander street from Main to Burwell street,
 the Boyer logs laid southerly of the water line and
 about in the gutter, which would bring it six or
 eight feet from our line, southerly from our line.
 The depth of the trench dug for the city water there
 599 was from five and six-tenths feet to five and eight-
 tenths feet. That was a solid rock trench. This
 trench was from four and one-half feet to five feet
 wide at the top. Little or no earth on top of rock
 from Main street to Petrie street, about three hundred
 feet. It was practically all rock and it ran out until
 we ran into the earth at Burwell street. There it
 was an earth trench the whole depth. I was along
 the line of the work on Alexander street I presume
 every day while it was being laid. My recollection
 is the pump logs were removed by the contractor
 600 from Main street to Petrie street, a distance of three
 hundred feet, and my best recollection is they were
 not removed from Petrie street to Burwell. I saw
 some of the logs there which were taken out.

Q. What was the condition ?

A. They laid on the surface of the ground and
 were more or less decayed. They were not new and
 apparently had been in use for quite a long while.
 None of these logs were taken out of the trench
 which was dug for the city main. I knew some-
 600 thing of the Boyer works from 1886 to 1888. I had
 seen most all of it. I was familiar at the time with
 the whole of it. I know through what streets it ex-
 tended.

(Plaintiff's map, Ex. 7, shown witness.)

Boyer logs did not lay in Second street, from Albany to John, not all the way. It extended only part of the way. It extended down Second street to the penstock, which was about one hundred feet northerly from John street. The Boyer logs were not on Second street, from Garden to Main, where we laid our line in the location indicated by the blue line of the map. I know they were not where indicated on the map, and my best recollection is they were not there at all. There were no pump logs there where indicated on the map on Albany street, between Second and Mary street, and my best recollection is there were none there. On John street, from Second to William, I am positive there were no logs at the points as indicated on the map, and I think there were no pump logs on that street at that place. On Main street, from William to Salisbury, there were no logs where indicated on the map, and my best recollection is there were no logs in Main street in that block. On William street, from Main to John, there were no pump logs laid on the line as indicated on the map. I have no recollection of any being there, my best recollection is there were no logs there. On Salisbury street they were not on the line as shown on the map. I have no recollection of any logs being there. On Salisbury street they were not on the line as shown on this map. There were no pump logs on Second street, from John street south. I saw this line of logs at other places than Alexander street, as much as could be seen of them.

Q. Describe the logs which you saw ?

A. Wherever they came to the surface, and they came to the surface in many places, they indicated that they were logs which had been in use some little time. I have seen the Hardin and Boyer spring and know the sources of supply of this system and saw these springs when I was constructing the city

works and know something of the capacity, that is I have an opinion which I derived from looking at them. I have recently seen the Boyer spring. I am
 604 familiar with the portion of the village through which the Boyer system extends and the population of those portions of the village. I was in 1888 familiar with the needs of these portions of the village of supply of water. I knew the reasonable cost of excavating in Little Falls in 1886, 1887, 1888. In Alexander street, from Main to Petrie, the Boyer pipe or logs were practically on the surface of the ground; that is to say it is a rocky street and some places it might be partly covered.

605 Q. What in your judgment was it worth to trench in that street from Main to Petrie street?

A. 25 cents a yard for excavating and 10 cents for back filling (cubic yard without rock excavation.) In the other streets where the Boyer system ran that is a fair estimate of the value of earth excavation and back filling.

The first schedule of rates for city water was to go into effect July 1st, 1888. Water was furnished to a great many consumers from the spring of 1887 but no charge was made for water prior to that time.
 606 All that was furnished prior to that time was free. There was a schedule of rates adopted to go into effect July, 1888.

(Book shown witness.)

Q. Does this printed book contain the rules and schedules of water rates adopted by water commissioners June 26, 1888, to go into effect July 1, 1888?

A. It is.

Book offered in evidence, Deft.'s No. 3, Aug. 17.

607 I have at different times been called upon to estimate the value of water systems in Little Falls and in central New York and have had experience in constructing systems of water works in Little Falls and other places in central New York and know of

the cost of them and know of a purchase of a pump log system of water works similar to plaintiff's system within about two years of 1888 and knew the price paid for that system. I know the value of water works and water systems and what they were worth in Little Falls in 1887 and 1888. I have made estimate of the value of water system in Little Falls and other villages in central New York. 608

Q. In 1886 and 1887 were you familiar with the demand for water in Little Falls and the uses to which it was put?

A. I think I was.

Q. And with the different sources of supply to meet that demand?

A. Yes sir, in a general way. I have since that time been acquainted with the demand and the uses for water in Little Falls. 609

Q. What was the plaintiff's pump log system of water works worth in the spring of 1888, in May or June, 1888, assuming at the time that the village water works were substantially completed and were then supplying a large number of people with water in those portions of the village through which the Boyer system extended, that the income of rents or water rates received from the uses of Boyer water from consumers had fallen to about \$200 per year, resulting largely from those consumers having supplied themselves with city water and discontinued the Boyer water; that half or more of the supply of water from the Boyer system was obtained from the Hardin spring, so called, under a contract to run for fifteen years from Sept., 1880, at \$60 per year, and under an agreement to supply for the same period of time water free of charge to two houses on Alexander street and to three or four houses near the corner of east Main street and Salisbury street; that it took one man during the greater part of the time during the summer season with some extra help and a part of his time during the winter months to stop 610

612 leaks and make necessary repairs; that water was conducted along Eastern park in pipes of the Robinson system; that the pump logs had been laid a good many years and that no portion of the system had been re-laid with new logs for some time except a small stretch on Loomis street, and except that decayed and leaky logs were here and there replaced from time to time by new logs and that no part of the system was in shape to stand heavy pressure and that the pressure of the system was not sufficient to raise water to the second story of the houses of consumers and that the supply of water was unreliable, particularly in the dry season, and the water very hard?

613 A. It possessed no value at all in my opinion. Before I located the lines of the village trenches, I did make some examination to find out if there were pump logs there and where they were located. I have seen the Boyer and Hardin springs during the construction of the city works.

Q. In 1887 can you state which spring, the Boyer or Hardin spring, had the larger flow?

A. I think I can.

614 Q. Which spring do you say had the larger flow at that time?

615 A. The Hardin spring.

A trench dug one foot in depth and a foot in width at the bottom, the trench would have to be not more than fifteen inches at the top; a trench only a foot deep could be dug practically vertical. In a trench a foot wide at the bottom, which was two feet deep, would naturally be two feet wide at the top, and a three foot trench one foot wide at the bottom would be two and one-half feet wide at the top. A trench one foot wide at the bottom is wide enough to lay such pump logs as were in the Boyer system.

Q. Which in your opinion is the most durable

and better for the purpose of conveying water where it was conveyed by the Boyer system, pump logs similar to the Boyer logs or a fair quality of wrought iron pipe, the water being hard water ?

A. Wrought iron pipe.

Q. What would two inch wrought iron pipe cost, of good quality, in the spring of 1888 ? 616

A. Twelve cents per foot at the stores in Little Falls, and one and one-half inch pipe would cost nine cents per foot.

Cross-Examination by Mr. Steele :

In giving the prices of iron pipe I have referred to the price list I have in my possession. I did not give my evidence from the price list, but rather through my recollection. I refreshed my recollection from my private marks on the price list. This is the paper I looked at when I gave my testimony in regard to the price of iron. 617

(Paper marked A for identification.)

This price list upon which I looked is a price list of April 13th, 1893. In giving my opinion of the value of pipe, two inch, I meant inside diameter. The price list here for two inch pipe is thirty-one cents per foot, and one and one-half inch is twenty-four cents. At this time I cannot tell without referring to a trade list what three inch iron pipe was worth in 1888. At this time the price would be .625 off from the trade list price, at that time it ran from 62½ to 65 off. Three inch pipe would be at that time about 23 or 24 cents; it would make no difference in the ordinary transactions whether you bought large or small quantities. In 1888 I did not myself buy wrought iron pipe. In 1888 I think iron pipe was worth more than in 1893,—the difference between the trade list and about seventy cents in 1893 and sixty-two and one-half in 1888. I did not look to see if I could find a price list of iron pipe for 1888. I did not bring a price list of 1888 to use on this trial 618
619

because I did not care for it. It is not the fact that it does not suit my purpose as well for the trial of this case. I have not taken a good deal of interest in the trial of this case.

Q. During the trial of this case, have you suggested questions to counsel to put to witness ?

I may have done so ; I will not say whether I have or not.

Q. Since you have been on the stand have you suggested the form of questions ?

A. I have not suggested the form of questions, but I have suggested addendas so as to make the questions more clear to my mind. I made the survey from which the trenches for the city water system in Little Falls were made. The water mains were not in all cases laid in the center of the street. It was generally one third way into the street except where there were rocky streets, where there were sewers, and then we laid in the same trench as the sewers. In laying the trenches I took into consideration the fact whether there were pump logs in the street. I laid the pipes where in my judgment it was best. I did not locate the pipes without reference to the pump logs. In Loomis street I do not think I ran the pipe over the line of pump logs. I ran them on the same side of the street but not on the same ditch. My recollection is I did not locate my line right over along the line of the pump logs. I will not say if Mr. Boyer did or did not ask me to change the line. I don't think I did change the line. I think the main was laid on Loomis street in 1887, am not certain without referring to books. From Mr. Boyer's lot to Ward street is 1200 or 1300 feet as the street runs. From Ward street to Mrs. Boyer's residence, I can't tell when that work was done. I do not know if my books would show. It would only show the monthly estimate. It was in the summer of 1887. I would not undertake to state without referring to my books. I think probably

it ran through a couple of months. We had a half dozen gangs of men at different places about the village. Through Loomis street the city mains were laid on the same side of the street as the Boyer logs. The Boyer pipes in one place were sufficiently near so that in blasting our line it would open it up. The rock commences about seventy-five or one hundred feet west from the Boyer house. It ran more or less rock down to Whitehead street. Loomis street is substantially a rock street. Boyer logs were removed practically that whole distance by the contractor. I was employed by the water commissioners in doing what I did. I had charge as engineer of the works from the time it was commenced till it was finished. I was naturally interested in the success. I am still the chief engineer of the Little Falls Water Works. When I commenced there were three systems of water works in the village. I was interested to have consumers take the city water prior to July 1st, 1888. I was interested.

Q. Did you in one case buy a line of logs from Mr. Robinson and then order him to cut the water off for the purpose of compelling the Girvan House to take city water?

Objection on the ground that whatever transaction was had was had in writing and that writing is the best evidence.

Objection overruled and exception.

A. I did not buy the line myself and that was not the whole object in buying the line. It is a hard question to answer how long a pump log will last if laid under ground. It would depend somewhat on the condition of sap in the log and some on the exposure. If a pump log had been in twenty years and there was no crack in it, it might last and I think it should. Cracks would be caused by a variety of causes. If laid in water and then brought to the surface I think it would crack. If water had

run in the logs and then had been taken out I think it would decay quite rapidly.

628 Q. Did you ever measure the amount of water that flows from the Boyer spring ?

A. No, sir. It is not difficult to measure water flowing from a spring; it can be done absolutely.

Q. Do you know as a matter of fact in the use of the Boyer water it was wasted ?

629 A. I can only say that in the construction of the system there must have been waste. It was susceptible of improvement. There has been a quarry there where the spring is. As the quarry has been opened the spring is set back on the line of the flow. 630 The quarry I think is 100 feet long and it might be 100 feet wide. I do not know if the water of the spring could be raised by damming. A reservoir could not be made there except by getting down below the crevices in the rock and make it absolutely tight. I do not know how the seams in the rock can be stopped except as I have stated. I have looked at the spring with a view of determining the quantity of water flowing from it; I did so last week. I looked at the spring in 1887 and while looking at it in 1887 I determined in my mind the quantity of flow of water. Curiosity led me to do that. It was during the construction of the work, in May or June. I can't say as I was there more than once; I may have been there several times.

Q. Do you know if there were more than one line of logs on Alexander street in 1888 ?

A. I am not capable of answering it in that way. I can't answer it by yes or no.

631 Q. Do you know if there was more than one line of logs on Alexander street in 1888 ?

Objection; incompetent, immaterial and not within the scope of inquiry in this action.

Objection overruled and exception.

A. I do not know of but one line, that was the Robinson line. Before making the survey I have no recollection of asking Mr. Boyer where his logs were laid. I still state that the plaintiff's line of logs did not extend from Albany to John street on Second street when I put in my system, because I would have run on the logs if they were there and I am sure we did not. On John street we ran a cross pipe across Second street; we ran a pipe the whole length of Second street under the railroad and all. My pipe on John street connected with the pipe on Second street; it connected also on Albany street. We crossed Second street with Albany street line. Our pipe run west of Second street and connected with the pipe on Second street. I think the penstock was located near McChesney's, about as located on plaintiff's map. His house is a corner lot.

Q. At that time can you state if water was carried to Sheridan's building.

A. I can only tell by saying we found no line there. I say on the line as shown on this map, and my best recollection is there was no line of logs there on Second street from Garden to Main street. There was no line of logs there as located on this map I am sure of, and my best recollection is there was no line there. I discovered no iron pipe there. There is an iron pipe there belonging to the Fox estate. My best recollection is there is no penstock on the corner of Garden and Second street. The Stauring system of logs was on the other side of the river. I do not know as the Boyer system was on the other side of the river. I do not know where the line ran that went to the tannery. I do not know that Boyer water was carried to the tannery. I have no recollection of running across any of Boyer's logs going to the tannery when we excavated. I have no recollection of pipes going across Second street toward the river. I am positive we did not cross any there at John street. The main was laid on the west side of the Boyer logs on Sec-

686 ond street. I am positive there was no iron pipe
across our trench to the Sheridan house. I have not
any recollection of such a pipe. I know where Bar-
net's tannery is located. I carried our main on Sec-
ond street across under the railroad. I think I will
swear there was no iron pipe on Second street below
John street.

Q. Will you swear there was not a system of
logs leading to the tannery connected by iron pipe
on Second street ?

687 A. I will not; what I mean is, I did not run
across any iron pipe in making our excavation. I
did not make any memorandum of where our system
of city water interfered with the Boyer system of
pump logs. The water main is five feet deep to the
top of the pipe, but where there is a sewer pipe I
did not take up the sewer pipe. In earth ditches
the top was about three and one-half feet across the
ditch. In rock five or six feet in width on top. The
construction was begun in 1886, but the survey was
made in 1885. We intersected the Boyer works at
every place shown on the maps, his map and ours,
except where I have stated. My best recollection
is there was not any pipe laid. I can't tell at how
688 many different places that occurred.

Q. In 1886 did you in the construction of the
water works strike any of the logs of the Boyer
system ?

Objection ; incompetent, immaterial, not within
the issue and not within the order opening the case.

Objection overruled and exception.

689 A. My best recollection is we did not. I think
we did not get in that territory in 1886. I might
have struck it in one place but I think not. The
city water is all taken from Beaver Creek. A reser-
voir is on Beaver Creek and it is brought in pipes
here. The reservoir at the head of the works is
about 300 feet long and about 200 feet wide and four

or five feet deep. I think the dam is about six feet high. Where there was rock the logs were taken out to prevent injury to them. I have said that up to July 1st, 1888, that in every instance water was let into the building within forty-eight hours after the plumbers reported, or that is what I intended to testify to. 690

Q. In the case of Mary Perry on John street, you said that the plumbers reported they had finished the plumbing September 27th, 1887, you say the water was let on within forty-eight hours after that ?

A. Yes, that is what my book says.

Q. Have you any personal recollection of these facts ?

A. No, sir; no personal recollection. I was not with the plumbers when they did the work. I did not see the plumbers leave to go there and do the work. I might or not have been at the office when the plumbers returned from work, we did not pay any attention to that. I don't know anything about that. I do not recollect whether I was at Mrs. Perry's or not when the water was let on. I do not recollect any particular case. My book does not show specifically when the water was let on at the Perry place. I have a very clear recollection of turning on at Shepherd & Skinner's and going in and tasting the water. My best recollection is I turned the water on and I recollect of being at Grand Central. These are the only two specific places where I recollect now at this particular time of turning the water on. I will swear both of those were turned on within forty-eight hours after the plumbers had made their return. There was a rule or standing order that water should be turned on the same day the plumber's return came in. 691 692 693

Q. What would you say the Boyer system of works to be worth, yielding a profit of \$200 a year above all expense, here in the village of Little Falls ?

Objection ; incompetent, immaterial, wholly problematical and has no basis in fact and indefinite and no sufficient data.

694 Objection overruled and exception.

A. It is a hard question to answer. This \$200 income has a certain bearing and would be one element. I do not think a valuation can be put on. I do not think the question capable of a direct answer.

Q. Assuming that in 1887 Mr. Boyer was receiving \$500 a year from water rates over and above the expense of keeping the works in repair, what would you say they were worth at that time ?

Objection same, same ruling and exception.

695 A. Worth the \$500 she received, and that is all, to my notion.

Q. Assuming she was receiving a thousand a year in 1887, rates or rents, for use of water from the Boyer system over and above the expense of keeping the same in repair, what would you say they were worth ?

696 Objection same as last, and the value in 1887 is not a measure of damages in this case, and there is no evidence of any interference with plaintiff's water works in 1887, or of any interference for which the defendant is liable.

Objection overruled and exception.

A. Just what she received that year, \$1000.

Q. Why in your opinion would it not be worth more ?

697 A. Because in 1888 the city water works were constructed and in active use, and the consumers of the Boyer water had shifted to the city water to such an extent that the Boyer system was practically useless in my opinion. I do not think any permission was obtained from Mr. Boyer for leave to dig trenches for the city water works.

Q. Assuming the Boyer system in 1887 yielded

a water⁴rent or rent of \$500 over and above the expense of keeping the works in repair, what would you say they were worth, laying aside any consideration of the city water works, I mean net income?

Objection same ground.

Objection overruled and exception.

A. I should say about \$3000.

Q. Would they not be worth a principal sum which would be required to produce \$500, interest say at 5 per cent?

A. No, sir, they would not; that is only one element that goes to make up this value, and five per cent. is not a proper capitalization for private water works.

Q. If the work would yield \$500 net profit, it would be worth \$3000; would they not be worth \$6000 if they yielded \$1000 net profit?

A. I do not think so, not necessarily.

Q. Why?

A. Because the duplication of the plant would be one element, and there was a lease of the spring which is limited as to time, which would reduce the value of the plant. These two elements would put the value down to about the same thing.

Q. So that if this plant yielded \$1000 it would not be worth more than if it yielded \$500?

A. Yes, I think it would be worth more. Before 1888 the Boyer system did not supply the whole of the village. I have been told and I have seen pipes in the town that I know were here before 1888. In giving my opinion I assumed it was a matter of uncertainty as to a renewal of the lease of the Hardin spring.

Q. What then would be your judgment upon the assumption that they would be able to continue the

use of the Hardin spring, of the value of the system if the net profit was \$500 ?

702 Objection same as before, and the question assumes facts not in evidence, and is wholly conjectural.

Objection overruled and exception.

A. It might probably increase it to \$3500.

703 James Carney sworn for defendant : I live in Little Falls. I do not and never did know of any other James Carney in Little Falls. I now live on Loomis street. I never did live on John street; I lived on Albany street in 1887; I lived there on the 3d day of May and lived there until about August. I have never since lived on either John street or Albany street. I used the water that came into the house; I did not know what water it was. I never paid Boyer for water.

Cross-Examination :

I lived in Thomas Kearney's; Mr. Feeter owned the house. I used to get the water in a pail. I did not see water running in the house in a pipe. I was married when I was on Albany street.

704 Mrs. Christina Loban sworn for defendant says: I live in Little Falls on Main street and have property there, between Second and Mary streets, on the north side of Main street. That property consists of four small stores and the buildings in which the stores are. I have occupied it for many years; I have had charge of it since my husband died. He owned the property at the time of his death, about eighteen years ago. I was gone from Main street about a year, I was west about seven months. It was seven years ago in November and six years ago when I came back. When I was away Mr. Fred Girvan had charge of the place. City water was put in the building during the year I was away. When I came back the city water was in. Since then Boyer water has not been used there, to my knowledge.

705

When I had Boyer water Mr. Loban paid \$9 per year, and after his death I paid \$4 per year. I had nothing to do with anything except the kitchen water.

Cross-Examination by Mr. Steele :

I paid \$4 for my family water. It will be seven years next November that we went west. I was west seven months and I came back the 9th of November. The city water was in when we came back from Colorado in the last of June. I do not remember of paying Mr. Boyer for water. I paid for the water, but whether I paid Mr. Boyer or not I can't tell.

Re-Direct:

My son went west and came back after I went west. My son never came back, he died in the west.

John Selcer, sworn for defendant, says :

I live in the village. I have had a place of business on Second street since 1871. I have been acquainted in the village since that time. My father's name was John. He carried on the business up to the time of his death. He died in June, 1890. It was a clothing store. The business was owned by my father, and since by me. I know the Boyer system of water works. We used the water from the system, we used it when Smith owned it. We put in city water in my building. I do not remember the date. It was when the main was put in after the city water was put in. After the city water was put in, I did not use the Boyer water. My father lived on Main street. My father lived on Eastern avenue until he died. I lived on Monroe street. I did not use Boyer water in my residence.

Cross-Examination :

I did not know of the change from Smith to Boyer. I did business on the east side of Second street, about the center of the block. I got water at the penstock. There was a scarcity of water at that penstock always. I generally went for the water

710 myself. I paid Smith for the water until he died. I never paid Boyer. My father died in 1890. He had charge of the business. I never had any talk with Boyer. Boyer either sued or threatened to sue father for water.

Re-Direct :

Q. Do you know what supply of water your father used at his home ?

A. Well water.

Q. Did you sometimes settle for water used at the store ?

A. Yes, sir.

Q. To whom ?

711 A. Mrs. James T. Smith, a short time after he died.

Q. Do you remember how much you paid, or at what rate ?

Objection; incompetent, immaterial and too remote.

Objection sustained and exception.

Nothing was paid to Boyer to my knowledge.

Dennis Collins, sworn for defendant, says :

712 Defendant asks permission to ask Hiram Boyer whether the D. Collins named by him as a consumer of water in 1887 is this witness or some other person.

Objection by plaintiff; not within the order opening the case, and Boyer has been examined and cross-examined.

The Referee holds that at this time the case must proceed without re-calling Mr. Boyer.

Exception to defendant.

713 I reside in Little Falls and on Loomis street. I have property and a place of business on Main street. I never resided on John street and never owned property there nor had a place of business there. I never used water on that street from the

Boyer system or paid for it there. I know a Dennis Collins who resides in Little Falls on Diamond street. He had lived there for fifteen years that I know of. He has not to my knowledge resided on or owned property on John street. I have not used the Boyer water at my house. I had a well.

714

Cross-Examination :

I have owned the property on Main street since 1873.

Robert Upright sworn for defendant says : I reside in Little Falls. I was at one time with Mr. Tallmin in a restaurant and saloon in the Petrie block on Second street. While I was there city water was put into the restaurant and saloon. That was in the corner building at the S. E. corner of Second and Main streets. I can't remember the year the city water was put in. We tapped the main as it was laid on Second street before it was covered. I was in there until about five years ago. I was in there about two years or a little over. After the city water was put in we used the Boyer water about a month or six weeks after the city water was put in and after that we did not use the Boyer water. I think there was a man there by the name of Fox before I was there. Hess & Widrick were there before I went there. I think Hess & Widrick were there a year or so. I think Fox was there ahead of Hess & Widrick. There was no other restaurant or saloon in that building.

715

716

Cross-Examination :

I can't remember the year I went in there. I went out about five years ago. I do not know whether Fox went to keep a saloon anywhere else. I do not know where Fox went. I do not know about the penstocks being cut down. I know I used Boyer water about a month after city water was put in. I remember a penstock was there. We stopped using the Boyer water because we could not get it when we wanted it ; it would stop on us.

717

Augustus Golden sworn for defendant says :

718 I reside in Little Falls, on the corner of Garden
and William streets, and have for a number of years.
I know the Boyer system of water works. There
was a penstock on the corner near my house. I live
on the north-west corner of the street and the pen-
stock was on the same corner. I used water from
that system for domestic purposes down as long as it
ran there, about 1890. It was for about two years
and over after the city water was put in, and I think
longer. It was a year or a year and a half after the
water stopped running there that I put in city water.

Cross-Examination :

719 I would use the Boyer water now if I could get it.
I know the water was cool and good water.

Re-Direct :

I paid Mr. Boyer for water as long as I used it.

William Kingston, sworn for defendant, says :

720 Until recently I resided on Albany street and do
now, and have lived there on the street for many
years, about twenty years. I have lived where I do
now over three years, that is at the corner of Albany
and William streets. Before that I lived on Albany,
west of Second street, the third building east from
Ann street. I know the Boyer system of water
works. I do not remember of ever using water from
that system. One time Mr. Smith came with a bill
and I paid it. We used to get water at another
place, and occasionally when that failed we used
water from the Smith system, and after a few years
he presented a small bill and I paid it. I never made
but one payment for water from that system. I put
in city water just as soon as it was on the street.
721 After I put in city water I used no other water. Be-
fore I put in city water I had been using water from
the Robinson system.

Cross Examination :

Robinson had no line of logs on Albany street. It

passed along Bushnell's yard in the rear of my house.

George F. Girvan, sworn for defendant, says :

I reside in Little Falls and know Mrs. Loban and the Loban property on Main street. That consists of four stores and the buildings in which the stores are located. I remember when Mrs. Loban went west about 1887 or 1888. I know her son Daniel, he was west. During the time she was absent I had charge of her property. I received the rent, paid taxes and other expenses. I had charge of the property a year or eighteen months. 722

Q. During the time you had charge did you pay for Boyer water ?

A. I did not. When I was in charge, Amos Woolever, Pross Bros., and two others, I forget who, were tenants in the stores. I should not wonder if one was Augustus Golden, who had a grocery there. I remember J. E. Groff. He was once a tenant there, but it was before the time I speak of, about five years before, as near as I can get at it. 723

Q. Do you know of Groff having any place of business on Main street, after he went out of the Loban building ?

A. I do not; the other store was a stationery store. I do not recall the man's name. 724

Sarah Haight, sworn for defendant, says :

I reside in Little Falls and have for forty years. I am the widow of Alfred Haight, he died about three years ago now. I live and have lived for some time at the corner of Garden and William streets. My husband owned property in that locality. I know the Boyer system of water works. We used water from that system up to the time we put in city water, and obtained it from the penstock near A. Golden's. We used to pay \$4 per year. City water was put in before my husband's death. It was about a year after it was in the village. We have had it 725

726 in our house four years. Within the past ten years my husband has owned no property on John street and rented none there and had no place of business there. I do not know of his using or having use for water on John street.

Cross-Examination :

I continued to use the Boyer water about a year after the city water was put in in the village. We would have continued to use it if we could have got it. Mr. Haight always paid the water rate. We used the water for drinking and culinary purposes. He kept no horse and used it for no other purpose.

727 Q. How long did you use the water from the Smith-Boyer system ?

A. We used it all the time during the forty years until we put in the city water.

Anna Haight, sworn for defendant, says:

728 I am the daughter of Alfred Haight, spoken of by the last witness. I have always lived in father's family. I remember city water was put in. I can't tell the exact number of years. It was the second year after the works were established in the village. McDermott & Ashenhurst were the plumbers who put in our pipe. We resided at the north-east corner of Garden and William streets. The water was put in in the fall.

Cross-Examination:

It was a year after the city works were put in that we took city water in the house.

Re-Direct.

729 It was two years after it was in the mains that we put it in the house. My father never had property on John street or any place of business there.

Re-Cross Examination:

I can't state what year it was we put in city water. I can't tell whether it was 1889 or 1890.

Kittie B. Stauring, sworn for defendant, says:

I reside in Little Falls and am a daughter of Peter A. Stauring, who is now dead. My father died on the second of last December. At the time of his death and for several years he resided on John street, nearly opposite the Central railroad depot. We moved on John street before the city water was put in that street. Father put city water into his residence. I can't tell the date. He put in the water at the time they ran the water through John street. After the city water was put in no other water was used there. Mr. W. H. Williams lived there last before we came there, I think, but the house was vacant for a number of years. Major Priest owned it. I do not know where Mr. Williams lived when we moved there.

Cross-examination:

Before living on John street we lived on what is known as Lovers' Leap, on the other side of the river. I do not know when Mr. Williams moved out of the house. My mother bought it from Mr. Priest.

Amos Keller, sworn for defendant, says:

I reside on Main street, just west of William St., on the north side. I have resided in that house since February, 1883, previous to that I lived in the same block just this side of where I now live. I know the Smith-Boyer system of water logs. We used that water in my family down to a short time before I put in city water. I am not positive about the date, but I think it was about two years after water was in the main. I obtained my supply from a penstock.

Cross Examination:

I can't give the year I put in city water. The penstock I used last was that in the east line of my lot in the gutter on Main street. Before that I got it from the penstock about in front of my barn lot

734 near the feed store. I think it was moved from
there up to the east line of my lot. I can't tell the
year the penstock was moved, I think it was in 1878
or 1879. I continued to get water at the penstock
as long as I could get it. I do not recollect when it
was removed. It was some time after no water was
running through it. I made application for city
water. I think the city water was put in on Main
street in 1887, and I had it put in about 1889.

Miss Ada M. Dorr, sworn for defendant, says:

735 I have always lived in Little Falls. Am a daugh-
ter of Wm. M. Dorr, who is now dead. He resided
the latter part of his life on John street, at the cor-
ner of John and William. My father died twelve
years ago. My mother died July 1st, 1894. My
father owned property at the S. E. corner of John
and William streets. That consisted, when my
father died, of one house and a lot. Since then
another house has been built on the lot just east of
the old residence. Since his death I have lived in
the corner house. My sister and her husband live
in the house just east in the house built on the lot
since my father died. They have lived there per-
haps nine years. City water was put into both of
those places. I think it was put into both houses at
the same time. Do not remember the date it was
put in. I think water was put in the house when
the main was dug. Since the city water was put in
no other water was used in my family or Mr. Van-
Alstine's, my brother-in-law. I or my mother or
the Van Alstines did not use or have use for any
other water on any place on John street.

Cross-Examination:

737 Father had a barn. I don't remember if he kept
a horse in 1887, 1888 or 1889. We kept a horse once
but I can't tell the date. We took city water within
three months after it was put in the street. It was
within two months after the main was put in. It
was while the trench was open. I have nothing but

recollection to go by. I can't recollect the year nor the month, it was in the summer.

Amos Woolever, sworn for defendant, says:

I reside in the village on Prospect street. Have a drug store on Main street, in Loban property, and have for years. City water was put into my store. Before that I did not pay for water. I never paid Boyer for water and he never presented his bill or made any claim for water. Mr. T. Mitchell kept a stationary store in the block. I think he was there when city water was put in. I think he is now in Wisconsin. 738

Cross-Examination ?

The building was owned by Mrs. David Loban. I used the Boyer water until the city water was put in, still in the same building. Mrs. Loban now pays the water tax. 739

Re-Direct :

Sanford and Abram Snell had a store, grocery and fruit store next east of Loban's property, and continued it to, I can't tell what time. I can't give the date. I have been there eight years. I think they have not been there since I was there, and yet I can't say positively.

Re-Cross :

Q. In the use of the Boyer water did you have to pay an extra rate as a druggist ? 740

Objection ; incompetent and immaterial.

Objection overruled and exception.

A. I had nothing to do with the payment of rates. I paid rent to the landlord and he paid the rates until the city water was put in.

Re-Direct :

After the city water was put in and while they were laying the main, it is my impression we used Boyer water, but not after it was turned on. 741

Miss Kittie R. Stauring, re-called for defendant :

742 After our people moved on John street I do not think they used the Boyer water. The spring water was brought from across the river to the barn and we got water there. There was no penstock near us there. Our men brought the water up from the barn.

Harriet H. Gregory, sworn for defendant, says :

743 I reside in Little Falls on John street. Have lived there since 1883. City water was put in that property, I think it was the fall of 1887. Since the city water has been in use we have used no other water except rain water. Before city water was put in we went to Austin's across the railroad. We had used the Boyer water when we could get it, but there was a time we did not use it because we could not get it. I do not know how long a time that was.

Q. What was the fact as to the supply of the Boyer water for two or three years prior to the time you put in the city water ?

744 A. When we took the house on John street it came in the kitchen, and finally we could not get it and we had to go across the railroad. Mrs. J. M. Barber was my mother. She died in 1890. Up to the time of her death she owned the property.

Cross Examination :

745 My father has been dead thirty years. I lived in this house with my mother in 1887. We went there together in 1883. It is on the south side of the street. The penstock was on the north side on Cronkhite's property. The water was carried across the street by an iron pipe into the house. It was in the house when we bought it. It stopped running through the pipe into the house. We did not have it for some time. We got it at the penstock after it stopped running in the house. The penstock was right opposite on the north side of the street. It finally stopped running from the penstock before

we put in city water. Sometimes it ran and sometimes it stopped. I think the water was put in the house in the fall of 1887.

Timothy Dasey, sworn for defendant, says :

I reside in Little Falls. I am a Trustee of the Catholic church. The trustees of the church had charge of the church, school and property in 1887 and 1888. I was then a trustee. The church property consisted of the church, school property, the pastor's residence and the present deanery. The deanery and school building have been constructed since 1888. That is at the intersection of John street with E Main street, or Eastern avenue, and has a frontage on both streets. City water was put in the pastor's residence in July, 1888. The application was made in June, 1888. Before that a pipe ran into the pastor's house from the Boyer system. There was no separate supply for the use of the school. A penstock was erected and the children got the water from that. I assume they got it while the penstock stood there. I should say it was there until the city water was put in. I think when the city water was put in the other water had stopped. I think \$10 per year was paid for water. They were not continued after city water was put in the pastor's residence.

Edwin J. Nelson :

I live in Middleville, and formerly resided in Little Falls. In 1887 and 1888 I was interested in two stores on Main street. I supplied these buildings with water from the Boyer system up to 1888, I think. We did until city water was put in and afterwards supplied the buildings with city water. After that we did not have Boyer water, we put in city water while the mains were being put in, as soon as we could get water from them. I have not used or paid for the Boyer water since that time.

Cross-Examination :

I last paid for Boyer water May 1st, 1887:

George A. Pross, re-called for defendant :

750 I assisted in making some of the pump logs used in repairing the system. Some were bored one inch, some two inches and some three inches. Smith sometimes sold logs such as were used in the system down to 1882 or 1883. I knew the prices for which they were sold. Those that were sold were some of the same kind of logs and were out of the same pile of logs as those used. I know what the logs were worth.

Q. How much ?

751 A. One-inch bore were sold for \$1.00, the two-inch bore were \$1.25 and the three-inch \$1.50. They were twelve foot logs and laid eleven feet in the clear.

The logs were bored by hand. One man would bore about a half dozen in a day. The labor was worth about twenty-five cents per log to bore these logs. The prices when sold were the retail prices, whether sold singly or in large lots. My attention was called yesterday by Mr. Beckwith to two penstocks, one at the corner of Garden and William streets, and one on Garden street, just west. The 752 penstock at the corner of Garden and William is a three-hole penstock and the other a two-hole penstock. The three-hole penstock is a great deal the largest. I was familiar with all the penstocks in the Boyer system, but I never made any of them. I do not remember any other three-hole penstock. The rest were all two-hole penstocks. Those on Main street were larger and longer than the one on Garden street, but on the other streets they were about the same size as the one on Garden street. The penstocks were pine logs and bored by hand. 753 They had to be bored on one side to let the water in and bored to let the water out. I had made penstocks similar to these.

Q. What was it worth to make these penstocks, what was the work fairly worth ?

A. A two-hole penstock, it was worth \$1.50 to make it. The three-hole penstock spoken of is still standing. It was worth more to make a three hole penstock than a two-hole penstock.

Cross-Examination:

In 1888 I can't say what it would be worth to bore them. It required a good deal of skill and a good deal of experience to be able to bore one-half dozen in a day. I last bored pump logs in 1882 or 1883, about a year after Mr. Smith's death. It would depend upon the kind of logs we had to bore as to how many could be bored. We could not use every pine log. They had to be selected with care, and in boring once in a while we would find a log we could not use, but it was very seldom. It required the very best kind of log to make a penstock. Mr. Smith sold in 1881 or 1882, while I worked for him, to Wm. H. Robinson and to Mr. Wilcox. I sold some of them myself after Mr. Smith was dead. I sold to Mr. Robinson for \$1.50, and a few \$1.25. I sold to Mr. Long and some to Mr. Bellinger and some to Mr. Charles Cook, I think, to Mr. James Feeter. I had assistance sometimes but I could bore them alone. The logs I bored came from the way of East Creek, Mr. Boder used to bring them up. The logs which would be a two-inch bore would be about a foot in diameter at the butt. Towards the lower end of this system they used a few inch logs. The bulk of them were two-inch bore. The three-inch bore logs ran to the three hole penstock. I think there was a three hole penstock towards the brewery, above Main street by Jimmie Gage's barn. I do not know if pine lumber or timber is getting scarce. I did not deal in pump logs or know about the prices after I stopped working at Smith's. I can't say whether that was in 1883 or 1884.

E. T. E. Lansing recalled:

I reside in Little Falls. I am a civil engineer and

have been village engineer for a number of years.

Q. Have you done engineering in the village where the Boyer system is indicated ?

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A. I have. I am familiar with the streets, the formation, soil, etc. I have prepared plans and estimates for work in those streets and superintended the work. I know what earth excavation in the streets was worth in 1887 and 1888. It was worth for earth excavation twenty-five cents per cubic yard and ten cents for back filling. I have made an estimate of the expense trenching twenty-two inches deep, one and one-half feet in width at bottom and two feet at top on a basis of twenty-five cents per cubic yard for excavating and twenty-five cents for back filling. That would amount to four cents per lineal foot to cover both excavating and back filling. I made a computation of a depth of two feet deep, same width as above, and that gave four and one-half cents per running foot. And a ditch three feet in depth with the width same as above would be seven cents per lineal foot. I have prepared plans and specifications for public works here in the village. I have had experience in hydraulic engineering. I have had something to do as civil engineer in constructing municipal water works and know about the cost of construction. I know about the cost of constructing the Little Falls water works. I have lived in Little Falls all my life, my home has been here. I am acquainted with every street and every portion of the village. I know the need for water of portions of the village and the uses to which it can be put. I have been called as an expert witness to testify as to the value of water works. I know of the sale in 1890 or 1891 of a system of water works in Little Falls similar to the Boyer pump log system. I am familiar with property and property values in Little Falls and was in 1887 and 1888.

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Q. At that time, in the spring of 1888, were you familiar with the Boyer pump log system ?

A. I do not know as it had any market value. I never heard it offered for sale after Boyer bought it. I do not know what market value I should put on it in those days. Not a very high one.

Q. What was the Boyer pump log system worth in the spring of 1888, assuming that at the time the village water works were nearly completed in these same portions of the village and supply water, that the gross income from consumers was reduced to about \$200 per year, largely by reason of consumers leaving and taking the city water, that a portion of the water supply of this system was obtained from the so-called Hardin spring under a binding contract to continue to September 1st, 1895, under which \$60 per year was paid for the same, semi-annually, that the supply was not reliable, particularly in a dry season, that the logs in places were decayed and leaky, that the pressure was not sufficient to run the water to the second floor of any building and the supply was mostly obtained from penstocks located as indicated on the map, and that the greater part of the system had been laid for a considerable number of years?

A. In 1888, I would not give \$1 for it.

Q. In your opinion did the establishment of the Little Falls water works system affect the value of the Boyer system?

A. Yes, sir.

Q. State in what way?

A. On account of the city water supply, the patrons leaving the Boyer system and consequently cutting down his rentals, and I suppose in the matter of maintenance, the village authorities would not permit it to be maintained in paved streets.

Cross Examination :

I made a map for Mr. Boyer. I am the engineer called by Mr. Boyer. I have made no estimate late-

ly on jobs where the trenches were to be only two feet deep. I have no trenches three feet deep. On a pipe line for a farm in Manheim where galvanized pipe was laid, it was 310 feet long, not in sandy ground. It was this summer. It was for John Killenbeck. It was not in writing, no plan of it was in writing. I went up to the farm, I took the level and the measurement. The work was done by the job, that was to dig, lay and back fill. I never laid any pump logs and I never made any estimate for a system of logs. I do not think I ever saw any laid. I believe a band of iron is put around the end of the log. To remove one log, I am not competent to say how much excavation would be necessary. In some places the streets have been graded by cutting down and raising up. I do not know of any such grading previous to 1887 and 1888, when the system except at Burwell and Ward street. I think there was some filling at the corner of Burwell and Alexander.

Q. Do you think a trench eighteen inches wide would be sufficient to lay a twelve inch log in ?

A. No, sir.

To lay a fourteen inch pipe the trench should be twenty inches at the bottom. It would require more care if you were digging over a system of logs. My estimate was on new work for trenching, but not for winter work. I assisted in making plans for the city water works and as engineer in charge of the reservoir and canals, but not of the distribution system.

Re-Direct :

Q. Did the establishment of the city water deprive the Boyer system of whatever value they ever had.

Objection as incompetent and immaterial and conjectural, not a matter of expert testing. It calls for an opinion or conclusion which is incompetent.

Objection sustained and exception.

Philo W. Casler :

I reside in Little Falls and have for a number of years. I have been engaged in the lumber business in Little Falls and have been eleven years, and am still in it. I handled pine lumber and pine logs. I have seen the penstock on Garden street, west of William street. 770

Q. What was a good quality pine stick worth in 1887 and 1888, the size of this penstock ?

A. About \$1 a log, twelve inches in diameter and about twelve feet long.

Q. From 1880 to 1883 what was it worth ?

A. I think there would be no difference.

Cross-Examination:

Pine timber of this kind is not very plenty. I think not much more scarce now than in 1887. I never sold any bored logs. I never sold any such logs as these for pump logs. I have not dealt in logs which were to be used for pump logs. I have dealt in other pine lumber. I do not pretend to know anything about pump logs. Pine logs such as I have dealt in, such as would be sawed up in different grades of lumber. 771

Re-Direct :

Q. Of what quality pump logs did you speak when you gave a value of \$1. 772

A. I meant a good sound straight log.

Cross-Examination :

A log twelve inches, free from knots and straight and sound would be worth about that.

John W. Fitzgerald, sworn for defendant, says :

I reside in the village of Little Falls and have all my life or for a number of years. I have been a practicing attorney. I know James T. Smith and his wife. I assisted in collecting water rents and in making settlements for the Smiths and for Mr. and 773

774 Mrs. Boyer, for water rents. I know of the system and knew of it in 1879 and 1880 and subsequently. I knew or learned in 1879, 1880 and down to 1883 or 1884 of the amounts received from the use of water and made some computations of the amounts received for the use of the water, I did after the death of James T. Smith for Mrs. Jas. T. Smith. I did for Mr. and Mrs. Boyer. I think they asked me to compute the amount due. During those years I knew something of the expense of running the system. After the computation of which I have spoken I made a statement of the result of it. I do not now remember what the amounts were. (Paper shown witness.) I made calculations from 1879 to 1881 inclusive.

775 Q. What amount was found to be due Mr. Boyer by the computation spoken of by you from the receipts from the pump log system?

I computed the total amount charged for the use of water from that system from 1879 to 1881. The amount charged was the amount and not the amount actually collected.

Q. What was that amount?

776 Objection; improper and immaterial, too remote and hearsay.

Objection sustained.

Q. What was the total of water rents charged for the system in 1879?

Objection: incompetent, improper and too remote.

Objection sustained and exception.

Q. How much did plaintiff receive as income from the system in 1879?

777 A. Her share of the income was \$82.10. I computed her share for her at her request. I did that for 1879, 1880 and 1881.

Q. In 1880 and 1881 it amounted to how much?

A. In 1880, \$102.50; 1881, \$129.99. I knew at the time what the income of the system was in 1882 and until they were sold to Boyer. I think they were sold in 1886. I knew at the time what the expense was of running the system down to that time. I knew of the sale of the system in 1886 and had something to do with negotiating that sale. 778

Q. Did you prior to that time have talks with Mrs. Johanna Smith about what it was worth?

A. Yes, I had. In 1887 and 1888. I knew the value of property in Little Falls. I know of the establishment of the city water works in 1887 and 1888.

Q. Do you know what the Boyer works were worth in the spring of 1888, when the city work was about completed? 779

A. I do.

Q. What do you say they were worth at that time?

A. It had no value at that time.

Cross-Examination:

I knew at the time I made the computation what the contract was between Mrs. Smith and Mr. Boyer. My impression is that the Hardin spring and the Boyer spring was not then in. I think they were taken in afterwards, but am not certain. The expense of keeping the system in repair was not taken into account. I know the expense and went over the whole account. The amount charged for water rent was \$583.83 in 1879. There was an amount of \$25 in dispute and I gave Mr. Boyer the benefit of it. There was charged in 1880, \$729.66. In 1886 the amount charged was \$682.56, and of that in the settlement I gave Mr. Boyer five-fifteenths of one-half after taking out ten per cent. for collection according to the report. I cannot tell from this paper the expense of keeping it in repair. I think the expense of collecting is the only thing shown. 780 781

I did some collecting up to the time it was sold. After Mr. Keller took it I do not remember that I collected any. I don't know if I have a list of subscribers to the water. I will look and see.

Re-Direct:

In giving the amount charged I gave the whole amount charged whether the rent was paid or not.

Q. Were there names of persons appearing on the roll the total of which you gave as being charged who did not pay for the water?

A. Yes, sir, there were those on the list who never paid.

S. M. Richmond, sworn for defendant, says:

I have lived in Little Falls since 1837. I have been in business ever since that time. I have been connected with the Little Falls National Bank. I knew Wm. H. Williams and his family, he resided next house west of me on John street, second house east from Second street. He died fifteen or twenty years ago. His family stayed there all the while. His family lived next to me until four or five years ago. I think it was longer ago than that. It was soon after the death of Major Priest. Stauring moved in about the time Mrs. Williams left it. Mrs. Williams boarded here for a few years after she sold. I knew this Boyer system of water works and had for a great many years, ever since I had been here. During the time Mr. Smith had it I knew something of the logs as to their condition. After it passed into Boyer's hands, sometimes the water would not run. The penstock was near our place, that was the later part before the city water was put in.

Q. Did you ever know of any continuous portion of the system being re-laid with new logs?

A. I never knew of any general repairing except a log now and then, a new log put in where it was necessary. In 1887 I lived in a part of a double

house, the other part of which was occupied by Mr. King, the present president of the village. I remember city water being put in in that house. It is down near the depot. City water was put in both houses. After that I used city water. I think a man named Harkell, who worked in the tannery, occupied the house east of the double one. I have bought pump logs, and once bought of Mr. Smith. We used some near the paper mill. I bought some about the last of the time Smith had charge of the works. I think I paid a shilling a foot. I think the bore was two inch. I think the logs were from five to eight inches across. They varied some. That was the diameter of the lumber out of which the pump logs was made.

Cross-Examination:

I think I bought logs of Smith some time before. I was told Smith had sold the works. I think the logs I bought were about eight inches in diameter. I think I paid for them a shilling a foot. They were usually twelve feet long. I used them for the gas works, but I had bought some before for over the river. I bought enough to come to \$12. I bought some years ago for the paper mill. I did not buy them from Smith. That was in the 40's. I put city water in as soon as completed. For a year or two before that the supply had been irregular, that is, the flow was interrupted from time to time. The logs I bought were not charred or burned on the outside. There might have been several new logs put in at a place and I not know it. For the past fifteen years I have spent most of my time in the bank. I have taken water for the gas works from this system. I think I ceased there about twenty years ago. I do not know but that I might have been annoyed more than others. I do not know of any whole new streets being laid, but I will not say there was not.

Dennis Collins, re-called by defendant :

790 I used the Boyer water in my block in Main street, down to a certain time. I put in city water in 1887, I believe. In 1886 and 1887 I paid for the Boyer water, January, 1886, I paid \$5. June 1st, 1886, I paid \$5, at the rate of \$1 per month. August 27th, I paid \$3. That was for May, June and July. The last payment of \$1 per month was made up to August 1st, 1886. On November 22d, 1886, I paid 75 cents water tax for three months at the rate of 25 cents per month. That was for my store only. February 7th, 1887, I paid for three months water 75 cents. May 21st, 1887, three months, 75 cents. August 1st, 1887, three months tax, 75 cents. The payment of 75 cents was for my store only. I have no recollection of any payment for Boyer water since. I have no record of any payment for Boyer water since. I had a spring in the rear of my premises from which the surplus water was formerly taken into the Smith system. Instead of paying \$1 for the water I used the water from my spring in my block for the use of my tenants, and all I had to pay for was water for my store. The tenants used water from the spring. The occupants of the stores as I understood paid Boyer.

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792 Q. In what parts of building was the city water put in and when?

A. I think it was put in all of it. It was not all put in the stores at the same time. The stores had it first, and afterwards it was extended to the dwelling portions.

Watts T. Loomis :

793 I reside in Little Falls and have all my life. I am a son of Arphaxed Loomis, deceased. He died in 1885. Since his death or at his death he left several pieces of property in Little Falls and since then I have had charge of the property, so far as the case is concerned, I have had sole charge of the property. I am an attorney and have practiced engineering and surveying for a number of years. I am pretty thor-

oughly acquainted with all portions of Little Falls. Since my father's death I have not paid Boyer for water either on account of my property or property left by my father that I recollect. City water was put in my residence as soon as the main was laid in the street, I think in 1886. I was a water commissioner during the first five years from the organization, that would be to and including 1891. I was one of the committee to investigate the matter of city water. Judge Hardin was the chairman. I think it was a committee of twenty. That was just preceding the election of 1885. In the years 1885 and 1886, I examined as to the needs of the inhabitants and the sources of supply water. I know of the Boyer pump log system and the portion of the village through which it passed and of the sources of supply generally, and I know of the business carried on there by the people living there, and to some extent other sources of water supply to a considerable extent.

(Map shown witness Plaintiff's Ex. 7.)

Referring to map, witness says:

There were no pump logs on the lower end of Salisbury street, nor any on Main street from Salisbury to William, that is in front of where I live. There was none on Second street, between Garden and Main street. I think, but I can't say positively, there was none on John street, between Mary and Second street. I do not now recall any other. I have frequently seen the logs of the Boyer system, where they were to be seen, and have seen them in different places as long as they were in use in the system. When I saw them, in many places the logs were much decayed and were frequently repaired. I saw Boyer and his men repairing them. They were leaky and water escaped from them in many places. I have known of the purchase and sale of property and am familiar with property value in Little Falls. When Mr. or Mrs. Smith owned the

798 system our office had something to do with collect-
 ing rents for water. Mr. Fitzgerald was then in my
 office. At or during that time I frequently had
 talks with Mrs. Smith as to the works or their con-
 dition and I think I had talks with James T. Smith
 about it. After Mrs. Smith had care of system I
 know about what the receipts of the system were.
 I know of the sale from Mrs. Smith to Mrs. Boyer.
 I had something to do with negotiating for the sale.
 Hiram Boyer acted for Mrs. Boyer during those
 negotiations. At that time city water had been
 decided upon and the work of construction com-
 menced. I don't remember of having any talk with
 799 plaintiff upon the subject of value, but I did have
 with her husband, Hiram Boyer. During the ne-
 gotiations I do not now recall what was said with
 Hiram Boyer.

Q. Do you recall whether something was said by
 Mr. Boyer about the facts of the city water works
 being then in process of construction, and if so,
 what?

A. I do not. I do not remember but very little
 of the affair, my recollection does not go into the
 details of the transaction of fixing the value.

800 Q. As to whether the value or price was deter-
 mined by the parties to the negotiation upon the
 basis of what could be gotten out of the pump log
 system before the completion of the village water
 works?

A. I do not think that was all.

Q. What do you recall as having been said by
 Mr. Boyer or you and Mr. Boyer upon that subject,
 if anything?

801 A. I think at that time, Boyer stated the people
 would not like city water to drink, and he would be
 able to furnish the spring water for people to drink
 if they used city water for other purposes. I do not
 now recall anything that was said by either party in

that connection, nor as to the condition of the system. Since that sale I have known of another sale of a pump log system of water works here in Little Falls and I had something to do with conducting it.

Q. In 1886, 1887 and 1888 do you know of the value of the Boyer pump log system ? 802

A. I think I did.

Q. What was the Boyer pump log system worth in the spring of 1888, assuming that at the time the gross income from consumers was at the rate of \$200 to \$250. That a portion of the supply of water for the Boyer system, viz: Water from the Hardin spring and was obtained under a contract to continue until September 1st, 1895, at the price of \$60 a year payable semi-annually. That the supply of water furnished was unreliable, particularly in the dry season, that most of the consumers had to get this supply from the penstocks in the streets; the logs had mostly been laid a long period of time and were in places leaky and decayed, and in places laid that they were partly above the surface of the ground, and that there was not sufficient pressure to raise the water to the second floor of any building; that water was being conducted across the Eastern park, so called, through Robinson's pipe, and that the city water works were at the time nearly completed and were supplying with water a large number of persons, who had been formerly consumers of Boyer water ? 803 804

A. I think they would have no value whatever. I know of the receipts and expenses of the system while Mrs. Smith had it, but cannot now recollect them without papers.

Cross-Examination : 805

I know there was a line of pipe across the park.

Q. After the city water was put in, did you not as one of the city officers cause the arrest of Hiram

Boyer for digging in the park where his line of pipe was laid ?

806 Objected to as incompetent and immaterial, not within the issue and not within the order re-opening the case, and as occurring since the commencement of this action.

Objection overruled and exception.

A. I did.

Q While Mr. Boyer was under arrest did you order the men to chop these pipes off ?

Objected to on the same ground, and defendant offers to show it was after the commencement of the action.

807 Objection overruled and exception to defendant.

A. I do not think I did. I think I threatened to do so. I had some men at work on the park as a commissioner of public grounds. I think the pipes were cut off in my presence later, but not on that occasion; it might have been months after. I can't say if I got the street commissioner. The pipes were not cut off at the same place where the digging was done. I think Dan Haley or Manning was then at work on the park. I am interested in stocks and securities to some extent.

708 Q. Assuming there was a line of logs already laid from the Boyer spring down Loomis street, and to any of the portions situated on the line indicated on the map as to where the logs run, and that there was one man who was willing to pay \$100 a year for the use of water, how much do you say that system would be worth ?

809 Objection; incompetent, immaterial and not based upon any facts in the case and not a statement of fact can intelligently fix value.

Objection overruled and exception.

A. It would hardly be possible to form an estimate on so few elements.

Q. Assuming that the system would yield a net revenue of \$500 per year over and above the expense of keeping it in repair what do you say it would be worth ?

Objection on the same ground.

Objection overruled and exception.

810

A. I think it would be worth \$500 or more according to its permanency. If it were to last one year it would be worth \$500.

Q. Assuming that it would last twenty years, what would it be worth ?

Objection same.

Objection overruled and exception.

811

A. I should say \$8,000.

Q. Assuming they would continue for forty years, what would they be worth ?

Objection same; same ruling and exception.

A. I should think, without making figures, it would be worth in the neighborhood of \$8,000.

Q. Assuming that it would last perpetually ?

A. That would depend upon the per cent. you figured on, three per cent. or four per cent in perpetuity would be a good income.

812

Q. Assuming \$500 was the interest of an investment perpetual in duration would it not be worth an amount equal to a principal sum which would be required to produce that amount at interest at say five per cent.

Objection same, and it is wholly an abstract question and foreign to the fact.

Objection overruled and exception.

813

A. A sum invested at five per cent. which would pay \$500 a year would be a good investment, or even less than that. The value would be in proportion to the amount and interest.

Re-Direct :

814 Q. In your estimate of \$8,000 as value assuming the net income is \$500, and to continue for twenty years, do you desire to correct this ?

815 A. I would like to correct that and now state that my judgment would be \$4,500. I have made a computation since I gave my opinion of value at \$8,000. I compute that at the end of that time I do not get the investment back. I compute the value of an annuity. In making my estimate of value I took into account no personal care, but where the income is brought without any care or risk to the investor. The valuable part of an investment is what it will produce and the amount of care necessary to produce it on the part of the recipient.

Q. In your judgment what was the fair value of the system when purchased by Mrs. Boyer from Mrs. Smith ?

A. I think \$600 was a fair value at that time.

816 I know of the manner of constructing the city water works and of the source of supply and of the portions of the village through which the mains were laid, and of the amount of supply and the rates charged while I was commissioner, and pretty nearly of the number of consumers and the amount of consumption. I know of the contract for the water from the Hardin spring.

Q. What was the Boyer system worth early in 1888 ?

A. I think it had no value.

Q. In your judgment did the construction of the city water works effect the value of the Boyer system, and if so, how and to what extent ?

817 A. I think it did very materially. I think it destroyed whatever value they had.

Q. Why was it you caused or had something to do in causing Boyer's arrest ?

A. I was at the time chairman of the commissioners of public work and had charge of the Eastern park. Mr. Boyer had a line of logs crossing the park, which had become old, worn and decayed, which made bad and swampy places in the park, beside losing his water, and he was accustomed to go there and dig up his logs and repair them, he or his employees. The trenches dug were frequently left open and when filled were badly done and the men employed by our department had to do the work over again. This was done in spite of my remonstrances with Mr. Boyer so that his arrest became necessary for self defense. I do not know if it was after or before the purchase of the Robinson system. I think it was in the fall.

818

Q. Was the arrest made because you had any feeling against Boyer?

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A. I was a good deal annoyed.

Re-Cross Examination :

Q. Was not Mr. Boyer engaged on the Eastern end of the park when arrested?

A. I can't say, but the offense for which he was arrested was near the middle of the park. I can't say I recollect when he and Robinson repaired the line across the park.

Mrs. Clara Groff, sworn for defendant, says :

820

I live in Little Falls and am the wife of J. E. Groff. He formerly lived here. I make my home here now. He was in business here on Main street. My husband lived in Little Falls between ten and eleven years ago and he has had no business here since he left. When he was here we lived on Church street. I never lived on John street. I never to my knowledge used water in the family from the Boyer system. My husband's business was in Loban's building on Main street.

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Cross-Examination :

He kept a grocery store. I can't tell where my

husband is now. We have been separated for nine years. The last I heard of him he was in Fonda and I think he is still there. He did not remain in business here after we separated.

222

Henry Whitemore, sworn for defendant, says :

I reside in Little Falls on John street. I know the Boyer system of water works. I remember when the city water was put in. I put it in and I put in city water I think in 1888. I put it in when they put the pipes down and connected with the main when they put it in. After the city water was in I commenced using it. I used no more Boyer water.

223

(It is conceded that the time of the arrest of Mr. Boyer spoken of by Mr. Loomis was after this action was commenced.)

Charles J. Palmer, sworn for defendant says :

I reside in Little Falls and have been a practicing attorney here for twenty years or more. I was a water commissioner from the time of appointment by act of the Legislature for, I think, six years. I was not one of the citizens' committee to look into water works, of which Judge Hardin was chairman. I think I was a trustee of the village about that time.

224

I am acquainted with all portions of the village of Little Falls and with the business interest, and am largely acquainted with the people. I made an examination in 1885 or 1886 of the needs of the people and different sources of supply, and when I was water commissioner I had some experience as to the demand and need of water. I knew the Smith and Boyer pump log system and the portion of the village through which it was laid. I know of the sources of supply. The Hardin and Boyer springs. Have noticed the logs somewhat at different portions of the village at different times. When I noticed them I can't tell the condition. I have noticed them when they were exposed and partly uncovered. I noticed them when they were decayed and leaky and when water escaped from them. I had some-

225

thing to do with the purchase of a similar system of water works here in Little Falls and I knew the price paid, I think I do now. I was somewhat familiar with property and property values here in 1888, and have drawn conveyances of property and have attended public sales of property about 1888 or 1889. I gave evidence of property values. 826

Q. Do you know of the condition of the city water works and of the manner of their construction?

A. Yes, sir. And of the source and quantity of supply of water for that system. I know my opinion of the value of the Boyer system in the spring of 1888.

Q. Same question put to this witness as the hypothetical question to witness Loomis? (See folio 803.) 827

A. Valueless.

Cross-Examination:

I know a great deal about the system. The system was only on a part of the street I live on.

Q. Assuming that the Boyer works would pay a net profit over and above all expense of \$500 a year, how much would it be worth in your opinion?

Objection; incompetent and immaterial. It has no basis of fact, the question does not assume sufficient facts. 828

Objection overruled and exception.

A. I should think it was worth more than \$500.

Q. Assuming the same fact, what would it be worth for ten years?

Objection same and ruling same and exception.

A. It would be worth a sum equal to \$500 a year for each of the ten years less and the interest at five per cent. for each of the \$500 for the number of years you had to wait to receive it. 829

Q. Assuming that the works would continue

twenty years and would produce a net income of \$500 over and above all expense what would it be worth ?

Same objection, same ruling and exception.

A. I think nothing.

Q. What would the water works be worth if they had a net income of \$500 per year in perpetuity over and above all expense and trouble ?

Same objection, same ruling and exception.

A. I don't know what it would be worth, I cannot answer that question.

Q. Would it not be worth an amount equal to the principal sum necessary to produce \$500 per year at interest at five per cent. ?

Same objection, same ruling and exception.

A. No, sir.

Q. What per cent. would it be worth ?

A. I cannot tell.

Q. Assuming that the system is still on hand and producing a net income of \$500 per year, what is it worth ?

Objection same and same ruling.

A. It would probably be worth as much more as the cost of producing the system in the shape that it now is; that is, you would have a principal that was valuable than that of mere income.

Q. Assuming that the system of water works would produce a net income of \$500 a year for twenty years, what would the system be worth, over and above the expense of keeping it in repair ?

Objection same and same ruling.

A. It would be worth the cost probably of producing the system if the cost of producing did not exceed an amount, the annual interest upon which at three and one-half or four per cent., or possibly

three per cent., would produce the annual income, providing you can get your money at that rate.

Q. Does the value of the system depend in any way upon the net income it produces?

A. Yes.

834

Q. And if so to what extent?

Objection same ground, same ruling and exception.

A. That depends largely on the length of time the system upon which your income is to come will exist.

Re-Direct:

Q. In your judgment did the construction of the city water affect the value of the Boyer system, if so, how and to what extent?

835

A. I say yes, it does affect it, and it affects it on account of the quantity of the water as compared with the Boyer system. Further, the Boyer works are affected in that the pressure of the city water is such as to run to all parts of buildings and also for washing purposes and a constant supply, and also for closet purposes and for sprinkling purposes. I think to the extent there would in my judgment be no demand for the Boyer works at places accessible to city works for the reasons I have given.

836

E. J. Coffin, sworn for defendant, says:

Up to 1891 I boarded at the Metropolitan Hotel, from 1884 to 1891 and part of 1892. I boarded there during the entire time Mr. Brigham was landlord. He was there I think in the neighborhood of three years. Before Brigham Mr. Lasher owned the hotel and when I first went there. After Brigham, Page & Snyder took possession. When Brigham was there his family lived there in the hotel. When Brigham was there the city water was introduced and used in the hotel. I don't remember the date Page & Snyder went in. It was in the spring, I think in 1888. I did not know if Brigham had any

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other business in Little Falls aside from the hotel.

Cross-Examination :

838 I think Page & Snyder moved in in 1888 but am not certain without looking it up.

Alonzo H. Greene, sworn for defendant. says :

839 I reside in the village of Little Falls and have for many years, about thirty years. In 1886, 1887 and 1888 I was a trustee of Little Falls Union Free Schools and was for fifteen years and down to 1891. I am a surveyor and engineer and have been village engineer of Little Falls. During that time I have known the Boyer or the James T. Smith system of water supply. I know the city supply and about the time it was put in. The water from the city system was introduced in the Academy, the Free School and Academy, I do not recall the date. It was soon after the main was put in the street. I think it was early the following season.

Q. After the city water was put in what water was used there ?

A. City water was used there.

Q. Was Boyer water used or paid for there, to your knowledge, after that time ?

840 A. No, to my knowledge.

The Little Falls Academy is a stone building at the corner of East Main and Alexander streets. Two stone buildings. They are a part of the school system, Union Free School District No. 1 of Little Falls. The trustees have charge of the school and buildings. There is no other building or school known as the Little Falls Academy.

Cross-Examination :

841 I mean to say I cannot swear positively Boyer water was used there after the city water was put in. I know there was a penstock near the Academy. I do not know if it is there yet. That was on the Boyer system. I think I may have seen it

there within the past year. I think there were two. There was one near the corner of Alexander and East Main street. I will not swear that water was not carried into the school for the purpose of drinking from the penstock in 1888, 1889 and 1890 for anything I know. I cannot now tell what year the main was put in on Main or Alexander street. I think it was put in in the summer and fall. I think the next spring they put in city water. I was there when the city water was being put in. I was there while the city water was being put in the Academy building. It was carried on to the first floor in the hall and I think it was at the same time carried into the second floor to the laboratory. It was put in for wash, for closets and also faucets for drinking purposes. I will not say they did not use water from the Boyer penstock after that. I do not remember how much was paid Mrs. Boyer for the use of the water.

Re-Direct :

Before the city water was put in bills were presented to the trustees for Boyer water.

Q. Do you remember of any bills for Boyer water after the city water was put in being presented ?

A. I do not. I was clerk of the school district, commencing after Mr. Hart's death, and as such kept the records of the bills received and allowed. Water was turned on as soon as the city water was put in the building.

Irving Snell, sworn for defendant, says :

I reside in the village of Little Falls and did in 1887, 1888 and 1886. I owned a store on Main street, third door east from Second on the north side of Main street. I know the Boyer-Smith system of water supply in Little Falls. For a time my building had water from the Boyer penstock on Main street. Afterwards I put in city water. I can't remember the date. Mr. Loomis owns the building but I remember the fact of its being put in. It was

probably put in the following season after the Main was laid. After the city water was put in I did not use or pay for the use of Boyer water. The Boyer water was not put in the building, it was only obtained from the penstocks.

Q. What was the fact as to the supply of the Boyer water during the last year or two that you used it?

A. We had a usual supply; there were times of course, we were shut off for some causes, repairing logs I suppose, I don't know. City water was turned on as soon as pipes were introduced into the building. During the years mentioned I did not use or pay for any Boyer water, except for the store mentioned.

Cross-Examination :

Down to the time when city water was put in there was a good supply of water except where there was a stoppage of water. I did not own the building. My recollection is city water was put in the next spring or summer after the mains were laid. There was a penstock at John Smith's corner, three doors from my store. I do not recollect of the occurrence of its being removed. I occupied the two floors, first and second stories.

Re-Direct :

I do not know what was the cause of the interruption or failure of water in the Boyer system and have no knowledge on the subject.

Joseph Mullen, sworn for defendant, says :

I live in Little Falls and have for upwards of twenty years. I own the Metropolitan Hotel, situate on the corner of East Main and Mary streets, and have owned it ever since it was the Metropolitan, eleven or twelve years. I know of the Boyer system of water supply, and know of a system called the Robinson system and also of the city water works. I remember water was put in the Metropolitan Ho-

tel. It was put in the house while the mains were being laid on Main street. I do not remember the date. City water was turned on as soon as we could get it after connection was made with the mains. Since that the hotel has been supplied with city water exclusively. For a year or two prior to the introduction of the city water I understand the Boyer water was used, but I did not have anything to do with that, my tenants tended to that. I know there was a line of water pipe down Mary street. I suppose that was the Robinson line. The extension of that line was down Mary. It was after the trouble between Boyer and Robinson. Before that I suppose it was furnished from the James T. Smith system. The water from the James T. Smith system while I ran the hotel was run into a cistern in the basement and pumped by a pump into a tank at the top of a building and drawn from the tank by pipes. There was nowhere near a sufficient supply for a hotel. I paid for Smith water \$25 per year. I did not notice anything particular about the quality of the water. I do not recollect it being roily.

Cross-Examination :

At the time Robinson's logs were connected with the hotel, I was not running the hotel. Mr. Brigham was in possession of the hotel at that time, I think. He had some trouble with Boyer and he then connected with the Robinson system. I think Boyer shut the water off because they could not agree over rates, or some fuss about it. I do not recollect I signed a contract with Brigham in securing Boyer for the water. I did not sign a contract with Brigham to secure the payment of \$200 for water to Boyer. I do not think I signed any contract. I think Brigham told me Boyer had sued him. I owned the line of pipes from Garden street down to the hotel. They were put in while Mr. Lasher ran the hotel. Brigham bought out Lasher.

(Agreed that copy of contract between village and T. Sullivan & Co. may be used instead of original,

which is mislaid or cannot now be found, which original is Defendant's Ex. No. 1, July 25th, 1894, with same effect as if original is produced. Copy marked Defendant's Ex. No. 1, July 25th, and left with Mr. Beckwith.)

David H. Burrell, being duly sworn, says :

I reside in Little Falls and have nearly all my life, ever since I was twelve years of age. I am and have been for a long time familiar with the village and its streets and have a general idea of the population. I was a water commissioner during all the time of the putting in of the village water works and in that way I became thoroughly or reasonably familiar with the village water works, the city system. I know of the portions of the village through which the distribution system of the village water works extend. I know of the James T. Smith system, afterwards called the Boyer pump log system of water supply. I for a time supplied my family with the Boyer water for domestic use until 1887, and then I changed to city water. I know of the location of the Boyer system of pump logs and of the portions of the village which were supplied from that system. I know something of the manner of construction and sources of supply of that system.

Q. About 1890, did you with others purchase a system in Little Falls similar to the Boyer system ?

A. I did. I own property in Little Falls and am familiar with property values.

Q. In your judgment can you state the value of the Boyer pump log system of water works about June, 1888, at a time when the village water works were substantially completed ?

Objected to on the ground that this witness cannot be shown competent by the expression of his own opinion that he is competent, also that the witness is not shown competent to answer the question, also that it calls for an opinion from the witness which is incompetent and inadmissible.

Objection sustained and exception.

Q. Did the construction of the city water works affect the value of the Boyer pump log system ?

A. Yes.

Q. How and to what extent ?

A. In my opinion it superceded it and rendered the Boyer system valueless.

Q. What was the Boyer pump log system worth in the spring of 1888, assuming that at the time the gross income for consumers was at the rate of \$200 or \$250 per year, that a portion of the supply of water from the Boyer system was water from the Hardin spring and was obtained under a contract to continue until September 1st, 1895, at the price of \$60 per year, payable semi-annually, that the supply of water furnished was unreliable, particularly in the dry season, that most of the consumers had to get this supply from the penstocks in the street, the logs had mostly been laid a long period of time and in places they laid above the surface of the ground and there was not sufficient pressure to raise the water to the second floor of any building, that water was being conducted across Eastern Park, so called, through Robinson's pipe, and that the city water works were at the time nearly completed and were supplying with water a large number of persons who had been formerly consumers of the Boyer water. Assuming all these things to be true, what do you say would be a fair value of the Boyer system ?

Question waived.

Q. Do you know the spring from which this source of supply was obtained from the eastern part of the village ?

A. Yes, sir. I visited the spring, but have not a particular idea of the location or the details connected therewith.

Q. You know that it was situated at the base of

a range of hills extending in a westerly direction some distance north of the Dolgeville railroad ?

862 A. Yes, sir; and the water was brought from there and distributed through the streets in wooden pump logs. I have noticed these pump logs in different portions of the village prior to 1887, and used this water in my family for a number of years, when it was the James T. Smith system. I have bought and sold property to some extent and have known of transactions and conveyances of real estate, and as an appraiser know something as to its value. I have appraised property here for the Utica Savings Bank.

863 The hypothetical question waived now asked.

A. It was worth nothing in my opinion.

Cross-Examination :

I have been to the Hardin spring three or four times. I cannot say that I went there for the purpose of ascertaining the flow of water from the Hardin spring or to examine it. I went to the Boyer spring once but I did not particularly examine it ; it was several years ago.

864 Q. Was your answer to the hypothetical question put to you based upon the assumption that all facts stated in the hypothetical question were true ?

A. Yes, sir ; based upon the fact that all of the facts or any part of them were true.

Q. What do you mean by all or any part of them ?

A. I mean that if part were true, that the same would be sufficient to render the system valueless.

865 Q. In giving your answer as to value, did you take into consideration the cost of construction of the Boyer system ?

A. No, I did not.

Q. Did you take into consideration the question as to the value of the pump logs ?

A. Yes, sir.

Q. And in considering that, did you consider the facts of the hypothetical question or what you know of it outside the question?

A. I confined myself to what was included in the hypothetical question. 866

Q. Did you in 1887 and 1888 know anything about the value of pump logs as an article of commerce?

A. No, not new pump logs.

Q. Leaving out of consideration the city water works, what would a system of water works in this village in 1887 and 1888 be worth which would produce an annual net income of \$100 over and above all expenses of keeping it in repair, assuming it to be continuous? 867

Objected to as incompetent and immaterial, no basis of fact in this case for this question, it merely asks the witness to give the present value of a perpetuity?

Objection overruled and exception.

A. I should say about \$1,600.

Q. Assuming that the use was to continue only ten years at a net income of \$100? 868

A. In value it would be according to the Northampton Tables at six per cent., about \$700.

Q. Leaving out of consideration the question of city water, assuming that the annual net income from the Boyer water system \$200, what would you say it was worth, assuming it to be continuous?

A. \$3,200 or \$3,300, and for \$400 it would double that amount, and for \$600 it would be \$9,600 as long as grass grows and water flows. 869

Q. Taking into consideration the city water works and assuming that the Boyer water works yielded a net income of \$200 per year in perpetuity, what would it be worth?

A. The same exactly as the other.

Re-Direct :

870 In my answer to the several questions that have been asked I assumed that the system was in good condition all the time. My answer to the question was assuming it continued as indicated and without reference to re-laying the system.

Re-Cross Examination :

Q. Taking into consideration the fact of the city water works, assuming that the Boyer works yielded a net income of \$600 for ten years, what would it be worth ?

A. \$4,300.

871 Q. In giving these answers as to the value you do not take into consideration the value of the material from which the works were constructed ?

A. Yes, sir, I do. My opinion is based upon six per cent. interest. I consider also that the plant is one which will go to decay, a natural depreciation.

Q. The value, as you get at it, would be the principal sum of such an amount as would be necessary to produce an income at six per cent. ?

872 A. Yes, sir.

Q. How many years purchase would that require ?

A. Sixteen and two-thirds.

William H. Robinson, re-called by plaintiff for further cross-examination :

Defendant objects on the ground that he has been already twice on the witness stand since the case reopened, and if plaintiff wants any further evidence from him, she should call him as her witness.

873 Objection overruled and exception.

Q. When you were called by the defense in this case and asked the question whether you took into consideration the city water works and its effect on the Boyer system, when you answered or stated that

in your opinion the value of the Boyer system was \$8,000, what did you mean?

Objected to as incompetent and immaterial, the question is not in accordance with the evidence given by the witness, the question should not be allowed because the plaintiff has had two opportunities since to cross-examine the witness, that the evidence referred to was mostly given prior to the re-opening of the case and it is not proper now to take testimony as to evidence given at that time and not proper within the order re-opening the case.

874

Objection overruled and exception.

A. I did not take into consideration the city water works when I stated the value at \$8,000.

875

Q. Taking into consideration the city water works and the effect upon the Boyer system, what do you say the Boyer system was worth in 1887 or 1888?

Objection same, not proper cross-examination. It does not appear that the witness is competent.

Objection overruled and exception.

A. \$5,000.

Q. How long were you the owner of a system of water works in the village?

876

A. Eight or ten years, and during the whole of that time I was familiar with the Boyer system of water works up to the time the city water works were put in and completed, and frequently assisted in the repairing of the Boyer water works. I superintended the repair of my own works at that time and I know through what streets principally the Boyer system ran and am familiar with the Boyer spring and have been there a great many times.

877

Q. About what is the capacity of the spring, about how large a pipe would the stream fill?

Objected to same as last, and not within the order opening the case, not proper cross examination.

Objection overruled and exception.

A. About a three inch bore.

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Q. Was the stream constant in summer and winter?

Objection same, same ruling and exception.

A. It would vary some in dry weather. I am familiar with the Hardin spring.

Q. Which is the larger spring of the two?

Objection same as before. Objection overruled and exception.

A. The Boyer spring.

879

Examined by Mr. Beckwith:

Q. You remember my having some talk with you shortly before an application was made to re-open the case and preparing an affidavit for you which you swore to before Police Justice Brown?

A. Yes, sir.

Q. You remember my having some talk with you about that time about the cost of repairing the Boyer system?

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A. Yes, I think you did. Such pump log systems require repairs every year. You have to lay new logs and dig new trenches in order to keep the system good. I do not remember of saying the repairs would cost about \$400 per year.

(Paper shown witness.)

Q. Do you remember making affidavit to that effect?

A. I don't recollect. I remember signing the affidavit. I guess it was not all read over to me. I think I heard some of it dictated as it was taken down on the typewriter.

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Q. As the system gets older the necessary repairs become more do they not?

A. Yes, sir. The older the logs get the larger

portion of them give out. I do not know what the receipts from the Boyer system amounted to in the spring of 1888.

Q. Would not the value of the system at that time depend largely among other things upon the number of consumers using the water and the amount received ? 882

A. It would in a great part and part it wouldn't.

Q. If in the spring of 1888 the consumption of water and the revenue from the system had so decreased that it was not self-sustaining, you would not say it was worth \$5,000 ?

A. I do not think it would.

(Paper shown witness.)

I think that is the affidavit to which my attention has been called. 883

Affidavit of William H. Robinson offered in evidence, marked for identification Ex. 1 of February 19th, 1895.

Objected to as incompetent and improper.

Objection sustained and exception.

Q. You at one time owned or had charge of a system similar to the Boyer system ?

A. Yes, sir. 884

The source of supply was this side of Boyer's, in the same neighborhood, probably one-quarter of a mile. It was not at the base of the same hill. There was a sort of ravine between my spring and Boyer's.

Q. About what was the capacity of your spring ?

A. It would fill a two and one-half inch bore. My system extended through a portion of the park, over Garden street. 885

Q. How did your system compare in extent with the Boyer system ?

Objected to as incompetent, improper and immaterial.

Objection sustained and exception.

Q. Shortly after 1888 did you not sell your system for \$100 ?

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Objected to as incompetent and immaterial.

Objection sustained and exception.

I don't know if there was some expense connected with collections. It was worth something to make the collections. It would take a good smart boy about a day in each month.

887

Q. In the affidavit to which your attention was called did you state that if the water rents from the Boyer system prior to 1888 did not amount to more than \$300 per year, that the system would not be self-sustaining, and no one could afford to continue it on the income and proceeds ?

Objected to as incompetent and improper.

Objection sustained and exception.

888

Mr. Beckwith moves to strike out the evidence of witness Robinson as to the value of the Boyer system in 1888, upon the grounds stated in the objection to the question, and upon the further ground that the witness is not competent to state the value at that time, because he says the value depends largely upon the income of the system, of the amount of which he has no knowledge whatever.

Motion denied and exception.

DEFENDANT RESTS.

George Keller, being duly sworn for plaintiff, says :

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I reside in the village of Little Falls and have for sixty-five years, and for two years I collected the water rates of the Boyer system. I collected the rates a year before Mrs. Boyer bought it. I remember when she bought Mrs. Smith out. I made out a list of the persons who used the water and gave it to Mr. Boyer.

(Paper shown witness.)

Q. Is that the list made out by you and in your handwriting?

A. I think it is, but it looks as if it was written in great haste.

Q. Is the last name that appears on the paper in your handwriting? 1890

A. Yes, sir; I think it is.

Q. Are you able to say that is a list of the names of persons using water when Mrs. Boyer bought from Mrs. Smith, together with the prices which were paid as water rates?

A. Yes sir.

Paper offered in evidence.

Objected to upon the ground that the list is too remote and furnishes no evidence as to consumers at the time when it is claimed plaintiff's works were interfered with in July, 1888, and it appears by the evidence that plaintiff at that time had but a small portion of the consumers that she had a year or two before. That it is incompetent and immaterial, not within the order re-opening the case and not proper examination. 1891

Objection sustained.

Q. What amount did you collect for water the year before Mrs. Boyer took it? 1892

Objected to; same ground.

Objection overruled and exception.

A. About \$800.

Cross-Examination.

Q. You say you made collections for two years. do you recall what years those were?

A. Yes, sir. I think 1883 and 1884, and those were the only two years. I know because it was the two years before I went into a store, and I went into that in 1885. I may have collected some in 1885. 1893

Q. You say the amount for one year was \$800, do you recollect which year?

894 A. I do not recollect which year, and I know nothing about the collection after it went out of my hands.

Mr. Beckwith moves to strike out the evidence of Mr. Keller as to the amount collected on the ground that it is too remote and no evidence of the income at the time of the alleged interference and upon the grounds stated in the objection to the question.

Motion denied and exception.

PLAINTIFF RESTS.

895 EVIDENCE CLOSED.

March 6th, 1895, case called before the Referee for final submission, and parties appeared as before.

Defendant moved to re-open the case to prove the death prior to the trial of this action of Isaac B. Richmond, president, and Amos Rankins, street commissioner of the village of Little Falls, mentioned in the evidence.

Motion denied. Exception to defendant.

896 On defendant's motion the case was re-opened and defendant's charter and by-laws received in evidence.

The foregoing is all the material evidence given upon the trial.

DEFENDANT'S MOTION FOR NON-SUIT.

Defendant's motion of February 22d, 1893, to strike out evidence and for a non-suit:

897 At close of plaintiff's evidence defendant moves to strike out evidence—Boyer married—page 37, Referee's minutes of May 18th, 1892. Sheet 2, minutes 56 post. Page 56 is minutes of Boyer's conversation with Alexander, deceased, and 37 is the number of the page containing conversation with Richmond and Rankins.

1.

Motion by defendant to strike out the evidence of Hiram Boyer, the plaintiff's husband, concerning the transactions with Isaac B. Richmond and Amos Rankins, both of whom were deceased when said evidence was given, on the ground that the same is incompetent, improper, immaterial and irrelevant in that the defendant by its officers and agents, to wit, its President and Street Commissioner, is the survivor of said deceased persons. That the said Hiram Boyer being the husband of said plaintiff and the father of her children, is interested in the event of this action and therefore comes within the mischiefs which Section 829 of the Code of Civil Procedure aims to prevent.

2.

Move for non-suit on failure to connect titles :

The defendant moves for non-suit of the plaintiff on the ground that she has failed to establish her succession to the corporate franchise of the so-called Aqueduct Association as provided by Chapter 45 of the Laws of 1806, or otherwise. That there is no competent evidence that Wm. Usher and others were the successors of said Association, or that it was in being, and not dormant, at the time they claimed to succeed to the rights and privileges thereof. That said corporation or franchise being an entity, an incorporal hereditament it could only be transferred, if at all, with the consent of the sovereign power by which it was created, and that the one certificate or script belonging to said Usher, after it was turned over, did not avail to transfer any part of said body corporate under the general assignment of Wm. Usher to H. P. Alexander, and that in consequence of the foregoing failure of proof, plaintiff has failed to establish her right to damages as against the defendant in this action, by, through or under said association, as being its successor to the extent

of the whole or any part thereof, by, through or under said general assignment or otherwise.

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3.

After defendant rests and charter in evidence move for non-suit on failure to present claim as provided by Section 56 of the charter.

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Defendant moves to non-suit the plaintiff on the ground that it does not appear that she ever presented her claim to the trustees of the village of Little Falls, pursuant to section 56 of defendant's charter for damages alleged to have been sustained and for which this action is now pending.

4.

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Motion for non-suit on the ground that it does not appear by the evidence of the plaintiff that the president of the village of Little Falls, to wit, Isaac B. Richmond, and the street commissioner, Amos Rankin, were in any way or manner authorized by the governing power of the said village, to wit, the trustees thereof, to take up, remove or destroy any of the pump logs or conduits claimed by the plaintiff. That the plaintiff's action being in trespass the village is not liable in damages for said unauthorized acts.

5.

905

Motion for non-suit, on the ground that it does not appear by the plaintiff's evidence that said village by its said trustees, its said governing power, in any way or manner ever ratified or confirmed the unauthorized acts of trespass of said President or Street Commissioner in taking up, removing or destroying said pump logs or conduits claimed by the said plaintiff, and said village is not therefore liable for the injury complained of.

SUPREME COURT.

NANCY M. BOYER

*vs.*THE VILLAGE OF LITTLE
FALLS.

906

Defendant now renews its motion to strike out the evidence of the witness, Hiram Boyer, in relation to all penstocks which he testified to as having been cut down, and which he did not see cut down, on the ground that it is incompetent, immaterial, irrelevant and hear-say, which motion was denied with leave to renew it at the hearing of February 22, 1892.

Defendant renews the motion made at the close of the evidence given prior to the re-opening of the case to strike out evidence of Hiram Boyer as to transactions had with Isaac B. Richmond and Amos Rankin, upon the grounds stated in said motion and upon the further ground that such evidence is mere hear-say, and further that it cannot operate to bind defendant, and plaintiff cannot show by such evidence an interruption of her plant by defendant, or an intention on the part of defendant to resist and prevent repairing and re-building the same in any place or places where it may have been interrupted or interfered with. That said Richmond and Rankin could not by their declarations bind defendant except to the extent authorized and advanced or afterwards ratified.

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Defendant moves to strike out the evidence of Hiram Boyer as to statements made to him by Soule, Duke and Connelly, and other persons alleged to have been in the employ of Mr. Rankin, as street commissioner, as to statements made to them and orders and directions given them by President Richmond, Commissioner Rankin or Trustee Timmerman or either of them, upon the grounds stated in defendant's motion last above.

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910 Defendant now renews its motion for a non suit made at the close of the case as originally tried, and now moves for a non-suit and dismissal of the complaint and for judgment in favor of defendant and against plaintiff upon all the grounds stated in said motion as made by defendant's attorney, and upon the further grounds, viz.:

First.—That upon all the evidence plaintiff has failed to establish her cause of action against defendant.

911 Second.—That plaintiff has by her complaint alleged a cause of action in tort and must recover if at all in tort and that the evidence fails to show any tortious or wrongful act on the part of defendant or for which defendant is responsible or which was authorized or afterwards ratified by defendant.

Third.—That any wrongful or tortious interference with plaintiff's system of water works on the part of Commissioner Rankin and men in his employ or sanctioned or directed by President Richmond was a mere trespass on the part of those officers not within the line or scope of their authority or duty and not authorized or ratified by defendant.

912 Fourth.—That defendant's street commissioner is by defendant's charter required to report to defendants board of trustees in advance any work to be done and is only authorized to do the same as directed by said board of trustees and that defendant is only responsible for the acts of its street commissioner when so directed and that it does not appear in this action, that defendant's street commissioner was given any direction except as he was directed by an illegal meeting of defendant's trustees by resolution of May 15th, 1888, which related only to
913 pen stocks not in use

Fifth.—That the meeting of May 15th, 1888, was a special meeting at which two of defendant's trustees were absent and it does not appear that they were notified of the meeting or of its object as re-

quired by law and by defendant's charter, and said meeting was therefore wholly illegal and could transact no business legally.

Sixth.—That in so far as any interference with plaintiff's water works is claimed to have been made by Contractor Sullivan while putting in defendant's water works it was unnecessary ; that said Sullivan was an independent contractor for whose negligent or wrongful acts defendant was in no manner responsible. 914

Sixth.—That plaintiff has failed to show that she occupied defendant's streets by any right or authority, and that she had at most a mere license resulting from occupation and failure on the part of defendant to interfere, and that such license only entitled her to occupy defendant's streets so long as permitted by defendant and in such manner as not to interfere with the beneficial use and enjoyment thereof and the improvement thereof by the defendant and the public, and that defendant had the right to interfere with plaintiff's system of water works whenever it became necessary or desirable so to do to improve defendant's streets or to construct defendant's system of village water works, and that such interference was neither wrongful nor tortious and defendant is in no manner liable to plaintiff therefor and that no other or different interference is shown in this action, and if shown the same was a mere trespass on the part of defendant's officers not within the line or scope of their duty and unauthorized and not ratified. 915 916

Seventh.—That it is not alleged in the complaint and does not appear that plaintiff's claim herein was presented and notice of the time and place at which the injuries complained of were received were filed with the village clerk or presented to defendant's board of trustees within one year after the cause of action accrued as required by Chapter 440 of Laws of 1889. 917

Eighth.—That as to all damages or injuries claim-

ed to have resulted from any act or omission on the part of contractor Sullivan it appears by his uncontradicted evidence that plaintiff's works wherever
 918 interfered with by him were restored to better condition than before.

All of the foregoing motions separately denied with an exception to defendant.

Case was then argued for defendant by J. D. Beckwith, and for plaintiff by J. A. Steele, and the parties were given by the Referee fifteen days within which to prepare and file written briefs and requests for findings of law and fact, and such briefs and requests for findings were duly submitted and
 919 filed.

SUPREME COURT—HERKIMER COUNTY.

NANCY M. BOYER

vs.

THE VILLAGE OF LITTLE
 FALLS.

The defendant, answering the plaintiff's complaint
 920

1.

Denies each and every allegation therein contained, excepting that of its incorporation.

2.

For a second and further answer and defence to plaintiff's complaint, the defendant avers, that beginning in the year 1886, it commenced within its corporate limits, the construction of a system of
 921 water works, and continued in constructing the same during said year of 1886, and also during the years 1887, 1888 and 1889.

That in constructing the said system of water

works it became necessary to remove any and all obstructions found in defendant's streets and avenues in order that the works of laying the mains, conduits and pipes, constituting said system, might be properly and efficiently done. That before beginning the construction of said works, the defendant was duly granted its franchise therefor by the legislature of the State of New York, pursuant to Chapter 13 of the laws of 1886 and acts supplementary thereto, and the said work in its entirety was performed in accordance therewith.

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3.

That the plaintiff was never granted any right, leave or license to construct the system of water works, set out and described in her complaint, by the defendant or any party of competent jurisdiction having a right to confer the same.

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The defendant therefore demands judgment, dismissing the plaintiff's complaint with costs.

E. J. COFFIN,

Defendant's Att'y,

Little Falls, N. Y.

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SUPREME COURT—HERKIMER COUNTY.

NANCY M. BOYER,

vs.

THE VILLAGE OF LITTLE
FALLS.

925

The plaintiff complains of the defendant and shows to the court the following facts constituting her cause of action :

I.

926 That the defendant is, and was at the times hereinafter mentioned, a municipal corporation organized and incorporated under and by virtue of the provisions of the laws of the State of New York.

II.

927 That at the times hereinafter mentioned, the plaintiff was, and for a long time prior thereto was, and is now, the owner of certain springs of water, situated in or near the said village of Little Falls and a system of water works leading from said springs into the said village of Little Falls, consisting of logs and other conduits and penstocks, by which the inhabitants of said Little Falls or a large portion thereof were supplied by the plaintiff with pure, wholesome spring water from said springs so owned by said plaintiff, and from which the said plaintiff derived a large revenue, or profit, to wit: the sum of about twelve hundred dollars annually.

III.

928 That on or about the first day of May, 1887, the said plaintiff by its said agents and officers wrongfully and unlawfully took up and destroyed plaintiff's 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 and use of said springs to the plaintiff's great damage of twenty five thousand dollars.

929 Wherefore the plaintiff demands judgment against the defendant for the sum of twenty-five thousand dollars, besides costs of this action.

J. A. STEELE,

Plaintiff's Att'y.

SUPREME COURT.

NANCY M. BOYER

vs.

THE VILLAGE OF LITTLE
FALLS.

930

To the Supreme Court :

I, the undersigned referee to whom it was, by an order of this court, referred to determine the issues in this action, do hereby respectfully report as follows : I have, from time to time, been attended by the parties and their respective attorneys, and have heard the testimony offered, and have considered the arguments of the respective counsel herein, and I find the following facts. viz :

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First—The defendant is a municipal corporation, and has the control and management of the streets within said village, subject to such rights as the plaintiff has, as hereinafter stated.

Second—That in 1805, and before the incorporation of the defendant, Wm. 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, by means of wooden conduits known as pump logs, and proceeded to introduce a system of water supply.

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Third—In March, 1806, an act was passed by the Legislature, being Chapter XLV of the laws of 1806, which is declared to be a public act, and entitled, "An Act to incorporate an Aqueduct Association in the Village of Little Falls, in the County of Herkimer." By that act William Alexander and others were created a body politic with certain powers granted to them, among which was the power to enter upon and make use of land for the purpose of conducting a supply of water to and through the village of Little Falls, and "in every part of said

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village," provided consent was obtained from the persons "through or over which pipes or aqueducts might pass."

934 *Fourth*—In September, 1806, the persons created a body politic by said act, organized and appointed such officers as the act provided, and subsequently enacted By-Laws and adopted a seal, issued script certificates of stock, and held stated meetings, and kept regular minutes of their proceedings up to 1851.

935 *Fifth*—Prior to 1851, William Usher had purchased some of the stock of the association and in that year he purchased all the remainder of the stock and became the sole owner of the water supply system, and carried on the business, and supplied the people with water, for which he received water rents—the water was principally so supplied by means of wooden penstocks erected at street corners, and at other convenient places along the streets of the village, into which penstocks the water flowed through pump logs from the said spring which was located higher up.

936 *Sixth*—In 1862 said Wm. Usher made a general assignment of all his property (except exempt property) to Henry P. Alexander, for the benefit of creditors, which assignment was recorded in Herkimer County Clerk's office and was never vacated or set aside. 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, together with all the right and franchises granted by said Act of 1806, was conveyed by several *mesne* conveyances, to this plaintiff, all of which conveyances were recorded in the County Clerk's office of Herkimer County, and in the summer of 1888 the plaintiff was the sole owner thereof.

937 *Seventh*—For several years prior to 1888, the plaintiff had maintained said water supply system, and had supplied a large number of inhabitants of said

village with water, in the way hereinbefore indicated, and for which she received water rents, and it was a source of considerable net income to her. 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.

Eighth—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 a 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

942 the village to construct its system of water works,
 also in the necessary prosecution of that work tore
 up several of plaintiff's pump logs with the same
 effect. For considerable time the plaintiff's busi-
 ness was thus interrupted by the acts aforesaid, and
 her revenue for water rents cut off. In some instan-
 ces 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
 943 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 consid-
 erable extent by allowing air, &c., to enter them, the
 extent of the last mentioned item of damage is nec-
 essarily somewhat problematical, but I think cer-
 tain; and taking all her damages together I think
 fourteen hundred dollars will not more than fairly
 indemnify her, and I find she has sustained dam-
 944 ages by reason of such acts in the sum of fourteen
 hundred dollars.

As conclusions of law I find :

First—In June, 1888, and at the time of the com-
 mission of the acts referred to in the foregoing find-
 ings of fact, the plaintiff was the owner of the water
 supply system above mentioned, and had a right to
 maintain, in a proper and reasonable way, such sys-
 tem in the streets of Little Falls where her logs and
 conduits were then located.

945 *Second*—That the defendant is liable for the acts
 of the persons who so interfered with the plaintiff's
 water system to the extent of such interference by
 them, as above found.

Third—That the plaintiff is entitled to recover

against the defendant in this action a judgment for her damages to the amount of fourteen hundred dollars, with interest thereon from August 1st, 1888, and judgment for that amount is ordered accordingly, with costs of this action.

Dated May 2d, 1895.

J. B. RAFTER, Referee.

SUPREME COURT—HERKIMER COUNTY.

NANCY M. BOYER,

vs.

THE VILLAGE OF LITTLE
FALLS.

This action having been duly referred to J. B. Rafter, Esq., as sole referee to hear, try and determine the same, by an order duly entered in Herkimer County Clerk's office, February 26, 1892, and a trial having been had on due notice to all the parties, and said Referee having duly made his report herein, dated May 2d, 1895, and the same having been duly filed in the Herkimer County Clerk's office, said report stating the findings of fact therein and conclusions of law thereon; and the said Referee having found and decided that the plaintiff has sustained damage to the amount of fourteen hundred dollars, by reason of the unlawful acts of the defendant, and that she is entitled to recover that amount in this action against the defendant, with interest thereon from the first day of August, 1888, and directed judgment for that amount and interest as aforesaid, in favor of the plaintiff and against the defendant, with costs of this action, and the plaintiff's costs having been adjusted at five hundred and ninety-seven dollars and forty cents: *Now*, on motion of J. A. Steele, attorney for the plaintiff, it is adjudged

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950 that the plaintiff, Nancy M. Boyer, recover of the
 defendant, the Village of Little Falls, the said sum
 of fourteen hundred dollars, so found by said Ref-
 eree, together with five hundred and sixty-seven
 dollars, interest thereon from August 1st, 1888, to
 May 2d, 1895, and amounting to nineteen hundred
 and sixty-seven dollars, recovery, together with five
 hundred and ninety-seven dollars and forty cents
 costs, amounting in all to the sum of two thousand
 five hundred and sixty-four dollars and forty cents,
 (\$2,564.40,) and that the plaintiff have execution
 therefor.

Entered May 21, 1895, at 9 A. M.

R. R. WOOD,
 Deputy Clerk.

REPORT AND FINDINGS OF REFEREE.

SUPREME COURT.

NANCY M. BOYER

vs.

952 THE VILLAGE OF LITTLE
 FALLS.

J. A. STEELE, Plaintiff's Att'y.

A. B. STEELE, of Counsel.

E. J. COFFIN, Defendant's Att'y.

J. D. BECKWITH, of Counsel.

J. B. RAFTER, Referee.

953 This action is brought by the plaintiff to recover
 damages against the Village of Little Falls, for an
 injury to a system of water works, which, with cer-
 tain rights or franchises to use the streets in Little
 Falls, for the purpose of supplying water, she claims
 to own, and which injury she claims was done by

the defendant or persons for whose acts in that regard the defendant was responsible.

The action is in some respects peculiar, and the amount of damages claimed considerable.

The defendant stoutly contends that the plaintiff, at the time of the commission of the acts complained of, had no such rights as she asserts, and that in any event the defendant is not responsible for the result of the acts complained of. 954

The plaintiff claims that her whole plant or water supply system, was absolutely destroyed and rendered worthless by the acts of the persons who interfered with it, and that the defendant is liable to a judgment in this action for the whole value, which she has offered some evidence to show to be worth twenty thousand dollars, but which is probably worth a much less sum; the defendant challenges this proposition and claims that if any liability is shown against the defendant, it is only liable for the real fair value of the logs and penstocks shown to have been actually destroyed. 955

The evidence is very voluminous. In 1805 certain inhabitants of the village of Little Falls, at that time a small hamlet, conceived the project of forming a voluntary association for the purpose of supplying themselves and others with wholesome water, the source of which was a large spring situate in the easterly portion of the present village; such water to be carried by means of conduits under ground and distributed where desired. 956

Such an association was formed and some money expended for that purpose.

In March, 1806, an act was passed by the Legislature entitled "An Act to incorporate an Aqueduct Association in the Village of Little Falls, in the County of Herkimer." By this act William Alexander, William Carr, Clark Shurtleff, Daniel Bel- 957
lows, being four of the persons who had joined such voluntary association, and others named; "and such

958 other persons as may become interested in the association or company formed for supplying the Village of Little Falls, &c., with water, by means of conduits," &c., were created a body politic and corporate by the name stated in the title of the act. The act provided for the election of a treasurer, clerk and collector and other agents of the association, and gave authority for "said company" and persons employed by them to enter upon and make use of land "for the purpose of conducting a plentiful supply of pure and wholesome water to and through the said Village of Little Falls," and "to or toward said village and in every part of said village."

959 "Provided the said company obtain the consent of the owners of the said land, from which the water is to be taken, and through and over which the said canals, pipes or aqueducts may pass." Soon after the enactment of this law, and on the 8th day of September, 1806, said William Alexander, William Carr, Daniel Bellows, Clark Shurtleff, with several others, met and took some action, though somewhat informal, toward perfecting an organization under the act, and the minutes of that meeting recite that
960 it was "a meeting of the proprietors of the Aqueduct Association at the Little Falls," and at that meeting provision was made for the enactment of By Laws for the government of the Association, and for the purchase of a book "for the use of this association," in which was to be entered "the former proceedings of the association, previous to the Act of incorporation, and the present and further minutes of the association," &c.

961 Thus it is seen that steps were taken by the people interested to avail themselves of the rights and privileges granted by that act. Later a form of script certificate was agreed upon, and a seal adopted, and meetings were held from time to time at least up to June 9th, 1851, when "a meeting of the stockholders of the Aqueduct Association" was held.

This is the last record of any meeting of that association shown to have been had.

It appears, however, by the evidence given that about 1851, William Usher, who owned some interest in that association, bought up the whole of the remaining shares, and became the sole owner of the spring, which was the source of water supply, and of the logs and conduits, which had heretofore been laid along several streets in Little Falls, and from which many people were being supplied with water, principally from "penstocks" erected at street corners, and convenient and accessible places along the streets. 962

The conduits which were put in for conveying the water were chiefly wood, and what are known as pump logs, and were laid in ditches along the several streets, where the system extended, which never included the whole village; where the soil permitted the logs were sunk to a reasonable depth, but where rock came near the surface the logs were laid near the surface and in some places partly exposed. 963

After William Usher became the owner of this crude and primitive system of water supply, he carried on the business for several years, of supplying water, for which he received certain water rents. As the demand for water increased the original spring was found inadequate, and resort was had to another spring in the same vicinity, owned by Hon. G. A. Hardin and known as the "Hardin Spring," for additional supply, for which a yearly rental was paid. 964

In 1862 William Usher made a general assignment of all his property (not exempt) to Henry P. Alexander, which assignment was recorded in Herkimer County. In 1863 said Henry P. Alexander by deed conveyed to James T. Smith "all that certain lot of land with the spring thereon situate," which is the original spring above referred to, "together with all and singular the hereditament and appurtenances 965

thereto belonging," &c., and thereafter James T. Smith continued to supply water therefrom.

966 Subsequently, and in 1880, James T. Smith and his wife, by a warranty deed, conveyed the same spring lot, including the spring and appurtenances, &c., to William H. and George B. Dale.

967 By opening a quarry upon an adjacent lot this spring upon the lot mentioned in the foregoing conveyance was dried up and the spring appeared upon the quarry lot, which was owned by the husband of the plaintiff, and the pump log system was connected to this spring and was the source of supply of the water to this system at the time of the acts complained of, as also fed by the Hardin spring.

968 Before the acts complained of this plaintiff became the owner of the quarry lot upon which the present spring is located, and was furnishing water, by means of that pump log system, to a great many people in Little Falls, who paid water rent therefor, and it was a source of considerable profit to her.

969 Its value, of course, was somewhat precarious, for the reason of the uncertainty of the continued use of the water by any considerable number of people, and of the permanency of the supply; because while the spring is without doubt permanent, its location may be changed by opening of other quarries, or the like, as it changed from the Dale lot.

970 I am, constrained to believe, however, that at the time of the acts complained of, the plaintiff had a vested property interest in this system of pump log supply of water, and a right to keep and maintain in a reasonable way her logs under ground, and her penstocks for supply in the streets of Little Falls where they were interfered with at the time of such interference, and that the acts which resulted in damage to the plaintiff, were done by persons acting for the village in doing the acts, and so far within the scope of their duty and authority that the defendant was civilly liable for the damages thus done.

In 1888, the village had grown to such proportions, that this quaint method of supplying water was quite inadequate and a water supply system was undertaken and was being carried on, on a large scale by the village itself, under the statute authorizing such undertaking, and its magnitude was such, that wherever the plaintiff's system was in the path of that enterprise, it must yield—instead of acquiring plaintiff's right by purchase or condemnation, it chose rather to push plaintiff's works aside, and abide the consequences. 970

If these views are correct, it only remains to determine the amount of damages actually and really sustained by the plaintiff.

The rule of damages to be applied in such a case, as it seems to me, should exclude such damages as are conjectural and possible, and include only such as are actual and real. 971

I suppose it is settled law, however, that if a person carrying on a lawful business is wrongfully interrupted in such business, his reasonable profits which it is fair to determine he might have made but for such interruption, may be included as a part of his real damages. No other rule would fully indemnify him; at least in the language of Earl J., in *Snow vs. Pulitezer*, 142 N. Y., page 271, they are "proper to be considered in estimating damages in a case like this." 972

In this case I do not agree with the plaintiff in her claim that her whole plant has been destroyed.

Her source of water supply has not been interfered with, some portions of her system were left intact, and the remainder might have been, and still may be restored, and she may enter the field of competition with the village in the supply of water to such inhabitants as will patronize her; and if by reason of better water or cheaper rates she can secure 973

974 a sufficient number of customers to her system she
975 may successfully compete. Her real damages there-
fore as I regard it, have occurred to her log system
and penstocks, and such damages as she sustained
by reason of the interruption of her business.

It was the plaintiff's duty to take active measures
to make the damages as light as she reasonably
could, and she might not set idly by and permit the
damages to be really aggravated, and require the
defendant to pay damages which she might by rea-
sonable efforts on her part, have prevented.

975 The following rule laid down by Rapallo J. is a
safe and reasonable rule :

“An amount sufficient to indemnify the party in-
jured for the loss, which is the natural, reasonable
and proximate result of the wrongful act complained
of, and which a proper degree of prudence on the
part of the complainant would not have averted, is
the measure of damages,” &c. *Baker vs. Drake*,
53 N. Y., 211-216.

I shall endeavor to apply the foregoing rule to the
damages in this case.

976 My judgment is guided to the value of the plain-
tiff's whole plant, in view of the certain competition
which she was to meet by the village system, by the
evidence of the witness Robinson, a gentleman called
by both parties, and thus vouched for by both,—he
said her plant was worth \$8,000, without taking into
consideration the competition of the village system;
and with that competition he regarded it worth \$5,-
000. That amount was therefore probably about
its value in the summer of 1888 when the acts out
of which this action grew took place.

977 In no event, therefore, can she recover to exceed
five thousand dollars. *Hartshorne vs. Chaddock*,
135 N. Y., 116.

It appears by the evidence that from the nature

of the logs, which served as conduits for plaintiff's water, the length of time they had been buried, &c., that if left undisturbed they were liable to last considerable time by making some annual repairs, but that if disturbed, or portions of the system taken out, so that air entered the buried logs they would rapidly decay. 978

I think the plaintiff cannot be fully indemnified without reparation for this item of damage—by cutting and plugging the logs her business was interrupted for a period of time, and she sustained damage in that particular; some of her logs and some of her penstocks were actually destroyed.

Evidence of the value of new logs, of the value of penstocks, and of excavating, laying logs and refilling was furnished upon the trial, and from the evidence and by the best computation I can make, applying the rule of damages I have before suggested; I think the plaintiff has sustained damages to the amount of fourteen hundred dollars, for which the defendant is liable. 979

SUPREME COURT. 980

NANCY M. BOYER

vs.

THE VILLAGE OF LITTLE
FALLS.

Gentlemen:—Please take notice, that the defendant appeals to the General Term, Supreme Court, Fourth Department, from the judgment of the Supreme Court, herein entered in the office of the Clerk 981

of the County of Herkimer, on the 21st day of May,
1895.

Dated June 21st, 1895.

982

Yours, &c.,

E. J. COFFIN,

Att'y for the Deft. and Applt,

Journal and Courier Block, Little Falls, N. Y.

To the Clerk of the County of Herkimer,

and to J. A. STEELE, Esq.,

Att'y for the Plaintiff and Respondent.

983

DEFENDANT'S REQUESTS FOR FINDINGS.

SUPREME COURT—HERKIMER COUNTY.

NANCY M. BOYER,

Plaintiff,

vs.

THE VILLAGE OF LITTLE
FALLS,

Defendant.

984

The defendant in the above entitled action requests the following findings of fact.

I.

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That during all the times complained of in the plaintiff's complaint the witness, Hiram Boyer, was, and still is, the husband of said plaintiff and the father of her children, Edward and Theodore.

II.

That at the times of the injury complained of in

the complaint, Isaac B. Richmond was the president of the Village of Little Falls and that Amos Rankins was Street Commissioner of said village, and that at the time Hiram Boyer, plaintiff's husband and chief witness, gave his testimony in plaintiff's behalf, the said Isaac B. Richmond and the said Amos Rankins were deceased. 986

III.

The said village of Little Falls was regularly incorporated into a municipal body and granted a charter on the 10th day of April in the year 1850, which said charter was substantially amended at various times since said year down to and including the year 1878. And that said charter and the by-laws therein contained was in force at all times during said period and during the times set out and described in the plaintiff's complaint. 987

IV.

That prior to the commencement of the plaintiff's action she did not present a verified claim of the injury complained of showing the nature thereof to the Board of Trustees of said village as required by Sec. 56 of said charter. 988

V.

That the plaintiff has not established her title to the franchise of the so-called Aqueduct Association by purchase, successive or otherwise.

VI.

That the President of the Village at the times complained of, to wit: Isaac B. Richmond, and the Street Commissioner, to wit: Amos Rankins, were in no way or manner authorized by the Trustees of said Village to take up, remove or destroy any of the pump logs or conduits as claimed by the plaintiff in her complaint. 989

VII.

990 That the Village of Little Falls by its said Trustees did not in any way or manner ratify or confirm the unauthorized acts of trespass of said President or said Street Commissioner in taking up, moving or destroying said pump logs or conduits claimed by the plaintiff as her property.

VIII.

991 That the defendant was guilty of no act of trespass to the plaintiff in removing her penstocks and thereby abating the nuisance which they constituted, it having theretofore declared them as such and directing their removal by the plaintiff,

CONCLUSIONS OF LAW.

I.

992 That the plaintiff is not and was not, at or before the commencement of this action, entitled to maintain the same or to recover any damages for the removal of the said water logs or conduits.

II.

That there should be a judgment in this action in favor of the defendant against the plaintiff for costs.

III.

993 That judgment is ordered in favor of the defendant, the Village of Little Falls against the plaintiff for the dismissal of the complaint and costs of action in accordance with the foregoing findings of facts and conclusions of law.

SUPREME COURT—HERKIMER COUNTY.

NANCY M. BOYER,

*vs.*THE VILLAGE OF LITTLE
FALLS.

994

Defendant respectfully requests the Referee herein to find as matters of fact and law as follows, viz:

AS MATTERS OF FACT.

I.

That it does not appear that the “Aqueduct Association in the village of Little Falls” or any successor to said association ever obtained consent of the owners of the land through and over which its pipes, conduits or aqueducts passed, or of the public or the village of Little Falls, or of those in charge of the streets and highways through which the same are laid. 995

II.

That it does not appear that any right or permission was ever granted to said Aqueduct Association or its successor or to plaintiff to construct or maintain pipes, pump-logs or other conduits in or through any streets or highways of the village of Little Falls or to construct or maintain penstocks therein. 996

III.

That it does not appear that William Alexander, William Carr and the other persons named in Chap. XLV, Laws 1806, or any other person, ever incorporated under the provisions of that act or exercised the corporate rights and franchises granted thereby. 997

IV.

That it does not appear that William Usher ever

acquired or succeeded to any rights and franchises of said Aqueduct Association or to the whole or a majority of the script thereof.

998

V.

That it does not appear that the said William Usher ever transferred any such rights or franchises or such script to his assignee, Henry P. Alexander.

VI.

999

That it does not appear that the said Henry P. Alexander ever in any manner transferred to James T. Smith said rights and franchises, or the said script or any system of water works, or logs, conduits and penstocks, or any property or interest in property, except the lands and premises described in his deed to Smith, recorded in Herkimer County, Book No. 82, page 146.

VII.

That it does not appear that said Alexander purchased or in any manner obtained the said premises described in said deed from said William Usher.

1000

VIII.

That it does not appear that plaintiff in any manner succeeded to any rights or franchises of said Aqueduct Association.

IX.

1001

That it does not appear that plaintiff succeeded to any pipes, pump-logs, conduits, penstocks or water works of any kind owned by or at any time belonging to said Aqueduct Association or constructed by it.

X.

That all plaintiff's right, title and interest in and to the pump-logs and penstocks indicated on the

map prepared by Engineer Lansing were acquired from Johanna Smith, as administratrix of James T. Smith, about May 1st, 1886, for \$600.

XI.

That said sum of \$600 was the fair and reasonable value, at the time, of plaintiff's said right, title and interest.

1002

XII.

That said system of pump-logs and penstocks did not increase in value from the date of said purchase, May 1st, 1886, down to the commencement of this action, but on the contrary, naturally decreased.

1003

XIII.

That it does not appear that plaintiff's spring or springs were ever in any manner disturbed or interfered with by defendant and in so far as appears, she is still the owner thereof or of all the right, title and interest in and to the same which she ever had.

XIV.

That the first interference with defendant's pump-logs or penstocks claimed, or shown and located, was in Alexander street, near the corner of Alexander and Main and near the Academy, and was not earlier than July or the latter part of June, 1888.

1004

XV.

That whatever interference was shown at this place was by Contractor Sullivan and his employees while putting in said village water.

XVI.

That the line of village water mains on Alexander street from Main street to Petrie street was located some five to eight feet northerly of the line of the Boyer pump logs and the nearest part of the trench

1005

as planned was at least three and one half feet distant from the line of pump-logs.

1006

XVII.

That it does not appear that it was necessary to in any manner interfere with the Boyer pump logs in constructing the village water main through Alexander street from Main street to Petrie street.

XVIII.

That the next interference with defendant's pump-logs was on John street, near Mrs. Perry's, where four logs were necessarily taken out by Michael Connelly in repairing the gutter.

1007

XIX.

The next interference is claimed on William street near the corner of Main.

XX.

That the next interference was near Oyston's corner, near the park, at the corner of Albany and Main streets, where sand boxes were put in.

1008

XXI.

That Trustee Timmerman did not in any manner direct or authorize this interference or any other interference.

XXII.

The next interference claimed was at the intersection of Burwell and Alexander streets.

XXIII.

1009

The next interference claimed was on Loomis street, a short distance west from plaintiff's residence, where it is claimed that about one hundred feet of logs were taken out.

XXIV.

The next interference was at the corner of Salisbury street and Garden street, near Carryl's barn, where one log was taken out.

XXV.

1010

That it does not appear that more than 10 penstocks in all were in any manner disturbed, and it is not shown that defendant and its officers or employes took down more than 5 or 6, and, of this number, it does not appear how many were in use and how many were not.

XXVI.

That it does not appear that defendant's Board of Trustees in any manner directed or authorized any disturbance of or interference with plaintiff's logs or penstocks, or in any manner ratified the same, except by the resolution of May 15th, 1888, which was passed at a Special Meeting from which two trustees were absent, and it does not appear that any notice was given them of the meeting.

1011

XXVII.

That said resolution, at most, directed or authorized interference with penstocks not in use and did not in any manner direct or authorize interference with plaintiff's pump logs or with penstocks which were in use.

1012

XXVIII.

That it does not appear that any interference or disturbance of plaintiff's logs shown was unnecessary to the proper repair and maintenance of defendant's streets.

1013

XXIX.

That it does not appear that the taking down of

any of plaintiff's penstocks was unnecessary to the proper repair and maintenance and enjoyment by the public of defendant's streets.

1014

XXX.

That it does not appear that defendant's Street Commissioner at any time during the year 1888 prepared a report to defendant's Board of Trustees showing in any manner that any interference with plaintiff's logs or penstocks would be necessary, or that he presented to said board any estimate of work to be done or of repairs or improvements, which in any manner indicated to said board or in any manner apprised it of any intention on his part to in any manner disturb or interfere with plaintiff's logs or penstocks.

1015

XXXI.

That in the spring of 1888, and for two or three years prior thereto, plaintiff's logs had most of them been laid a long time, that they were old and in places decayed and leaky, and that frequent repairs, including replacing of old logs with new ones were necessary, the necessary repairs taking the greater portion of the time of one man during the summer season with some extra help, and that after plaintiff claims to have purchased the works in May, 1886, no repairs to amount to much were made up to May, 1887, and it does not appear that any repairs were made by plaintiff from that time to July, 1888.

1016

XXXII.

That at least one-half of the supply of water for plaintiff's system was obtained from the Hardin Spring so-called, under a lease thereof which was to continue until about 1895, at the annual rental therefor of \$60 per year, and also the supplying of some six houses on Alexander and Salisbury streets with water during the term without charge.

1017

XXXIII.

That the water furnished by plaintiff's system was hard and the supply furnished to consumers in 1887 and down to July, 1888, was unreliable, particularly in the dry season and in winter.

1018

XXXIV.

That the service afforded consumers was mostly a penstock service, the supply being drawn from penstocks located at different points in defendant's streets.

XXXV.

That the lowest rate or charge for plaintiff's water appearing by the evidence was \$3 per year for penstock service.

1019

XXXVI.

That from before July, 1888, down to January, 1891, plaintiff's water was conducted across the Eastern Park, so called, in logs of the Robinson system, plaintiff having no line of logs across the park which would serve the purpose.

1020

XXXVII.

That before July, 1888, or before any substantial interference with plaintiff's logs or penstocks is shown, plaintiff had lost nearly all of her principal paying consumers of water, and that it appears that out of a total of consumers claimed aggregating about \$1,468, plaintiff had left consumers the total of whose rates did not aggregate to exceed about \$200 per year, and that most of the said principal consumers had discontinued the use of plaintiff's water and supplied themselves with city water.

1021

XXXIX.

That prior to July 1st, 1888, defendant's system

1022 of village water works were substantially completed
furnishing an ample supply of pure and wholesome
water to consumers under a pressure which would
take it to any part of any building, and to the ex-
tent of at least one faucet to each house without any
extra charge therefor.

XL.

That the construction of the village water works
affected the value of plaintiff's water works to the
extent of depriving plaintiff's works of all or nearly
all their value.

XLI.

1023 That about June, 1888, plaintiff's system of pump-
logs and penstocks had become practically worthless.

XLII.

1024 That the fair and reasonable cost of replacing and
restoring plaintiff's logs and penstocks with new
logs and penstocks was not to exceed about 25 cents
per yard for trenching therefor, and 10 cents per
yard for back filling, and about one shilling per foot
for new pumplogs, and pen stocks and about \$2.50
apiece for two hole penstocks and \$5 for three-hole
penstocks.

XLIII.

That there is no evidence showing the deprecia-
tion in the value of plaintiff's plant resulting from
the alleged interference therewith.

XLIV.

1025 That not to exceed about 600 feet of plaintiff's
logs out of a total of some 14,000 to 15,000 feet ap-
pear to have been in any manner disturbed.

XLV.

That down to 1889 or 1890 plaintiff furnished and

received pay for a supply of water to Augustus Golden, and Haight's at the corner of Garden and William streets and to Amos Keller on Main street, near William street.

XLVI

1026

With the exception of the logs on Alexander street, from Main street to Petrie street, Contractor Sullivan replaced, or caused to be replaced, in as good shape and condition as before, all logs disturbed by him.

XLVII.

That Contractor Sullivan in constructing the distributing system of defendant's Village Water Works acted as an independent contractor performing an independent contract and not as the servant or agent of defendant.

1027

XLVIII.

That plaintiff did not present her claim to defendant or defendant's trustees, verified by her affidavit or the affidavit of some other person proving the facts constituting the claim and that no payment had been made thereon.

1028

XLIX.

That plaintiff's pump-logs in defendant's streets were nowhere laid below the surface of the rock which underlies many of defendant's streets and in Alexander street from Main street to Petrie street, said logs lay nearly to or at the surface of the ground, and in Loomis street, west of plaintiff's residence, where it is claimed logs were disturbed, they were near the surface and not over 6 or 8 inches below it.

1029

(See Ev. p 41.)

AS MATTERS OF LAW.

I.

1030 That the act, Chap. XLV, Laws 1806, does not grant to the "Aqueduct Association in the Village of Little Falls," or to persons named in the act, any right to, or interest in public streets or highways of the village of Little Falls, or any right to lay or construct, or maintain therein any water pipes, pump-logs or conduits, or penstocks and it does not grant to said association, or persons any rights to or through or over any lands except upon obtaining the consent of the owners thereof.

II.

1031 That such consents cannot be presumed from mere lapse of time or undisturbed occupation of defendant's streets as against the public or as against defendant.

III.

1032 The plaintiff has not acquired by undisturbed occupation the right to maintain her pump-logs and penstocks in defendant's village streets.

IV.

That plaintiff's pump-logs and penstocks were and are encroachments in defendant's streets.

V.

1033 That defendant's trustees had the power and it was their duty to remove plaintiff's logs and penstocks from defendant's streets as encroachments therein.

VI.

Defendant is not liable for the alleged interference with plaintiff's logs or penstocks of Commissioner

Rankins and those in his employ, because it was not directed or authorized or afterwards ratified by defendant.

VII.

Defendant is not liable for such interference because (except as it was necessary to the repair of defendant's streets) it consisted of unauthorized and unlawful acts of the officer, not within the scope of his authority or of any general authority conferred upon him to act for defendant.

1034

VIII.

The resolution of May 15, 1888, was irregular and passed at a Special Meeting, irregularly held and has no binding force.

1035

IX.

If that resolution shall be held to be valid and binding it at most can only impose upon defendant liability for what was in terms authorized by it, viz: The removal of defendant's penstocks not in use.

1036

X.

That resolution impliedly limits defendant's Street Commissioner to the interference therein directed, viz: The removal of penstocks not in use.

XI.

The resolution of May 15th, 1888, having been offered by plaintiff and received, and no other and further direction by defendant's Trustees being shown, it is presumed that there was no other or further direction and that no further or other resolution touching the matter in controversy was passed by them.

1037

XII.

1038 That President Richmond had no authority or direction over defendant's Street Commissioner or those in his employ, and directions given by him to said Street Commissioner or employes can not bind defendant and defendant is not liable for acts of said Street Commissioner and employes done under the direction of said Village President.

XIII.

1039 Whatever rights plaintiff may have had in the way of maintaining her logs and penstocks in defendant's streets were subordinate to the right and duty resting upon defendant of keeping its streets in proper and suitable condition and repair for the use and accommodation of the public and the making by defendant of such repairs and changes therein as would fit and maintain defendant's streets in such condition.

XIV.

1040 The Referee cannot presume that any interference with defendant's logs and penstocks shown by the evidence was unnecessary. In the absence of evidence showing such interference to have been unnecessary; it will be presumed to have been necessary to the proper repair and maintenance of defendant's streets.

XV.

Defendant had the right to interfere with or remove plaintiff's logs and penstocks wherever and whenever it became necessary so to do in order to properly repair or maintain defendant's streets.

XVI.

1041 Contractor Sullivan, in the construction of the distribution system of defendant's village water works, was an independent contractor performing an independent contract, for whose negligence or wrongful

interference with plaintiff's logs and pump-logs defendant is not liable.

XVII.

That it will not be presumed that any interference on the part of Contractor Sullivan or his employees was made necessary by the plan of the village water works.

1042

XVIII.

That the value of plaintiff's pump-log distribution system at the time it was interfered with, about July or the latter part of June, 1888, is not the measure of damages in this case and is not a proper measure of damages.

XIX.

1043

That plaintiff's damages in this action can not exceed the cost of replacing the logs and penstocks shown to have been disturbed or removed by defendant or under circumstances which make defendant liable therefor, not exceeding, however, the diminution in value of plaintiff's plant or system resulting from such disturbance or removal.

XX.

1044

That plaintiff's pump-log distribution system was not wholly destroyed.

XXI.

That it was plaintiff's duty to replace the logs and penstocks claimed to have been disturbed or removed, if the same could have been replaced at moderate cost and plaintiff's damage thereby largely prevented or greatly reduced.

1045

XXII.

That plaintiff can only recover in this action for

wrongful and unlawful or in other words tortious interference with her logs and penstocks for which defendant is shown to be liable.

1046

EXCEPTIONS TO REPORT OF REFEREE.

SUPREME COURT—HERKIMER COUNTY.

NANCY M. BOYER,

vs.

1047

THE VILLAGE OF LITTLE
FALLS.

The defendant, the Village of Little Falls, hereby excepts to the decision and report of the Referee herein filed in Herkimer County Clerk's office, May 8th, 1895, and to the Findings of Fact and Conclusions of Law therein contained as follows, viz :

I.

1048

To the "Fifth" finding of fact therein contained upon the ground that there is no evidence to sustain such finding.

II.

To that part of the "Fifth" finding of fact as follows: "In that year, (meaning 1851,) he, (meaning William Usher,) purchased all the remainder of the stock and became the sole owner of the water supply system" upon the ground that there is no evidence to sustain such finding.

1049

III.

To the "Sixth" finding of fact upon the ground that there is no evidence to sustain such finding.

IV.

To the finding of the Referee contained in the “Sixth” finding of fact to the effect that the pump-logs and penstocks mentioned in said report, together with all the right and franchises granted by the act of 1806 were appurtenant to the spring mentioned in said finding and the lot upon which it was situate, and were conveyed by several *mense* conveyances to plaintiff, upon the ground that there was no evidence to sustain such finding. 1050

V.

To that part of the “Sixth” finding of fact to the effect that in the summer of 1888, the plaintiff was the sole owner of the said pump-logs and penstocks, together with all the right and franchises granted by said act of 1806 upon the ground that there is no evidence to sustain such finding. 1051

VI.

To the “Seventh” finding of fact upon the ground that there is no evidence to sustain such finding.

VII.

To that part of the “Seventh” finding of fact which reads as follows: “While kept in tact, 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 disturbed, they were exposed to more rapid decay,” upon the ground that there is no evidence to sustain such finding. 1052

VIII.

To the “Eighth” finding of fact upon the ground that there is no evidence to sustain it. 1053

IX.

To that part of the “Eighth” finding of fact which

1054 reads as follows: "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 plaintiff's penstocks and dug up and threw out a number of plaintiff's pump-logs," upon the ground that there is no evidence to sustain such finding, and particularly that there is no evidence that said acts were done under the direction of the President of the village.

X.

1055 To that part of the "Eight" finding of fact in words following: "thus disconnecting her water system and allowing air to enter the remainder of her logs to a considerable extent," upon the ground that there is no evidence to sustain such finding.

XI.

To that part of the "Eighth" finding of fact in words following, viz: "and such action was at least in part either directed to be done or sanctioned by the Board of Trustees of the Village," upon the ground that there is no evidence to sustain the same.

XII.

1056 To that part of the "Eighth" finding of fact in words following, viz: "For a considerable time the plaintiff's business was thus interrupted by the acts aforesaid and her revenue for water rents cut off," upon the ground that there is no evidence to sustain the same.

XIII.

1057 To that part of said finding in words following, viz: "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," upon the ground that there is no

evidence to sustain it and the further ground that the evidence fails to show more than one instance where plaintiff attempted to repair or where repairs were torn out by the Street Commissioner and fails to show that the same was by order of the President of the Village.

1058

XIV.

To that part of said finding in words following: "The interference consisted of breaking through the system and taking out the logs in several places and in cutting down the penstocks and in plugging plaintiff's logs," upon the ground that there is no evidence to sustain it.

XV.

To that part of said finding in words following: "Such acts totally destroyed the penstocks and the logs taken out," upon the ground that there is no evidence to sustain it.

1059

XVI.

To that part of said finding in words following: "And damaged the remainder of the logs to a considerable extent by allowing air etc. to enter them," upon the ground that there is no evidence to sustain it and to all of the balance and following portions of said finding upon the same ground.

1060

XVII.

To that part of said "Eighth" finding in words following: "And taking all her damage together I think fourteen hundred dollars (\$1,400) will not more than fairly indemnify her, and I find she has sustained damages by reason of such acts in the sum of fourteen hundred dollars (\$1,400)," upon the ground that there is no evidence to sustain it and upon the further ground that the same is not sustained by the other facts found by the Referee in said report.

1061

XVIII.

1062 To the first conclusion of law in said report contained and specifically to that portion thereof wherein the Referee finds that the plaintiff was the owner of the water supply system mentioned in said report.

XIX.

To the "Second" Conclusion of Law in said report contained.

XX.

To the "Third" Conclusion of Law in said report contained.

XXI.

1063 Defendant also excepts to the omission and refusal of the Referee to find as requested in Defendant's Requests for Findings of Fact and Conclusions of Law filled with said Referee.

XXII.

Defendant also excepts to the memorandum of opinion or decision of said Referee accompanying said report and filed in said Clerk's office the said 8th day of May, 1895.

1064 Dated this 24th day of May, 1895.

E. J. COFFIN,

Att'y for Defendant.

Office and P. O. Address, Little Falls, N. Y.

 PLAINTIFF'S EX. 1.

1065 "The Little Falls Water Company and Joanna Smith hereby sell and convey to Nancy Boyer, wife of Hiram Boyer, of Little Falls, N. Y., the pumps, logs, and water conduits of the said Water Company, as same are laid through the streets of the said village, including the penstocks and all the ap-

purtenances together with the lease of the Hardin spring, the rent whereof the said Nancy Boyer hereby assumes and agrees to pay, said Boyer to have possession as of the first day of May, 1886, and to collect the rent from that day.

And the said Nancy Boyer, in consideration of the foregoing, hereby purchases said conduits and logs, and agrees to pay therefor the sum of six hundred dollars, (\$600,) assumes payment of the rent of the said Hardin spring and releases the said Water Company and said Smith from the contract now existing in relation to the Boyer spring and assumes the position of the said Smith and Water Company in regard to the public and the supply of water to the village and the public.

Said Boyer agrees to pay said sum of six hundred dollars (\$600) as follows: One hundred and fifty dollars (\$150) on the first day of September next, one hundred and fifty dollars (\$150) on the first day of December next, one hundred and fifty dollars (\$150) on the first day of March, 1887, and one hundred and fifty dollars on the first day of June, 1887. And in case default shall be made in the payment of any of the several sums at the time above provided, and should the same remain unpaid for the space of thirty days then the whole sum agreed to be paid by the terms of this conveyance shall in the option of the said Smith, become immediately due and payable.

Little Falls, N. Y., May 6th, 1886.

Her
NANCY X BOYER,
mark.

Witness, Morgan Boyer.

LITTLE FALLS WATER COMPANY,
By RICHMOND SMITH, President.

JOANNA H. SMITH,
Administratrix.

1066

1067

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1070 Plaintiff's Ex. 2 was a certified copy of letters of administration to Joanna H. Smith upon the goods, chattles and credits of James T. Smith, deceased, issued on the 7th day of February, 1882.

Plaintiff's Ex. 3 was a record of a general assignment for the benefit of creditors in usual form from William Usher to Henry P. Alexander, dated on the 18th day of February, 1861.

1071 Plaintiff's Ex. 4 was a deed from Henry P. Alexander to James T. Smith, duly recorded and dated January 1st, 1863, and the description of property therein contained reads as follows: "All that certain lot of land with the spring thereon, situate in said village on the north side of the Northern avenue or Plank Road and known and distinguished on a map made by J. French for F. Lansing in 1849 as lot No. 10." Book of Deeds 82, page 146. Also deed from James T. Smith and Johanna, his wife, to William H. and George B. Dale, dated February 16th, 1880, and duly recorded and description of property therein contained reads as follows: "All that certain lot of land known as the Spring lot, situate in said village on the north side of Northern avenue or Plank Road and known and distinguished on a map made by J. French for F. Lansing in 1849, as lot No. 10, being about ninety-three feet in width and two hundred feet in depth more or less." Book of Deeds 113, page 444. Recorded March 16, '80.

1073 Plaintiffs exhibit 5 was a deed from William H. and George B. Dale and wives to Nancy M. Boyer, dated Jan. 10th, 1882, and duly recorded and the description thereof reads as follows: "All that tract or parcel of land situate in the village of Little Falls, known as the "Spring lot," situate in said village, on the north side of Northern Avenue on plank road, and known and distinguished on a map made by J. French for F. Lansing, in 1849, as lot No. 10, being about ninety-three feet in width and two hundred

feet in depth, be the same more or less." Book of Deeds 127, page 371. Recorded July 3, 1886.

Plaintiff's exhibit 6 was a deed from Van Voorhees to Boyer dated March 22d, 1864, and recorded, and the description therein contained reads as follows: "All that tract or parcel of land situate in the village of Little Falls, N. Y., known on the map of a part of the village, made by Joseph French, Esq., for John Ward, of the city of New York, in 1849, as lots numbers eleven (11) and twelve (12) on the north side of the Northern avenue, and are bounded together as follows: North by the lands of S. F. Bennett; east by lot thirteen (13) on said Northern avenue, now owned by S. F. Bennett; south in front on Northern avenue, and west by the lot number ten, (10), known as the Spring lot, and are in front and rear, measuring from the west line of lot number thirteen west two hundred and five feet, and in depth two hundred feet, being the same premises conveyed to party of first part by deed from Frederick Lansing and wife, dated April 16th, 1856, and recorded in Herkimer County Clerk's office in Book No. 68 of Deeds, on page 6." Book of Deeds 83, page 121. Recorded April 16th, 1864. Signed "Hannah Van ^{her} x Voarst, L. S." _{mark.}

Plaintiff's Ex. 7, was a map prepared for plaintiff by E. T. E. Lansing, Engineer, and purports to indicate the location through the streets of Little Falls of plaintiff's system of pump-logs with the penstocks and to indicate the location of penstocks—claimed to have been disturbed by defendant.

Plaintiff's Ex. 8 was Chapter 45 of the Laws 1806, for which reference is made to session laws.

Plaintiff's Exhibits 9 and 10 are portions of the record of the proceedings of the Board of Trustees of the Village of Little Falls, showing the election of defendant's President and Trustees and the appointment of Clerk and Street Commissioner in March and April, 1888.

Plaintiff's Ex. 11 appears in the evidence.

1078 Plaintiff's Exhibits 12 and 13 are records showing the formation in 1806 of "Aqueduct Association in the Village of Little Falls," and the proceedings of the Association from that time down to and including a meeting held June 9th, 1851, which is the last meeting of which said books show any record. Said books do not show any transfer from said association to William Usher of the system of water works owned by it, but do show transfers of interest from one person to another.

DEFENDANT'S EXHIBITS.

1079 Defendant's Exhibit 1 was the contract made between the water commissioners of the village of Little Falls and T. Sullivan & Co., for the construction of the distribution system of the Little Falls City water works and the material portions of said contract and specifications are as follows:

LITTLE FALLS WATER WORKS, N. Y., 1886.

1080 CONTRACT AND SPECIFICATIONS for excavating and refilling trenches and laying a system of water distribution complete.

THIS AGREEMENT, executed this day of May, in the year one thousand eight hundred and eighty-six, between the Village of Little Falls, N. Y., of the first part, and T. Sullivan & Co., of Syracuse, in the State of New York, parties of the second part.

1081 WITNESSETH, That the said parties of the second part, in consideration of the payments hereinafter mentioned to be made to them by the said party of the first part, and under the penalty expressed in a bond, bearing even date with these presents, and hereunto annexed, hereby agree at their own proper cost and expense to do all the work, furnish all the material called for by this agreement, and according

to the true intent and meaning of the specifications herein contained.

And do further agree that the Board of Water Commissioners shall be and are hereby authorized to appoint a chief engineer of said Water Works, as they may deem proper to inspect the materials furnished and work to be done under this agreement and to see that the same corresponds strictly with the specifications hereinafter set forth.

1082

To prevent all disputes and litigation, it is further agreed by and between the parties to this contract that the Chief Engineer of said Little Falls Water Works, shall in all cases determine the amount or the quantity of the several classes of work which are to be paid for under this contract, and he shall decide all questions which may arise relative to the execution of this contract on the part of the contractor, and his estimates, directions and decisions shall be final and conclusive.

1083

Section 28 of specifications is as follows, viz:

"In laying the pipes care shall be taken not to move, without the consent of the proper parties, any water pipes or fixtures, and in crossing these they shall be sustained securely in place until the work is completed. The earth shall be filled in afterwards carefully under and around them, so as to render their position as safe and permanent as before. Any damage done to said water pipes or caused by neglect to attend to them to be paid by the contractor. The material from the trenches shall be so deposited as to interfere as little as possible with the public transit, or the convenience of the residents of the street or road."

1084

DEFENDANT'S EXHIBIT 2.

1085

This instrument made this 28th day of August, 1880, between George A. Hardin, of Little Falls, and James T. Smith, of Manheim, of second part, witnesseth.

1086 (1.) Whereas said Hardin bid off lot 15, on north
side of Northern avenue, formerly belonging to T.
Smith, in Manheim, and which lot said Hardin took
title to by sheriff's deed in 1880. Whereas said
Hardin has sold the house and lot to D. C. Fleming
and excepted, reserved and kept back all the springs
and waters on and to come on said lot from springs
and water courses, as fully expressed in the contract
• with said Fleming, except the privilege of using
water for an ordinary family on said lot.

1087 (2.) The said Hardin hereby agrees to and does
hereby lease to James T. Smith said springs and
waters for the term of fifteen years, from the 1st
day of September, 1880, with the privileges of enter-
ing upon said premises to take use and conduct said
water off from said premises, excepting enough for
one ordinary family, upon the Fleming lot for said
Fleming and his grantee for and during said term,
the said Smith to do no unusual or extraordinary
damage.

1088 (3.) And the said Smith agrees to pay and allow
for the use of said water and privileges the sum of
sixty (\$60) dollars per year, payable semi-annually
and to allow and supply with logs and conduits and
pipes water for the use of the two dwellings next
north of the old Catholic church, during said
term, which said two houses are owned by said
Hardin, and also to allow, provide and supply by
means of pipes, conduits and logs, water sufficient
for the use of the four houses at the corner of Salis-
bury and Main streets, lately bought by W. T.
Wheeler and said Hardin of John McCauley, for and
during said term, for the use and accommodation of
said four dwellings.

1089 The said Smith to supply said six houses with
water as aforesaid, during the term of this lease,
free of charge to the owners or tenants of said
houses in addition to the payment of said \$60 per
year.

The water to be used at the houses with reason- •

able care and prudence so as to cause no unusual waste or loss thereof, in a reasonable and prudent manner. Faucets not to be left running unreasonably.

The stipulations aforesaid to bind the respective parties and to be observed and kept by the respective parties hereto.

Witness our hands and seals:

[L. S.]

GEORGE A. HARDIN,
JAS. T. SMITH.

Witness, W. T. WHEELER.

(The above is a copy.)

E. J. C.

Defendant's Exhibit 3 was a book containing the rules and regulations and schedule of water rates for the introduction and management of the water supply of the Little Falls water works, adopted by the commissioners June 26th, 1888, and the material portions thereof are as follows:

PLUMBERS' RETURNS.

7. The plumber shall within twenty-four hours after completing any attachment, connection or alteration, make a true return in writing on a blank furnished for the purpose, of the nature of each and every attachment and the contemplated use of water by such attachments, and when run to a tank shall state all the uses supplied therefrom, together with the permits issued in each particular case, properly endorsed by the said plumber, and file the same in the office of the Water Commissioners. Every return must be full and complete in every particular.

The plumber must promptly make his return of work done, under penalty of having his license revoked.

SCHEDULE A.

Regular water rates will be charged on all classes

1094 of property, including vacant lots and all buildings, whether water is taken or not, situate on line of all streets, alleys, or business places through which water mains are laid or from which supply can be taken, payable annually May 1st, collected in the same manner and with the same penalties attached as provided in the village tax, unless otherwise collected.

Water rates for the term from July 1st, 1888, to May 1st, 1889, are payable as per section 18 of Rules and Regulations.

DWELLING HOUSE PROPERTY.

1095 Each dwelling house occupied by one family, with privilege of one faucet, and for domestic purposes only \$ 5 00
 Each additional family, with privilege of one faucet and for domestic purposes only . . . 3 00

BUSINESS PROPERTY.

Each entitled to one tap only, unless specially rated in schedule B.
 Every store, store house, shop, manufactory, business building or public stable \$ 5 00
 1096 All vacant lots, per lineal foot 02
 Each dwelling over store 4 00
 Hotel buildings and boarding houses 6 00
 Churches exempt.

Defendant's Exhibit 4 was the charter and by-laws of the village of Little Falls. The charter is Chapter 330 of the laws of 1850 with the amendments thereto, to which reference is made.

1097 Defendant also put in evidence a map showing the distribution system in the village of Little Falls of the Little Falls Village Water Works, showing the location thereof in all the portions of the streets of the village through which plaintiff's pump-log system extended.

Defendant's Exhibit 1, for identification, of August 17th :

WHEREAS, William H. Robinson and Catharine J. Robinson, his wife, claim and are the owners of a series of water pipes or pump-logs, so-called, located in the streets of the Village of Little Falls, N. Y., a more particular description of which is as follows: Ann street line, beginning at the Girvan House hotel and running up Ann street 610 feet of 2 inch iron pipe to the corner of Lansing street, thence by pump-logs and iron pipe interspersed to the Whitman spring, so-called, also a line of water pipes and pump-logs leading from the Robinson and Ives spring in Manheim, down through Manheim by pump-logs and iron pipe interspersed, to the Eastern Park, thence by 2 inch iron pipe through and across Eastern Park, thence by pump-logs and iron pipe interspersed to the junction of Garden and Ann streets, and,

WHEREAS, The said Robinsons hereby guarantee and warrant that they are the sole owners of the above described water pipe lines, and hereby guarantee that there are no encumbrances on the same or any contracts or agreements to use the same except as hereinafter stated, nor any written or verbal agreement which would prevent the discontinuance and removal of said pipes and pump-logs at any time after this date:

Now, therefore, we, the said William H. Robinson and Catharine J. Robinson, for and in consideration of 'the sum of one hundred dollars to us in hand paid, the receipt whereof is hereby acknowledged, do hereby sell and convey to the village of Little Falls, New York, the said lines of water pipes or pump-logs hereinbefore stated, together with all the rights we may have acquired by reason of said water pipes or pump-logs lying in the said streets of the village of Little Falls; subject, however, to the use of said water pipe lines for the term of the present contract to supply water to the store of Horace

1102 Babcock and W. H. H. Lintner and the Girvan
House and Girvan House barn until May 31, 1891;
and the said Robinsons are to collect and receive the
rentals of said water and logs accruing up to May
31, 1891, in addition to the above stated one hun-
dred dollars. And the said Robinsons hereby guar-
antee and warrant that these, the above stated are
all the contracts existing requiring water or the use
of said pipes and pump-logs, and that the above
mentioned time, May 31, 1891, is the full term or
limit of said contracts.

1103 In witness whereof we have hereunto
[L. S.] set our hands and seals this 17th day of
January, 1891.

WM. H. ROBINSON.

KATHERINE J. ROBINSON.

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

1104 On this 17th day of January, 1891, before me, the
subscriber, personally came Wm. H. Robinson and
Catharine J. Robinson, his wife, of the Village of
Little Falls, to me known to be the person described
in and who executed the within instrument and each
severally acknowledged that they executed the same
of their own free will.

RICHARD HURLEY.

Notary Public.

1105 Defendant's Exhibit 1 for identification of February
19th, 1895, was the affidavit of William H. Rob-
inson, verified May 8th, 1894, before H. C. Brown,
police justice, and appears at length in the motion
papers presented by defendant in support of defend-
ant's motion of June 5th, 1894, to re-open the case.

It is hereby stipulated that the foregoing case,

&c., is the case on appeal herein as settled and agreed upon by the attorneys for the respective parties.

Dated September 9th, 1895.

J. A. STEELE,
Att'y for Plaintiff and Respondent.

1106

E. J. COFFIN,
Att'y for Defendant and Appellant.

By J. D. BECKWITH,
of Counsel.

By consent of attorneys for both parties hereto, ordered, that the case and exceptions on appeal herein, and amendments proposed thereto, be and the same are hereby settled as appears in the foregoing printed case and exceptions, and the same are ordered filed as the case and exceptions upon appeal herein.

1107

J. B. RAFTER, Referee.

It is hereby stipulated and agreed that the foregoing printed papers are true copies of the case on appeal herein, as settled and filed in the Herkimer County clerk's office, and of all requisite papers upon said appeal, ~~in so far as it is necessary or material to set forth said papers, and~~ of the whole of said case on appeal, and of the said material portions of said papers.

1108

Dated January 11th, 1896.

J. A. STEELE,
Att'y for Plaintiff and Respondent.

1109

E. J. COFFIN,
Att'y for Defendant and Appellant.

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SUPREME COURT.

Appellate Division---Fourth Department.

NANCY M. BOYER,	Resp't,	} Defendant's Brief.
<i>vs.</i>		
THE VILLAGE OF LITTLE FALLS,	Appl't.	

STATEMENT UNDER RULE 41.

The above entitled action was brought by plaintiff against defendant in the Supreme Court of this state, about March, 1890, to recover for the alleged wrongful destruction by defendant in 1887 and 1888 of a pump-log system of water works in the village of Little Falls, which plaintiff claimed to own, for which plaintiff claimed damages of \$25,000. (Complaint, case, folio 925.) Defendant's principal defense was a general denial. (Answer, case, folio 919.) The action was referred to J. B. Rafter, Esq., of Mohawk, N. Y., and was by him heard and determined and a report and decision made by which the referee found that the plaintiff was entitled to recover from defendant damages to the amount of \$1400, with interest from August 1, 1888, the time of the alleged injury and interference. (Case, folio 945.) The action was tried before said referee in

the usual way and the evidence closed. (Case, folio 218.) Prior to a decision by the referee an application was made by defendant to re-open the case for the purpose of giving further evidence and the same was granted by the referee, at least in part. (Case, folio 226-290.) After the case was reopened considerable further and additional evidence was given, and a decision and report rendered by him, (case folio 952.) Subsequent to the decision of the action by said referee, exceptions, etc., to the report were filed and this appeal was taken. Upon the decision by the referee an opinion was written by him (case folios 952-980,) which, in so far as we know, has not been reported.

FACTS.

This action was brought by plaintiff to recover for the alleged destruction of a pump log system of water works which plaintiff claimed to own and which upon the trial she claimed was constructed about 1806 by the "Aqueduct Association in the Village of Little Falls," to all property and rights of which she claimed to have succeeded.

In 1806 an act was passed, Chapter XLV, Laws 1806, providing for the formation of the "Aqueduct Association in the Village of Little Falls." By that act William Alexander and certain other persons therein named with others who might join in the enterprise were constituted a body corporate under the said name, and were among other things empowered "to enter into and upon and freely make use of any land which they shall deem necessary for the purpose of conducting a plentiful supply of pure and wholesome water to and through said village of Little Falls; and to erect any dams or works across or upon any stream or streams of water or any other place or places where they shall judge proper for the raising such stream or streams of water or turning the course thereof or for making use of such streams or places for constructing or working of any necessary engines, and to construct, dig or cause to be

dug any canal or trenches whatever for the conducting such springs, streams or other quantity of water from any source or sources that they may see fit; and to raise and construct such dikes, mounds and reservoirs as they may judge proper for securing and conveying such supply of water as aforesaid to and through the said village; and to survey and lay out all such streams as they may think proper, in order to ascertain the best mode of furnishing such supply; and to lay and conduct any number of pipes, conduits or aqueducts through or over any of the said lands as they may see fit to and towards the said village, and in any and every part of the said village; *Provided*, the said company *obtain the consent* of the owners of said land, from which the water is to be taken and through and over which said canals, pipes or aqueducts may pass."

Upon the trial books and records were produced showing the proceedings had by said Association, from about 1806 down to a meeting held June 9th, 1851, when the record stops. We have no evidence of anything done by or of any corporate act of said Association thereafter, and it was not claimed or pretended that anything was done thereafter.

No consent from any owner of lands was shown to have been at any time obtained by said Association.

Plaintiff claims that she succeeded to said pump-log system and to the rights of said Aqueduct Association as follows viz:

That about 1851, one William Usher, who had been interested in said Association became the owner of the springs, logs and conduits, by buying up all of the scrip or shares thereof. (Ev. William Usher, pp. 24 and 27.) That said springs, logs and conduits passed to Henry P. Alexander, General Assignee of said Usher by his general assignment made in 1860 or 1861. (Case folios 90 and 1070.) That Henry P. Alexander conveyed the same to James T.

Smith by deed dated January 1st, 1863, (Ex. 4, case folios 8 and 1070 in which, however, the logs and conduits are in no manner mentioned.) That said premises known as the "Dale Lot" were afterwards deeded to William H. and George B. Dale and by them to plaintiff, (Case folios 8 and 1071 and 1074.)

That at about the time plaintiff became the owner of the VanVoorhees lot, so called, situate east of the said "Dale Lot," and while the latter was still owned by Smith and before plaintiff acquired it, plaintiff, by quarrying on the VanVoorhees lot, struck the vein of water supplying the spring on the Dale lot and cut off the supply therefrom and formed a new spring on the VanVoorhees lot, (Case folio 19, 1074, 12 and 13.) An agreement was then (about 1879) made between plaintiff and James T. Smith, who still owned the Dale Lot on which the spring had just dried up, by which the logs were connected with the new spring that had started as before stated on the VanVoorhees lot and each was to receive one-half of the water rents (folios 13-50.) In May 1886 plaintiff purchased of the personal representatives of James T. Smith, then deceased, and the Little Falls Water Company, the "pumps, logs and water conduits of the said company," (folios 7 and 1065-1068,) though what the Little Falls Water Company was or when or how it was organized or what "pump-logs or water conduits" it owned or had an interest in, in no manner appears in the case, and it was not shown to have in any manner succeeded to the body corporate created by the act of 1806 and known as the "Aqueduct Association in the Village of Little Falls."

Said contract (Exhibit 1) does not purport to convey any "pump-logs or water conduits" owned by James T. Smith, deceased, or his estate, or any rights, privileges or franchises.

A lease for a term of years had also been made of the "Hardin spring," so called, for which part of the supply of said pump-log system was obtained,

which plaintiff by said contract assumed at an annual rental of \$60, besides undertaking to furnish water to certain houses free of charge. (Contract, folios 1065-1068, lease 1085-1090.)

This primitive system of water works, known as the Smith or Boyer system, extended through a number of streets in the village and supplied water to certain inhabitants thereof by means of penstocks erected at divers places along the streets and a few by means of iron pipes run into the house, and in the summer of 1888 plaintiff claims that the street commissioner of defendant and men in his employ, acting part of the time under the direction of the then village president, Mr. Richmond, and of trustee Timmerman, disturbed or took up some of the pump-logs and took down some of the penstocks and that others of the pump-logs were disturbed or taken up by T. Sullivan, a contractor employed at the time in putting in the village water works and those in his employ, and that by means of such interference plaintiff was damaged—

1st. By the direct injury to her works ;

2d. By interruption of her water supply to consumers and consequent loss of revenue, and

3d. By the more rapid decay of the whole system of logs, resulting from air being allowed to enter the system at places where the logs were taken up.

(See Ev. Hiram Boyer, direct ex. folio 23, cross ex. folio 126; Michael Connelly, folio 61; Richard Duke, folio 53; Henry Soule, folio 49; Hiram Boyer, 215, and report of referee, 8th finding of fact, p. 233.)

It does not appear that any consumers discontinued the use of water from plaintiff's system or ceased to pay therefor either temporarily or permanently by reason of any interference on the part of defendant, defendant's street commissioner or employes, or those engaged in putting in defendant's system of water works, and no evidence was given

to show that plaintiff had sustained damage by the more rapid decay of her logs from air having entered them except the evidence of Hiram Boyer (Case, folios 215-217) to which the attention of the Court is called.

May 15th, 1888, a resolution was passed by defendant's Board of Trustees as follows :

“Resolved, That the clerk serve notice upon Hiram Boyer and W. H. Robinson to remove from the streets penstocks belonging to them which are not in use, within ten days, and if not so removed that they be removed by the street commissioner,” (folios 80-82.) No other action or resolution upon the subject by said board of trustees was shown and no evidence was given showing which or how many of plaintiff's penstocks were not in use.

The referee finds the first interference with the said pump-log system to have been in the early summer of 1888. (Folio 940-942.)

Plaintiff gave a long list of persons who it was claimed were taking water from her works in 1887, or at the time the water was cut off, (Ev. H. Boyer, folio 34,) with the amounts paid by them, aggregating about \$1,468, (Case, folios 36-48,) and of these it was made to appear either by the cross-examination of plaintiff's witness, Hiram Boyer, who testified upon the subject, (folios 162-189) or by the testimony of the persons themselves who were called as witnesses for the defendant after the re-opening of the case that at least \$1,200 of said claimed income from consumers had been lost to plaintiff prior to the “early summer of 1888” by reason of their never having used or paid for the Boyer water, or of their having discontinued the use of it from a few months to several years prior to that time, most of them supplying themselves with water from the village water works.

Plaintiff's evidence shows that out of a total length of line of some 15735 feet of pump logs, (folio

109), at most not to exceed 600 to 800 feet, about 5 per cent. of the length of the system, were in any manner disturbed, and some 10 to 15 penstocks; (Ev. Hiram Boyer, folios 23-26 and cross-ex. 126-138), and the referee finds that "the plaintiff's spring or source of 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." (folio 942.)

The referee does not find as to the number of penstocks taken down or as to the number or total lengths of pump-logs disturbed.

Plaintiff gave evidence to the effect that it was worth \$6.00 to \$8.00 a rod to trench for and re-lay the pump-logs, and that plaintiff's pump-log system of water works was worth \$20,000. (Ev. Hiram Boyer, folios 203-206.)

Defendant gave the evidence of two practical, competent and reliable engineers, one of them, Mr. Lansing, plaintiff's witness in the case, and both of whom had had large experience working in and upon, and were thoroughly familiar with the streets of Little Falls, that such work was worth twenty-five cents per cubic yard for trenching and ten cents for back filling, and Mr. Lansing gave the result of some computations showing that such work for a trench twenty-two inches deep and one and one-half feet in width at the bottom would cost four cents per lineal foot or sixty-six cents per rod, and a ditch three feet in depth would cost 7 cents per lineal foot or \$1.15 per rod, (Ev. Lansing, folio 758-760, and of Babcock, 605.) As before suggested, not to exceed 600 to 800 feet of plaintiff's pump-logs had been disturbed, and at her figures \$8.00 per rod, it was worth \$400 to re-lay them, while about fifteen penstocks, claimed to have been taken down, could have been replaced according to her estimate of \$10.00 apiece, for \$150, or in all, \$550, while at

defendant's figures all this could have been done for \$56 for re-laying pump-logs, and about \$40 for pen-stocks.

Other evidence as to the value of said pump-log system was that of the witness Robinson, to which attention will be called later, and also of several witnesses called by defendant, who testified that the system was worthless, to which attention will also be called.

Plaintiff paid in May, 1886, for the logs, conduits and her entire system, \$600, (folios 104 and 1067,) and had made no repairs to amount to anything, (folios 205 and 206,) though such systems require repairs every year and as they get older the repairs increase. (Ev. Robinson, folio 880 and 881.)

Underlying nearly all of defendant's streets, and in most places not lower than from six inches to two or three feet from the surface is a mass of rock and the pump-logs in question were laid above the rock, and in many places so near the surface that they were partly or wholly above the surface of the street and exposed. The logs in many places were decayed and leaky and had been laid a long time, no considerable portion of the system having been re-laid with new logs, and new logs having only been put in here and there to re-place a log which it was necessary to take out. The pressure was not sufficient to raise the water to the second floor of any building. The supply of water was very unreliable and the water at times roily. All of these conditions had continued for several years prior to 1887. (Ev. of Michael Connelly, folio 63 and 65, S. E. Babcock, 599, Timmerman, 353-363, King, 415-420, Shall, 321 and 328, Benedict, 464, Cronkhite, 550-552, Loucks, 541 and 542, Failing, 305, Churchill, 343, Conyne, 526, Ingalls, 478, Keyser, 457, Oscar Taylor, 537, and others of defendant's witnesses.)

The work of putting in defendant's system of village water works was going on during the year 1887

and practically completed July 1st, 1888, and water was furnished from the system to people residing along the line as fast as it was extended through the different streets, many of the witnesses being supplied with water as early as May, 1887, (Ev. Babcock, 317.) No charge was made for village water until July 1st, 1888, and from that time to the extent of one faucet could be used by every family without extra charge as the defendant's board of water commissioners imposed an arbitrary charge or rate of one faucet tax whether the water was used or not, (Defendant's Ex. 3, Schedule A thereof, fol. 1093.)

Of plaintiff's alleged water consumers set forth in the list thereof as given (Ev. Hiram Boyer, case folios 34-48,) and aggregating \$1,468. it appears from the cross-examination of said witness, (case folios 162-189,) or by the testimony of the persons named when called as witnesses by defendant, that the following had never used the Boyer water nor paid for it or had discontinued its use prior to June or July, 1888, the time fixed by the referee as the commencement of the interference with plaintiff's pump-log system, (referee's report, folio 940,) viz:

Metropolitan hotel, \$200 (Ev. Mullen, folios 848-851, and Robinson 577-579); the Grand Central hotel, \$100 (Ev. Jackson 427); Beattie house, \$60 (Ev. McWinnie, 516); Hinchman house, \$90 (Ev. Shall, 323); J. W. Ingalls, \$35 (Ev. 477); W. H. Dorr, \$10 (Ev. Ada M. Dorr, 735); George Failing, \$10 (Ev. 306); J. E. Groff, \$10 (Ev. Mrs. Groff, 820); Skinner & Co., \$10 (Ev. H. A. Skinner, 483-485); William Beattie, \$25, (Ev., 472); Bramer estate, \$15 (Ev. R. H. Smith, 389-391); E. J. Nelson, \$12 (Ev., 748); Charles Benedict, \$30 (Ev. 462-464); Newell, Loomis & Ives, \$30 (Ev. W. B. Newell, 497-502, and Selim Newell, 509-512); D. Collins, \$12 (Ev. 790-792); William Fox, \$15 (Ev. Upright, 715 and 716, and Boyer 297); James Churchill, \$50, (at folio 43,) and James Churchill, \$50, at folio 47 (Ev., 342-345, and of Hiram

Boyer, 296); Mr. Loban, \$35 (Ev. Girvan, 722, and Mrs. Loban, 704); H. Burch, \$18 (Ev. J. L. Aldridge, 486-490, and J. S. Aldridge 494-497); Terry Smith, \$50, (Ev. Sheridan, 339); Mrs. Beniens, \$12 (Ev. Henry Beniens, 517-520); J. S. Barnet, \$60 (Ev., 513); George Shall, \$10 (Ev., 323); Little Falls Academy, \$12 (Ev. A. H. Greene, 838); S. B. Merriam, \$10 (Ev. Boyer, folio 181); H. Brigham, \$10 (Ev. Boyer, folio 176); and the following in smaller amounts, as to whom we will not burden the Court with a reference to the evidence, viz.

D. C. Bangs \$3, D. H. Burrell \$5, J. H. Bucklin \$5, L. Bellinger \$3, Benton estate \$4, W. H. Cronkhite \$5, Mrs. J. C. Clark \$4, P. A. Conyne \$8, Mrs. Clark \$6, B. Doxtater \$4, A. Doxtater \$4, C. Fleming \$4, G. C. Fleming \$3, W. D. Garlock \$4, J. Gililand \$6, Mrs. Gregory \$5, Howell & Taylor \$3, A. Haight, John street \$5, W. D. Ingham \$7, C. Judd \$4, Philip Jones \$4, L. R. Klock \$3, Mrs. Klock \$3, Patrick Kehoe \$4, John Koehler \$4, William Kingston \$6, James Kearney \$6, A. King \$4, O. Loucks \$4, A. Loomis estate \$3, Leary & Co. \$6, P. H. McEvoy \$3, J. H. McChesney \$4, S. Newell \$3, M. Penoyer \$5, M. Reddy \$4, S. M. Richmond \$4, H. Sharp \$7, John Selcer, Second street, \$3, John Selcer, Main street, \$3, Irving Snell \$3, Dr. Isham \$8, L. Timmerman \$5, H. Whittemore \$4, J. M. Walrath \$4, W. H. Williams \$4, Mrs. Ward \$5, E. Wiley \$3; amounting in the aggregate to about \$1200; while others of plaintiff's alleged consumers are shown to have continued the use of water from her system and to have paid for it for from one to three years after the alleged interference (Ev. Golden, 718, 719; Sarah Haight and Anna Haight, 724-729; Amos Keller, 732.)

Assuming therefore that all those named, whom we did not show to have discontinued the use of the Boyer water prior to June or July, 1888, were continuing it and would have continued it, we find that the income from the works had, prior to the injury and interference alleged, been reduced by loss of

consumers to considerably less than \$300 per year. If the evidence of Hiram Boyer is true plaintiff bought the system of pump-logs, conduits, etc., in 1886, when it had all the consumers named by him, for \$600, and yet was allowed by the referee for a partial destruction of it in 1888, when it had lost more than four-fifths of its paying consumers, \$1,400, which would seem upon the face of it to be at least a most prodigal award.

But little evidence was given as to the situation at any place where it was claimed plaintiff's pump-logs were interfered with, and whatever is made to appear in that regard is to the effect that plaintiff's pump-logs were so situated that their removal was necessary by defendant's street commissioner and those in his employ in the proper and necessary repair and maintenance of defendant's streets. (Ev. Michael Connelly, folio 63-66; Henry Soule, 49-53.) No evidence was given whatever to show that any such interference was *unnecessary*.

As to the interference claimed on the part of Sullivan and those in his employ while putting in the village water works, the evidence shows that Sullivan was an independent contractor (Defendant's Exhibit 1, folio 1080-1084) and the plan and location of defendant's water works were not shown to have been such as to make interference with plaintiff's pump logs necessary except in places where her pump-logs ran diagonally across defendant's streets. (See plaintiff's map, Ex. 7, and defendant's map referred to at 1097.) As to plaintiff's pump logs, which were claimed to have been taken out in Alexander street from Main street to Petrie street, the evidence shows that the line of the village main was located six to eight feet from the Boyer line and that the trench was from four and one-half to five feet wide at the top (Ev. Babcock, folio 597.) This would leave the nearest edge of the city trench from three to five feet distant from the Boyer pump-logs

and make interference with them wholly unnecessary.

Of plaintiff's penstocks claimed to have been taken down, it appears that some of them were not in use though not how many, and some of them had been standing so long that they were rotten and decayed to that extent that two men were able to push them over, (Ev. Soule and Duke, folios 49-61.)

The pump-logs were worth one shilling per foot, (Ev. Pross, folio 751,) and the penstocks were worth for the log from which they were made \$1.00, (Ev. Casler, folio 770,) and to bore them, \$1.50, (Ev. Pross, folio 753.) The lowest rate charged for the use of water from plaintiff's system was \$3.00 per year, which was for the privilege of going into the streets and drawing the water from the penstocks.

Upon the trial one principal contention of defendant was to the effect that plaintiff's pump-log system of water works was rendered practically worthless by the superior service afforded by the village system completed about July 1st, 1888, and by the necessary loss of the consumers of water from her system, who had discontinued and were discontinuing the same and replacing it with water from the village system. The force of this contention was admitted by plaintiff's principal witness and manager, Hiram Boyer, who stated to Mr. Timmerman when Mr. Timmerman advised the replacing of the pump-logs by iron pipe, that he, Boyer, "thought it would not pay him, that the village was talking of putting in water and there would not be enough to pay him," (Ev. folio 598,) and to the Hon. Geo. A. Hardin at the time of the village water works election that it would destroy his spring, (Ev. folio 564.)

Upon the trial defendant proved by six competent and reliable witnesses, all of whom were particularly qualified to speak upon the subject, that in June or July, 1888, when defendant's system of water works

was practically completed, that plaintiff's pump-log system had lost whatever of value it had formerly possessed and had become practically worthless, and this by the evidence of Engineer Lansing, who was originally called as plaintiff's witness, (folios 757-765,) S. E. Babcock, (607-616.), J. W. Fitzgerald, (773-780,) W. T. Loomis, (793-804,) C. J. Palmer, (823-827,) D. H. Burrell, (854-863.)

Evidence of the witness Robinson as to the value is found at folio 212, where, in reply to the question by defendant's attorney, he stated that plaintiff's pump-log system was worth \$8,000, and cheap at that; at folio 414, where he stated that in giving his former estimate of value he did not take into consideration the effect of the construction of the village system and of its effect upon the value of the Boyer system; and again at folio 873-888, where he was recalled for further cross-examination by plaintiff and stated that taking into consideration the city works and the effect upon the Boyer system, the Boyer system was worth in 1887 or 1888, \$5,000, and this estimate is accepted by the referee as the fair value of the plant (opinion, folio 976.)

At the close of the case as originally tried a motion to strike out certain evidence and for a non-suit was made by defendant's attorney (Case, folios 218-225) and at the close of all the evidence that motion was renewed (Case, folios 898-905) and a further motion to strike out certain evidence and for a non-suit, made upon grounds stated therein (Case, folios 906-918) all of which were denied with exceptions to defendant, and the case was then argued and written briefs and requests for findings were filed with the referee within fifteen days (folio 918.) The referee omitted to pass upon any of defendant's requests for findings (Case, folios 983-1045) but rendered his report containing certain findings of fact and law (folios 930-946) and accompanied the same with an opinion (Case, folios 952-959) and exceptions were filed by defendant to the findings of the referee

and to his omissions and refusals to find as requested in defendant's requests (Case, folios 1047-1064.

LAW.

I.

either The referee finds defendant liable for all of the alleged injury to said pump-log system occasioned, ~~whether~~ by defendant's Street Commissioner and those in his employ, or by Contractor Sullivan and those in his employ, and this we insist was reversible error.

(a) In order to hold defendant liable for any injury to said pump-log system caused by defendant's Street Commissioner, it must appear that said Street Commissioner was expressly authorized to do the acts by the village government; or that they were done *bona fide* in pursuance of a general authority to act for the village on the subject to which they relate. Such is the rule as stated by Chief Justice Shaw in *Thayer vs. The City of Boston*, (19 Pick. R. 516.) and quoted with approval in *Lee vs. The Village of Sandy Hill*, 40 N. Y. 442-449, and again in *Smith vs. The City of Rochester*, 76 N. Y. 506-512, and in

Buffalo & Hamburg Turnpike Company vs. The City of Buffalo, 68 N. Y., 639.

In the latter case it is further held that "a municipal corporation can act in the first instance only by its Common Council, Board of Trustees or other governing body; the acts of this body are the acts of the corporation and for them it is liable."

The acts alleged and attempted to be proved on the part of defendant's Street Commissioner by which he took up and tore down or caused to be taken up and torn down logs and penstocks of said system, were not authorized by the village government, and it does not appear that they were done

bona fide in pursuance of a general authority to act for the village.

The powers and duties of defendant's Street Commissioner were fixed by defendant's Charter and were as follows: (See defendant's Charter, Laws 1850, Chapter 330, Section 49, as amended by Laws 1855, Chapter 79,) "The Street Commissioner has the care and supervision of the streets and highways within the village, to keep them in good repair and condition and clear of obstructions, subject, however, to the control and direction of the Trustees. It is his duty as early as practicable after his appointment in each year, to inspect all the streets and highways in the village and to prepare and report to the Trustees upon their condition, showing what improvements and repairs are necessary, with an estimate of the aggregate expenses. He shall also at stated times, at least as often as once a month, present an estimate of the work necessary to be done for the next ensuing month, or other shorter periods to be fixed by the Trustees, specifying the street, location and kind of repair or improvement, and the expense thereof, in writing. If the Trustees approve the proposed repair or improvement, they shall cause the necessary funds arising from the highway assessment, to be placed at his disposal for that purpose, and they may direct any repair or improvement or may disapprove or change any repair or improvement proposed by the Street Commissioner, in manner and structure or materials, and may limit the expense thereof, or may, if they so deem best, cause any of such work to be done by contract by the lowest bidder who will give good security. The Street Commissioner shall with each estimate, report a true statement, verified by his oath and by satisfactory vouchers, showing the expenditure for the last month, or stated period, and the same shall be laid before the board before any new appropriation for the next month or stated period shall be made."

The defendant's Trustees by section 29, subdivision 18 of said Charter were among other things "to exercise the powers and duties of commissioners of highways of towns within the limits of the village."

The Street Commissioner is by the terms of said act made subject to the control and direction of the Trustees, and the said act limits him in the discharge of his duties to those repairs and improvements which shall have been approved and sanctioned by the Trustees, and that is the limit to the authority of the Commissioner to act for the village.

Plaintiff offered in evidence the resolution of May 15th, 1888 (Case, folios 80-82) as follows, viz: "Resolved, that the Clerk serve notice on Hiram Boyer and W. H. Robinson to remove from the streets penstocks belonging to them which are not in use, within ten days, and if not so removed, that they be removed by the Street Commissioner."

No report from the Street Commissioner to the Trustees upon the subject of this pump-log system of water works, of the logs or penstocks or proposing in any way to repair, improve or remove them was shown to have been made at any time, and no other resolution or action on the part of defendant's Trustees touching or in any manner relating to said pump-logs and penstocks was shown or offered, and plaintiff having offered the resolution of May 15th, 1888, and other portions of the records of proceedings of defendant's Board of Trustees, the presumption is that she gave in evidence all there was bearing in any manner upon the subject, or at least all in her favor.

Smith vs. Standard Laundry Co., 11 Daley, 154.

The resolution of May 15th, 1888, points out, defines and limits the action of the Street Commissioner to the removal of penstocks not in use, and any other action upon his part resulting in injury to said pump-logs and penstocks, and any other removal of

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SUPREME COURT.

APPELLATE DIVISION.

FOURTH DEPARTMENT.

NANCY M. BOYER,
RESPONDENT,

vs.

THE VILLAGE OF LITTLE
FALLS,

APPELLANT.

RESPONDENT'S BRIEF.

STATEMENT OF FACTS.

In 1805, certain residents of Little Falls organized a company or association for the purpose of supplying

themselves with water from springs located near the then settled parts of the village; and in 1806, the Legislature passed an act granting a charter to William Alexander, and five other residents, and to such other persons as should become interested in such association, for supplying the residents of Little Falls with water by means of conduits or aqueducts, and authorizing and empowering such persons to take the necessary lands and lay pipes and conduits through and across such lands, and conduct the water from springs and other sources through and by means of pump logs, pipes and conduits, to and through the said village and into every part thereof.

Chap. 45, Laws of 1806.

(This act was put in evidence but is not printed with the case, reference being made to the session laws of 1806, folio 1076, printed case.)

Under the rights and franchises granted by this act the plaintiff's system of water works was constructed and maintained from 1806, (long before the village was incorporated,) down to the time when the plaintiffs' pump logs were torn up and pen stocks cut down.

The book of records or minutes, showing the formation of the association in 1805, and the organization in 1806, under this act of the legislature, and the minutes of the meetings showing the names of the persons who subsequently became interested in, and



the same by him was not only unauthorized, but a clear over-stepping on his part of the limits which his superiors, the defendant's Board of Trustees, had fixed, was in clear violation of their direction and clearly unauthorized, and defendant was not liable therefor.

Plaintiff alleged a wrongful and unlawful interference with her logs, conduits and penstocks.

Under the complaint, therefore, she can only recover for the acts of defendant's Street Commissioner complained of, upon the assumption that those acts were wrongful and unlawful, or in other words in the nature of a trespass on his part, and certainly acts on the part of the Commissioner in the nature of a trespass, were not in pursuance of any general authority on his part to act for the village and were not authorized by the said government, except in so far as they may be held to have been authorized by the said resolution of May 15th, 1888, directing the removal of penstocks not in use.

Code of Civil Procedure, Sec. 1207.

Stevens vs. The Mayor, 84 N. Y., 296.

Kirkland vs. Kille, 99 N. Y., 390-394.

Where a city officer, while improving a street, committed a trespass upon private property, by taking earth therefrom without authority so to do: Held that he alone was liable and not the city.

Rowland vs. Gallatin, 75 Mo., 134.

If a city officer while removing obstructions from a street, enters upon private property under a mistaken belief that the land is a public way, the city is not liable for the trespass.

Manners vs. Haverhill, 135 Mass. 165.

Where the officers and agents of a city, corporation assumed to build a bridge under the authority of a statute not constitutionally passed for

want of a two-thirds vote and the bridge fell in consequence of the negligent construction thereof: Held that the corporation was not liable to an action at the will of a person injured by the accident.

Mayor, &c., of Albany vs. Cunliff, 2 N. Y., 165.

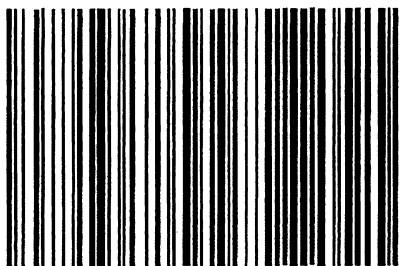
The referee finds that "the Street Commissioner of the village and men in his employ under the direction of the president of the village, cut down a number of plaintiff's penstocks and dug up and threw out a number of plaintiff's pump-logs, (Referee's Report, 8th Finding of Fact, folios 940-942.)

The defendant insists, however, that no direction on the part of the President of the village to the Street Commissioner could in any manner make defendant liable for the injury to plaintiff's works complained of.

Under the Charter of the Village of Little Falls, Laws 1850, Chapter 330, Sec. 24, the President of the village was declared to be the chief executive officer and was to preside at meetings of the Trustees and to have a casting vote in case of a tie; it was his duty to see that the provisions of the Charter and the village by-laws and ordinances were faithfully executed; he was given a certain veto power and he was to execute all leases, contracts and other papers in behalf of the village. Such was the extent of the power of the President of the village and he was nowhere given any power or authority to in any manner direct the Street Commissioner in the performance of his duty, and he was nowhere given any power or authority over defendant's streets or clothed with any power or authority similar to that of a Street Commissioner.

We insist, therefore, that neither in reason nor precedent can there be found authority for the proposition that any direction on the part of the President of the village to the defendant's Street Commissioner as to taking up of plaintiff's logs or the





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cutting down of her penstocks can in any manner impose liability therefor upon the defendant. ✕

The defendant is not liable for the injuries alleged to have resulted from the acts of defendant's Street Commissioner and the finding to that effect of the referee was error for which the judgment appealed from must be reversed.

(b) Defendant is not liable for any injury to plaintiff's logs, conduits and penstocks caused by Contractor Sullivan and those in his employ while putting in defendant's system of municipal water works. Contractor Sullivan undertook the work of construction of the distribution system of defendant's village water works under an independent contract, and as an independent contractor, and defendant is not liable for his negligent or wrongful acts while prosecuting that work, (Defendant's Ex. 1, Case folios 1079-1084.)

The true test is to ascertain the relation between the party charged and the party actually doing the injury. Unless the relation of master and servant exists between them the act of one creates no liability in the other.

Blake vs. Ferris; 5 N. Y., 48.

Wylie vs. Palmer; 137 N. Y., 248.

Peck vs. The City of New York; 8 N. Y., 222.

Harington vs. Lansingburg; 110 N. Y., 145.

II.

Plaintiff had no right and no franchise to maintain the pump-log system of water works alleged to belong to her or any other system of pipes, logs or conduits in the public streets or grounds of the village of Little Falls, or, at any rate, no such right or franchise which was superior to the right of the public and of the village of Little Falls to the beneficial use and enjoyment of the public streets and grounds of

the village and to the duty resting on the said village of properly maintaining and keeping in repair said streets and public grounds.

It does not appear that the body corporate claimed to have been created by act of 1806 under the name of the "Aqueduct Association in the Village of Little Falls" ever obtained the consents of the owners of any land through which water was to be taken and through and over which the owner's pipes or aqueducts were to pass, or of the Village of Little Falls (see Chapter XLV, Laws 1806, *supra*); and such body corporate by a failure to exercise any corporate functions since 1851, about 37 years prior to the alleged injury, and by the deaths of the principal corporators, forfeited whatever corporate rights, franchise or privileges it ever had or possessed.

Waterman on Corporations; 4 ed. § 422, p. 857.

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 or anybody else.

The evidence of William A. Usher, the only evidence upon the subject, falls far short of showing any such transfer. It is true that Mr. Usher says that at or about 1851, his father became the owner of the springs, logs and conduits, but his ~~other necessary~~ statement when he comes to give what knowledge he has upon the subject, is simply this, viz.: "I understand he bought up the whole of the outstanding scrip or shares besides what he owned," (Ev. folio 87) and his further evidence, his attention having been called to some book, "From the entries in this book I should think he became the owner of the works in 1852, using the books to refresh my recollection, but I can't remember the fact, and he continued to own it until he made the assignment. (Ev. folios 98 and 99.) There is no other evidence in the case showing or tending to show that Mr. Usher became the owner of said works, and the fore-

going evidence of William A. Usher shows clearly that he was simply giving expression to his opinion upon the subject and the evidence is not competent or sufficient to show the fact of the transfer claimed and found by the Referee in his 6th finding of fact. (Report of Referee, folio 936.)

The statement that the witness' father became the owner of the springs, etc., is either opinion of the witness or a statement of a conclusion of law or a resultant fact, and the witness having given in detail all the facts within his knowledge upon which the same was based the court must be governed by such statement of facts in detail and determine from them whether title passed and witness' father was shown to be the owner.

Clark vs. Bowe; 60 How. pr. 98.

Lange vs. Benedict, 73 N. Y., 12.

There being, as we have seen, no competent and sufficient evidence that said works or said franchises (if there were any) ever passed to said Usher; there is no evidence that the same passed by his general assignment to his assignee, Henry P. Alexander; and there is no evidence in the case whatever that any such works or franchises ever passed from Henry P. Alexander to James T. Smith, or from Smith through subsequent *mense* conveyances to plaintiff, because said conveyances do not assume to convey anything except the mere lot or lots in the eastern part of the village of Little Falls, known locally as "Manheim."

The descriptive portions of said conveyances are set forth in the printed case (folios 1071-1076) and nowhere is any mention made of any line of pump-logs and penstocks or water pipes or conduits of any sort or description.

Plaintiff claims to have purchased the pump-log system from the estate of James T. Smith, deceased, by the contract, Plaintiff's Ex. 1. (Case, folios 6, 1065-1068, 124.)

This contract, however, does not even purport to convey any interest whatever of the said James T. Smith, deceased, in and to any pumps, logs or water conduits whatever, or any system of water works, but simply conveys the pumps, logs, etc., of "The Little Falls Water Company."

There is no evidence to show what pumps, logs and water conduits or water works the said "Little Falls Water Company" owned or had an interest in, and no evidence showing that such company had any interest in the pump-log system claimed to have been owned by the said "Aqueduct Association," and to have passed through Usher, Alexander and others to James T. Smith, deceased, and to plaintiff.

Plaintiff has failed to show any title by grant or purchase to the pump-log system in question, or to any rights or franchises or privileges of the said "Aqueduct Association," or of any other person or body corporate. The only right or title shown by plaintiff in or to said pump log system, and to maintain the same were the right and title, or in other words the mere license which she acquired by reason of her connection with said works from about 1879 or 1880 when the source of supply was transferred from the spring on the "Dale lot" which had substantially dried up, to the spring on the Van Voorhes lot; where the vein of water had been struck in quarrying, (Ev. folios 12-16, also folio 19, where it appears that plaintiff became the owner of the Van Voorhes lot not earlier than July 14th, 1880.)

We insist therefore, that as suggested at the beginning of this subdivision, that whatever license or right or franchise plaintiff had in and to said pump-log system of water works and to maintain the same in the public streets and grounds of the village of Little Falls, was clearly subject and subordinate to the right of the public and of the village of Little Falls to the beneficial use and enjoyment of the public streets and grounds of the village, and to the duty resting upon said village of properly maintain

ing and keeping in repair said streets and public grounds, and further that as against the plaintiff, the public and the village of Little Falls had the prior and superior right to the use of said streets for any lawful and proper public purpose such as constructing therein a system of municipal water works or street railroads or any other public enterprise proper to be established in said streets, and that said pump-log system must yield and give way to any such public enterprise undertaken by said public or by said village.

Dillon on Municipal Corporations, 4th Ed , Sec. 669
and cases cited, and Sec. 688 and cases cited.

Burbank vs. Fay, 65 N. Y., 57.

Driggs vs. Phillips, 103 N. Y., 77.

Kellogg vs. Thompson, 66 N. Y., 88.

Anderson vs. Young, 66 Hun. 240.

The finding of the referee therefore contained in his 6th finding of fact (Case, folio 936) was error.

III.

The plaintiff's right to maintain said pump-log system in the streets and public grounds in the village of Little Falls must in any event have been subject and subordinate to the right of the public and of the village of Little Falls to the beneficial use and enjoyment of said public streets and public grounds and to the right and duty resting upon the public and upon said village of properly maintaining and repairing said streets and grounds and this, we insist is so, even though, as claimed by plaintiff, she succeeded to the ownership of said pump log system and of all the rights and franchises ever granted to or in any manner acquired or exercised by the said "Aqueduct Association," because the Legislature by the act of 1806 does not assume or undertake to grant or in any manner curtail any of the rights of the public or of the village of Little Falls, in or to

said public streets or public grounds, and it does not appear that any other person, association, or body corporate ever assumed or undertook to in any manner grant to said "Aqueduct Association," or to plaintiff or to any body else any such rights, or to curtail the same, nor could they legally or constitutionally have done so.

The evidence in the case fails to show that any interference with plaintiff's alleged pump-log system on the part of defendant's Street Commissioner and those in his employ was in any manner wanton, uncalled for and unnecessary, or that such interference was not necessary in the proper repair and maintenance of defendant's streets. Whatever evidence there is upon the subject shows that such interference was in the course of repair to defendant's streets by men who were employed for the purpose and were engaged in that work, as for instance, Henry Soule, (Ev. folio 49), Richard Duke, (Ev. folio 53), and Michael Connelly, (Ev. folio 62), who was engaged in repairing a gutter in one of defendant's streets, and who found the logs of said pump-log system so near the surface that he was obliged to remove them in the necessary performance of his work.

In the absence of evidence showing that such interference was wrongful and unlawful, or that it was unnecessary, or showing facts and circumstances from which the Court can find the same to have been unnecessary to the proper repair of defendant's streets, the Court must find that defendant's officers and employees properly discharged their duty and must presume that the interference was only such as was required to put defendant's streets in proper condition and was rightful and not wrongful and unlawful.

In the absence of evidence to the contrary the Court will presume that officers perform their duty properly and rightfully and also that acts are lawful rather than tortious and unlawful.

Kinsella vs. Auburn, 26 St. Rep., 884.
 Georgeson vs. Caffery, 71 Hun, 472.
 Cole vs. Germania Ins. Co., 99 N. Y., 36, 42.
 Turner vs. Kouwenhoven, 100 N. Y., 115.
 Averill vs. Williams, 1 Den., 501.

IV.

If, as above contended, plaintiff acquired no right or franchise by grant or succession to maintain said system of pump-logs in defendant's streets, and had acquired and could acquire no such right or franchise by occupation then her own evidence, and the whole case shows that she had no right to occupy said streets with said pump-logs and penstocks; that the same were encroachments in and upon defendant's streets which it was the duty of defendant's officers and particularly of defendant's Trustees and Street Commissioner to remove.

Plaintiff having brought this action as for a trespass upon the part of defendant, must in the view of defendant's general denial show some right on her part and that she, herself, was in a position better than that of a mere trespasser, or in other words, that her works were not a mere encroachment and obstruction in and upon defendant's streets. (See Sec. 49 and Sec. 29, Subd. 18 of defendant's charter above quoted.)

Defendant's general denial places plaintiff's whole case in issue and places her in a position where she must show that her right has been invaded.

Bliss on Code Pleadings, Sec. 325.
 Holmes vs. Seeley, 19 Wend 507.
 Drigs vs. Phillips, 108 N. Y., 77.

V.

The referee erred in fixing and determining the amount of plaintiff's damages recoverable in this action by including in the award items or elements

of damage which could not properly be included in such award because not sustained by the evidence in the case, and also by awarding excessive damages.

(a) The referee in determining the amount of plaintiff's damages recoverable in this action finds that she is entitled to and allows her for three distinct kinds or elements of damage, viz:

1st. By the direct injury to her works.

2nd. By the interruption of her water supply to consumers and consequent loss of revenue, and

3rd. 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.

These three kinds or elements of damage are grouped or bunched together in a grand total of \$1,400, but there is no determination as to the amount of either of the said kinds or elements of damage. (Referee's Report, 8th finding of fact, page 233. Referee's opinion, folios 971-976.)

This we insist was reversible error, because there was no evidence in the case showing that any consumer discontinued the use of water from plaintiff's system or ceased to pay therefor either permanently or temporarily by reason of any interference with said system upon the part of defendant or defendant's Street Commissioner or the contractor engaged in putting in defendant's system of Village Water Works, or any person or persons in their employ, and we challenge the respondent to point to any evidence showing the fact. If we are right in this contention then the allowance to plaintiff of such kind or element of damages was improper, and there being nothing to indicate the amount of such allowance the Court cannot correct the award of the Referee and the judgment entered thereon, but must reverse the whole judgment.

As to the allowance to plaintiff in said award of damages for the third kind or element of damage above indicated, viz: for the more rapid decay of

her whole system of logs resulting from air being allowed to enter at places where the logs were taken out, we urge that there was no competent or sufficient proof to show that any such damage was sustained by plaintiff and further that under the evidence any such allowance to plaintiff is and was wholly problematical and matter of guess work on the part of the Referee. There is no evidence in the case that any of plaintiff's logs did as a matter of fact decay any more rapidly by reason of air being allowed to enter and of their being exposed to the air, but only an expression of opinion of plaintiff's witness, Hiram Boyer, that such was the case and nowhere in the case is there any statement of any fact by any witness from which the Referee by any sort of computation could arrive at any determination of any particular amount of damages sustained by plaintiff from this cause, and we again challenge the respondent to point out any such evidence.

Mr. Boyer on his cross-examination stated in substance that he took up about three logs on John street in July prior to the time when he was giving his evidence, which would bring it in July '93, five years subsequent to July, 1888, the time of the injury complained of, and that he examined three logs and they were all in about the same shape. (Case folios 215-217.)

There is no evidence in the case going to show that the condition of the logs was then any worse than it was in 1888, the time of the alleged interference with plaintiff's system by defendant, and the evidence of a number of witnesses is to the effect that the line of logs on John street had been laid for a very long time and not relaid; that the logs in that street in places were on the surface and exposed, that the line was not in good condition and that at times there were leakages. (Ev. William H. Cronkhite, folios 550-552, Charles King, 417-420, O. F. Loucks, 542, S. M. Richmond, 785.)

No facts were shown from which the Referee could properly find that plaintiff's logs did decay for the reasons claimed or that plaintiff thereby sustained any amount of damages which could be in any manner determined or arrived at, and there being no way of determining the extent to which this kind or element of damages entered into the Referee's total award of \$1,400, the award and the judgment founded upon it cannot be corrected but must be reversed.

The case presented seems to be on a par with that presented by an action to recover, say for an injury to growing crops, where the plaintiff in the action gives evidence of the trespass of his neighbor's cattle into a field of growing grain followed by evidence that such trespass would damage the grain and further, if you will, that it did actually damage it, and then resting without giving evidence of the extent of such injury or damage. In such case it is clear that the plaintiff could only recover nominal damages, and this we insist is all that plaintiff is in any manner entitled to recover for the third kind or element of damage above indicated, and as the Referee allowed substantial damages therefor without indicating to what extent, he committed error for which there must be a reversal.

Plaintiff must prove her damages.

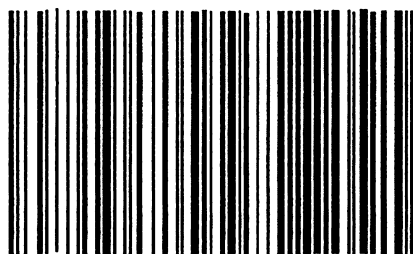
1 Greenleaf on Ev., Sec. 75.

Andrews vs. Tyng, 94 N. Y., 16.

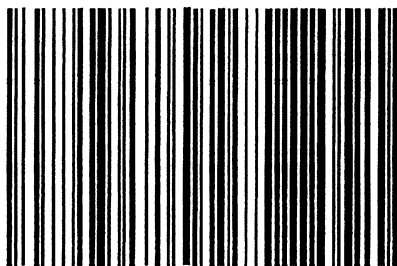
Whitehead vs. Kennedy, 69 N. Y., 462. #

(b) The award of damages to plaintiff, made by the Referee, \$1,400, was clearly excessive.

Plaintiff bought the entire plant in May, 1886, as we have seen, for \$600, at a time when plaintiff claims she had a large number of paying consumers, most of whom as we have seen had discontinued the use of her water prior to the "early summer of 1888," when the Referee finds that the system was



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GES. FOLIO 11

injured and damaged by defendant her works were not wholly destroyed but only partially injured or interfered with, less than 1,000 feet of pump-logs out of a total of some 15,000 feet had been in any manner disturbed, and not to exceed about a dozen of her penstocks had been taken down, and according to plaintiff's showing her pump-logs could have been relaid for \$8 per rod or 50c. per foot, or for \$500, and her penstocks could have been replaced with new ones, according to our showing, (I find no evidence on the part of plaintiff as to the value of the penstocks) for \$2.50 a piece or about \$30 in all. (Ev. Casler, who says the logs were worth \$1 apiece, Ev. 770, and of Pross that it was worth \$1.50 to make them, folio 753.)

Ev. fol. 19

Taking defendant's evidence given by witnesses Lansing and Babcock, to the effect that it was worth 25c. per yard for trenching and 10c. for back-filling, with the computation made by the witness Lansing that it was worth 7c. per lineal foot for a ditch three feet in depth, (Ev. folio 759) and we find that it was worth not to exceed \$70 for relaying the pump-logs and adding about \$30 for new penstocks in place of the old and decayed ones which two men could push over, (Ev. Duke, folios 55 and 59) we find that \$100 was ample to restore plaintiff's system and this would seem to be a fair measure of the entire damage and injury done to the system.

An award of damage, therefore, of \$1,400, was clearly excessive.

VI.

Plaintiff was clearly not entitled to recover damages in excess of the value of her whole plant.

Hartshorn vs. Chaddock, 135 N. Y., 116.

This value was shown by the evidence of six reliable witnesses called by defendant to be practically

nothing in the spring of 1888, and prior to the time of the alleged injury, (Ev. Burrell, folios 854-872; Babcock, 607-613; Fitzgerald, 777-780; Lansing, 761-765; Loomis, 801-805, and Palmer, 825-827.)

This evidence was in accord with the facts that plaintiff bought the works in 1886 for \$600; that no repairs to amount to anything were made while she had them, (Ev. Hiram Boyer, folio 206), and the evidence of other witnesses to which the attention of the Court has been called, showing that the logs were in a decayed and leaky condition, and that the supply of water was wholly unreliable and that plaintiff had prior to the alleged injury lost the great body of her paying consumers, and that the village had established a costly and elaborate system of village water works, in the maintenance of which all property owners and tax payers were interested, and we insist that in view of the great preponderance of evidence upon this question presented by defendant that it was error for the referee to award plaintiff damages, \$1,400.

VII.

The referee erred in refusing to permit defendant to show why the witness, Shall, and others, whom plaintiff claimed had discontinued the use of her water, (Ev., folios 34-47 and 326,) did so.

George W. Shall was named as one of those who had discontinued the use of and paying for plaintiff's water, (folio 47), and he was afterwards called by defendant and asked this question: "Q. Why did you discontinue the use of the Boyer water and put in city water?" (Case, folios 326-327,) and this question was objected to by plaintiff as not admissible under the pleadings and not within the order allowing the case to be re-opened and the objection was sustained with an exception to defendant, and this we urge was reversible error and particularly so in view of the finding of the Referee that defendant

is liable for the interruption of plaintiff's revenue resulting from the discontinuance ~~from~~^{of} the use of her water by those who had used it, because it was clearly competent in answer to that claim made by plaintiff for defendant to show that plaintiff's consumers discontinued the use of her water for reasons other and different than those attributed by plaintiff.

VIII.

It was error for the referee to refuse to allow defendant to show by the witness, Burrell, the value of the Boyer pump-log system about June, 1888, (Ev., folios 854-857.) The witness had clearly rendered himself competent and the plaintiff having given evidence as to the value of the works and made that an issue in the case, and as we think properly, it was competent and proper for the defendant to meet that evidence by similar evidence of competent witnesses, and it does not excuse the error to say that defendant was afterwards allowed to give a statement of value by the witness in response to a hypothetical question put to him.

IX.

It was error not to allow defendant to show the supply of water for defendant's village system (Ev. of witness Babcock, folios 589-591.) It was contended upon the trial by defendant that the value of plaintiff's pump log system was materially effected by the construction and consequent competition of defendant's village water works, and in order to show fully this effect and the extent of it, it was proper and necessary for defendant to show the situation and manner of construction of defendant's system, the price charged for water and the manner of furnishing it, and what was still more important, the supply, in order that it might fully

appear as to what inducements there were in favor of defendant's Village System.

This evidence was important also as bearing upon the evidence given by plaintiff's witness, Hiram Boyer, to the effect that plaintiff lost a large number of consumers during the year 1887, as explaining that loss and showing a reason for it other than that which plaintiff undertook to assign, viz: Defendant's interference with her works.

The evidence was competent, material and proper for both purposes, and its rejection was error which the Court can hardly say did not prejudice the defendant and for which, therefore, there must be a reversal of judgment.

X.

William H. Robinson was called as a witness by plaintiff. (Case, folio 67) and again recalled, (Case, folio 83) and was called by defendant (Case, folio 210) and after some preliminary examination was asked this question. "Q. What was the whole system of plaintiff's water works worth at any time from 1887 to 1889? A. It was worth \$8,000 and cheap at that." The witness was then cross examined, examined on re direct and re-cross-examined. He then signed and swore to an affidavit which was used by defendant on its motion to re-open the case, (Case, folios 272 277) subsequently he was again called as a witness by defendant and his attention called to his former evidence and then asked this question. "Q. In giving your estimate of value did you take into consideration the effect of the construction of the Village System of water works and of its effect upon the value of the Boyer system? A. I did not." (Case folio 413.) He was again re-called by defendant and examined and cross-examined. (Ev. 576-588.)

At what was practically the close of defendant's

case the witness Robinson was, against defendant's objection, re-called by plaintiff for further cross-examination and was then permitted to state that taking into consideration the city water works and its effect upon the Boyer system, the Boyer system was worth \$5,000 in 1887 or 1888. To this defendant objected, upon the grounds among others that plaintiff had had two opportunities to cross examine the witness, that as the evidence was given prior to the re-opening of the case that it was not proper at that time to take the testimony and not within the order re-opening the case. Subsequently defendant called the attention of the witness to the said affidavit and offered the same in evidence, but it was excluded, (Case folio 883) and also sought to show by the witness that shortly after 1888, the time of the alleged injury to plaintiff's system, the witness had sold a system similar to plaintiff's for \$100. (Ev. case folios 883-886, also case folios 210-212, where Robinson describes his system and the evidence of Pross, folio 446, in which he says the Boyer system of pump-logs was one-third longer than the Robinson system.) The capacity of the Boyer spring was sufficient to fill a 3 inch pipe, (folio 877) while the spring from which the Robinson system was supplied would fill a 2½ inch pipe, (Ev. folio 884) and no part of Robinson's system had been interfered with at the time. (Ev. folio 213.)

The referee had refused to allow defendant to re-call Hiram Boyer for further cross-examination, sustaining substantially the same objection as that made by defendant to the re-calling of the witness, Robinson, (Case, folio 292), and repeatedly refused to allow defendant to ask Boyer, when called as a witness for defendant, questions which defendant had had opportunity to ask, (Case, folios 293-304). The witness, Robinson, was defendant's witness as to his first estimate of value of \$8,000, given as a part of the original case, and no further evidence of

value was given subsequently by the witness and plaintiff when she asked witness the value of her works, taking into consideration the city water works and its effect made him her witness and gave the estimate as her estimate, an estimate which was very much at variance with any evidence given by defendant, and defendant had the right to fairly and properly test the witness, and among other things to ask witness as to the sale of the system owned by him and to question him as to the affidavit which he had made and statements contained in it, and to offer the affidavit and have it received in evidence, and to the refusal of all of these things by the referee, and of his allowing plaintiff to re-call the witness for further cross-examination considered in connection with the rule applied by him when defendant sought to further cross-examine the witness, Hiram Boyer, and to ask him certain questions to which the attention of the Court has been called, was reversible error, and it was particularly so in view of the fact that the referee was governed wholly by the evidence of the witness in arriving at his determination of the value of plaintiff's plant. (Opinion of referee, folio 976).

XI.

The defendant and appellant insists that in view of the foregoing considerations the judgment appealed from should be reversed and a new trial ordered before another referee to be agreed upon by the parties or selected by the Court.

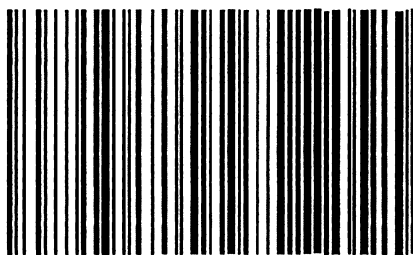
Respectfully Submitted,

E. J. COFFIN,

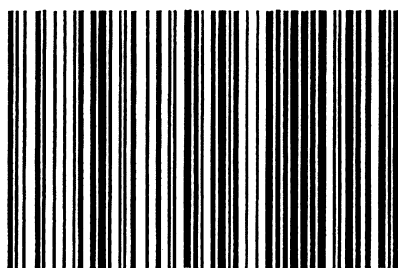
For Appellant,

Little Falls, N. Y.

J. D. BECKWITH, of Counsel.



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were part owners of this water system from 1805 down to and including 1851, was also put in evidence, but is not contained in the printed case. (Folio 1078.)

In 1851 or 1852, William Usher (now deceased), became the owner of the entire system of logs, pipes and conduits, and sources of water supply, and from him it passed from one to another, until in May, 1886, when the plaintiff became the owner of the whole system.

For several years prior to 1886, the plaintiff had been the owner of the "Boyer spring," the principal source of supply, and William T. Smith owned the logs, pipes and conduits, and the water rents were divided between them. In May, 1886, the plaintiff purchased Smith's interest, and from that time she was the sole owner.

During all these years, from 1806, down to 1888, the water system was kept in operation, and from which considerable rents were received each year.

The village of Little Falls was first incorporated by chapter 276, of the laws of 1826.

In 1886, the defendant determined to construct a system of water works on a large scale, by bringing the water from streams at considerable distance from the village, storing it in reservoirs and distributing it through all parts of the village by large pipes and mains. An engineer was employed by the defendant

to make the necessary survey, and establish the lines where the mains were to be laid through the streets of the village.

In digging the trenches and laying the mains for the new water supply no effort was made to avoid interference with the plaintiff's logs and conduits, and in some places long distances of the plaintiff's logs were dug up and taken out to make place for the new mains. (Folio 379.) In some places several hundred feet were thus removed. (Folios 383, 384.)

In one place (Alexander street) 400 or 500 feet of logs were removed and were never replaced, but were thrown out and drawn away, (Folios 383, 384.)

By reference to the map it will be seen that this destruction of the logs on Alexander street cut off the water from a large part of the plaintiff's system, and deprived her customers of their water supply.

The logs were taken up on Loomis street, for a long distance, where the line for the village main was located on the same line as the Boyer logs. During all of this time the water was cut off at the spring. (Folios 384, 385, 386.) By reference to the map it will be seen that all the water that supplied the plaintiff's customers run through these logs on Loomis street.

The logs were thrown out on Alexander street was in the summer of 1887. (Folio 387.)

The evidence of the destruction of the plaintiff's pen-stocks and pump logs, by the defendant, is ample. See evidence of witness, Henry Soule, folios 49 to 51; Richard Duke, folios 53 to 60; Michael Connelly, folios 62 to 64; W. H. Robinson, folios 67 to 75; Timothy Sullivan, folios 383, 384, 387, and see evidence of Hiram Boyer.

In some instances the plaintiff's logs were out several days, and in others several weeks (Fol. 388).

In one instance where the village ordered "sand boxes" to be put in, the plaintiff's logs were dug up and thrown out, the "sand boxes" occupying the places where the logs laid. The plaintiff then laid an iron pipe around the boxes, thus connecting the ends of the broken line of logs, which, as soon as repaired, and on the same day, the defendant again tore up and threw out. (Folios 69 to 75).

The logs were thrown out in many other places, and the pen-stocks were cut down by the street commissioner and the men in the employ of the defendant.

For the purpose of laying out and constructing the new water works, the village employed an engineer and two inspectors, and all the work of laying out the lines for the water mains, digging the trenches, laying the mains and filling in was done under the direction and supervision of these officers or agents of the defendant. (Folios 387, 624).

In the location and construction of these new water mains by the defendant, it is not pretended that any regard was had for the rights of the plaintiff, and wherever the mains crossed, or ran along or upon the

logs of the plaintiff, they were dug up and thrown out without her leave or license.

The village authorities and persons acting as their agents, first stop the flow of water through the plaintiff's pump logs and make it impossible for the plaintiff to keep the water running, and then the village trustees pass a resolution directing the street commissioner to cut the pen-stocks down because there is no water running through them. (Folio 81.)

There is no evidence in the case contradicting the evidence given by the plaintiff as to the various acts of injury to the plaintiff's system of water supply.

For the purpose of compelling the plaintiff's customers to abandon her and take the "city water," the defendant passed an ordinance requiring every property owner and family residing within the village to pay a frontage tax upon their lots, and in addition each family to pay for the use of one faucet, at least, whether they used it or not; and so, the plaintiff herself, who had a water supply already, under a charter granted by the legislature long before the village was incorporated, was compelled to pay for one faucet, and so with all her customers. (Folios 1094 to 1096.)

And if a house had more than one family living in it, they were compelled to pay for as many faucets as there were families, notwithstanding the fact that they were already supplied by the plaintiff's system with water, carried into the house, as was the fact in many instances, as shown by the evidence.

Upon a review of the whole evidence it is difficult to escape the conclusion that from the time of the pro-

jection of the new system of water supply, the village authorities and those in their employ, were engaged in efforts to cripple and destroy the usefulness of the plaintiff's water supply, and by a series of interruptions to the flow of the water through the pump logs and conduits, and municipal ordinances to compel her customers to abandon her and subscribe for the "city water."

The statement of facts made by the counsel for the appellant is misleading, and in many instances incorrect, for example, where he states on page six of his brief, that, "no evidence was given to show that plaintiff had sustained damage by the more rapid decay of her logs from air having entered them, except the evidence of Hiram Boyer." In evidence of the defendant's engineer, Babcock, (Folio 627.)

Again on page eleven of the appellant's brief, in which he says, "the evidence shows that Sullivan was an independent contractor." See evidence of Sullivan at (Folio 387 and 377. Again on page eleven it is said "the plan and location of defendant's water works were not shown to have been such as to make interference with plaintiff's pump logs necessary, except in places where her pump logs ran diagonally across defendant's streets. See evidence of some witness, (Folio 383.)

In many other important respects the appellant's statement of facts is incorrect.

POINTS.

I.

The original water association was formed in 1805; and the old record shows that it was all completed in

that year; the logs laid, pen stocks put up and assessments made and paid to cover the expense. The charter granted by the legislature in 1806 was to the same persons who organized in 1805.

The first section of this chapter forty-five of 1806, provides that certain persons, "and such other persons as may become interested in the association or company formed" shall be a body politic.

The second section authorizes the persons so associated to elect from their number a treasurer, clerk and collector, and such agents as might be necessary to carry into effect the object of the association.

The third section authorized the said persons so associated to make use of any land which they should deem necessary for the purpose of conducting a plentiful supply "of pure and wholesome water to and through the village of Little Falls"; to erect dams, to make use of streams of water, to dig canals or trenches for the purpose of conducting water from springs, to construct dikes, to lay and conduct any number of pipes, conduits or aqueducts over any of said lands to or towards said village, "and in every part of said village."

The fourth section prescribes the duties of the treasurer, clerk and collector.

According to the book of records put in evidence in this case, this association had meetings, at stated intervals from 1806 down to about the year 1852, when one William Usher became the sole owner of the conduits, pipes, penstocks, &c. The next owner after William Usher seems to have been one Alexander, and after him James T. Smith, who died in 1880 owning said

system of water-works, and the plaintiff in this action purchased from the administrators of said Smith. The plaintiff called some of the oldest residents of Little Falls as witnesses, who testified that these same water-works had been in operation as long as they could remember. Hiram Boyer says that he recollects them for about 60 years; so that the plaintiff has shown possession of these logs, conduits, penstocks and water supply in herself and those through and under whom she claims for over eighty years, at the time of the commencement of this section; and that such right originated in grant by the legislature of the State of New York. That the franchise thus granted has been in continual use down to the time of the acts complained of by the village as constituting the damages sought to be recovered in this action.

The plaintiff is in no sense an interloper or squatter upon the village streets, parks or lands, but her rights originated and became fixed and certain many years before the village of Little Falls was incorporated; the franchise granted by the act of 1806 is not limited as to time or duration, and under the Constitution of the State existing at that time the rights granted are perpetual until revoked by the judgment of some competent Court, and it has been held that a subsequent Legislature could not revoke or repeal the rights thus granted. Subsequent constitutions of the State provide that all charters and franchises granted by the Legislature may be at any time modified or revoked by the same authority. But in this case there is no pretence of proof or suggestion that any such thing has ever been done, either by our courts or by the Legislature of the State of New York, or that the rights thus granted have been lost by non-user or forfeited by abuse.

The plaintiff shows herself the owner of the springs from which the water was taken and conducted through these conduits and pipes, and traces her title back for thirty or forty years, one of the springs however being rented from Judge Hardin at an annual rent of \$60 per year.

There is no question but that the water supplied to the village by the plaintiff was of excellent character, pure and wholesome.

As soon as the defendant had determined to construct a new system of water supply upon an extensive scale and at large expense, it became desirable to abolish or get rid of the primitive system of the plaintiff, and the village sought to accomplish this result by digging up and interfering with the plaintiff's logs and destroying her penstocks, so as to cut off the supply of water.

The evidence is all on one side and there is no pretense of justification. The answer of the defendant attempts to justify the acts upon the ground that the village was constructing a system of water-works, and it was their duty to remove all obstructions found in the streets. They do not allege, however, that these logs, conduits and pen-stocks were obstructions, and that they removed them as such.

The evidence throughout shows that these acts complained of were committed by the officers of the defendant and men under their employ, while engaged in repairing, working on or improving the streets of the village. All of this work was done under the immediate supervision of the street commissioner of the defendant. By subdivision 9, of section 30, of the

charter of the village of Little Falls, the trustees have general power and authority over the streets and sidewalks of the village as to grading, paving, extending and improving the same.

By section 5 of said charter, the trustees are authorized to appoint a street commissioner, and section 49 declares that the street commissioner shall have the care and supervision of the streets and highways within the village, to keep them in good repair and condition and clear of obstructions, subject however to the control and direction of the trustees.

By reference to the evidence it will be seen that in each of the cases where the plaintiff's conduits were torn up and thrown out, the street commissioner of the defendant was engaged in the performance of his duty cast upon him by the statute of keeping the streets in repair, and we deem it unnecessary to go into these facts in detail, because, by the acts of interference, all of the plaintiff's system of water works was destroyed below the junction of Loomis and Ward streets. (See map.)

II.

Title has been proved in the plaintiff, first by purchase, and second, by prescription.

If the defendant seeks to attack the title of the plaintiff and claims that she, as the successor of the Little Falls Aqueduct Association, has forfeited the franchise, it cannot succeed, for the forfeiture of the franchise cannot be attacked collaterally; it may only be by a judicial decree in a proper proceeding instituted for that pur-

pose. (*McLaren vs. Pennington, et al.*, 1 Paige, 101 ; *Bank of Niagara vs. Johnson*, 8 Wend., 645 ; *People vs. the President and Directors of the Manhattan Co.*, 9 Wend., 351 ; *Matter of R. P. Church*, 7 How., 476). Added to this, that the Aqueduct Association continued from the time of its organization to the time of the acts on which the complaint rests, or in this case its assigns or the person or persons to whom it transferred its property, to supply the village of Little Falls with that same wholesome, spring water ; and however the defendant may look at it, the plaintiff's title through this franchise cannot be attacked thus collaterally.

The plaintiff's title, too, by prescription is too strong for any objection sought to be made. The Aqueduct Association was formed by the Act of 1806, and it was many years afterwards that the village of Rockton or Little Falls first took on a corporate form. And whatever franchises or rights were granted to or obtained by this village under the first act of the Legislature incorporating it as a village, must have been subservient to the rights theretofore granted by the Legislature to the Aqueduct Association. To hold otherwise would be to hold that the Legislature could repeal or annul the rights and franchises already granted to the Aqueduct Association. And how can the defendant say in view of these facts, that the plaintiff is an interloper and trespasser, when the defendant itself is not first on the ground ?

The franchise granted to these persons named in the Act of 1806, and to others who should become interested, is property, and has always been recognized as such by the Courts of our State. And such a right or franchise may be granted to a number of persons in

common or to an individual. The franchise here granted was the right to lay pump logs or other conduits through the streets of the village of Little Falls, for the purpose of supplying its inhabitants with water, and this right the plaintiff claims has been invaded and violated by the defendant.

It is also equally certain that such a franchise may be sold or transferred the same as any other property. "Corporate franchises have been uniformly regarded as indestructible by legislative authority, and as constituting property in the highest sense of the term. * * The laws of this State have made such interests taxable, inheritable, alienable, subject to levy and sale under an execution, to condemnation under the exercise of the right of eminent domain, and invested them with the attributes of property generally." (People vs. O'Brien, 111 N. Y., 40, 41.)

And certainly no valid criticism can be made as to the sale of the property of the Aqueduct Association and its franchises to the plaintiff in this action, or any of the persons through whom she derives title, so long as such sale did not violate any of the benefits which the public would derive from such grant, and especially in in this case where the interests of the public would be promoted by a change of ownership.

It has been held in some cases that the property and franchises of a corporation could not be sold without the authority of the board of directors or other governing power of the corporation, but none of those cases apply to this case for the simple reason that this law of 1806 does not create any board of directors or provide for the election or appointment of any or of even a president or presiding officer; it simply provides that

these persons may elect a treasurer, clerk and collector, so that there is nothing in the law itself which would limit the right of the owners to sell and transfer their right or interest in any form or to any other person or corporation.

The objects of the charter and benefits to be derived therefrom have been carried on and the village has had the benefit whoever the owner or owners were.

III.

In reply to point I, made by the appellant, we say : The officers, from the president to the street commissioner, were simply the agents of the municipality ; but plaintiff has shown that the trustees did take action in the matter, by ordering their street commissioner to cut the pen-stocks down, if certain conditions were not complied with by the plaintiff. This shows that the trustees had the plaintiff's system of water-works under consideration. But let us look a little further into the fact : The village, in 1886, caused a survey to be made for a new system of water supply to be owned and operated by the municipality. In the location of the lines for the water mains no regard was had for the plaintiff's rights, for in many places the trenches were dug and the mains laid, upon the same lines occupied by the plaintiff's pump logs and pipes.

The digging of these trenches and the removal of the plaintiff's logs was under the supervision and direction of the village engineer, an officer employed by the defendant, who was in no way connected with the contractor. The street commissioner was engaged in the

business of the village at the time the pen-stocks were cut down and the logs and pipes taken out in 1888, and he, and the men under him, were paid by the defendant for doing these very acts complained of.

All the acts complained of, and for which damages are claimed, were done by the officers and agents of the defendant, "in the course and within the scope of their employments,"

Lee vs. Village of Sandy Hill, 40 N. Y., 442, and cases there cited by Mason, J.

Dillon on Municipal Corporations, Section 968, 4th Ed.

Spier vs. City of Brooklyn, 139 N. Y., 6.

Stoddard vs. Village of Saratoga Springs, 127 N. Y., 261.

Buffalo & H. T. Co. vs. City of Buffalo, 58 N. Y., 639.

Ehrgott vs. Mayor, &c, 96 N. Y., 264.

No one of the other cases cited by the appellant's counsel for authority upon his first point, has any application.

IV.

Points two, three and four, of the appellant's brief, are answered in part by our first and second points.

The statement made in this point by the appellant, that it does not appear that the Aqueduct Association ever obtained the consent of any of the land owners over which the plaintiff's logs were laid, is incorrect.

These facts appear in the early records of the association which are not printed in the case. The logs were already laid and the system constructed when the charter was granted.

Besides, this particular objection was not raised on the trial.

The further statement or assumption in this point that it nowhere appears that the plaintiff ever became the owner of the original water supply system of the Aqueduct Association, is incorrect.

It appears by the evidence of numerous witnesses that the line of logs, pipes and pen-stocks in possession of the plaintiff, was the original system constructed in 1805. Hon. G. A. Hardin knew it when Wm. Usher owned it. (Folio 557.) Wm. Usher owned it or was interested in it for about ten years prior to 1851. See also evidence of S. M. Richmond, folio 784, H. McChesney, folio 100, H. Robinson, folio 67, S. J. Waters, who had lived there since 1841. folio 91, and who knew and recognized the handwriting of some of the original owners, contained in the old book of records.

It further appeared by this book of records that prior to 1851, the owners or persons interested in this water supply had become quite numerous, and to each one was issued a paper showing that he owned so many shares, and upon which he received dividends or paid assessments, and the evidence shows that these shares had all been purchased by Wm. Usher prior to 1851, when he became the sole owner.

In 1864, plaintiff became the owner of two lots, 11 and 12, which were located immediately east of and adjoining the "spring lot," (folio 1074,) and in 1882 she

became the owner of the "spring lot," on which is located what is called the Boyer spring. (Folio 1071.) On these lots is located a stone quarry, and in digging back into the hill, the vein of this spring was tapped further back on one of these two lots.

The plaintiff has shown beyond any doubt that she and her predecessors have been in possession of this identical water system even since 1805, and under a franchise granted by the state since 1806. She is the owner of one of the springs from which the water was supplied and had a lease of the other. The ownership of the springs and the conduits, carries with it the franchise.

But how is the defendant in a position to challenge the plaintiff's rights, or claim that her title is defective? The village makes no claim to the ownership of the springs, conduits, or the franchise granted by the legislature. In order to avail itself of this defense it should allege title in itself, or in some third person with whom it is in some way connected.

Stonebridge vs. Perkins, 141 N. Y., 1 and cases there cited.

Possession alone as against a wrong doer is sufficient to maintain the action.

V.

As to the amount of damages awarded the plaintiff by the learned referee, the defendant cannot complain, at least ought not to, for the following reason :

If the defendant wished to establish a new and more extensive system of water supply, and at the same time get rid of the old one, it has entirely mistaken its remedy. It should have proceeded to acquire the plaintiff's rights by proceedings of eminent domain, at least so much as was necessary for the use of the defendant. Instead of this the defendant took by force, not only what it desired of the land occupied by the plaintiff, but destroyed as it went, and when the plaintiff tried to repair threw the pipes out again, or as was done in one instance, when the plaintiff's husband undertook to repair where they torn out, had him arrested for an alleged violation of the village ordinances, for digging in the earth. (Folio 808, 809.)

The amount collected for water rents just before the plaintiff purchased in 1886 was about \$800 yearly. (Folio 892.)

A witness called by the defendant gave the water rents charged in 1879, at \$583.83; 1880, \$729.66; in 1886, \$682.56. (Folio 780.)

The witnesses differed much as to the value of the pen-stocks, pump logs, and the value of the labor in relaying.

One of the witnesses called by the defendant as to the value of the whole system with the spring, placed it at \$8,000 and cheap at that. (Folio 212.)

In looking into the items we shall find, that there was about 850 rods of logs below the junction of Ward and Loomis streets; at this point the water was cut off, which had the effect of cutting it off from all the streets below that in the village. This cutting of the logs off

let the water out and air in, and they soon became filled with dirt. It cannot be claimed that the plaintiff should have dug up these logs to preserve them.

These logs were all spoiled and if worth only ten cents per foot, less than one-half what the defendant's witnesses put it, their value would amount to \$1425.50.

Iron pipe to replace the wooden pipe would cost more. (Folios 616 to 619.)

The digging of the trenches and filling in after relaying pipes or logs would cost much more than the pipes.

There were 20 of the pen-stocks and they were worth ten dollars each according to the evidence of the witnesses.

Another view taken by Mr. Burrill, one of the defendant's witnesses says that an investment of capital which will yield an annual profit of \$100, is worth \$1,666; if \$200, \$3,332; and so on in the same proportion. (Folios 867, 868, 869.)

But if it is argued that the plaintiff's customers had or would all abandon her for the city water, that is by no means certain.

We are not contending that the state might not grant another franchise to an individual, or to the municipality, to supply water to the residents, and might enter into competition with the owners of a former franchise. But we do insist that in the exercise of such competition, it is not fair or just that the one party should be permitted to destroy the machinery which the other party was enabled to compete with.

under pretext of municipal authority, you must pay whether you patronize the village or not. Yet this is just what the defendant did, for, during almost all the time after May, 1887, the defendant, by repeated and prolonged interference with the plaintiff's logs, prevented her from supplying her customers, and then passed an ordinance requiring the plaintiff and all her customers to pay for the use of the city water to her rival, notwithstanding the fact that they were already supplied by her.

These trespasses complained of were of the most aggravated nature, and the defendant should not be permitted to take advantage of its own wrong, and, after destroying the plaintiff's property, claim that it was not worth anything, and after compelling the plaintiff's customers to abandon her, assert that her system was not worth anything for that reason.

The fact is that the plaintiff's whole system of logs below the junction of Loomis and Ward streets was substantially destroyed, and however we figure the damages, they were allowed by the referee at the smallest possible amount. If only one seventh of the logs were destroyed, their value and the cost of relaying them, and the pen-stocks, would amount to more than \$1400, saying nothing about the loss of income for several years.

But it is urged by appellant that the plaintiff paid Mrs. Smith only \$600 for the logs, conduits, &c.

But Mrs. Smith did not own the water supply, and the logs were worth nothing without the springs. ~~THE~~

~~_____~~

~~_____~~

There are numerous cases in the books stating the rule of damages in like cases, all of which are based on the general rule laid down in the text books, and that is, generally stated, a rule which compensates the party for the injury sustained.

Sedgwick on measure of damages, 5th Ed., page 80.

LaCour vs. Mayor, 3 Duer, 406.

St. John vs. Mayor, 6 Duer, 315.

Walter vs. Post, 4 Abb. Pr. Rep., 382, and see cases cited by Woodruff, J., at page 391.

Walrath vs. Redfield, 11 Barb., 568, affirmed 18 N. Y., 457.

Mylert vs. Gas Consumers Benefit Co., 26 Abb., N. C., 262.

Fromm vs. Ide, 68 Hun, 310.

However we may look at the plaintiff's damages, the amount awarded by the referee was excessive only in its smallness.

VI.

The appellant's sixth point is answered in the foregoing point in this brief.

VII.

The appellant's seventh point is not well taken. There may be twenty reasons why he discontinued the use of the Boyer water.

The evidence was not shown to be competent.

VIII.

Nor is the appellant's eighth point well taken.

The witness was not shown competent, besides he afterwards answered substantially the same question. (Folio 858.)

IX.

The ninth point is not well taken.

No question was made upon the trial as to the capacity of the city water works, or of its sufficiency for all purposes. The witness had been permitted to give a general description of the new system, the capacity of the reservoir, and the general plan of the distribution. (Folio 589, 596.)

X.

The tenth point is not well taken.

This witness had testified for the defendant that the plaintiff's whole system was worth \$8,000, and afterwards upon a further examination by defendant, modified his opinion by stating that in making that estimate of value, he did not take into consideration the effect the city water works would have on the Boyer system.

As a part of the cross-examination it was permissible.

XI.

There was no error in the refusal of the referee to allow the defendant to re-call the witness Hiram Boyer for further cross-examination, as insisted by appellant's attorney in his tenth point.

The defendant made a motion to re-open the case, and, among other things, to be allowed to re-call the plaintiff's witnesses for further cross-examination, and that part of the motion was denied by the referee.

XII.

The findings of the learned referee are fully sustained by the evidence in the case, and the damages awarded by the referee might, with much propriety, have been much larger, even upon the evidence of the defendant's own witnesses ; and it is apparent from the whole case, that nothing could be gained by a re-trial.

It is respectfully submitted that the judgment should be affirmed, with costs.

J. A. STEELE,
Attorney for Plaintiff,
Herkimer, N. Y.

2005

SUPREME COURT.

Appellate Division. Fourth Department...

NANCY M. BOYER,	}
Respondent,	
<i>vs.</i>	
THE VILLAGE OF LITTLE	}
FALLS,	
Appellant.	

APPELLANT'S ANSWERING BRIEF.

FACTS.

As to respondent's criticism of appellant's statement of facts found on page seven of respondent's brief, we reply that the evidence of witness Babcock there referred to, does not show that plaintiff's logs had as a matter of fact decayed.

That Sullivan was an independent contractor, or at least, was neither servant nor agent of defendant is shown by his contract. (Case fols. 1080, 1085).

Interference by the contractor with plaintiff's pump logs was not shown necessary. The witness, Sullivan, only claimed that he had to remove them on Alexander street, and we showed by Engineer Babcock that the pump-logs were some three to five feet distance from the nearest edge of the trench for the village main. (Case fols. 597-8).

Respondent's "statement of facts" is in many respects inaccurate and misleading. On page 3 he says "In 1851 or 1852 William Usher, now deceased, became the owner of the entire system of logs, pipes, conduits, etc." This proposition is discussed in our brief (pp. 20-21) and in addition to what is there said we wish to call the attention of the court to plaintiff's exhibits 12 and 13. (Case fol. 1078). Nor do we concede that plaintiff became the owner. (Brief pp. 21-22).

On page 4 it is suggested that in some places long distances of plaintiff's logs were taken out to make place for the new mains. This was only shown to have occurred on a part of Alexander street as to which we have shown by witness Babcock that the village mains were located at a sufficient distance from the Boyer logs. (Ev. fols. 597-8).

The Loomis street logs (resp't brief p 4) were relaid and it does not appear how long they were out and the water cut off. Plaintiff's logs, except on Alexander street, were better after they were relaid than before. (Re-direct ex. fol. 388).

On page 4 it is stated that "the logs were thrown out on Alexander street in the summer of 1887." The referee finds the interference with plaintiff's works to have been in "the early summer of 1888." (Report, 8th finding, fols. 939-944).

At the bottom of page 5 of respondent's brief is the statement "it is not pretended that any regard was had for the rights of plaintiff &c. &c." There is no evidence that such was the case, while section 28 of the specifications in the contract for the construction of the village works shows that proper regard was had for plaintiff's rights. (Case fol. 1084).

On page 6 occurs the statement "the village authorities and persons acting as their agents first stopped the flow of water through the plaintiff's

pump logs &c., &c.," and then direct them to be cut down.

As we have seen, the referee has found the first interference to have been in "the early summer of 1888," while the resolution in question, the only resolution upon the subject, was passed before that time, viz. May 15, 1888. (Case fol. 81).

There is no evidence that defendant's scale of water rates and taxes was adopted for the purpose of compelling plaintiff's customers to abandon her as suggested. (Respondent's points p 6).

LAW.

I

The book of records referred to does not show as suggested in point I of respondent's brief at foot of page 8 that "William Usher became the sole owner of the conduits, pipes, pen-stocks, &c." (See statement as to contents of same, case fol. 1078).

Defendant does not concede that plaintiff acquired Smith's interest as stated in point I of her brief page 9. (See appellant's brief commencing at foot of page 21).

II.

In the three concluding paragraphs of "point I" of respondent's brief (pp. 10 and 11) it is contended that defendant was liable for the acts of defendant's street commissioner, by which plaintiff's logs were torn up and her penstocks cut down.

In reply to this we suggest that, as we have already seen, defendant's street commissioner was in all things "subject to the control and direction of the trustees." (Appellant's brief, p. 15). The trustees exercised their control and direction over him in the matters in question by the resolution of May 15, 1888, by which he was limited to the cut-

ting down of penstocks not in use, (Case fol. 81) and anything done by him beyond that was clearly in excess of and in direct violation of his authority, and for it defendant was not liable.

Respondent, however, suggests that "the acts complained of were committed by the officers of defendant and men in their employ while engaged in repairing, working on or improving the streets of the village," (see respondent's points foot of p. 10) and that therefore defendant is liable. It is not even suggested that such work was not properly done.

In reply to that we desire to call attention to points II and III of appellant's brief, (pp. 19 25) and also to the rule as stated by Bronson, C. J., in *Radcliff's Executors vs. Brooklyn*, (4 N. Y., 195) that "an act done under a lawful authority, if done in a proper manner, will not subject the party doing it to an action for the consequences whatever they may be," and this case has been many times approved. The attention of the court is also called to *Atwater vs. Canandaigua* (124 N. Y., 602-608) for a further statement and application of the same rule.

III.

The suggestion made at the close of point I, respondent's brief, that "all of the plaintiff's system of water works was destroyed below the junction of Loomis and Ward streets" if not correct. (See statement of fact, appellant's brief, commencing at foot of p. 7).

IV.

In point II respondent speaks of "franchises" granted by the act of 1806, and we find more or less use of this term all through respondent's brief. We submit that the act of 1806 does not

grant and does not assume to grant any "franchise." It simply creates the "aqueduct association."

V.

In point II (p. 12) respondent suggests that because defendant was not incorporated until after 1806, defendant cannot question the rights of plaintiff. But the act of 1806 by its terms clearly shows that there was then and before that time, some sort of municipality where Little Falls now stands to which Little Falls has succeeded, and to the rights of which the "aqueduct association" was subordinate. The act of 1806 does not grant any rights in or to any public streets or grounds.

VI.

In all of the cases cited by respondent in point III (p. 15) the court holds defendant liable by finding authority and direction from the governing body of the corporation in question, *i. e.* the common council or board of trustees, for the act from the commission of which the liability arose.

VII.

Respondent does not suggest anything by way of answer or reply to appellant's point III.

VIII.

The statement made in respondents fourth point, at foot of p. 15, and on p. 16, that the facts of consents of land owners over which plaintiff's logs were laid having been obtained appear in the early records of the association we insist is incorrect. (See statement as to those records, fol. 1078).

The objection that such consents had not been obtained, at least as to the public streets and grounds, was clearly raised upon the trial. (See

defendant's motion for non-suit, "first" ground, fol. 910, and "sixth" ground, fol. 914-916).

The evidence there referred to, as showing that plaintiff became the owner of the original water supply system of the "aqueduct association" is neither competent nor sufficient for the purpose.

IX.

The contention of plaintiff that defendant cannot question or challenge her rights or title is not well taken. (Respondent's brief, Point IV.)

She was in defendant's streets and must show that she was in a position better than that of a mere trespasser. (Driggs vs. Phillips, 103 N. Y., 77.) The cases cited in her second point are not in point.

X.

The arrest referred to in first paragraph, page 18 of respondent's points, was after March, 1890, the date of the commencement of this action. (Case, folio 833.)

XI.

The statement in respondent's points, in last paragraph page 18, is not correct. (See Point III above.) Further, there is no evidence that any log was filled with dirt or spoiled.

There is no evidence that there were 20 penstocks or that that number were destroyed, as claimed on page 19. Boyer testified that plaintiff had only twelve. (Case fol. 190).

XII.

Plaintiff's customers were not compelled to abandon her, as claimed in respondent's points, (page 20, 2d paragraph.) They left before her works were interfered with. (Appellant's brief, pages 9-10.)

XIII.

Respondent argues in Point V, seemingly in answer to appellant's fifth point, that the damages awarded were not excessive. That is only a part of our contention. We also there contend that there was no evidence in the case in support of two kinds or elements of damage awarded plaintiff by the referee, and challenge respondent to point to any, and this respondent fails to do.

XIV.

Respondent, in her seventh point, suggests that "There may be twenty reasons why he (Geo. W. Shall) discontinued the use of the Boyer water," and we reply that if any of those reasons were other than defendant's interference with plaintiff's works defendant was entitled to show them.

XV.

In reply to respondent's eighth point we urge that the bald statement of the witness as to value is very different from his answer to a hypothetical question. The witness was competent.

XVI.

The ninth point is not an answer to our ninth point.

XVII.

Respondent's tenth point is not well taken. The witness Robinson gave his estimate of value \$5,000, at plaintiff's request, and as her witness, although nominally re-called for further cross-examination. The effect of the question was to make the witness plaintiff's witness, as to that evidence, and to entitle defendant to cross-examine.

