

Apollinaris

"The Queen of Table Waters"

capacity of the pumps were specified. The storage and settling reservoirs were located, their number and capacity given and the elevations of the former above low water mark of the river and above the various portions of the city were set forth. The main or pipe system was described in minute details; the names of the streets in which the pipes were to be laid, the distances to be traversed, the size of the pipes in each street and the precise location of the first 247 fire hydrants were shown. The report also contained tables showing the discharge capacity of water mains or pipes of specified diameters and lengths, and also the distances fire streams could be thrown with stated pressures at the hydrant heads, through hose of different lengths and nozzles of different diameters. The character of Missouri river water, its excellence for drinking and domestic purposes and the ease of clarifying it were discussed.

Plans and Specifications.
In short, the report which concluded with an itemized statement of the estimated cost furnished almost complete plans and specifications for the entire work. The distribution system was designed for both fire protection and private consumption. In other words, there was not to be a separate system of mains and pipes for each. The difficulties in depending wholly upon direct hydraulic pressure for fire protection were pointed out. It was said that in a large, densely populated city it could scarcely be considered a safe reliance; that the friction caused by the transmission of the water through an extensive pipe distribution and the depletion by daily consumption would necessitate an immense initial pressure as the city grew. It was said that the experience in many cities was that reliability upon direct hydraulic service was diminishing proportionately to the increase of the demand for current supply. Hydrant service as a sole reliance for fire protection depended upon one or both of two things, namely, the gravity pressure resulting from the elevation of the reservoirs, and direct pressure from the pumps of the water-works.

Maximum Gravity Pressure.
The maximum gravity pressure was fixed by the elevation of the reservoirs and therefore not the subject of increase though its efficiency depended greatly upon the judicious arrangement of the pipe system and the location of the hydrants. As the city grew this pressure was subject to great impairment by the increase of friction in the increase of the pipes and by the constant withdrawal of water by consumers. On the other hand it was stated that direct pressure from the pumps was always more or less objectionable. The contract and ordinances required that the works should be of a capacity and power to throw streams of water to specified heights from hydrants at designated points. When the works were completed in 1903 they were subjected to these tests and were accepted by the city as complying with all requirements. In the fall of 1905, after these actions were begun, the city authorities made tests of the pressure at the hydrants and it is contended that they disclosed that the pressure was deficient and did not reach the contract standard.

Last Tests Ex Parte.
On the other hand, the company claims that it was not contemplated that the pressure specified in the contract should be maintained longer than a year after the completion of the works, also that the last tests of the city were ex parte, without participation on the part of the company, and that it was not requested to and did not re-verify the gravity pressure by direct pressure from the pumps. However this may be, we think that the trial court was right in holding the evidence showed that the maintenance of the pressure sought by the city would be injurious to the service pipes and the plumbing in the buildings of the city, and that as private consumers were furnished through the same mains that afforded the fire protection, it could not have been contemplated that a pressure should be maintained for

one which would be destructive of the other; and this notwithstanding there was language in the contract and ordinance tending to the contrary. This seems to have been the construction voluntarily put by the city upon the contract and ordinance as early as 1905, when it purchased a fire engine and commenced the establishment of a fire department. Other engines were purchased from time to time thereafter and by such means the pressure that was lacking at the hydrant heads was supplied by the engines on occasions of fire.

Claim of Failure of Duty.
It was also claimed that the company failed to perform its obligation to furnish pure, wholesome, clear water, and therefore there could be no recovery upon the contract. No special damages were alleged to have been sustained by the city on this account, but performance by the company was asserted as a condition precedent to its recovery upon the contract. It is contended that the water was taken from the source prescribed, namely, the Missouri river, and it was shown that settling basins, also prescribed, were used by the company and were the means employed to purify and clarify the water, ever since the works were installed. It may be admitted that it was a continuing duty of the company to make the water as clear and potable as was reasonably practicable, and to that end to adopt such new and approved methods as came into use from time to time, yet it appeared that but twice in more than twenty years did the municipal authorities make complaint of the character of the water that was being furnished. In 1905 the city brought suit to forfeit the franchise upon the public grounds set up in the first and second defenses now under review, namely, insufficiency of pressure and impurity of water. In the following year the suit was determined against the city on the merits. For nearly eight years thereafter no further complaint was made.

More Tactical Move.
In June, 1906, near the end of the rental period covered by the second action now under review, the Water Board served upon the company a notice to increase the pressure and to furnish clear water. This notice was evidently a mere tactical move in the midst of controversy and litigation. It required compliance within ten days though manifestly if the means employed for many years without objection to make the water clear had been insufficient the adoption of new processes would have taken much more time than that allowed. Moreover, the notice was given while proceedings, commenced by the city, were on foot for the acquisition of the works under a right of purchase. The notice does not lessen the substantial accuracy of the statement that during the period covered by the actions and for years prior the city accepted the service without complaint either of the quantity of water or of the character of the water itself. There was a substantial performance by the company of its contract obligation to furnish clear and wholesome water coupled with retention of the benefits, and silent acquiescence on the part of the city. Even if it were true, as contended, that the company did not in full measure perform its duty, nevertheless upon the facts shown it may maintain an action upon the contract to recover the accrued hydrant rentals and the city is remitted to an affirmative assertion and proof of damages sustained. It is well settled that substantial performance of a contract by one party coupled with retention of the benefits thereof by the other will authorize an action by the former to recover the contract compensation; that in such case recovery may be had upon an averment of full performance though the proof falls short of showing it; and that the remedy of the latter is by counter claim for his damages or by an independent action before he is sued. (City of St. Charles vs. Stookley, C. C. 4th Cir. 72.)

Number of Hydrants.
The remaining question arises from the failure of the company to install the additional hydrants ordered by the city. The hydrant rentals sued for were for the last six months of 1904 and the first six months of 1905. During the former

period the city ordered the company to place 117 new hydrants, to do which involved the laying of a large amount of new water mains. The company obeyed the orders to the extent of forty-five hydrants and the requisite mains; on January 1, 1905, the remaining seventy-two hydrants had not been placed. The city asserted the failure of the company as a complete defense to the actions for rentals of hydrants previously placed and in service. The company replied, denying that it had defaulted in its duty and asserting that the city first broke the contract by failing to make payments due and owing it; also that the orders for more hydrants were beyond the lawful authority of the city and entailed indebtedness, it had no legal power to contract. The trial court held that the failure of the company to install all the hydrants ordered, being a failure to perform a duty imposed by the contract, was without sufficient excuse, that its actions upon the contract were not to be maintained, and that since it did not seek a recovery upon the quantum meruit verdict should go for the city.

Facts Bearing on This.
The facts pertaining to this feature of the case are as follows: The original contract of 1890 between the city and a predecessor of the company provided for the installation of 250 hydrants at designated places, and that others on new mains might thereafter be required by the city, and when so required should be placed and maintained by the company at an annual rental of \$6 per hydrant. As the city grew the number of hydrants put in service greatly increased until on July 1, 1904, there were about 1,500 of them, requiring payment to the company of about \$9,000 a year, payable on the first days of January and July. From the time the contract of 1890 was made to 1903 there was power in the city, expressly conferred by legislative act, to levy and collect taxes for the payment of the hydrant rentals. One of the ordinances incorporated in the contract provided that after twenty years the city should have the right to purchase the water works at an average by three engineers. The legislature of Nebraska passed an act, which was approved February 2, 1903, authorizing the city to acquire the works, creating a Water Board for the management thereof and repealing every provision of law for the levy and collection of taxes for hydrant rentals. Of course this act could not impair the obligation of the city in respect of hydrants theretofore installed. But it is in effect contended by the city that since the city was not required by the contract of 1890 to order the location of additional hydrants, since it might do so or not as it pleased, it was in respect of the exercise of its discretion subject to the dominant control of the legislature; that the company had no vested contract right to have new hydrants ordered and if the legislature would not order them, the legislature could say it should not; finally, that the withdrawal from the city of the means of payment was equivalent to a prohibition against incurring the indebtedness. We have not, however, found it necessary to determine this question.

Ordinance to Buy Works.
Pursuant to the act of 1903 the mayor and council adopted a resolution February 24, 1903, electing to purchase the water works. An appraiser was appointed for the city, the company appointed one and the two chose a third. During the progress of this litigation and the causes that led to it the appraisers were engaged in the performance of their duties, an appraisal not having been finally made upon. When the hydrant rentals became due July 1, 1903, the city defaulted in payment and the company had to sue for them. Like default was made January 1, 1904, and again the company sued. Judgments were rendered and after mandamus proceedings to compel the city to pay taxes to pay them they were paid in February, 1904. The rentals due July 1, 1904, were paid a few days later. The mayor of the city in an official communication to the city council said that the money with which the payment was made was raised under the mandatory ordinance of the city. This left a small balance in the water fund. The city levied no tax to pay future hydrant rentals, though necessarily provision for funds should have been made in advance. Not only this, but in November, 1904, while the city council was ordering many new hydrants, it actually sold the water fund then amounting to about \$20,000, was by order of that body transferred to the general fund. As ordinances ordering the company to install new hydrants were passed the mayor vetoed them, calling attention in one instance to the fact that there was no money in the water fund, no money in sight and no provision for the levy of taxes, also that it would cost the company over \$27,000 to install the fifty-five hydrants required by the ordinances then in question. The ordinances were passed over the mayor's veto.

Pass the Question.
We pass the question whether the company could lawfully be required to make extensive additions and improvements after the election of the city to purchase and while proceedings for its consummation were under way, or whether the duty of the company in such case was merely to preserve the integrity of the works and efficiently operate them as they stood when the election was made. There was substantial evidence that the city did not intend voluntarily to pay the rentals either of the old hydrants or of the new ones it ordered. It had recently defaulted in payments and had compelled the company to engage in litigation. It diverted the balance in the fund specially collected for the purpose and it made no definite provision, as the law required, for the indebtedness that was accruing from month to month. When the rentals for the last half of 1904 were due the city did not pay them and the fall due the city did not pay them and the company brought one of these actions for their recovery. We do not think the contention that the city was justified in refusing to pay because the remaining hydrants had not been placed, can be sustained.

No Time Prescribed.
The contract prescribed no time within which new hydrants should be installed on new mains after being ordered by the city, and the company was therefore entitled to a reasonable time for performance of its duty in that regard. Whether the company committed a breach of its contract by failing to install all of the hydrants involves a consideration of the number ordered, and what would be a reasonable time in view of the season of the year. There were 117 ordered between July 12 and December 28, 1904. Of these the company installed forty-nine, and to do so laid about four miles of new mains before January 1, 1905. We find no evidence that this was not a reasonable performance by the company of its duty. It cannot be assumed that the company broke its contract merely because on January 1, 1905, sixty-eight of the hydrants ordered during the preceding six months had not yet been placed. No contract or ordinance imposed upon the company the duty to place all hydrants ordered within any fixed and limited time. The company not appearing to have been in default on January 1, 1905, the city should have paid the rentals due on that date, but it did not do so and the first of the actions now under review was brought. The failure of the city to pay were not important in their relation to the contract as an entirety, nor can they be ascribed to mere chance or oversight. There was manifested a purpose to withhold performance of stipulations that were im-

portant to the interests of the company. "A municipal corporation, in respect of its purely business relations as distinguished from those that are governmental, is held to the same standard of just dealing that the law exacts of private individuals. One party to a continuing contract of mutual and dependent covenants cannot require the other to perform executory stipulations while he persists in default and compels the other to seek the aid of the courts for compensation due for those he has already executed. (Construction Co. against Seymour, 91 U. S. 444; Cort against Ambergate, etc., 17 Q. B. 127.)

"When the company declined to install the remaining hydrants after the city it did not thereby wholly discard the contract and deprive itself of its right of action upon the contract for the rentals previously earned. When there is part performance an action upon the contract will lie for the balance of the rentals due. (District of Columbia against Camden Iron Works, 181 U. S. 438.)"

BILLIONS IN CROPS
(Continued from First Page.)
The removal of locusts from the public domain has necessitated more stringent regulations for the control of cattle manges. There were 4000 diagnoses for this disease in Utah, Colorado, New Mexico, and Arizona. The removal of locusts from the public domain has necessitated more stringent regulations for the control of cattle manges. There were 4000 diagnoses for this disease in Utah, Colorado, New Mexico, and Arizona. The removal of locusts from the public domain has necessitated more stringent regulations for the control of cattle manges. There were 4000 diagnoses for this disease in Utah, Colorado, New Mexico, and Arizona.

National Forests.
The area of forest land reserved by the government was increased during 1907 by 1,000,000 acres, making the total area of the national forests more than 100,000,000 acres. In fact, nearly all the timber land of the country is now under the administration of the Department of Agriculture. The forest lands are now being guarded against fire, theft and wasteful exploitation, and the timber is being stored and water will be safeguarded for all time. At the same time their present use is being promoted. Timber is being given away in small quantities through forest ranger offices, and in larger quantities to communities for public purposes. Beyond this it is sold to private parties under restrictions which will maintain a lasting supply. While the primary object of setting aside the national forests is to preserve the great sources of prosperity for the people, it is also a source of satisfaction that the income from the national forests was greater during the last fiscal year than the entire cost of administration. This income amounted to \$1,500,000—twice as much as the income for 1905 and more than twenty times that for 1902.

Fire Record.
One Death in Apartment House Blaze.
GLOUCESTER, Mass., Nov. 29.—A fire in the apartment house here today, resulted in one death, several injured, and damage estimated at \$15,000. A man believed to be George Chambers of this city was killed by jumping from a window on the second floor of the burning apartment house which was a three and one-half story structure. The injured persons included several firemen and house holders. One woman, who was badly affected by the smoke that at first her condition was regarded as very serious. The Harvard house was owned by the L. B. Smith company.

Heavy Loss at Granite, Colo.
LEADVILLE, Colo., Nov. 29.—A fire which started from the overturning of a lamp in a hotel here today, resulted in the destruction of three-fourths of the town of Granite, a small mining station twenty miles east of Leadville. The total loss is estimated at \$25,000.

Store Open Saturday Night Till 10 O'clock

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OUR AFTER THANKSGIVING SALE OPENS SATURDAY MORNING

Thousands of Dollars worth of beautiful garments upon which this great Cloak and Suit house has built up such a well earned reputation will be offered Saturday at greatly reduced prices. THIS EXTRAORDINARY SALE OF HIGH GRADE STYLISH CLOAKS TAILORED SUITS AND FURS will attract all of Omaha's most critical dressers.

BEAUTIFUL TAILORED SUITS AT A SACRIFICE

\$45.00, \$50.00 and \$55.00

TAILORED SUITS—Over 200 to select from, all are out of the ordinary styles; reduced to—

\$35.00 and \$37.50

\$35.00, \$37.50 and \$40.00

TAILORED SUITS—All correct styles, all colors, and all sizes to choose from; reduced to—

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\$25.00, \$27.50 and \$30.00

TAILORED SUITS—All are stylish New Suits, made of all wool materials, reduced to—

\$19.50

AFTER THANKSGIVING SALE OF COATS

Over 500 Beautiful Coats made in either tight fitting, semi-fitting or loose styles, of finest broadcloths and lined throughout with satin, regular \$35.00 values, at **25.00**

Over 800 Coats made of all wool broadcloth or kersey, in black and all colors, also fine covert and fancy materials, all styles and sizes to choose from; regular \$15.00 and \$17.50 values, at **19.50**

Over 400 Coats made of good broadcloths and kersey, in black or colors, also of fancy materials. All are new stylish garments and regular \$17.50 and \$20.00 values, at **12.50**

AFTER THANKSGIVING SALE OF FURS

\$57.50 Near Seal Coats, made of selected skins, in blouse or regular styles, special price, at **\$45**

\$45.00 Near Seal Coats, made of skins, in blouse or regular styles, special price, at **\$35**

\$55.00 Brook Mink Coats, made of selected skins, in smart hip length styles, special price.

We have hundreds of other Fur Garments. All are offered at Special Prices.

Fine Squirrel Sets, \$35.00 special

\$25.00

Hooded Squirrel Sets, worth \$25.00, special at

\$15.00

Handsome Brook Mink Sets, worth \$10.00, special at

\$12.50

Isabella or Sable Fox Scarfs, worth \$2.00, special at

\$13.50

Isabella Fox Scarfs, worth \$1.50, special price, at

\$10.00

\$15.00 Squirrel Neck Pieces—

\$10.00

\$5.00 Squirrel Neck Pieces—

\$5.75

\$7.50 Brook Mink Neck Pieces—

\$4.75

\$6.00 Neck Pieces of Brook Mink or Squirrel, at

\$3.75

Up to \$6.50 Waists at \$2.98

All pretty new designs, made of good taffeta laces, in white or ecru, nun's veiling and wool waists, all colors and sizes, regular \$5, \$6.75 and \$6.50 values, at **2.98**

Up to \$8.50 Skirts at \$4.95

New Skirts made of all wool panama or fancy materials, in all the newest designs. Some \$10 to choose from; regular \$6.75, \$7.50 and \$8.50 values, at **4.95**

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Underwear is the foundation on which you build health and comfort.

If you realize the vital importance of the right kind you will appreciate the excellence of our stock. Two Underwear departments.

Easy fitting, comfortable underwear, from the best manufacturers in the country.

Boys' and Girls' Underwear

In the East Room

Boys' Union Suits, combed Egyptian cotton, natural gray, Jersey ribbed, \$1.00

Boys' Union Suits, combed Egyptian cotton, extra quality, per suit, \$1.50

Boys' Union Suits, plain plaited wool and cotton, 60 per cent wool, suit, \$1.00

Boys' Shirts and Drawers, fine, natural gray, Jersey-rib garment, at each, \$1.00

Boys' Shirts and Pants, gray, ribbed cotton, garment, \$1.00

Girls' Vests and Pantalets, white, natural gray, Jersey-rib, fleeced cotton, per garment, \$1.00

Girls' Vests and Pantalets in two-threads, fine, combed, Swiss rib, silk finish, garment, \$1.00

Girls' Union Suits, fleeced Egyptian cotton, suit, \$1.00

Girls' Black Pantalets

Jersey ribbed, fleeced cotton, according to size, \$1.00 to \$1.50

Jersey ribbed, Australian wool, according to size, \$1.00 to \$1.50

WRITE FOR ILLUSTRATED CATALOGUE.

BENSON & THORNE CO.

Lilliputian Bazaar

1515-1517 DOUGLAS STREET

TO THE PUBLIC

Whereas, it has been falsely, wrongfully, and injuriously published that Christian-son Bros. at 31st and Dodge streets, were quarantined because of typhoid fever, we desire hereby to give Public Notice that such report is false. We never were quarantined and had no reason to be. On Monday, Nov. 25, Dr. Connell gave us "orders" not to sell our milk. On the following morning, Nov. 26, he countermanded said order, and told us to proceed to sell milk as before, from our cows.

CHRISTIANSON BROS.

By John Christenson.

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THE OMAHA BEE

Best in West

AMUSEMENTS.

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Tonight, Saturday Matinee and Night

Law Year's Best Musical Comedy

LITTLE JOHNNY JONES

Next Tuesday and Wednesday

MATINEE WEDNESDAY

MR. WILLIAM FAVERSHAM

In the American Comedy

THE SQUAW MAN

By EDWIN MILTON ROYLE

SEAT SALE TODAY.

Thursday, Friday and Saturday,

December 6-7-8. Matinee Saturday.

SEAT SALE TOMORROW.

MAN OF THE HOUR

PRICES—Night, \$1.00, \$1.50, \$2.00, \$2.50, \$3.00, \$3.50, \$4.00, \$4.50, \$5.00, \$5.50, \$6.00, \$6.50, \$7.00, \$7.50, \$8.00, \$8.50, \$9.00, \$9.50, \$10.00.

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ADVANCED VAUDEVILLE

MATINEE TODAY 2:15

Adults 25c Children 10c

NOTE—Curtain \$15 Sharp

TONIGHT—Prices, 10c, 25c, 50c

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Last Appearance of Miss

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The Expert Skater, Saturday Night.

ADMISSION, 10c SEATS, 50c

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Waltons; Daisy Gordon;

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2:30 AND

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NINE GREAT ACTS

Clutch

denotes shirt superiority. It's a label that marks the best made, best balanced and the most fashionable shirt produced ready for wear. \$1.50 and more.

CLUTCH, PERRY & CO.

MAKERS OF ARROW COLLARS

Scott's Emulsion

sends heat and rich nourishment through the blood all over the body. It does its work through the blood. It gives vigor to the tissues and is a powerful flesh-producer.

All Druggists; 50c. and \$1.00.

MEXICO CITY, Nov. 29.

Ricardo Castro, Mexico's foremost musician, died here yesterday of pneumonia. Signor Castro was not yet 30 years old but had achieved international fame as a pianist and composer. At the time of his death he was the director general of the national conservatory of music.

Child Burned to Death.

LEAD, S. D., Nov. 29.—(Special Telegram.)—In a fire this morning which destroyed the residence of M. R. Matson, on Mill