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A

REPORT

OF THE TRIAL OF THE CAUSE OF
JOHN TAYLOR vs. EDWARD C. DELAVAN,

PROSECUTED FOR AN ALLEGED

LIBEL;

TRIED AT THE ALBANY CIRCUIT, APRIL, 1840.

AND

MR. DELAVAN'S CORRESPONDENCE

WITH THE EX. COMMITTEE OF THE ALBANY CITY TEMPE-
RANCE SOCIETY, &c.

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JOHN TAYLOR VS EDWARD C. DELAVAN

PROSECUTED FOR AN ALLEGED

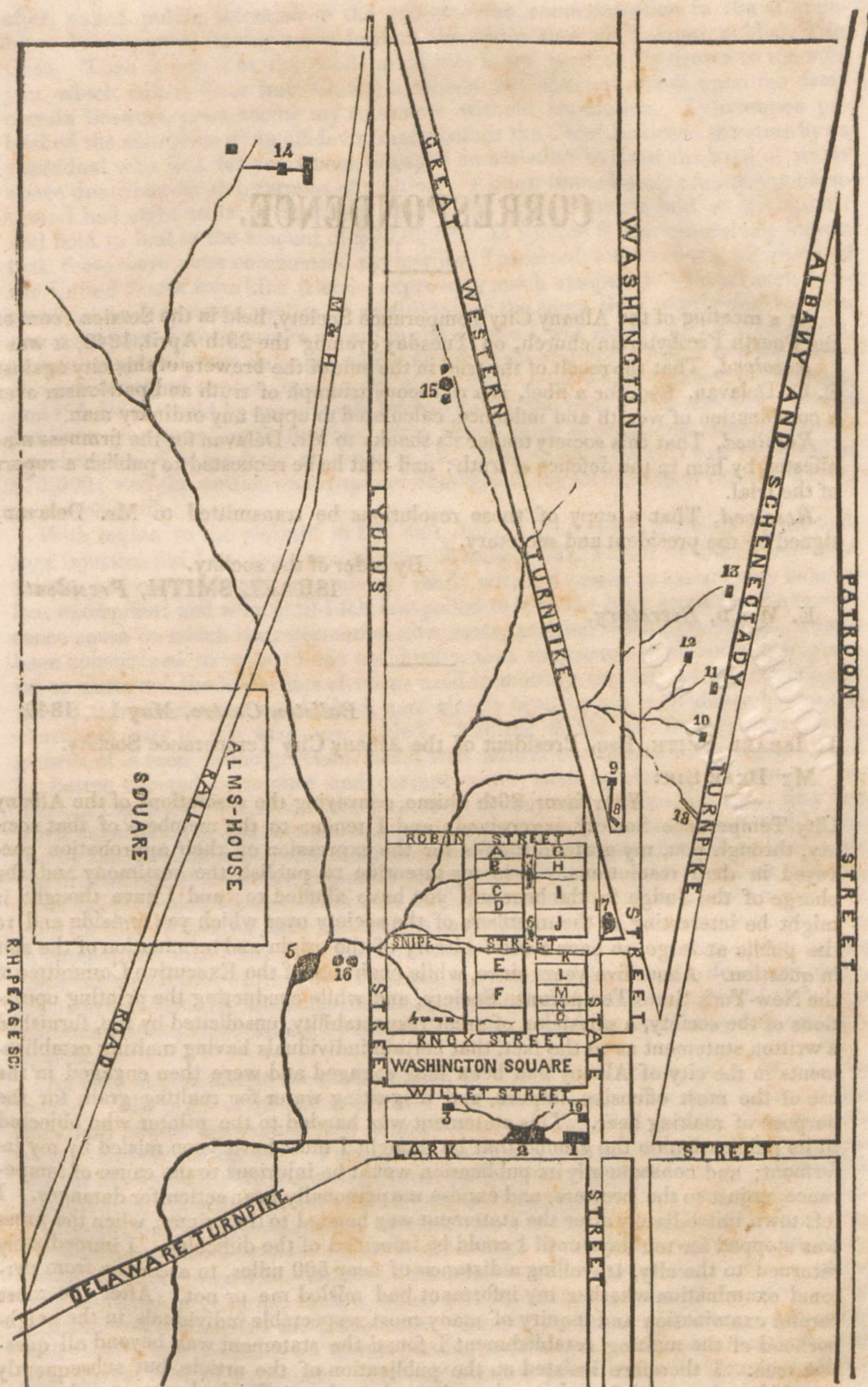
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REFERENCES.

1. Malt house. 2. Pond. 3. Glue factory and drain. 4. Slaughter-houses. 5. Hole in the creek. 6. Dead hog. 7. Remains of dead horse. 8. Orphan Asylum and drain. 9. Privy on the creek. 10. and 11. Slaughter-houses. 12. Supposed a barn. 13. Coulson's glue factory. 14. Wilson's slaughter-house and appendages. 15 and 16. Heaps of manure. 17. Pond north of the Burial Grounds. 18. Drain from turnpike. 19. Mouths of three sewers.
- A. Quakers. B. Potters Field. C. Negroes. D. Baptists. E. Reformed Dutch. F. 2d Presbyterian. G. Seceders. H. Lutherans. I. Reformed Dutch. J. Episcopalians. K. Private Cemetery. L. 1st Presbyterians. M. United Presbyterians. N. Catholics. O. Methodists—burying places.

CORRESPONDENCE.

At a meeting of the Albany City Temperance Society, held in the Session room of the Fourth Presbyterian church, on Tuesday evening the 28th April, 1840, it was

Resolved, That the result of the trial in the suit of the brewers of this city against E. C. Delavan, Esq. for a libel, is a righteous triumph of truth and patriotism over a combination of wealth and influence, calculated to appal any ordinary man.

Resolved, That this society tender its thanks to Mr. Delavan for the firmness manifested by him in the defence of truth; and that he be requested to publish a report of the trial.

Resolved, That a copy of these resolutions be transmitted to Mr. Delavan, signed by the president and secretary.

By order of the society.

ISRAEL SMITH, *President*.

E. WOOD, *Secretary*.

Ballston Centre, May 1st, 1840.

To ISRAEL SMITH, Esq. President of the Albany City Temperance Society.

MY DEAR SIR:

Your favor, 28th ultimo, conveying the resolutions of the Albany City Temperance Society, is received; and I tender to the members of that society, through you, my grateful thanks for the expression of their approbation conveyed in their resolutions. It is my intention to publish the testimony and the charge of the Judge in the beer suit you have alluded to; and I have thought it might be interesting to the members of the society over which you preside and to the public at large, to have a brief history of the origin and termination of the suit in question. About five years since, while chairman of the Executive Committee of the New-York State Temperance Society, and while conducting the printing operations of the society, a physician of great respectability, unsolicited by me, furnished a written statement as to the fact, that certain individuals having malting establishments in the city of Albany had been long engaged and were then engaged in the use of the most offensive, impure, and disgusting water for malting grain for the purpose of making beer. This statement was handed to the printer who objected to its publication on the ground that he thought I must have been misled by my informant; and consequently its publication would be injurious to the cause of temperance, unjust to the brewers, and expose me personally to an action for damages. I left town immediately after the statement was handed to the printer, when the press was stopped for ten days until I could be informed of the difficulty. I immediately returned to the city, travelling a distance of near 500 miles, to ascertain from personal examination whether my informant had misled me or not. After the most careful examination and inquiry of many most respectable individuals in the neighborhood of the malting establishment I found the statement was beyond all question true. I therefore insisted on the publication of the article, but subsequently was induced to withdraw it at the solicitation of an individual who stated to me that he was interested in one of the establishments named, that the statements were true; but the use of impure water should be discontinued. Some six months after this occurrence I was again informed, and by citizens of the first respectability, that as the filthy water could be procured for about sixpence a hogshead, while it would cost about fifty cents to procure pure, the filthy was again used in great quantities. I therefore felt it my duty to the public to state the fact, and did so state it in the American Temperance Intelligencer; a copy of which was placed in every family in the city of Albany, and sixty thousand circulated throughout the Union. No notice was taken of the publication until one of the political papers of Albany, months

after, called public attention to the subject—the communication in the Temperance Intelligencer having come back to the editor through a paper published in Ohio. Then it was that the public mind was more particularly drawn to the subject, which called forth immediately a violent and abusive attack upon me from certain brewers, pronouncing my statement without foundation. I thereupon published the substance of an affidavit, made before the Chief Justice of the state by an individual who had for years been engaged in assisting to draw the kind of water above described for the purpose of malting. Almost immediately after this publication, I had eight suits commenced against me with damages laid at \$300,000; and held to bail in the amount of \$40,000.* As soon as it was extensively known that there were suits commenced against me, I received letters from all parts of the United States from kind friends, expressing much sympathy. To all such communications I returned replies of gratitude; at the same time expressing my firm conviction that I could sustain myself in the charge I had made; and if I could not, to meet personally any damages which an incorrect statement might expose me to. From a variety of causes growing out of the law's delay which I do not understand, and if I did it would be unnecessary here to detail, the trial of the case now decided has been postponed until the 21st ult.; when, after a protracted examination, it was determined in my favor on the 27th ult. The damages in this suit were laid at \$74,000; and the verdict was *sixpence* damages in my favor, which threw the costs on the plaintiff.

With regard to the plaintiff in this suit, John Taylor, Esq., I should do my feelings injustice did I not say a few words. I esteem Mr. Taylor as one of our most worthy and estimable citizens; always ready with his means to assist every benevolent enterprise; and who, until I felt compelled to take the high ground in the temperance cause on which the reformation now rests, assisted it with his purse. I have been constrained to come to the conclusion, that the custom had become so general to disregard the impurities of water used in malting, that the *wrong* of such use was in a great measure overlooked, until clearly brought out in evidence before the court and jury in the case now settled. Malting is but the first process of the growth of a seed in the ground; and it was natural to suppose this purpose would be better effected by impure and corrupt water, than by clear, pure water. Indeed, it has been understood as a matter of history and science for ages, that the great superiority of the London malt liquor over any other was occasioned by the use by the great London brewers of the water of the Thames, loaded, as it is, with the filth of one of the most populous cities in the world. Were I a beer drinker, even now, I would as soon drink Mr. Taylor's beer as that of any other maker. I view the filthy water, as nauseous as it has been proved to be, as a mere circumstance in comparison with other qualities in all beer. Unlike all other intoxicating drinks used for a common beverage, it contains, by means of the hop, a deadly narcotic, an anodyne, with its alcoholic stimulant, and thus distracts, impairs and racks the nervous system, more fatally by means of acting upon it by conflicting and contrary agencies.

As soon as practicable the evidence and charge of the Judge will be given to the public. The price of the document will be established at a low rate. Any profits that may accrue over actual cost of publication will be paid over to the treasurer of the temperance society. The friends, therefore, who extend to me their sympathy, or others kindly disposed to give the public the important facts developed, can now have an opportunity to contribute, so as to circulate a document which should, in my opinion, be placed in every family in the Union. I trust the friends of temperance and truth in every city, town and village in the Union will, without delay, make an effort to give the document the most extended circulation. A map of the neighborhood of the malt-houses, which was referred to on the trial, giving the localities, will accompany the publication. Mr. E. H. Pease of Albany, book-seller, will receive and despatch all orders coming with funds, post paid, or to draw with the current rate of exchange. The extreme low price of the document must preclude credit.

I am, dear sir,

Respectfully yours,

EDWARD C. DELAVAN.

* See affidavit on last page.

TRIAL FOR LIBEL.

CIRCUIT COURT,—APRIL TERM, 1840.

Judge CUSHMAN presiding.

JOHN TAYLOR

vs.

EDWARD C. DELAVAN.

Counsel for Plaintiff,

Messrs, STEVENS, REYNOLDS, McKOWN and VAN BUREN.

Counsel for Defendant,

Messrs. BEARDSLEY, TABER and WHEATON.

THE PROSECUTION.

Tuesday, April 21, 1840.

Mr. STEVENS opened with a brief statement of the case. John Taylor, the plaintiff, Mr. S. said, was a very worthy and respectable inhabitant of this city. He had been, for a great number of years past, engaged in the occupation of a brewer. He had had, and now had, a large amount of property invested in this business.

Some few years ago, he believed in 1835, the defendant, Mr. Edward C. Delavan, became exceedingly desirous to obtain notoriety. He was engaged in a very good cause; a cause which enlisted the sympathies and good wishes of all the citizens of this place; a cause which he believed he might say, without fear of contradiction, had had the benefit of the time, the influence, the money of Mr. Taylor, as well as of a great many other citizens of this community. The defendant at the time mentioned, saw fit to publish or cause to be published, of and concerning Mr. Taylor and the business in which he was engaged, a certain libel in the public newspapers printed in this city, for which this action was brought.

This libel, this false and scurrilous article, which Mr. Delavan saw proper, through the medium of the public press, to publish against Mr. Taylor, was one that was calculated to hold him up to the scorn, the contempt, the hatred of every honest man; to bring his business into disrepute: indeed, to utterly ruin him, so far as brewing beer or making malt was concerned; to show him up to the public as entirely reckless of the means of manufacturing the article he vended.

Mr. S. proceeded to read the alleged libel from the Evening Journal of the 12th February, 1835, as follows:

"TO THE PUBLIC.

"The following statement has been made by a respectable and responsible person, in the presence of Chief Justice Savage and E. C. Delavan; (the former took down the testimony.) The individual making the disclosure felt a delicacy in giving his name to the public; but should his statements be denied, he stands ready, not only to give his name, but make oath to the facts.

"He states, that so long since as six or seven years he was knowing to the fact of Fidler and Taylor's, and Robert Dunlap's malting establishment on the hill in Albany, being supplied with water for malting from stagnant pools, gutters and ditches, often in such a state as to be green on the surface; that such water was collected for several seasons to his knowledge. That he had not only seen the water of this character collected, but deposited in the malting establishment for the use of malting. That no attention was ever paid to cleanliness; the water was often taken from puddles in which were dead animals. When the water was low in the pools, holes were sometimes made, in which the pail was sunk; and he had seen the sides of it come in contact with dead animals in a state of putridity; has seen water carried to the malt houses nearly as thick as cream with filth; saw last winter, water passing on carts coming from the direction of the same filthy ponds, and taken to the malt houses. There are several malt houses on the hill; all of which, he believes, rely on water taken from such places as he has described, occasionally. That the facts here stated he believes to be known to hundreds residing in the neighborhood of the malting establishments. He states, also, that seven hogsheads of water are usually placed in a steep-tub at a time, and it is then filled with barley; that he has seen a deposite or so-

din eat of from 10 to 12 inches of the most filthy matter settle to the bottom from that quantity of water. This has been from water collected from the places described. That he has no unkind feeling towards any of the brewers; that he is astonished they should deny facts so easily to be proved; that he knows several cartmen who for years have been employed in carting water from the places described to the malt houses. That Mr. Fidler, now Fidler & Ryckman, was recently of the firm of Fidler & Taylor; and that Mr. John Taylor was of the same firm."

On the 17th of February, Mr. S. said, Mr. Delavan published another article in the same paper, which was part of the slanderous matter for which the suit was brought. Mr. S. read as follows:

"TO THE PUBLIC.

"The conductors of the Temperance Press publish nothing which they do not believe to be entirely true; the statements with regard to impure water made use of by certain malting establishments were furnished by respectable citizens, who have given their affidavits as to the facts. When legal steps are taken by those who feel themselves aggrieved, the public may rest assured that nothing has been stated but what can be most abundantly sustained by proof."

For the publication of these libels Mr. Taylor had seen fit to present his claim for damages. The defendant had interposed a plea, denying the publication. To that plea he had also subjoined a notice, of which he (Mr. S.) did not propose to speak now. He should do no more than state that he supposed he should be able to prove that Mr. Delavan procured the publication of these libels; that he indemnified the proprietors of this newspaper against any suits on account of them; in a word, enough to charge him with the publication of them.

The question was not one as to whether the temperance cause was to be sustained or not. If that question were ever to be presented to a court and jury, we (said Mr. S.) should claim that the proof would not support the proposition, that Mr. Delavan is alone the supporter of that cause in this community. The cause was a good one. Mr. Delavan had been engaged in it, and the occupation was a good one. But he had no business, for even the best of purposes, to resort to foul, wicked and unholy means to get it or himself notoriety. He had no business to make an attack on a respectable neighbor and fellow-citizen who had labored in that calling as much as he had, or on any other citizen, to further that or any other cause. When he did that, it was the duty of courts and juries to render full justice to the party aggrieved. It was not in the power of an individual to redress a grievance of that kind, except by application to a jury. We had no right to take justice into our hands, and administer summary punishment on the person guilty of such an outrage. We were bound to submit to it until our grievances were submitted to a court and jury; and it is to them we look and must look, and do now confidently look to be remunerated for the injury sustained.

ANDREW WHITE, sworn.

Examination direct.—Look at this paper; [an Evening Journal of the 12th February, 1835.] Are you the publisher of that paper? One of the publishers. Who wrote the article marked there, or furnished it for publication? Don't know who wrote it. Mr. Delavan handed the article to me. For publication? Yes. Did you object to publishing it? I told him I did not like to publish it. Did you give your reasons? Upon my objecting he said he would see us harmless. What was the circulation of your paper at that time? Could not say exactly. Within some hundreds, perhaps? I should think it was between four and five thousand. Does your paper circulate in different parts of the State and Union? Not much out of the state. Do you exchange with printers through different parts of the country? All through the Union. There was a short piece published on the 17th. Look at this, [an Evening Journal of the 17th] and tell us if that came from the same source? Don't recollect particularly about that article. The other one I do.

The plaintiff's counsel here rested.

THE DEFENCE.

Mr. TABER opened the defence. He alluded to the statement which had been read of the kind of water used by the maltsters, saying that he was free to concede that if that statement should prove to be false—if the defendant were guilty of publicly imputing the use of such water, when in truth the plaintiff had used pure and wholesome water, that then he would deserve the punishment sought to be inflicted on him. But if, on the contrary, it should turn out, that either because the plaintiff thought that water better for malting, or because it was cheaper from being nearer his malt-house, he had used it for malting grain as charged, then he apprehended the indignation of the jury and of the community would recoil upon the plaintiff.

We (said Mr. T.) have no disposition, any more than the counsel on the other side, to mingle this case with the cause of temperance. It has nothing to do with it. Mr. Delavan, it is true, has been a distinguished friend of the cause. Mr. Taylor also, until he thought it harmed his own business. But whether either or both are temperance men is not material to the investigation before us. As to the character of Mr. Taylor, as it has been spoken of on the other side, I freely accord to him the high respectability that has been claimed for him. I will say also, that he is a man whom I have been accustomed to respect from my earliest childhood. We have imputed nothing against him beyond what is charged in the alleged libel, and that we are compelled to prove true if we can.

It is my duty, gentlemen, to state the circumstances of this case so far as to enable you to understand our testimony. It was some time in the year 1834, that Mr. Delavan, by reason of his having much to do in conducting a temperance paper in this city, was called upon by a respectable and responsible individual, and informed that the maltsters on the hill used such water as has been charged, to malt barley for beer. That statement, was handed to the printer for publication, but it was not published. Mr. Delavan, meanwhile, having left the city, returned to it, and immediately set himself to work to ascertain its truth. He satisfied himself that the statement was literally true; but under assurances that the use of such water would be discontinued, he had the type distributed, and suspended the publication of it six months. Intelligence was however brought to him that the maltsters were using the same water in the same manner, and then, and not till then, did he prepare and publish the article in question. After having published that article in the Temperance Journal, it was distributed to every family in the city, and sent abroad far and wide throughout the Union.

The maltsters on the hill, submitted to that for at least six months, without one word of complaint; but upon its re-publication in the Evening Journal, they assembled to the number of eight or ten, united their forces, raised a purse of many thousands of dollars, and commenced a war, which they intended should be a war of extermination, against Mr. Delavan. This, gentlemen, is the origin of this suit, of which there are eight or ten like it, and Mr. Delavan comes before you, under these circumstances, to vindicate himself.

When this suit was commenced, though advised by his attorney that he had a good defence in point of law, Mr. Delavan preferred, and instructed his counsel, to put him before the jury on the truth of the matter charged, and after all this lapse of time (ever since May '35,) we have at length the satisfaction of coming before twelve of our neighbors to prove the truth of these assertions. That you may understand this case, gentlemen, and as the counsel for the plaintiff has not stated what the issue is, but has reserved for another occasion some intended technical objections to our notice, it becomes my duty to call your attention to the distinct issue. This case has been before the supreme court, or rather another one by Mr. Fidler, the partner of Mr. Taylor, precisely like this, and the pleadings in that case have undergone the revision of that court. The precise question is thus stated by the Chief Justice:

"That six or seven years ago (that is, previous to the publication,) the plaintiff caused his malting establishment on the hill in Albany, to be supplied with filthy, putrid water, such as is taken from pools, gutters and ditches, in which were dead, putrid animals: that the water was often so foul and polluted as to be green on the surface, and nearly as thick as cream with filth; that such water had been used by the plaintiff for several seasons, in malting for his brewery; and that steep-tubs, used for that purpose, which usually contained seven hogsheads, had a deposit of ten or twelve inches of the most filthy matter, that settled to the bottom of them. This is the essence of the charge as laid in the declaration, as understood by the general reader, and which the defendant was bound to justify."

That (said Mr. T.) is the substance of the charge set forth in the plaintiff's declaration, and which the defendant is bound to justify. We are bound to prove the substance of this charge—that water of the same filthy character was used for several seasons in malting. We have plead what is called the general issue, as matter of form, though the defendant never intended to deny the publication. We have subjoined a notice, to the effect, that we would prove that this water was such water as to justify the truth of the charge alleged to be libellous—that the plaintiff caused and permitted it to be used. We have had a map made showing, among other things, that while the brewery is near the river, the malt-house is on the hill in Lark-street. I have a right also to call attention to the difficulty we labor under from being obliged to rely, in some respects, on witnesses who are or have been in the employment of the plaintiff—none other knowing the facts. We

are obliged to get testimony from unwilling witnesses—to find out first what they know, and then get them to tell it. Your patience, therefore, will be subjected to some trial, but we believe we can show you notwithstanding, that we have not stated the truth quite as bad as it is. If so, it was wrong for the plaintiff to use that water. If he thought that by the process of fermentation or any other means, the beer was subsequently purified, he ought to have let you and I, and every body who wished to drink it, know what it was made of, and permit us to judge for ourselves whether we would drink it or not. All that Mr. Delavan did was to publish a statement as to what the beer was made of. If it don't hurt the beer to be made of such water, then no harm has been done by the publication. If it does, then the public ought to know it, most assuredly. These, gentlemen, are all the remarks we have to make before proceeding to the testimony, firmly believing that we can satisfy you of the truth, the entire truth, of the statement in the Evening Journal.

[On the 3d page is a copy of the map alluded to by the witnesses, and exhibited on the trial.]

THOMAS COULSON (Class leader, Methodist Church,) sworn.

Examination direct.—Where do you reside? In Washington-street. How long have you resided on the hill in Albany? About 19 years. Have you had a glue factory on Lark-street? Not on Lark-street but near it, near Willett-street. About how long did you carry on that glue factory? Fourteen years. Was it before the malt-house of Fidler & Taylor was erected? The malt-house was built previously. You know the malt-house of Fidler & Taylor near you? Yes. Was there a pond between your glue factory and this malt-house? I lived in a house on Lark-street, a little south of the pond. Was your glue factory in plain sight of the malt-house? Yes. What kind of water was there in that pond? Always bad; in a putrid state, in the fall of the year. What was in the water—any thing to make it bad? Different kinds of animals floating in the water. In the warmth of the weather the water was green. Dogs and cats and hogs, I've seen. Have you ever seen any larger animals there? Not in the pond. At one time a horse died on the rising ground above the pond. Repeat that, if you please? I have seen a dead horse that died there, pretty near the pond—on the rising ground near it. Seen any larger animals in the pond? Don't recollect. Did he decay there? The horse remained there, sir. Do you know what time of the year they got water for malting? They don't do any thing in summer; when the fall comes they take it; they commenced about October. There were dead animals in the water? Yes, sir. Did you ever try to make glue of that water? It would'nt do for that. Why not? It was what I call rotten water. Have you seen that water dipped up and carried any where? I have seen it taken in hogsheads into the malt-house—poured through at the end of the malt-house.

Plaintiff's counsel.—Taylor's malt-house? Yes, sir.

The Court.—What about its being poured in? It was poured in at the end of the malt-house.

Defendant's counsel.—At which end of the malt-house? The north end—the end on State-street. Was it through a trough or chute that went in at the end? They run the water in, I believe, in that way.

Plaintiff's counsel.—Do you say that was the fact? I saw it, sir. A trough? Yes.

Defendant's counsel.—About how far is the malt-house from the pond? About three lots [the witness was understood to say,]—been filled up since. Do you say three lots? About 100 feet. How was the pond formed? Made by running a road across the hollow. Did the wash of your glue factory run into the pond? I suppose so. Did they dip up a great deal or a little of this water? Don't know how much. Did they carry many cart loads? A great many cart loads; very often two carts going at once.

The Court.—Two carts going at once, carrying water from the pond to the malt-house? Yes.

Defendant's counsel.—Did that continue during the malting season? It did through a part of it: continued from fall to spring; cutting a hole in the ice in the winter. Did they get it all of the seven days of the week? [Plaintiff's counsel objected to this question, as too leading.] I have seen it on the Sabbath, but not so frequent as other parts of the week—sometimes seen them, not often. Recollect, if you can, and tell us how many seasons you saw this water dipped up and thus carried to the malt-house? As far as I can recollect, they began in '26 or '27, and continued until '33 or '34: I am not certain as to the time. How did they dip the water up? They drove the cart and horse into it, and dipped it up with a dipper; sometimes with a long handle, and sometimes with a short one. Where did this

water come from? any springs there? No springs there. There is a small spring on the rising ground, but it amounts to nothing. Some from State-street continued; some from Lark-street; some from the west—comes in from all quarters. Does it soak in from the top of the ground? Yes. Do you know Mr. Taylor, the plaintiff? Yes. Did you or did you not see him about there? [Plaintiff's counsel objected to this question, as too leading.] Do you know any thing in regard to Mr. Taylor's being about there? I have not seen him there often—have seen him there. During the time this water was dipping, have you seen him there? Can't say that. You saw Mr. Taylor there sometimes—was it between the periods you have mentioned, '26 and '34? My recollection is indistinct. Do you know any thing of a syphon being fixed from that pond? No. Will you look at this map and tell us if it properly represents the relative location of the premises? [The map copied above.] Witness thought it did. What kind of ground is it under the soil? There are only a few inches of soil; then yellow clay; then blue clay. Hold water? Yes. Hold it tight? Yes.

Cross-examined.—Did you at the time know what they were doing with that water? I could not know; saw where it went to; don't know what purpose they put it to. You did not know what they were doing with the water? I saw them running it into the house; that is all I can say on the subject. You say they commenced in the fall and continued in the spring? Don't know whether they got it in the spring or not; they got rain water in the spring. Does'nt it rain up there on the hill in November? Not often in that season of the year. Will you name some of the cartmen you saw doing this? Don't think I ought to do that. We should like to know their names. I saw one by the name of Butler; as to any other name, I don't know. His christian name? Don't know what it is. Where do you live? I live now on the top of Washington-street. Is he (Butler,) in the court room? I have not seen him. Seen him lately? No, sir. Remember any others? Can't remember any other name. Did you ever tell Mr. Taylor his men were using this cat cream? No, sir. Said nothing to him? Not at all. Why not? What business had I to mention it! Why not? It was not my business—that is all the reason I can give. Do you know how the defendant found out what you knew about dead hogs in that neighborhood? I can't tell that. Who first spoke to you about it? A gentleman lately spoke to me. Was that the first time that any body knew what you could testify? No. Who first spoke to you? Can't think of the gentleman—Mr. Delavan knows, I suppose. Some agent of Mr. Delavan's? In partnership? That was three or four years ago. Mr. Delavan's partner first spoke to you then? About that time. Is your glue factory on a level? It has gone from there—it was on level ground, or pretty near. It is quite level now, is it not? Yes. What quantity do you throw away? Sometimes none at all—sometimes considerable. What is a good deal? Twenty hogsheads. Not all at once? During the day. Have you made a stream? In wet weather there was flow enough—in dry weather it dried up before it got to the pond—in a wet day it all washes down together. Do you swear that no stream runs through that valley? No natural stream—don't call that a natural stream that is made by the rain. Why not? There is no water except in rainy weather. Did not run when dried up? No, sir. A good deal of water must have run there? Yes; that is done in the spring of the year. There is evidence then that considerable water run there? Yes. What is the name of this pond? Don't know that it has any name. Recollect when Mr. Butler drew that water? Don't know. Was it Calvin Butler? Don't know what the christian name was. Was he a regular cartman? Yes. How near was you to the pond when you saw them dipping up this water? I was passing on the road. Was it frozen when they were dipping? I have seen it dipped when frozen. When you saw it was it frozen? Sometimes. Sometimes not? In frosty weather it was frozen, in warm weather not.

The Court.—How did you see it? I saw it as they passed me, and as I passed them; the pond was near me.

Direct resumed.—About how far from the pond was your glue factory? Perhaps 7 or 800 feet. How far from your house? About 500 feet. Were the pond and the malt-house in plain sight from the glue factory and the house? Both in plain sight. About how much higher was your glue factory than the water in the pond? Considerably higher—it might be as much as 12 or 15 feet higher.

Cross-examined.—At the time you saw Butler there, recollect seeing a dead hog? Hardly ever saw the time in the fall when there were not dead animals in the pond. When Butler was there, you don't know? No, sir. Recollect whether you ever saw any other cartman there? Have seen others there—don't know their

names. When you saw them there, were there any dead animals in the pond? Don't know; hardly a time that there were not dead animals there. Don't recollect dead animals there when they got the water. When they cut holes in the ice to dip the water out, do you recollect the pail's going down at the side of dead animals? No. When frozen over, recollect seeing the pond all covered with green. I have seen it green. When the pond was frozen over, was the water green? Never took notice; not apt to be green after cold weather comes.

HENRY RECTOR—sworn.

Examination direct.—Reside in the city? Yes. How long? Nearly 27 years. What is your business? I am a surveyor and architect—follow that business at present. Did you draw this map? [The one copied above.] Yes. Is it a correct representation of the relative position of objects? It is not done by measurement; done by passing over the ground, and putting them down in that way; had the city map with me, and noted the streams, &c. on the map. Is it substantially correct? I should think it was. How many slaughter houses are there on the branches of the Poor-house creek?

Plaintiff's counsel.—Better confine yourself to the period prior to 1835.

Examination direct.—Have you been acquainted with that pond prior to '35 and '36? I have noticed the pond then. What was the character of the water? Don't recollect taking particular notice of the water in the pond. From the nature of the ground was it stagnant water? I should think it was stagnant water. Were these burying grounds there prior to 1835? I believe a portion of them were—don't think all were—new grounds have been laid out there. Which do you recollect? The Dutch Reformed was used in '35, and I believe the Stranger's burying ground—the Potters Field—was then. What is the inclination of the land on the sides of these ravines? The land on the north and south slopes towards the creek. Judging from the shape of the land, does or does not all the surface water go into these creeks—the Poor-house creek? I should think it did. Remember about the heaps of manure in the neighborhood of this creek? No, sir—my attention was called to this matter by Mr. Delavan, and I put these down as they stood a short time ago. Was the Orphan Asylum constructed as long ago as 1835? I should think it was? Does the sewer of that building lead into any of the branches of the creek? There is a sewer opening into the creek, running towards the Orphan Asylum. What is the condition of the ground in regard to dead animals? Saw dead animals there a few days ago. What is your recollection of the condition of the ground in '36—has it not been a place of deposit for dead animals? I have seen them frequently; could not tell when or what; could not speak of any particular animal, except saw a couple the other day. About how deep are the ravines running through the burying ground? One of them starts, I think, about at the fence—the north fence of the Dutch burying ground. The depression is not great until it gets to the south part. There it is six feet; passes through the street there. As to the Stranger's burying ground—how is that? The same one passes down through the Potters Field; it is the same ravine. Are these graves so placed that the wash of them goes into the ravine? I think there are some in the Potters Field, if they had water in them. We saw one the other day, filled with water, and running into the ravine, and emptying finally into what is called the Poor-house creek. What is the character of the soil—would it hold water? I believe most of the soil is clay, after you get through a small portion of sand. Is it that kind of clay that holds water? Yes; a very good article to hold water. Are there graves on the sides of the ravine? There are in the Potters Field; they approach nearer than in the others: in the Dutch burying ground they are not so near; the ravine lays rather west. Have you any knowledge as to whether these graves hold water? I have an indistinct recollection of seeing a person buried in the Dutch burying ground, and that when the coffin was put in, there was water enough to cover as high as the top of it; that was some years ago. Before '35? Yes, sir, before that; it made an impression at the time, but I don't recollect what case it was. Where does the wash of all these grave yards run? The wash of all of them, in the end, must go into this creek, if there is any particular wash that is obnoxious. You speak of the Poor-house creek—not connected with this pond? No, sir, not connected with that. In the fall of the year are not these graves wet? It is wet ground. How large a stream is this? Not a very large stream, except in wet weather; I suppose the other day, the stream was 6 or 8 feet wide where they come together.

Cross-examined.—As to that part of the Poor-house creek that lies above the burying ground—is that a considerable stream? Yes; it is largest nearest the

city; it is the same stream that comes down through the south part of the city, in the neighborhood of Johnson-street. Is it not the largest stream nearest the city—is there any as large till you get down beyond the Delaware turnpike? I suppose the next largest is the one down at the mill and that one up here [pointing]. It forms Buttermilk falls? Yes. Is not the water of that stream used, notwithstanding these burying grounds? That I can't say. Who requested you to make that map? Mr. Delavan. Told you to put down all these things built since this libel was published? He called my attention to it—whatever I saw along in the stream, such as manure, or dead animals, and slaughter-houses. When did you make this? I should think ten days ago. That was the time you was to put down these heaps of manure? I did not put down certain heaps—a lot of manure lies off a little way. There is a hog put down—is that correctly located? Yes, I believe it is. Did you examine his carcass? I did not go near him at all; it lies just in the vicinity of the burying ground, on the edge of the bank; the stream that runs down from [some place not heard]. You put down every dead hog? He wanted me to make the map as I saw things when there.

Direct resumed.—Usual to make maps of things as they are? I could not well make a map representing things precisely as they were in 1835.

Cross-examined in regard to a barn or barns which are put down, but the use of which witness was not certain of.

[BENJAMIN HOFFMAN was here called by the plaintiff's counsel in regard to the publication of the 17th February—sworn, and asked who delivered to him the copy of that article? Witness thought it was Mr. Delavan.]

JOHN SAVAGE (Late Chief Justice,) sworn.

Examination direct.—Did you reside in Albany in 1835? Yes. For how long previous? I lived here from 1822 to 1837; lived on the hill. Had you occasion to observe previous to 1835, the pond spoken of? Yes. Seen it frequently? Saw it frequently, from 1827 to 1837; being out of health, I was in the habit of riding by it with my family. State what was the character of the water? It was always dirty; never saw it otherwise. Was it in a condition fit for food or drink? I should think not; my horse refused to drink it. Have you seen any thing in it to render it impure? I have seen dead animals there; and I believe I have seen dogs and cats and hogs. You had observed this for several years between 1827 and 1835? Yes. Do you recollect of hearing about this prosecution at the time process was issued? Yes. At about that time, did you examine the Poor-house creek? I did, a part of it. What was the condition of the water in that? I examined it near Wilson's slaughter-house, I think. The filth from the slaughter-house yard was then running and oozing into the creek; the snow was going off; at any rate the slaughter-house yard was wet, and I could see filth and water mixed, running into the stream. Very large quantity in the creek? There was a great deal of it. Were there any persons dipping water there then? No, sir. Before this publication, was there a statement made of it in your presence?

Plaintiff's counsel objected to this question.

Defendant's counsel insisted on their right to prove that the publication charged as libellous was true, so far as the facts purported to have been sworn to previously, before Chief Justice Savage; and that it was competent for them to prove all the allegations in the pretended libel.

Plaintiff's counsel objected, on the ground that the failure to prove now the facts thus claimed to have been sworn to, could not be redeemed by proving that somebody had sworn to the facts before publication. That it was for the defendant himself now to prove what he had published as true of the plaintiff.

The Court ruled out the testimony, the defendant's counsel taking exception to the decision.

Cross-examined.—At whose request did you go to the slaughter-house to examine? Of Mr. Delavan, who went with me. How far is that from the place where water is taken out of the creek? Don't know. Over a mile? No; I should think not half a mile. Tell the jury how it was you went half a mile out of the way, instead of where the water is taken, to see if it was good? My object was to see the condition of the water where it went from the slaughter-house yard. You went by where they take it? I did not, if they dip it out where I understand they did. Why did you not go by there? The slaughter-house is almost on the junction of the rail-road; we went out on the turnpike. You went still further then—your object was to see what water was taken out? My object was to see what was the character of the brook. You could not stoop down and drink

it out of the stream, but you could walk half a mile to see if there wasn't a dead cat in it? Would not water fit to drink be fit to brew with? Certainly.

CHARLES W. HARVEY—sworn.

Examination direct.—What is your profession? That of a surgeon dentist. Have you formerly resided in Albany? Yes. How long? From 1811 up to 1829; I was born and brought up here. When did you return to the city? In 1832. Absent from 1829 to 1832? Yes, most of that time. From '32 till what time did you remain here? I resided here a year I think; absent part of '33 and '34. I left here for Buffalo in 1836. With whom did you reside from 1824 to 1828? With John Quinlan, my brother-in-law. What was his occupation? He was a gardener; sometimes employed as a cartman. Did you assist him? I did. Have you assisted him in drawing water for the plaintiff's malt-house? I have. Prior to 1835? Yes. Where did you get the water? We got it mostly from the big pond, for the plaintiff. The pond south of the plaintiff's malt-house, on Lark-street? Yes, sir. That is what you call the big pond? Yes, sir. Is the malt-house you refer to on the corner of State and the road running across to Paul Clark's? Yes. Did you know where the plaintiff's steep tub stood? On the north end of the malt-house. Had he more tubs than one? I think two. On the north end? On the north end of the building. How was water let into the building? From the bottom of the hogsheads, by a conductor, through a trough; sometimes into a well or a steep tub; I think in a well; either one or the other. You believe it was sometimes let into a well in the same manner? Yes; when let into the well, it was pumped out into a steep tub.

The Court.—What are you not positive about? Whether it was let into the well or not. I think it was sometimes let into the well.

Examination resumed.—From how many places did you assist in drawing this water? I think 15 or 20. From what places? From the big pond; that was always a standing source; and then, after rains, from whatever points were nearest the malt house. From puddles on the surface? Yes, from puddles. Get any from Poor-house creek? Yes. Was it below the bridge of the Poor-house creek? Yes. Get it ever from the vicinity of Judson's [the name was not distinctly heard] slaughter-house? Yes. Where was that located? I think on Orange-street. North of the Schenectady turnpike? Yes. Were there any puddles in front of the grave yards that you got water from? Yes. Any thing offensive that drained into the puddles near Judson's slaughter-house? Part of the offal of the slaughter-house drained into the pond from which water was taken, near the slaughter-house. You drew water from the big pond? Yes. How long? Four or five seasons. The pond in the vicinity of the malt-house? Yes. What was the character of the water in that pond? Very bad. How so? Bad, from the fact that it was receiving almost all the offal from the hill; dead hogs and dogs and cats; horses all drawn very near the pond; many in the pond, and with the sun on them, making it exceedingly foul, so that in drawing it, frequently made me sick. On the banks of the pond, were there dead animals? There were. In the water? Almost always more or less dead animals in the water. What dead animals have you seen while dipping, if any? Seen dead cats—dogs. While dipping? Yes; and I think hogs; not sure, however. Seen any dead cows or horses thereabouts? I have seen horses up towards the glue factory. This while you were dipping? Don't know that it was exactly at the time. They were left there to decay? Yes. What time of the year did you usually commence dipping? Commenced the first cold weather; I think in October, or thereabouts. These four or five seasons that you spoke of, about what time did you begin to draw water for this malt-house? That I don't know; I should think in the commencement of the season. Of the malting season? In cold weather, I know. How long did this continue? As long as the cold weather continued. They required cold weather for malting? Yes. How did you dip water in the winter, when it was frozen? Cut a hole through the ice. What evidence had you, if any, that there were dead animals there in the winter? I have frequently seen them. They would come to the hole from the wash of the water. I have drowned cats in these holes myself. Was it the ordinary way to drown cats in these holes? It was. Did they come to the hole frequently, so as to be troublesome? Exceedingly so, sometimes.

Plaintiff's counsel.—Came there so thick? Not so thick.

Examination resumed.—How did you manage it? Thrust them back. Did they come in contact with the pail while dipping that water? Yes, sir, they did. Were these dead animals in a state of putrefaction? Sometimes they were. Have you seen any color about this water to indicate its character? During the summer,

it was exceedingly green around the edges of the pond. Was it so at the time you commenced dipping? Not so much so in the fall. During these four or five seasons, when you first commenced dipping, was the water green on the surface?

Plaintiff's counsel here protested against this mode of putting questions.

Examination resumed.—At the time you were dipping in the fall, have you seen any particular color in the water, and if so, from what cause? The water was green in the fall—not so green as I have seen it before. From what cause? I suppose from the decomposition of animal matter. Filth? Yes. Where did the ravine that ran up in the rear of the malt-house terminate? It ran up near Washington-street. Recollect what was above on the ravine? There were some privies on that ravine, leading directly down to the pond. Have you ever dipped any water from State-street, between the Seceders' burying ground and the Orphan Asylum?

Plaintiff's counsel objected to this question unless the object of it was stated.

Examination resumed.—Had the plaintiff another malt-house at this time? I believe on the Western turnpike, on the corner of Knox-street. Did you carry water to that malt-house?

Plaintiff's counsel.—Do you swear that Mr. Taylor had any interest in that malt-house? I said I believed he had—not certain about that being Mr. Taylor's.

Examination resumed.—What did you find in the pools near the Seceders' burying ground?

Plaintiff's counsel objected to pursuing the inquiry in relation to this pool, unless it was to be traced to Mr. Taylor's malt-house.

Examination resumed.—Where did you get water for the malt-house on the Western turnpike? From various ponds—generally from the big pond. The water you dipped from near the Lutheran burying ground—where did that go? I don't recollect now to which of the malt-houses. Can you say to which of the two? I think I know we did not carry it to the one on Washington-street—it was too far off. For that malt-house, then, you got it from various pools—puddles of water? Yes. Were they not mere puddles? I think some one or two places where we got water were clean, but they were so far off we got little water there.

Plaintiff's counsel.—Where were the clean places? One was near the two mile house on the Schenectady turnpike—the other on the route of the Western turnpike—a ravine running above the route of the rail road.

Examination resumed.—With these exceptions, all of these were filthy pools? Yes. You carried this water to the malt-house on State-street, or to that on Washington turnpike? I think only to one. Have you noticed the water in Poor-house creek previous to 1835? Yes. In what condition was it? I have seen it very full. Seen it discolored? The stream is very small sometimes, and in places where the water lodges, it is very much like that in the big pond. Have you seen the creek look bloody? Can't tell. Have you seen the Poor-house creek look green from being stagnant? In places I have. Did you draw any water from this creek for the plaintiff's malt-house on State-street? That I don't know. What quantity of water was put into a steep tub? Seven hogsheads at a time. What was then done in the process of malting? The barley was then let in—I believe usually after the water is put in. How long is it suffered to remain? Forty-eight hours. What is the next step? The water is then drawn off. Have you seen barley taken out after being soaked? Yes. What was the appearance of it? What sort of sediment at the bottom? Sediment very thick. Describe the indications, if any, of filth? After the water is let off, and it has drained some time, the maltsters throw it out with scoops, and as they approach the bottom, it is frequently discolored—in other malt-houses more than in this—the barley and sediment settling together, and the mass being cleaner as you get up to the top. Was that a deep sediment? Don't know how deep—in some malt-houses it is very deep. How deep was it there? Can't say—two or three inches—sometimes more sediment than others, depending on the cleanness of the water from rains or other causes. Have you seen malt shovelled out of the steep tubs in the other malt-houses on the hill? I have. Were those higher up supplied with water having more alluvial matter in it? Yes. Did those steep tubs contain a deeper sediment? Yes. Have you seen it as high as ten or twelve inches in some malt-houses? I have. Was the fact of this water being used publicly known in the neighborhood?

Plaintiff's counsel objected to this testimony, and the question was varied as follows: Was the use of it spoken of to your knowledge? This was objected to also, and the court sustained the objection, on the ground of the immateriality of the testimony.

Examination resumed.—Have you seen the plaintiff about the malt-house, about the period you speak of? I think I have—I think I have seen Mr. Fidler

there more than Mr. Taylor, but I have seen them both there. Was there any other purpose for which water was needed in that malt-house, except for malting? No, sir. The water was not all used in the steep tubs—it was used in sprinkling the barley after it was thrown out—but it was all used for the purpose of malting. How old was you during this period? From twelve to sixteen—that includes the period during which I assisted in drawing water. What has become of your brother-in-law, Mr. Quinlan? He is dead, sir. Can you tell why this foul water was used instead of clean water? Because, I suppose, it was cheaper. It did not then cost as much to draw it there? I have an indistinct recollection of something being said—

Plaintiff's counsel objected to the witness' stating what he had heard said—and the question was waived.

Examination resumed.—How much did it cost to draw this water? Six cents a hogshead. What would it have cost to have drawn the water from the river? Four shillings was the usual price for drawing a hogshead of water from the dock on to the hill.

Plaintiff's counsel.—Ever draw any? No, sir. The families had it drawn, however, for washing, where I lived. You know it to have been drawn up? Yes. I think to my brother's house for washing—not sure, however.

Examination resumed.—How much a month did they require for the purpose of malting at this malt-house? They used seven hogsheads every forty-eight hours for each steep tub—making fourteen hogsheads in two days—rather less than seven, because there were some days intermitting. Have you known dead animals on the banks of the Poor-house creek? Yes. Was it a place to which they were taken? It was—I assisted in drawing one horse there.

Cross-examined.—Have you made a statement of these facts before? I have. Swear to them? It strikes me I did. Have you read the publications in the newspapers? Yes—don't know whether more than one. As to the statement before Judge Savage? I have read it. Is that statement true? It is, as far as my knowledge goes. What other cartmen can you name that have carted water of this description? I don't recollect any distinctly. On that occasion you swore you knew several. That I had seen several. You say you don't remember any? I don't now remember the names of any. Calvin Butler? I think I have seen him draw from the big pond, and Poor-house hollow. By the by, I know he drew from there. Who else? You swore you knew several. No, sir, I did not. You swore you knew several who for years had been carting—give us more. I saw several drawing water. You don't know any other cartman than Butler? I don't know their names—I know of other cartmen having drawn water—can't name any one except the one I have named. Can't name any other one? Can't name any other now. Are you a doctor? I am practising dentistry. You pull teeth? Yes. You studied divinity once? Did you not study divinity under Mrs. Mancius? Don't recollect any thing of the kind. Don't recollect studying under her patronage?

Defendant's counsel objected to this course of inquiry and plaintiff's counsel replied that they merely wanted to test the witness' capacity for judging what was pure spring water and what was not—adding, however, that this seemed to be a delicate subject. Witness replied, not at all, and expressed his willingness to answer any question—but the matter was dropped.

Cross-examination resumed.—When did you leave the city the last time? In 1836. What part of '33 was you here—winter or summer? Don't recollect distinctly. What part of the year 1834? In the summer of '34. And left here in '29? Yes. Then from '29, you was not here during the season at which they cart water, until this libel was published? I don't understand you. You went away in 1829? Yes. And was not here in the winter of '33 or '34? I don't recollect, sir. You know the difference between winter and summer—can't you tell whether you was here in the winter or summer of 1833? I was here in the summer of '34, and in the winter or summer of 1833—I was either here or in Schenectady. Very likely—did you see any water drawn between '29 and the time this libel was published? [Witness was preparing to answer this when the question was varied.] What time was you here in '32? In the winter. Where did you live? In State-street continued. Draw any water that winter? No. Got above being a cartman then? Yes, sir, fortunately. What was you doing then? I was going to school at the Academy. Who drew in '32? I saw Calvin Butler in that time. When you speak of the pond being filthy, you speak of the period prior to '29? Yes, sir, altogether. You saw Mr. Taylor there after '32, but Mr. Fidler more frequently? I did not say so. How many times do you recollect seeing him there before? I

have seen him there frequently—it's a great while ago. Did not take as much notice of him as the cat? Not very likely I would. What year did you see the water drawn? In '27, '28, '29? I don't know that I need to testify to any year. Some year between the ages of 12 and 16, you helped to draw water? Yes. How many more than one year? I think two—not positive, but think it was two and more—I think I was 17 when I left my brother-in-law's. Can you tell when you was born? I think I might. Was you born in 1811? I was. How many years did you draw water? Certainly one, and I believe more—perhaps four or five years. Were you both on the same cart? I was with him on a wagon—drew on a wagon generally. What made you draw such bad water as that? [Answer not heard, if any.] How many seasons did you help your brother draw water? I have said I could not answer distinctly. I know we drew water for a number of seasons—can't speak more definitely. You believe it was two? I can't swear. Why carry this filthy water? We were not paid enough to go further for it. Did they not pay the same price whether you got it in one place or another? We got less for drawing water for those near the pond. Did you get more for drawing water from the pond or the creek? [Witness stated something about a bargain having been made with reference to the distance of the source from the malt-house—but knowing nothing of it except what he had heard from his brother, the inquiry was not pushed.] Did you draw alone, or with your brother-in-law? I believe I was alone sometimes. How many times? Can't say—can't swear positively—though I drew once alone—my impression is I did. You know no other reason why you drew this bad water, except what your brother told you? I know we could not afford to go farther after it. When you was in the malt-house, and saw ten inches deposit of the screenings of dead cats, did you remark it to the foreman? I have not sworn that I saw it in that malt-house of that depth. Did you say that you saw filth deposited from the water to any depth in this malt-house—that you was ever in that malt-house, and saw the malt shovelled out of the vat, and saw the sediment of the water? Yes, I did. Did you tell the foreman of it? I don't know that I did. On what particular occasion was it you saw that? Don't recollect—I saw it there in that malt-house. Was you 12 then? I was a little older, I think. Don't recollect saying any thing about it? I spoke of it there or elsewhere. No doubt you told Judge Savage, but are you willing to say you told the foreman of it? Don't know that I told the foreman of it—the probability is I never did. No doubt of that—did it not smell bad? Yes. Did you hold your nose? No, I did not. Stood there snuffing it up? Did not stand longer than I could help. How came you to go there?—did you go to smell it? I used to help them occasionally in the malt-house. Who did you help? I don't recollect them—they were workmen in the malt-house—can't remember their names—I had worked in a malt-house—it was customary to go round and assist each other. Where was you working when you came round to help Mr. Taylor? Can you tell the year you was a maltster, or when you begun to study divinity? Which question (said the witness) shall I answer? Do you remember the year you begun to study divinity? [A pause.] If that is so difficult to answer, we won't press you. Can't you remember what year you was a maltster? I don't recollect the particular year. It was when I was 17 years old, that I worked in a malt-house—in '28 or '29—thereabouts. Who did you work for? For Mr. Dunlap. You swore you changed work? I said I went there to assist—what I meant to say was that it was a custom among maltsters to assist each other. They sent for you, did they? I went there. How did you know when they were going to shovel out malt? I could tell pretty well from knowing when they needed water. You mean to say this was when you was 17? I said I worked in a malt-house when I was 17. Was this the same year you helped them shovel? I don't know. You say it was extremely offensive? Yes—often-times it was. Could not the other workmen smell? Probably they did—we are often obliged to smell many things we don't like to. You was a maltster in '28? I think it was that year. In '29, do you remember being in there? No, I don't think I was. How did Delavan find out you knew this? He found it out accidentally in Dr. Green's office, as near as I can recollect—my feelings were rather against him at that time. I thought his course injudicious. What had Delavan done? My feelings were rather with the brewers. What made your feelings better towards Delavan? They are not better. Never received any money from Delavan? No, sir. Nor from him through any other person? No. You swear you have not? Yes. Do you recollect talking with a gentleman about this, and offering to go away if you could have a little money? No, sir, I don't recollect any such thing. Recollect having a conversation with a gentleman in this city to the effect that you would

go away if you had the means? I could not have said it. I never had such a feeling. It might have been said, however, in jest. Ever have a conversation with Mr. Ryckman in relation to these suits? There was something said—he asked me what I was down for. Did you not tell him you would go off if you had money? I did not—not so easily bought as that. Ever tell Mr. Ryckman you did not believe the owners of the brewery knew that filthy water was used. I recollect nothing of the kind, sir. Did Mr. Ryckman ask you how long you supposed they had used this water? On what occasion? The occasion which you say never existed. I ask you if he asked you how long they had used this water? Don't recollect any conversation at all about it with Mr. Ryckman. Did you say that this water had not been used within eight years? Don't recollect any thing of the kind. I think I should recollect it if I had had such a conversation. No part of this conversation or the substance of it ever passed? Not that I recollect. Mr. Ryckman asked me why I was here, and I told him I was down on this trial again. Ever have any conversation with Dr. Hinckley about receiving money from Delavan? If I ever had any it was in jest. I ask you if you had? It strikes me I had, or he with me. He put questions of that kind to me—asked me if Delavan paid me. Did you not tell Dr. Hinckley that you had got \$50 out of Delavan? Not unless I was jesting—if I had been in earnest, certainly I should have recollected it. I know jokes of that kind passed. I understood you to say that the pond was so thick with cats that you could scarcely get your dipper down? No, sir. I said that one cat gave us some trouble. Why not throw it out? It was not a very pleasant thing to take hold of it. You kept dipping it up then? It would come towards the pail, and when pushed back would return again. Any body there with you? Persons were passing frequently. Any body helping you draw? My brother. The man that is dead? Yes. The cat dead also? Did you not ask him to come and look at the cat? It was so frequent a thing that I did not think it worth the notice. You spoke of the ravine of the Poor-house creek as a place of deposit of dead animals—what part of it? Above or below where the road crosses? Both above and below, and particularly in the lower part where the brick yards were. Which side of the road to the Poor-house? On the left of Lydius-street. That is below where they got water? No, it is all round the road—both sides of it. You take that road to get the water? Yes. Do you think that bad water? It was very bad at times—particularly in the summer. Where did you see it green? I have seen it along the whole course of it, up as far as the slaughter-house. Do you mean to swear that that water is not perfectly good for brewing? I did not think any thing about it then—now I do not think it was good. Did you ever drink of this water in the malt-house? No, sir. Did you not tell Mr. Ryckman that you had drank of this very water spoken of? I did not, sir. You have been made to answer that you drew water from twenty places—from how many did you draw for this malt-house? One. Was that the same pond that Mr. Coulson speaks of? Yes.

ISRAEL SMITH, (Elder in Rev. Mr. Kirk's church,) sworn.

Examination direct.—Witness knew the pond called the big pond. Heard the testimony of Judge Savage as to the character of the water. Generally when witness had seen it, the water looked filthy. Had frequently seen dead animals in it, as he was riding by—dogs, hogs and cats. Had frequently seen carcasses of dead horses lying on the margin of it. Witness spoke of a period some 16 years ago, when he owned a dying establishment at Norman's kill. Fifteen years before and including 1835, witness passed the pond frequently—sometimes three or four times a week. The character of the water during the 15 years spoken of was very much the same, differing with the different seasons of the year. Did not recollect seeing carts there dipping water. Examined the Poor-house creek after the publication of this piece in the papers—it appeared to him in the fall of that year—it was not long after the publication. John F. Bacon asked him to go out there with Mr. Delavan, and witness took a ride out with them. As to the condition then of the creek, and his previous acquaintance with it, witness said it was very different at different seasons—in the spring, after heavy rains, there was quite a flood—in the latter part of summer and fall, there would be only water standing in pools, or holes made by the current—in other seasons there was quite a brisk stream. As to the character of the water in the fall and winter (the malting season,) witness said that so far as he is acquainted with it from the Poor-house to the slaughter-house, it is generally very filthy. When he went with Mr. Bacon, witness found them dipping water. As to whether there was any thing about the water to enable witness to judge what it had been during the previous winter, witness thought it was in the

fall that he went with Mr. Bacon; it was cold weather and the creek was low. The water was not frozen.

The court here adjourned until

Wednesday, April 22.

GARRET MIDDLETON—sworn.

Examination direct.—Witness lives in Spring-street, on the hill. Knew the malt-house on the corner of State and Lark streets. Believed it used to belong to Fidler and Taylor. Is acquainted with the pond south of it—or with the pond that used to be there. It is partly filled up now. Witness drew water from that pond some years ago—12 or 14 years ago. Drew it to Mr. Taylor's malt-house, corner of State and Lark. Drew at different times. Could not tell how often. Could not say that he drew more than one season. Did not draw steadily. Once in a while drew steeps. Witness let it run out of the hogsheads into the steep tub. They had a gutter to run it from the hogshead to the steep tub. Saw it go in through the gutter to the steep tub. It was very dirty water—stagnant—all turned green. Have seen dead dogs and cats in this pond. Think I have seen dead pigs—not positive about that—but I have seen dead dogs and cats in it. So long ago that I do not recollect much about what was on the banks. It was very dirty water though. Don't recollect any smell about it—water very dirty though—green and nasty. I have drawn this water in the fall and in the winter time—some. The water was such as I have described when I was drawing it. The way I used to get it was to back the horse and cart into the pond—the horse standing in it while dipping. In the winter, we drove in on the ice, and cut a hole in the ice.

Cross-examined.—At the time mentioned I worked for Mr. Butler—lived some distance above the pond—drove Butler's cart. The water was green when dipped out from under the ice. Don't recollect any cat snapping at me, nor any dogs that kept jumping into the dipper. There were dogs in the pond at that time—not sticking up on the ice—I saw them in the fall of the year—could not see them under the ice—they did not come into the hole while dipping. I saw them in the fall of the year though. Did not see any cat in the hole when dipping from it. Mr. Butler told me to go to the pond.

THOMAS A. HUGHES—sworn.

Examination direct.—Reside in Washington-street on the hill. Am acquainted with the malt-house on the corner of State and Lark streets, and the pond near it. Have assisted in drawing water from this pond some time ago—should think from 10 to 12 years ago. Have drawn it to this same malt-house. Can't tell how many hogsheads. Have drawn there a number of times—a number of steeps. I worked for Mr. Butler, off and on, four seasons. It ran right from the hogsheads to the steep tubs. It was green, filthy looking water, when I drew it. I have seen cats and dogs and hogs in it, when drawing it. It had a green looking filthy look. The way I got it was to back the horse in—cart and all—the horse standing in the water. Sometimes backed in further than at others. The water was higher sometimes than at others. I drew in the fall of the year. Can't recollect mentioning the state of the water at that time to any body. Can't say that I recollect hearing it mentioned then. Don't remember about the smell of the water.

Cross-examined—Who told you to draw this water? Calvin Butler.

JAMES D. WASSON, (Late Alderman,) sworn.

Examination direct.—Have been a resident since 1811, with the exception of four years. Know the pond in Lark-street, and the malt-house on the corner of Lark and State. Have passed it very often for a great many years—perhaps at all seasons—not always on official duty. I should think the water in the pond unwholesome, bad water, generally. I think I have seen in it cats and dogs and hogs—dead and alive. I have seen live hogs wallowing there in the summer season. No recollection of ever seeing any thing on the banks. My recollection is that it was not formed by nature, but by making Lark-street, which blocked up a small space of 30 yards perhaps, and made a pond 12 or 15 feet deep when I first knew it. If I recollect, some children were drowned in it. At least, one. The wash of the banks naturally filled it up. Some years since (don't recollect the precise time,) the Corporation made a drain there, and I believe now, it is full of earth to where the drain is—so that it is now dry except in time of rain. By the wash of the hill it has filled up I should think some 8 or 10 feet. I have seen boys swimming there, and others running about along the edges with their trowsers rolled up above their knees. Have seen carts in there dipping water. Don't know whose carts they were, nor for what purpose the water was used. Should think it unwhole-

some water for a person to drink or to cook with. When the pond had settled some time, it might be used for washing. A good many years ago, when it was deeper, it might be so used. Have known the Poor-house creek for a long time—that that forms Buttermilk falls. There is no water at all at the falls in a dry time. It is supplied with surface water from rains or the thawing of snow, and then dries up. I have never known it run through the season. In the fall of the year and in all seasons, since I have resided in the country, I have passed it frequently—sometimes twice or three times a day. Have crossed it in going to my farm for the last 5 or 6 years. I have seen bloody water in it that I presume came from the slaughter-house. Can't specify the time, except that it was since Wilson's new slaughter-house was erected—which was, I should think 6 or 7 years ago. As to the condition of things about the creek and slaughter-house, witness had never been at the latter, but about it—it was a piece of land laid open to commons—here and there a lot fenced in—the soil, in some places, sand, some clay and some loam. Near the stream it is clay—on the top good building sand. A considerable part of the bed of the creek is clay. The Orphan Asylum was built I think in 1832, during the cholera season. The children were taken in there in the spring of 1833, or summer, some time. The number, including all about the establishment, varies yearly from 85 to 110 or 115. Presume there are not as many now as formerly. The drain from the privy of the establishment, witness supposed enters into one of the branches of the Poor-house creek.

Cross-examined.—Witness had had nothing to do officially, as alderman or as trustee of the Orphan Asylum, with the big pond. It was a natural ravine dammed up by making the street. The first I recollect of it, the water was from 13 to 15 feet deep. There is not as much water flowing into it as formerly. It is carried off in different directions by making new streets, with sluices through them, and along the sides. Did not say I had seen live cats in the water. I have seen dead cats and dogs, and hogs dead and alive. I might have safely said live cats too, for I have seen boys drowning them there. This was some years ago—before '35. As to this water being as thick as cream, witness had only noticed it in riding or walking by. Had seen ponds dry up. Never knew one in which the water was as thick as cream until nearly dry. Was at the mouth of the drain of the Orphan Asylum 3 or 4 years since. It drained the house and the privy. Something like 300 feet long. It comes out near a dwelling house on the west side of the western turnpike, adjoining the Asylum lot. The people living in that house complained of the stench from the drain. The water issuing from it was rather impure. Witness thought there was a culvert under both the rail-road and the turnpike, where the ravine passes south.

Direct resumed.—Witness explained the particular relative locations of the bridge over the creek, the junction of the two branches, the distance of the Orphan Asylum drain from the junction &c. &c.

AMOS FASSETT, (Elder in Rev. Dr. Campbell's church,) sworn.

Examination direct.—Am acquainted with the pond and malt-house in question. Have seen water drawn from the pond to the malt-house previous to '35—seen it deposited in the malt-house, at the north end. The water I should call very impure. It has always been bad. I have known it for a great number of years. It was a place of general deposit for all kinds of dead animals, at all seasons of the year. I have known the pond 25 years. The water has been growing less every year,—the pond gradually filling up. When it was deep, the water was not so impure as now—though it was always a receptacle for dead animals. I have seen dead dogs and cats and hogs there—dead cows on the ice in the winter—dead horses. I have seen the water at different times, when passing, put into the malt-house. I should think more seasons than one. Have seen the Poor-house creek frequently. Some seasons of the year very unwholesome. Particularly while the slaughter-house was employed. The offal and blood &c. were thrown out, and the creek being lower, it all descended of course into the creek. Have seen also dead animals on the creek. Should think that the wash of some of the grave yards drained into the creek. Knew Mr. Taylor. He resided in the city. Appeared to be an industrious man that attended to his own business. I have seen him about the malt-house. Could not specify the year, nor how many times.

Cross-examined.—Live in State-street—No. 209—now, and at the the time spoken of. Business frequently called me up there. Did not mean to say that I had seen this water drawn in cold weather, or when I could say that it was as thick as cream. As to the disposition made of the offal and blood at the slaughter-house, witness again affirmed that he had seen it lay where it had been thrown out of the

slaughter-house, and that he had seen the creek look of a reddish color after a rain, as far down as the bridge; and concluded that it came from the slaughter-house. Not positive as to the year, but should say probably 1830, or near that time. Could not say positively at what period this water was drawn from the pond. Should think I had seen it in different seasons—perhaps two or three seasons between 1830 and 1835. Saw different carts drawing—can't recollect any particular one except Calvin Butler's. I know him. I was at work hard by—repairing a road. This was in the fall of the year—I should say October or November.

Direct resumed—Remember whether the old bridge was below the junction of the two streams? It was below.

Cross-examination resumed—How long has that bridge been gone? 5 or 6 years—6 or 7 perhaps. Was it not about '27? It has stood there since that time, I should think.

PATRICK ROONEY—sworn.

Examination direct—Previous to 1835 lived on the hill with Mr. Delavan, and still live in his family. Been with him since 1828. When employed as coachman, and in driving the cow to pasture morning and night, two seasons, frequently passed the malt-house and pond. These seasons were either '31 and 33, or 32 and 34—not successive seasons. Saw water taken from the pond to the malt-house. Not often, once in a while. They put it into the north end of the malt-house, through a trough as near as I could judge. I have seen this done more than one season. It was taken on a cart, in a hogshead.

Cross-examined—Can't tell who drew this water. Came to notice it in passing by. Noticed nothing else except a man making brick there. Mr. Delavan now lives in Ballston Centre. I drive his coach yet. Recollect the time mentioned because I took the cow to pasture then. Drove the cow as long as there was grass. Later than September. The pasture was right next to Mr. Slingerland's garden. The way that Mr. Delavan came to find out that I knew anything about it, was this—I said to him I wondered they should sue for such a public thing as that was. I thought every body knew it. Then you never thought much about it until Mr. Delavan was sued? It's a common occurrence in my own country to see such water used in breweries. You thought cat juice good for that purpose? I don't know that I thought any thing about it. Until Mr. Delavan was sued, it did not strike you as any thing very improper? I did not think any thing about it.

JOHN LOSSING—sworn.

Examination direct—Have resided in the city 28 years. I am acquainted with the malt-house and pond spoken of. Have observed the water in the pond at different times for five and twenty years, I suppose. Live not far from it, in Washington street. I should call the water impure. It was a place of deposit for dead animals. It was not fit to be used for drink or cooking. I have seen dead horses, hogs and dogs—cats—various things in it. Mr. Gibson had a slaughter-house that led right into it. It has been moved from there some years—cant tell how long. The filth from the slaughter-house went right into the ravine. Stood as Wilson's does in regard to the creek. All the slaughter-houses on that route run into the creek. Mr. Perry's, Mr. Wilson's, and another—in fact there are four—for besides these, Mr. Hartness occupied one. I should think all these emptied into the creek previous to 1835. This pond formerly took the filth from the houses in Washington street—from privies. Before the rail-road was built, there was a ravine which took a portion of the filth from the stables and back places; and all that came down State-street continued, leading right into this pond. Just above the malt-house and west of it there was a large ravine that ran across the road and injured it. The rail-road filled up this ravine. That was built, I think, about '31. Don't remember whether Gibson's slaughter-house was removed before or after the malt-house was built. There are other slaughter-houses that lead into the creek—Charles', Featherly's, Bedell's—going back to the rear of the burying grounds, and passing off in that direction. There are as many as 6 or 7, I should think. Never saw any water taken from the pond. Have noticed the water in the creek. In the fall when they are slaughtering at Wilson's, it will be the color of blood. I am speaking of different seasons in the fall. It is so every season when they slaughter. Have seen water of that description there, as far back as '35.

The court here took a recess until

Three o'clock P. M.

LABAN W. KEITH—sworn.

Examination direct.—I have resided in the city about 21 years. Have known the malt-house in question ever since it was built, and the pond near it ever since I

have been here. The water in the pond has always been pretty poor. I have seen dead animals in there of all descriptions almost—cats, dogs, hogs—and have seen one dead cow in there. Of course there was a bad smell about the pond when these creatures were in it. I certainly have smelt it. Recollect a drain or ravine from the rear of the buildings on Washington-street, before the rail-road was built, and that water ran in it into the pond. There was a spring in Spring-street, and considerable water ran from that through the same ravine into the pond. When there was a freshet, it washed every thing into this ravine—all kinds of filth I suspect. Don't remember whether Gibson's slaughter-house was taken away before the malt-house was built, or whether it ran into the pond—hardly think it ran that way. I have seen this pond-water carted to the malt-house, and unloaded there, at one of the places where it goes down below into the tub, at the north end of the building. It went in out of a cask or something like that, I suppose into the tubs. I saw them conducting water in that way. How was it conducted after it left the cask? Don't know what it conducted into—I expect into a tub. Did you observe how it passed through the side of the building? No, I didn't. Have you seen it conducted in any other way? Yes, by a pump. A syphon?

Plaintiff's counsel.—Did you say a syphon!

Defendant's counsel.—No, I said so.

Plaintiff's counsel.—By a pump? Yes.

Direct examination continued.—Describe to the jury how it was pumped? It was pumped out of the pond and put into the malt-house. Where was the pump? In the pond. [In answer to a question from plaintiff's counsel, witness repeated that they had a pump set in the pond, and pumped it up, and said something about it going through a trough into the malt-house.] Have seen that done as many as two times. Seen them often carting it there. Don't recollect the year that I saw them pumping. The water was not pure. In the summer time I have seen it very green—rather think it has been complained of as an unhealthy spot. Am acquainted with the Poor-house creek, and its condition prior to 1835. It has the catch of two or three slaughter-houses one way. Don't know what it gets to be further down. There is Perry's slaughter-house, Wilson's and Tom Charles's, that used to be—guess it is now. It gets the wash of the grave yards, or one of them. There are drains dug out from the grave yards, and it runs right down into the creek. Have known Mr. Taylor a long time as well as any man in the city. Believe I have seen him about the malt-house. Don't know that I have seen him in there. Have seen him up Washington-street often. He is a man that attends personally to his own business.

Cross-examined.—Know that Mr. Taylor attends to his own business so far as this, I have drawn malt for him, and he paid me himself. Whenever I did any thing for him, he attended to his own business. Have seen him in his office and settled with him there. The office is down in Green-street, I believe. Can't tell what year I saw a cart unloading water at the malt-house. I know it was when I thought a good deal of their using that water. I thought it was not proper water to use. Never told Delavan of that in the world, kept it to myself. Have drank beer since—two glasses a day. Never drank a drop the less of beer, for what was reported. Then you supposed it good for beer? I thought it pretty poor water to put in there. But when made into beer, you thought it pretty good? I drink it with the rest of you. You thought a good deal about it? I certainly did. Can't tell the year when I saw the pump. Did not swear that the water was pumped into a trough. It was pumped into a cask. As to the drain to the grave yards, witness spoke of the drain under the vaults, that comes out under a stone building, and runs down into the creek. Meant the stone building where they put coffins. Don't suspect it affects the water in the creek at all.

Direct resumed.—Did the drain run through the yard? It runs under the vaults. Does it pass in its course through the grave yard? Yes. It is all connected—the grave yard and the vaults.

ROBERT HARVEY—sworn.

Examination direct.—Reside in the city. Have resided here 39 years. Have been nine years out of the city in that time. I was here previous to '35, and am acquainted with the pond and malt-house on Lark-street. The water in the pond was bad—stagnant water—dirty water. Recollect seeing carrion about there in 1818, '19, '20 and '21. Am acquainted with the Strangers' burying ground. It drains into a branch of the Poor-house creek. Some of the places where they dig graves are quite steep. I was here in the time of the cholera in 1832. Witnessed quite a number of burials. Witness spoke of three corpses lying in the Pottery.

Field unburied at one time, and of 314 buried in the hollow. Don't know of more than one buried in the same grave. Have not seen the Potters Field for three or four years. Was there in '33 or '34. Saw then the edge of the coffins sticking out into the ravine. That was where the water runs. I am the brother of Dr. Harvey.

Cross-examined.—Did not complain to the authorities of the city of what I had seen in the Potters Field. Did my part in the cholera season in assisting to bury the dead there. As to whether there was water enough in the ravine to wash out the ground and expose the coffins, witness said there was a good deal of water falling in them. It comes from the rail-road. The ravine runs up to the rail-road. It passes through the Dutch burying ground and then through the Potters Field. The cholera season was a dry season.

Direct resumed.—The ground in the Potters Field is clay, with very little grass on it.

CONRAD A. TEN EYCK, (Late Clerk of the County,) sworn.

Examination direct.—Have had frequent occasion to pass the pond on Lark-street for a number of years. As far as I recollect, there is a good deal of stagnant water there. I should not like to drink it. I have seen it, at times, very green. Have seen people water their horses there constantly at certain seasons. Very green in summer. I have watered my horse there, but have seen it very green, and should not, unless very dry, wished to have watered him there. I think I have seen dead animals in it; won't be certain as to that—but I think I have.

JOSEPH MANUEL—sworn.

Examination direct.—Am acquainted with the creek that runs just back of the burying grounds. As I passed, I have seen blood and water come from the north, pass under the rail-road and down the creek. I think this was about five years ago. Have lived here eight years—ever since '32. I have seen blood coming down this stream from, I think, Mr. Perry's, and from another source that joins it just before it passes under the rail-road. The blood and water ran separate some distance before they mingled. This was in the fall of the year; and I have seen, day after day, a cart carrying this bloody water to the malt-house.

Cross-examined.—Saw this water where the rail-road is raised by an embankment, a quarter of a mile west of the Asylum. The slaughter-house of Perry is on the Schenectady turnpike. Took it for granted it came from the slaughter-house. Saw this both north and south of the rail-road. This was more than three years ago. Can't tell whether more than five. Have seen a cart day after day fetching it down State-street and putting it in the malt-house on the corner of State-street and the Delaware turnpike—on the left side as you go up.

LAMBERT CLARK—sworn.

Examination direct.—I know the pond and malt-house on Lark-street. Have helped draw water from the pond for the malt-house. Commenced working for Calvin Butler ten years ago. Have worked for him, off and on, every winter, except one—sometimes a month or two. Worked for him in '32, '33 and '34. Drew some of the water to the malt-house, and if I found it any ways clear, I carried it for washing. What did you do with the water for the malt-house? Put it in the gutter that ran into the steep tub. Did not go into the malt-house? I have gone into the kiln to warm myself. Could see where the water went. It went into the steep tub. I have let it run out while I went in and warmed myself. Have seen dead hogs, cats and a horse in the water—almost any thing you could wish for. The frame of a horse, I meant. Ever drawn any into it? Yes, and I have carried a bag full of kittens and thrown in. Was that the condition of the water when you were drawing it? It was generally pretty riley—frogs crying and one thing or other.

Plaintiff's counsel.—Do you say frogs crying? Yes, crying, or whatever you've a mind to call it—in summer time though—in winter time not apt to.

Examination resumed.—The water was a kind of a yellow, muddy color, some of the time. Sometimes a kind of a green round the edges.

Plaintiff's counsel.—Wonder if it was not black and blue? Yes—mixed up.

Defendant's counsel.—Was that the condition of the water, with these animals in it, when you was drawing? Yes.

Examination resumed.—Have drawn water from the Poor-house creek. It was very bad looking water. I worked with Mr. Middleton then. I drew it to Mr. Taylor's malt-house. It was sometimes so dirty and riley that I could'nt tell what it was. Sometimes greasy, and the horse would'nt drink there. Skim away the fat, and then he would'nt drink. Don't know where it came from. It ran

down stream. A good many creeks led into it. Did you put that water into the steep tubs too? Yes, sir—three days I was drawing at that time. What time of the year was it? About the middle of November. Where in the creek did you get it? I got it right below the bridge that crosses there. It was then so muddy that I could'nt get it out without having somebody dip up for me. The stream comes in below the bridge from the burying ground and all above there. Run only one cart during these three days.

Plaintiff's counsel.—You have cross-examined yourself—you can stand aside.

The defendant's counsel—here rested for the present, apprising the other side and the court that there were other witnesses, not in attendance that might be called by and by.

THE PROSECUTION.

LAUNCELOT HOWARD, (One of the prosecutors,) sworn.

Examination direct—I was a partner of Mr. Taylor in 1832. The malt-house was built in 1823. I believe I may consider myself as having the entire control of the malting business from 1823 until 1832—Mr. Taylor seldom interfering—hardly ever asking me a question about it. Sometimes I began malting the latter part of September. Sometimes not until October—generally waited until the weather was cool enough. Sometimes stopt malting early in April—sometimes continued until May—ranging from the 1st. of April until some time in May. Commenced malting in the fall of 1823. Considerable repairs were made to the malt-house in 1824, and more in 1825. In 1827 there were some additional sources of water added to the well. Before the malt-house was built, I sank a large well, between 7 and 8 feet in diameter, 32 or 3 feet deep, intending to use it as a reservoir if I did not get water, supplying it from the roof. I bored still deeper, and the next morning there was some water, but it did not increase much. There was over a foot in the bottom of the well. It was 32 feet deep, from the malt-house floor. The house stood two feet below the surface. I bored 28 feet deeper than the well. After the building was erected, finding the water did not increase, I concluded to bring water from the opposite side of the hill, in a direction a little southwest, and above the pond. To get that into the well, I ran a small trench down nearly to the edge of the pond, where I sunk a reservoir which would hold 6 or 7 barrels. I then carried it up and drew water from a small spring. There was a tub in the spring. Families used it. Bringing the trench down to the foot of the hill, I formed a syphon which worked very well, and filled the well up within a few inches of the head of the reservoir. I have already said I made the well intending to collect rain water in it. We had an abundant supply of water that fell from these sources. The malt-house floor is about 42 feet wide and 108 deep. On that we laid a heavy bed of mortar to make the malt floor; and made a second floor. I had our steeples made and placed in there. I had water rode from the pond and thrown into the steep tubs, and the water we used for mortar for our floors. This was in '23. The floor took some time to dry, and water was rode at different times—it might have been 6 or 8 weeks—and occasionally we had water rode as we wanted it. After the floor was dried, we filled in the building with brick all around, except the kiln. A coarse mortar was made from the water in the tubs. There was never any water from this pond used for the purpose of malting to my knowledge. I have not known any of it put into the malt-house and used for malting. The very heavy rains late in the fall of 1823, injured [what, was not heard] and we had water rode. I directed it to be rode at that time from the creek north, called the Patroon's creek. The water brought there was in good order. This was but a short time. Probably it was brought for 3, 4 or 5 steeples. I immediately constructed conductors from the roof, to bring it into the well, and very shortly after these were in, our well was filled to overflowing. My malt floors were drenched with water from the hole I made to let off the water. I had but very little water rode during the winter—there might have been, a few times. I think there was. If it was, it was good. It was unquestionably as good as I would wish to drink—the water brought there for malting. We intended to use these conductors and the water from the roof, as a principal supply; but in '26, we did not get a supply. I think it was in '26, and I had some difficulty. In conversation with Mr. McNab, I made an arrangement with him to carry a feeder along the sand bank on the side of a small ravine west of the malt-house. McNab agreed for \$50 dollars a year, and kept it supplied with good water for 5 years, at that price, from his well. There is no better water in the city. He commenced and we got a pretty fair supply, but in the spring of '27 we had to resort to water rode in. Before I commenced malting in '27, I repaired the con-

ductors, and had an abundant supply; and for several years, there was not a drop of water rode to my knowledge, and I paid for none. We had one of the finest wells in the county. I allude to the well in the malt-house. It was kept well filled, and with the best of water, and for several years. One of my maltsters, since this case commenced, told me that water was ridden in '31, he thinks one or two steeps. It never came to my knowledge. I state all the facts in relation to it, as far as they have come to my knowledge. I do know there was no better water in this county than this well afforded, and an abundant supply for several years. I was well aware that for making good malt, pure air and pure water were indispensable, and I took every pains to get it. In the fall of '26 or '25 (not certain which) I altered our drain, and before commencing malting (our well not being in order) I had water again rode, and the floor taken up, and run a large drain from the tubs off south across the street below the pond. The floor also had to be repaired, and the water from the pond being handiest, we used it. Water was ridden then at different times as we wanted it. Until the spring of '32, I have no knowledge of more water being rode, from the spring of '27. In the spring of '27 there was some—a few steeps—rode, and they had instructions to get good water. Nothing but good water was ever put into the malt to my knowledge. My connection with the malt-house closed in 1832, when our business was closed. Mr. Taylor had the sole management afterwards. I have had nothing to do with it since. Quinlan drew some in '23. He might have been there two or three weeks. There was some difficulty in getting him to attend, and getting what we wanted. He had rode water in 1822, I suspect. I am satisfied he did, for the malt-house we occupied before Mr. Taylor and myself were connected. He rode some water from —'s malt-house. His objection was, that he had too much gardening to do, and Calvin Butler sent a man whenever we needed it. My impression is that another—Mr. Vandenburg has ridden a small trifle once or twice. I don't recollect my employing him. There were some such bills paid, I believe. Another man—Mr. — rode some water when repairing the building. Don't know the name of the man that Butler sent there. Witness here described the process of malting. The water is first put into the tubs, holding 120 bushels, filled in with water. The grain is then thrown in gently, so as to let the dust, &c. rise on the top of the water, when it is skimmed off and thrown away. The grain is stirred up also and skimmed. When the grain was clean and handsome, the water would get to have a bad smell, and become high colored from the grain soaking in it. The water is drawn off, and frequently a second and third quantity of water is added, and the grain is washed until no color comes from it. We have kept a continual stream running, when we had command of water. The best writers say the purer the water and the purer the air, the sweeter and better flavored the malt. After it has stood from 24 to 50 hours, (the time depending on the judgment of the maltster,) the water is drawn off and the barley thrown out with a shovel, and placed in heaps. As soon as it begins to swell, it is spread gently over the floor. It takes some 17 days to complete the vegetation of the grain, when it is ready to be thrown on the kiln, and there is no more need of water except for sprinkling. The clearer the water the better the saccharine that is got from the malt. If pains is taken with it, the barley in the steep tub is as clean at the bottom as on the top. When scant of water, in cold weather, we have let it lay with only one water, and then the bottom of it is more discolored, probably from being damper. There may be a little sediment from the grain not being quite clean. From barley itself there is not much sediment. The water is strongly colored from the husk of the grain—as high as coffee sometimes, with a single water. If every thing was going right at the malt-house, I might not go there for a week, sometimes there every day. Mr. Taylor might have visited it once a month. I attended particularly, when there was any difficulty in getting water. It was an object of my care. I paid particular attention to see things done to suit me.

Cross-examined.—I am plaintiff in one of the suits against Mr. Delavan for this publication; but neither Mr. Delavan nor his temperance cause could induce me to deviate from any thing strictly true. I am now out of the brewing business altogether, nor have I any idea of going into it again.

The court here took a recess until

Seven o'clock P. M.

Mr. Howard's cross-examination resumed.—One of the best works on malting, and which recommends pure water, is Donalson on Malting—another is Donegan. Was born in England. Have seen the Thames repeatedly. It passes through many populous places—not so many above London as below. It must be of course

the common discharge of the sewers of those places. A strong tide would drive back as far as London the water from below. Had not the large establishments there the reputation of making the best beer in the world, until you beat them here in Albany? I don't know that. Don't they make the best ale? They make the best porter I am told. Don't they make the best ale? They are reputed to make the best porter, but not the best ale. Is not its excellence supposed to be the result of their using the water of the Thames? As far as my knowledge goes, these notions are imbibed from books got up to humbug people. Is it not a notorious fact that they do use it? No sir, I do not understand it so. I know there has been a great deal of noise about it. I made inquiry, having heard so much about filthy water. I believe it was filthy people that told the story as far as I could learn. I saw some of the persons connected with the best establishments, who assured me they did not use this water, and laughed at the idea that they did. I have heard they did use it in some instances, no doubt where they had followed some of the books manufactured to get people into trouble. Is the *Encyclopædia Americana* one of these books? I do think the account there is not correct. What is the character of the work? It stands very fair. [Witness was here asked the number of suits commenced against Mr. Delavan on account of this publication, and of his knowledge of a concert among the brewers to raise money to prosecute them, but denied any knowledge of such an arrangement to raise money.] Did you apply to Robert Dunlap to commence a suit? I did not put myself in his way. [The question was varied several times, and a similar answer given, when the court directed the witness to answer.] Did you urge or ask Mr. Dunlap to commence a suit? I think it probable such a conversation passed. I don't recollect it. I have been in company where he has been urged. I might have done it in conversation in company—might have asked him such a question. Do you know he refused to commence a suit? I did understand so. Did you not hear him refuse? I don't remember. [This train of inquiry and reply was pursued some time.] Never directed any other suit to be commenced but my own. Am not liable for a cent of the costs of this suit. The mortar for the floors was mixed some inside and some outside the building. The spring I spoke of as being there in '23, has dried up. It was on the side of the hill southwest of the malt-house. The last I know of it was in the fall in '23. The malt floors were made in the fall of that year—it must have been in the month of September. The repairs in '25 were made in the fall, before commencing malting—we got it ready barely in time. Other repairs were made at different times. Can't recollect the season or the year. Except in '23 and '25 there was but a small quantity of water used. Don't recollect whether that used outside was put into the tubs or not. They were handy, however, and we had rather have them wet. Besides this malt-house, Mr. Taylor was interested in another in Green-street, and for a short time in one in Washington-street, near Dr. Nott's furnace, which we occupied some two years and part of another, some time near 1826, 7 or 8. It was not after 1830. I know of no others in which Mr. Taylor was interested. Did not mean to be understood that the barley in the bottom in the tubs would sometimes be discolored by dirt. The steep tubs are in the northeast and northwest corners of the building. The sprouting or germination of the grain is part of the process of malting—it changes part of it into a saccharine, which is the object of malting. It is not a general rule to keep the grain in the tubs 48 hours. Good maltsters don't follow the rule, but go according to the quality of the grain, and the weather. I have no such rule in my establishment. I have seen such statements in the books. Never to my knowledge caused water for malting to be taken from the Poor-house creek. The men might have got it there. Don't recollect ever telling any body to go there. Know I have ordered them to go to the Patroon's creek. Have you been concerned in publishing a statement that water for this malt-house was procured from the Poor-house creek? I don't know how far I may have been concerned. I do know of sending some of the men to a notary to make affidavits of the facts, as far as they could recollect. [The question was repeated.] I was concerned in publishing certain affidavits, but what they were I don't recollect. [This inquiry was pursued at great length, but without eliciting any thing more definite.] I had no other large receptacle for water in or about the malt-house except the well and the tubs. There was a syphon with one end in the well and the other in a reservoir about 100 feet south, not far from the pool, but not connected with it. It was a tight tub set in the ground. It ran down 3½ or 4 feet—my impression is about as low as the surface of the pond. It stood on one side of the ravine that runs up into Washington-street. It was made, I believe, of plank, round, and with a bottom to it. Have never taken it up. Took part of the pipe up. I got water

from it to malt barley. The ground was thrown over it to keep it from the frost. I think it possible the water in the pond might overflow it sometimes. I am the brother-in-law of Mr. Taylor.

Direct resumed.—We quit the malt-house near Nott's furnace because the water came into the well. There was a natural spring in the cellar, and the corporation had a conductor from it to their principal pump. We took it on account of its having pure water in the cellar, and we abandoned it because Mr. White had a drain that injured the water. If putrid water had been used in malting without my knowledge, when it was on the floors, I think I would not have missed finding it out. It was my general practice to go from floor to floor, putting my hand into it, examining it and bringing it to my nose. That is a common practice if it has any wrong appearance. Don't think that but very little water could have got in there without my knowing it. Putrid water would ruin the grain, and we should find it in the liquor. Water that was putrid and as thick as cream with filth, could not be used, unless a person was determined to ruin his stuff, and to spoil his floors. It is utterly impossible for such a thing to take place without destroying the grain, and any body that tasted the liquor. I have often passed the creek, before I was in the brewing business. I have been at it when in the malting business. I should have no objections of taking that water. Never have seen it but what I could have used it. I believe at times it is stagnant. I have seen good water there, and this morning, as good as I should wish to brew with. I don't pretend to deny sending any men there. I don't recollect it if I did. Examined the pond carefully at the time we went there, in '23. Should think it might have covered an acre or an acre and a half. Never gave it a thought, however, as to the area it covered. There were springs that emptied into it at that time. The road formed the side of the pond. There was an outlet to it then, (1823,) and is now. It was a small wooden drain, intended to let off the water at a certain height. I have known that pond to be running over two or three months in the spring. Sometimes in the fall it is very dry. In the fall of '23, a heavy freshet filled it above the drain, and Lark-street was carried away. Since, a stone drain has been put in. It was in '23 that it washed away. Since the malt-house was built. It was pretty deep until '28 or '29. A brick-yard filled it up. The filling up of State-street also carried in more sediment than before. I have seen the pond in different stages. I have seen the water dirty—considerable mud. I have seen it clear. Seen boys bathing in it. Have seen dead hogs—I suspect cats. Don't recollect a dog. But from the time the malt-house was built, if there was ever a horse or a cow on the ice, it must have been removed pretty soon. It never came to my sight. Could not have been there long. I should have seen it. Gibson's slaughter-house had no connection with the pond at that time. It was on the west side of Washington-square, above the powder-house. He might have had a slaughter-house some time previous on the bank, and connected with the pond; but not to my knowledge since. I have seen the pond riley in September, when it was not fit for use. I have seen the water carried away in pails. Have seen the water very foul—what I considered bad. Then again pretty clear, and have heard of its being used for washing. Seen boys in there swimming. Have seen it look very well in summer, and a stream running out of it. The bridge crosses the creek just after you leave Lydius-street, and there is one above leading to the new Alms-house. Several little streams meet just above the bridge. As to the distance from Wilson's slaughter-house to the point where these streams meet, it is all guess work with me. I should think it was about a mile and quarter, or a mile and a half. Difficult to tell the distance from the Orphan Asylum, following the course of the ravine, to this point of junction. I should judge from having looked at it this morning, it was from a half a mile to three-quarters—indeed all of three-quarters of a mile.

Cross-examination resumed.—There are maltsters who do not sell malt, and here are brewers who do not malt. Malt, when sold, is sold by measure.

Direct resumed.—Mr. Taylor, in '35, was very heavily engaged in malting and brewing—few doing more—don't know any.

WILLIAM C. HELSE—sworn.

Examination direct.—I occupied the Poor-house lot—some 10 acres on the creek—nearly two years, about 12 years ago. The water of the creek was sometimes good and sometimes bad. Have seen it four feet deep and six wide—then it would run down to a stream of about a foot, and from that to six inches—hardly that sometimes in very dry weather. I was compelled to make use of the water. I kept a tavern, and had it in the bar-room for common use. The two wells for the Poor-house were not as good. Know that others about there used it for com-

mon use. Have known the pond between 13 and 14 years. It covered when I first knew it from three-fourths to an acre. I have seen carts drawing from it. Can't tell where they went with it. Went in different directions. Have seen 30 or 40 at a time in there swimming. It is fed principally by a stream; but there are springs that come out from the bank on the north-west corner. Found the barrel always full there, ever since I have known it. People round used to go to the barrel to get water. There were others besides that. It was as pure water as could be got from any spring or stream that could be found. I used to use it in my family when I resided there, for culinary purposes—for drinking too, or coffee, or any thing of that kind. The pond water I used always for washing. I lived then on the corner of Lark and Washington streets, 50 or a 100 rods from the pond. Lived there about a year and a half, or two years. There used to be an outlet. Never saw a dead cow or horse in the pond. Seen plenty on the other side of the road. That was a general depot for them. It is lower that side than where the pond is. Never saw dead dogs, or cats or hogs in the pond. I have seen the water colored after a storm—riley. Never saw it when it could be said with truth that it was as thick as cream with filth. It never was so. In the hot weather in summer, when I could get no water elsewhere, I used it for washing. Never saw the time but what cattle would go there and drink. Have seen boys swimming in it in hot weather in summer.

Cross-examined.—First went to live in Washington-street 14 years ago. Lived there a year and a half. Two years after, returned and remained there about a year. It was this last time that I used the water from this spring. That was about nine years ago, I should think. On first going there, I malted for Mr. White. The second time I kept tavern there—not out at the Alms-house. One or two seasons after, I followed gardening, and I mounted stoves. The creek never dries up wholly. Never saw it when there was no stream there. Have seen it discolored, but except after a storm it was clear. The pond was not entirely supplied by springs. As to the number, recollect only the one where the cask was down. Don't know whether people usually got water from the pond to wash with. I used to, for our own washing. Carried it in pails one hundred rods, when we could not get rain water. Might have went four or five times a week for it. We had a large family. I have been as many as three times a week. I have seen a little green on the southwest corner of the pond. Never saw it so bad but what cattle would drink.

The court here adjourned to

Thursday, April 23.

CHARLES LOWE—sworn.

Examination direct.—I reside in Herkimer-street continued, about 300 yards from the creek. Have heretofore lived (some 14 years since) within a stone's throw of it. Lived about ten years thus near it. It used to be considerable of a stream. In dry seasons now there is no water in it. I used to call it wholesome water. It comes from a good spring. In the heat of summer, it was warm. It was used in my family for drinking and cooking—not during the whole ten years—about a year only, when we first went there. Afterwards we had a well. When the water is plenty, it runs pretty freely. Never lived nearer the pond than Lydius-street—4 or 500 yards off. Had occasion to be at the pond two or three times a day. Used to drive through there to water, probably for six, seven or eight years. It was on my way in coming down to the city. Don't recollect having seen dead animals in it. I have seen dead horses thrown east of the road, down the hollow there. It was quite a large pond when I first knew it—covering half an acre, perhaps more. I know there are springs round the pond, where barrels are sunk to get water to use. Always supposed it was fed by springs, because there was nothing but the wash of the hills that could come in. My horse always drank at the pond. There was an outlet to it. I have drawn it for washing. Have seen carts in there; don't know for what purpose. Don't know its depth. Have drove in with my horses to wash them off, up over their backs. That was years ago though. No pond there now—filled up very much. Years back, the water looked very well—had a clear appearance in certain seasons. In summer time, when low, it did not look so healthy.

Cross-examined.—Never carted water for the brewers or maltsters up there. It was five or six years ago that it used to look clear. For the last three years, I have not noticed much about it. It was clear generally in the spring and fall. The ground above is this yellow clay, and blue. Used to drive my horse in when he got dirty in a muddy time, nearly up over his back. Did not rub him off there

nor the cart, except to drive through. It was pretty riley after driving through. Used to drive through every day when I went home to dinner. It was a watering place. Farmers and every thing used to drive through. It appears to me I did see a dead dog once on the bank. I saw dogs, and horses and hogs in the hollow below. Never saw one in the water to my knowledge. In common seasons it was as clear as common water. In the fall, not quite so healthy--the pond would be lower. It could not run off about that season. Teamsters went through, until the last four years, when they filled up the hollow, and they could not get in to water. There were two barrels in the side of the bank--about the width of this room west of the bank. Sometimes a small stream ran from them--sometimes none. Never saw the pond as high as the barrels. I know there was a ravine let into the pond from towards Washington-street. Have seen the water run down from it. Never noticed the color particularly. I have seen the creek when it did not run at all--some little pools standing where the bottom was uneven. Never saw it so but once. The water is lowest in the middle of summer. In spring and fall there is plenty of water. Know of two slaughter-houses on the creek and its branches. Have seen the water bloody in the time of slaughtering. Have seen it bloody right below the bridge, and at the falls. It looked red, and I supposed from the slaughter-houses. Slaughtering commences usually in October, and continues about six weeks. Wilson, in one year, I believe, slaughtered 4 or 5,000 cattle. Should think it 5 or 600 yards from the bridge to the Buttermilk falls. [The map was handed to the witness, who located the falls about 100 yards below the Delaware turnpike, and said it was about 200 yards below the junction of the two creeks that he saw the water bloody.] Have seen a dead horse in the hollow where the creek runs--no other dead animals to my knowledge.

Direct resumed.—The two creeks come together at the lower end of the bridge. There are two bridges.

Cross resumed.—I lived on Lydius-street, just opposite a point in the creek where the two streams unite.

STEPHEN WATSON—sworn.

Examination direct.—Am not very well acquainted with the creek. Some streams enter it below the bridge. Lived near the pond some 10 years ago. There used to be a barrel in the ground—put into a spring there—a little northwest of the pond. It was used for drinking and washing by the families about there I believe. Lived there only six months. Used the water of the pond, a good many times. There was an outlet under the road. Don't know particularly about its running, whether generally or not. Never saw any dead animals in it. Believe the neighbors at that time used to use it for washing. Don't know that I have seen boys swimming there. Have seen them drive in there to water their horses. The water used to look pretty well sometimes. Sometimes riley. Have seen the bones of animals on the other side of the road, where there is a considerable fall—I think 20 or 30 feet. Never saw the water green on the surface.

Cross-examined.—Don't know where the water came from. Some from the spring and probably some from the surface. In a wet time it would run in. It was not a large stream from the spring. Knew of no other spring there. Moved there in November, and left the 1st May. Never tried to see if the water in the pond was fit for cooking or drinking. I should not have gone there to get water to cook with myself, I don't believe.

NICHOLAS RULL—sworn.

Examination direct.—Lived within half a mile of the pond for 12 years. I pass it frequently. I know of but one spring emptying into it that is running water. It has a barrel in it. The water in the pond, in some parts of the season, spring and fall, is pretty clear. In dry weather, in summer, it is pretty riley. It then had a riley, muddy look. Don't know that I have seen dead animals in it before 1835. The pond is now filled in with mud and dirt washed off the hills, up level with the outlet, so that the water runs right off. It has been in that condition something like three or four years--don't recollect exactly. Previous to 1835, have seen boys bathing in it. Saw horses water there often. I have known the Poor-house creek about 12 years. I live between 2 and 300 yards from it. In some seasons, it is pretty much dried up in the hot weather in summer. In a freshet, I have seen it from four to five feet deep, perhaps from six to eight wide. It is a lively stream, when there is water running. Except one season, never knew it entirely dry--the water would stand in pools. Never made use of the water for drinking or cooking. I understood from the neighbors, they had made use of it for that purpose. Don't remember having seen people living near take it to their houses.

JOTHAM HANCOCK—sworn.

Examination direct.—Have known the pond over 20 years. I live now within five rods of it. The rest of the time within 40 rods. Can't speak of more than one spring. That I know very well. Prior to 1835, was along by the pond almost daily. Don't recollect ever seeing dead animals in the pond, before that year. When I first knew it, should think it covered a half or three-fourths of an acre. There was an outlet. Before it got filled up, people used to water cattle there, and I have got water there for washing in a dry season. Have watered mine there. Sometimes hogs would run along the margin, and geese, and make it muddy. Out in the pond, it looked as natural as any water, for what I know. Have seen people carrying it away in pails, and ride it away in hogsheads and barrels. The water was stagnant in a dry time in summer. But spring and fall, it was fed by springs and passed off at the outlet. It was generally muddy. When very low, the hogs, geese, &c. resort there and keep it muddy. Can't say that I ever discovered any green on the surface. If it was, I never took particular notice of it. Since the repairs on Lark-street—some three to five years ago—it has been pretty much filled up. I should call it a mud hole now. I know the creek. Have known it for 20 years. Live probably half a mile from it. Have drank the water high above, while hunting—a mile or two miles, perhaps three miles above the Poor-house road. Never noticed the water at the bridge except after a shower. It would be riley then. In ordinary times, it looked as natural as water generally does in such a stream. Have seen people take it from there—can't say what they used it for. Have seen women washing there in a dry season.

Cross-examined.—I did formerly suppose this pond was mostly supplied from the spring. It was two rods below the malt-house; a little west. Ten years ago, before State-street was pitched as now, there was quite a ravine from towards Washington-street, running across State, into the pond. The spring I speak of, I suppose, came from this ravine. There was no barrel there. There was a stream running there about as large as my arm. After passing State-street there is a fall. I might take a pail full in half a minute. I have seen a barrel further south. The water issued out of the sand banks between Washington and State-streets. Have seen it where it came into the pond; never saw it come out of any one place. There was a ditch in State-street formerly, that ran down and joined this ravine before it got to the pond. There was generally a little water running in it even in a dry season. Certainly, I have often seen hogs wallowing, and geese washing themselves in and about the pond. One family raised a great many geese. I have seen 20 and 50 in a flock, belonging to one family. You can judge as well as I, as to the neatness of that animal. I think the pond has continued to diminish from the time I first knew it, twenty years ago.

Direct resumed.—The spring I refer to, had no tub or barrel in it—though I have seen a tub sunk, a little further south, where the stream runs past State-street.

EDWIN SCACE—sworn.

Examination direct.—Have known the pond 16 or 17 years. Think there are 3 springs that feed it. There appeared to be two barrels sunk—one in a northerly direction—another northwesterly, and there is the appearance of a spring west or southwest. That on the north is about 25 yards from the pond, that northwest about 30 or 40—the other 25 or 30 yards. I have seen water running from these springs. The main spring seemed to be right at the bottom of the ravine—the northwesterly one—the other came out at the side. When I first knew the pond, I should think when full, it would cover pretty near an acre and a half—when down to the drain, probably an acre or an acre and a quarter. I have seen the pond, some years, look pretty well through the season. Other years in summer, I have seen it thick and muddy—unfit for use. In the spring and fall it generally appeared pretty good. It always was until it got below the drain. Then it looked more riley. I considered it good to use, when it was high enough to run through the drain, for cooking &c. I believe I have drank the water of the pond once or twice. Could not say that I have known of its being used when it was high enough to run through the drain, for cooking, &c. There were persons drawing it for different places. Think I have seen dead animals in the pond—dead hogs. Have seen numbers of dead animals in the hollow on the other side of the road. I have drawn the water for washing. My horse always would drink the water well. Have known the creek as long as the pond. Lived near it three or four years. Used the creek water a good deal for cooking, washing, drinking—for general use.

Cross-examined.—The barrel I spoke of was placed by the side of the channel of a little ravine running towards State-street. The run of water there, I think, did not

pass into the barrel. The barrel was filled from a spring in the ground there. Have seen water running there in different seasons of the year, as far north as State-street. The barrel in the middle ravine was pretty much in the bottom of the ravine. Don't think there was a run of water in that ravine. Don't remember ever seeing the other spring dry. I should think an inch pipe would take the water from it. In the southern ravine there is no barrel. The water runs there now. Generally during the warm season, the surface of the pond was below the outlet, indeed always, except after a heavy shower. I have drank the water after carrying it home in hogsheads and letting it settle. Have cooked with it. It made it better to settle. It was not often that you could catch the pond in such a situation as to take right out; but when it had been running over a day or two, you could get in the centre of the pond as good as almost any water. Did not use it more than three or four times in a season for cooking or drinking. When drawn over night, it looked as well as could be in the morning. There was a little sediment at the bottom most generally; not more than from a pint to a quart, if gathered all up. Got the best I could for my own use—drove in as far I could get, to dip it.

Direct resumed.—I have drank the water of the Water-works Company, and have known it unfit to drink near the Police office, until considerable had been drawn. Have seen the water from the penstocks which I think contained more than double the sediment in the water I have drawn from the pond.

THOMAS TOOMAY—sworn.

Examination direct.—Have known the pond between ten and eleven years. Used to drive a team for Charley Lowe, and passed and repassed it every day. Used to water the horses in it. Sometimes it was pretty clear, so that the horses drank it free—after a rain it was very riley. Have taken water out of it myself for washing—for one family only—Charley Lowe's. Never saw any dead animals in it. Have seen boys swimming in it. Never saw the water green.

WILLIAM HOOD—sworn.

Examination direct.—Lived with Judge Buel in '34. Know the big pond. Passed it once a week—sometimes twice. Have seen boys and girls and women carrying away the water in pails and tea kettles. Don't recollect ever seeing any dead animals in it.

Cross-examined.—Did not see this except in summer. Did not take particular notice whether the water was running from it at the time or not. Have seen geese swimming in the pond. The whole surface appeared to be pure water.

GARRET G. SHUFELT—sworn.

Examination direct.—Lived with William Barney, I believe four years, ten or eleven years ago. Used to pass the pond every day. Don't recollect ever seeing any dead animals in it. Have watered horses at the pond. The water was riled considerably, after they had been driving in, in the afternoon. Have seen several families use it for wash water—no otherwise. Mr. Barney lived within 200 yards of the creek. The water in the creek used to be very good water until Wilson started his slaughter-house there—the very best of water. In summer time, before he commenced slaughtering, it was the best water on the hill. The new one has been built since I left the hill. I mean the old one, right opposite William Barney's. After that, the water was bloody, and horses would not drink it. The new one was built in 1834. The old one was on the Poor-house lot. It probably belonged to Mr. French. Before that we used it for washing. I believe Mr. Lawson's family used it for cooking. I have seen them take it away, I suppose for that purpose. This slaughter-house was right opposite Mr. Barney's—between Mr. Barney's and the old Poor-house.

Cross-examined.—I have seen dead horses, cattle, sheep and hogs the other side of the street from the pond. As to the smell, it was uncomfortable riding by the glue factory. I have drove in with horses. Don't know that I ever saw hogs there. Have seen geese there. The pond was all open to the street. Very seldom saw cattle there. Once, one got in there, and it was difficult to get him out.

GEORGE COUCHMAN—sworn.

Examination direct.—I am a maltster. I was in Mr. Taylor's employ, in the season of 1831 and '30—worked for him again in '35, in the malt-house on the hill. Got the water for malting principally from a well in the malt-house. Got none from the pond to my knowledge. As to the creek, there were some few loads rode, but where it came from I could not tell. It was not my business to look to it. There was very little rode. To the best of my recollection it was Calvin Butler that rode it. I have drank of the water rode in '35. Can't say that I did in '31.

I saw it however. It was good, wholesome water, I should think, for such purposes or any other. Looked clean. Never noticed any bad smell about it. That drawn in '35 was good water, to the best of my knowledge. Have drank the well water. It was as good water as you would find on the hill. I frequently assisted in emptying the steep tubs. The dust and dirt, if any in the barley, would settle at the bottom. Never smelt any thing offensive in the barley when taking it out of the tubs.

The court here took a recess until

Three o'clock P. M.

Direct resumed.—In '31, saw the pond perhaps every day. It might have been eight or ten rods from the malt-house. Don't recollect ever seeing dead animals in it. The water was sometimes a little riley after a heavy shower. In spring and fall it was good, decent water. Used to water my horse and the cow there. I have seen it very low. I know my cow used to drink there in summer.

Cross-examined.—Learned my trade here in Albany. The first malt-house I worked in was Mr. Dunlap's. Worked but one season at Taylor's in '31 and '32, from September to the beginning of May. Mr. Birdsall employed me. Mr. Taylor paid my wages. The reason why we drew water was because there was not enough in the well. It was Mr. Birdsall's business to get water drawn. To the best of my knowledge Mr. Taylor was satisfied with my work there that season; he never complained of it. I have seen him there several times. It was in the spring that the water was drawn. The well was not dry, but there was not water enough for malting. Can't tell whether Mr. Taylor or Mr. Birdsall paid for bringing it. Don't recollect whether any water from out doors was put into the well. There were, I believe, some leaders put round the malt-house and then into the well. The water brought was not put into the well. The malting season ends the latter part of April. The water carted did not look so well as that in the well; no rain water would look so well. I think Mr. Taylor was there more than Mr. Fidler, (Howard, that is now.) He generally left his malting to the men. When I worked for him, he did not find any fault, left it to my direction, when I had charge of the house. He left it to me to make him good malt. Heard of the publications in the newspapers about making beer. Never read them. Went there about the beginning of February. Never saw hogs wallowing in the pond. Have seen geese there. The cow used to stand in the water until she had got enough, I suppose. She could not have got water except at the pond or at the slaughter-house on the creek, unless at the pump. I did not go to the pump for water for her.

JOHN G. WHITE, (Brewer and prosecutor,) sworn.

Examination direct.—My first acquaintance with the pond was in 1827. Continued to know it intimately until 1830, or the spring of 1831. I was there on an average once a week perhaps from fall to spring, sometimes oftener. Can't say that I ever saw any dead animals in the pond. Don't know whether the pond is supplied by springs or not. I recollect a barrel sunk on the west bank in the neighborhood of the pond, where some families got water. It was sunk some eight or ten feet from the level of the water. I recollect seeing persons going there for water. Never was close to it. I always considered the pond water good, in the fall, winter and spring. Don't know that I could say it was fit for any purpose. I would not drink it, if I could get better. Neither would I go to the river, although I drink river water every time I go to New-York. I considered the water of the Poor-house creek from '27 to '30, as good as the Hudson river—that is, in the fall, winter and spring. I am pretty well acquainted with the Poor-house creek. The reason why I would not drink the pond water, was not because I ever saw filth in it, but because I thought it not quite so fresh as spring or pump water.

Cross-examined.—Don't know but I am one of the maltsters on the hill that has sued Mr. Delavan for this publication. A suit has been entered. I have known the pond since 1831, not as familiarly as before. My business has been ever since on the hill. I am still a maltster. Don't know that I ever examined the pond particularly in summer and fall. Never had occasion to go to it in the fall. I think I have seen it when there was not a stream running out of it. I never saw any filth in it. I went to the pond to get water. I got it for various purposes. I have used it for malting and brewing. My malt-house stood where it does now—directly north of the burying ground, between State-street and the Great Western turnpike. My brewing establishment was also there. I have seen horses drink the pond water. I don't know that I ever saw my old white horse refuse it or drink it. I never saw any dead animals on the banks. We backed the horse and cart into the water to get it. Never saw any dead hogs in it. I saw a dead dog

lying in the vicinity of the pond once. Did not get all or the principal part of the water I used in malting and brewing, from the pond, between '30 and '31. Quite a small proportion of it. Did not get any after '31. Not sure that we got any in the spring of 1831. In the fall and winter of '30, we got some, and we might have got it in the spring of '31; but I am not positive. Very likely I have seen Mr. Taylor about his malt-house. No question but what I have seen him. I have frequently seen him, about the malting season, about the malt-house. I believe the pond was so much filled up, that we could not get water there, after 1831. After '31, we discontinued brewing, and got enough for malting from the premises. The brewing apparatus was removed from the hill to Dean-street in '30 or '31. I recollect seeing water going into Taylor's malt-house. Don't recollect whether it was at the same time I was dipping for my own. Where he got it from I don't know. I have seen a cart backed up at the north end of his malt-house—head towards the east. I recollect seeing him take water into an east window. Clean water and pure air don't make malt any worse. I consider it necessary to make good malt. I have thought so 12 years, when I became acquainted with the process of malting. I thought I was getting such water when I took it from the pond. I have tried water that was not clean, not however to see if it would make good beer. I was satisfied that impure water would not make good ale. We had a well within six or eight feet of the brew-house, and the wash of the cellar penetrated through the sand and got into the well, and the water became impure, so that it had a smell. We made a few brewings of it, and had to knock the bungs out and let it run out at the drain. I think this was in 1828 or 1829. I had then brewed a year and a half. We were aware that it was not exactly sweet, and thought we would test it. We thought we would make a brewing, and if it made good beer, would use it. It was not good beer, and we then went to the Poor-house creek and got some there. I don't know but the way in which we found the well was not good water, was a difference in the fermentation of the ale. It did not work right. There was some difficulty about it, and then we began to draw water. I have been spoken to about contributing towards the expenses of a suit, as a test suit. I was told that Mr. Delavan's and the brewers' counsel had agreed to take up one suit and try it as a test, and I was asked to bear a share of the expenses of the suit, which I declined.

JOHN HASWELL—sworn.

Examination direct.—I am partially acquainted with the big pond. Fifteen years ago, I occasionally passed it, not every day. Could not tell exactly how much ground it did cover, when I first knew it. It was considerable of a pond. I should doubt whether it would cover much over a quarter of an acre. At times the water was very clear. At other times, it was some riley—particularly near the road. Never saw any dead animals in the pond. Have seen them on the other side of the road. I have soaked grain for sowing, for a number of years. When I raised wheat, I never sowed it without, for 30 years. Have occasionally soaked rye. If soaked eight or ten or twelve hours, the water will have a red appearance. If you continue the water, it will be nearly a chocolate color.

Cross-examined—I live 3 miles from Lydius-street. Have been in the habit of coming into town 3 or 4 times a year—some years not at all. Don't recollect now passing the pond in the winter.

WILLIAM J. D. HILTON—sworn.

Examination direct—Have passed the pond frequently, perhaps a dozen or 15 times a year, from '28 or '29 until '35. Since that don't know much about it. The pond was always clear unless just after a rain. I have seen it a little riley. That was quite late in the fall. Seen boys swimming in it. Don't recollect ever seeing any dead animals in it.

Cross-examined—Have seen it at different seasons, but when I have seen it riley, it was late in the fall. Could not say whether the stream was running from the pond when I have seen it. I should think it was from half an acre to two-thirds in size. I commenced noticing the pond, as far back, I think, as '28. I was perhaps 14 years old then.

EBENEZER WILSON—sworn.

Examination direct—I occupy the slaughter-house spoken of on the creek. In a direct line, it is not exceeding a mile and a quarter—possibly a mile and a half from the malt-house. I should think it was full a mile and a quarter from the bridge leading to the Poor-house. It was built in '34—the first slaughtering there, was in the fall of that year. I should think it was something like 600 feet from the creek. Can't be precise as to the distance. It was an object to secure the blood and offal

for my own use. I had land there. [Witness went on to describe the mode he adopted to secure the blood, and keep it from running off down the creek—which was to dig a ditch on the flat between the slaughter-house and the creek, and throw up an embankment of about three feet from the bottom of the ditch.] When we had a severe rain storm, it would sometimes break away the embankment. I should think it likely it was so in '34 or '35—but only during the storm. It was immediately repaired as soon as the storm subsided. The old slaughter-house could not have been more than 250 feet from the creek. The blood and wash from the old one emptied into the creek, I should think a quarter of a mile below the bridge, just above the Delaware road—within 10 or 15 rods. The old one was discontinued when I went up—the same building was removed there.

Cross-examined—The largest number of cattle I ever slaughtered there in a season, was something like 58 hundred. In '34 it was in the neighborhood of 3,000. In '35 about 4,000. The slaughtering of that year commenced in October—we stop about the time the river closes. The blood and offal that is not consumed by the hogs remain on the ground. We usually keep about one hundred. I should think the blood of a steer of four years old would not exceed 3 gallons. I only judge from seeing it run. The ground at the foot of the hill on which the slaughter-house stands, is a marsh. When I went there, I commenced and ditched the land through. From the foot of the hill to the creek, was 150 feet—perhaps more. I think the freshets do overflow that sometimes.

Mr. HANCOCK—recalled.

Cross-examined—by defendant's counsel—I think I have seen the water of the pond carted to the plaintiff's malt-house—wont be positive. I have seen it carted to different malt-houses, and I think I have seen it carted to Mr. Taylor's. I have seen them letting the water run into his malt-house, at the north end. I don't know that the water was taken from this pond. I thought they might use better water. I have seen water taken from the pond, which I supposed was going to malt-houses, which was not bad. I do not say it was suitable for malting. It was water that families would use for washing. Don't know what water is fit for malting. It was not fit for drink or food.

Direct resumed—I have seen water taken from this pond at different times, and I have seen them running water into Mr. Taylor's malt-house.

Cross-examination resumed—I do know of Calvin Butler's taking water at the pond—can't tell where he carried it. I have seen him running water into the malt-house, but I can't say that it was on the same day that I saw him at the pond.

WILLIAM AMSDALE—sworn.

Examination direct—I was frequently at Fidler and Taylor's malt-house on the hill from 1829 up to and including the fall of '34. It was my business to see how they went on. I was the brewer. Am acquainted with that and the business of malting. Within the period mentioned, I have not seen a great deal of water rode, but I have seen water rode there. Undoubtedly I examined the water that I saw rode. I have had the men bring me a tumbler from the well, and I have drank the water that was rode, repeatedly, sometimes having a glass of it brought to me, and I have dipped it up in my hand as it was running through the trough. I have seen this water very clear, and I have seen it somewhat riled, probably by the rain. In winter, I have seen it considerably like snow water—rather blue—and I have drank that. Snow water is as pure as any except hail. It was no more than snow, hardly dissolved. It was certainly sweet, pure water—never saw snow impure yet. If either dirty water, or putrid water, actually clear, has been mixed with the grain in the steep tubs, I can detect both. It will make malt that will be condemned by all brewers. As long as the water is filthy, the malt will show it. I always examine the malt when I go up. I know that Mr. Taylor one year, before the river closed, bought 118,000 bushels of barley, 18,000 of which he sold again and sent to New-York. I believe on an average, I have consumed, yearly, for 3 years, between 60 and 80,000 bushels.

The Court here took a recess to

Seven o'clock, P. M.

Cross-examined—Have been engaged in this business 26 years. Learnt my trade in the county of Essex, in England. Served an apprenticeship of 4½ years. I was first a maltster. My father used to carry on brewing. I am a brewer. It is part of this business to attend to the malting. I made my examinations at the malt-house as often as once a day—sometimes twice—three times a week. It was my business to see that the malt was made to suit my notion. The maltster was

under my control. I examined his work—all—the whole of it. I called for the water I spoke of, to look at it, not because I was thirsty. Probably, if thirsty, I would drink. I had no reason to believe they made use of bad water. I remember a few odd times, when they were running the water in, catching it up and drinking it. I presume I may say I did that 20 different times—more than that—to speak within bounds I say 20. I have drank the water from the puncheons outside. Can't tell how often I have seen them riding water. Many seasons I saw none rode; but whether it was rode or not I can't tell. You say that sometimes this water looked riley? No further than snow water. You said it was sometimes clear and sometimes riley? With snow—which gives it always a blue hue. It was riley with snow then, not with dirt? Not with dirt. Did you not testify that this water was sometimes clearer than at others? I have said I have seen it perfectly clear—the water running from the puncheons, I suppose I have drank 20 times out of my hand. If it looked so clear, could not you trust your eyes? Undoubtedly. It is a peculiar mode I have. All are not alike. When brewing, I call for beer from such and such a puncheon. I look at it and taste it. You said you could tell whether the maltster had made use of bad water? If the malt has been steeped in water impregnated with iron ore. (We don't want that of you.) You said you could tell the difference, and whether malt was steeped in clear water having a bad smell, or in water that was thick? If water is putrid, the barley would be perfectly black. How do you know that? From experience. Where did you get that experience? In the county of Essex. Then you used putrid water there? That water was impregnated with iron ore. But where did you make the discovery that putrid water would turn barley black? I don't know that I could testify to making the discovery, but if you steep barley in putrid water, if I can't tell it, I forfeit my head for a football. The question is this: How can you tell when barley is steeped in putrid or dirty water? The barley itself will be as dirty as can be. After it is dried on the kiln? I don't want to see it on the kiln. When it comes from the steep tubs, it is as easy to ascertain, as to tell good water from bad. How do you ascertain it? If I see barley dirty, I know foul means have been used. Have you ever seen any in that condition? I did in the county of Essex. Ever made such a discovery in Albany? I have seen differences in barley in Albany. What was the reason of the difference? Because there was not water enough to wash it enough. Where did you make the discovery that some barley was not washed enough? In many places. In this city? Yes, and in other cities too, for lack of water. We don't understand now how you discover that putrid water has been made use of in steeping barley? I know I can tell it. How? I can detect it—two or three kinds of water will give a different color to the barley. What color does putrid water give, if it has a bad smell but is clear? Don't know that I ever saw putrid water used in the malt-house. Can you detect it when used? I have told you all I can tell. Does barley, after being malted, weigh more than before? No—good barley weighs 50 pounds to the bushel—when malted about 40.

Direct resumed.—In steeping barley, nothing is done but to mix it with the water.

Cross-examination resumed.—The 180,000 bushels were purchased, I think, in 1835. The three years I spoke of were '34, '35 and '36.

Direct resumed.—I know the smell of barley when steeped in pure water. If foul water is used, the color of the barley is enough.

ROBERT CLAWSON (colored)—sworn.

Examination direct.—For about 12 years I have been in the habit of passing the pond on Lark-street, four or five times a week. I have drawn water out of the pond. I moved out to Mr. Van Vechten's farm about 12 years ago, and used to pass this pond going back and forth. I drew water from it about 10 years ago. At that time the water was as clear as you could expect such water as that to be—very near as clear as river water. My horse drank it, when I drove in to draw water; and I have seen other people's horses drink of it. I remember going past two or three times, and driving in to water. When I drew this water it was for the masons up there. Then I drew most every day. Saw no dead animals in the pond—not one. Don't know whether the water was used for washing. It was in the summer that I drew this water—May, June and July. I think there is a spring, near the pond—just above, on the bank, where a ravine runs up, there is a barrel which I have come across myself, and stooped down to drink of it. Never saw the water green in the summer. There used to be hoop poles thrown into it, and I have seen a little green on the hoop poles. It is entirely dry now, so that I could go across it dry generally. It seems to have filled up all at once of late. Don't recollect whether it was filled up even with the outlet or not five or six years ago.

Cross-examined.—I never drank out of the pond, but the masons did. I have seen them come down to the barrel and drink. Was it such water as you would

use to cook with in your family? If I had no other water, I would cook with it of course. Do you think it proper and suitable to cook with? It would be to cook potatoes with. You think, then, it would answer to boil potatoes in? Of course, if the men drank it, it would do. Was it fit to make tea of? I wouldn't want to make tea of it, because cows and everything stood into it; and of course it was dirty; and the country people stopped into it and watered. Hogs wallowing in it? No, I never saw that. Country people drive in to let their horses drink? Yes. Then, although it would answer to boil potatoes, it was not fit for tea? Don't know that it would make any odds. I wouldn't drink it if I could get other water. If I could not get other water, I would take it of course.

JONATHAN SHARP—sworn.

Examination direct.—I guess I have known the pond on Lark-street 16 or 18 years. I have always lived on the hill there. Sometimes it has been pretty dirty after a hard rain. Have drawn hundreds of hogsheads out of it. Have drank out of it. Have drawn water there summer and winter, both. After a heavy rain, it would be muddy. Have seen others drink of it. I have drawn it for malt-houses and to wash with, and for other purposes—making mortar. The water looked clear enough, unless after a rain. Could't say that I ever did see dead animals in the pond. Have seen dead dogs and hogs, and horses down on the other side of the bank.

Cross-examined.—Have seen snipes (I call them) round the pond—not in it. Never saw live hogs wallowing there. Have seen cows standing to drink there. Have drove in. Have seen boys in swimming there. Don't recollect seeing geese. There might be though. The water has been pretty low when I have been there in the winter to draw water, so that it was pretty hard work to get any out of it by cutting through the ice. Can't say, certainly, whether the water ran off in the winter under the road. Have seen it run in the spring and fall. Don't know that I ever saw it run in winter. In the winter it froze up pretty near the bottom. The water then looked clayey; the colour of blue clay. Who was you drawing for then? I was drawing some for the malt-houses then. Whose malt-house? I was not drawing it home: I was helping. To whose malt-house? I don't know who owned it. Where did it stand? Mr. Butler was the one that owned the horse and cart at that time. Where did the malt-house stand that he drew it to? I think he drew it to the malt-house that Mr. White owned, if I am not mistaken. Where did that stand? On State-street continued, on the right hand side as you go up. Did you draw any water for Mr. Taylor's malt-house? I have helped draw some; yes—not sure how long ago; between 5 and 6 years ago, I think it was. It was in the fall or beginning of winter—in cold weather. How much did you draw that time? A number of hogsheads; don't know. I did not draw them—helped fill them. Could't tell how many; a number, at any rate. Where did you put the water? Don't know exactly; Dan. Sharp drove the water. Where did he drive it to? To Mr. Taylor's malt-house. Can't say which end. I was down at the pond when he was driving. I only helped fill the hogsheads. About how long were you drawing water about that time? A number of days; can't tell how long. Sometimes I helped draw probably 18 hogsheads in a day; 18 or 20 in a day; sometimes not more than 8 or 10. Don't know where it all went to. I speak of the time when he took it to Taylor's malt-house. I drew two or three days then in the winter. I think likely I did draw at other times with Dan. Sharp, during the same season, to Taylor's. Can't be sure because he drove. I think I have helped him draw after that for Mr. Taylor. I guess I helped him draw before the time I speak of. I can't say how often; but I know I have a number of times at any rate. I drew considerable for him to carry off—a great deal of water for one place and another. I know I drew it for Taylor's malt-house a number of times; they said it was going there, Dan. Sharp said. He was never gone long enough to go but a short distance at any rate. About how many seasons did you help Sharp draw water, when he said he was going to Taylor's with it, prior to the period you spoke of, 5 or 6 years ago? Two or three; three at any rate, to the best of my recollection. How near was Taylor's malt-house to the place where you drew it from? But a short distance—a very little ways; nearly 6 or 8 rods. There is another not much farther off, and others still higher up.

JEREMIAH BRADT—sworn.

Examination direct.—Have known the pond 8 or 10 years. It is about 3 years since it has been pretty much filled up. I lived not 300 yards from it. I was at it very frequently. The water, 7, 8 and 10 years ago, was good for all I know. Never saw anything into it. I have seen horses drink there. Have watered them there myself, often, as late as 6 years ago. Don't know whether families used it for cooking. They used it for washing. There are springs just above the bank. Not certain whether there are two barrels sunk there or one. One I am certain of.

Cross-examined.—These springs were eight or ten feet up the bank. Have seen water in these barrels within three years. Don't recollect seeing water run from

them in three years. Have seen the water run over the top of the barrel in the fall of the year.

JONATHAN GUY—sworn.

Examination direct.—Have known the big pond about eleven years. Lived within ten rods of it part of that time. There is one spring where the barrel is put into the ground, on the west side of the pond, in the bank. There are frequently small springs on the side. Before '36 the water in the pond was good. In the winter, clear and clean, and in the spring and fall, except in freshets, when it was riley. Don't recollect seeing any dead animals in it. Plenty of them on the other side of the road. Have seen plenty of horses drink there. Up to '35 do not recollect to have seen the water green. Have seen the pond frequently in warm weather. I know the Poor-house creek. The water is very good in spring and fall. In the summer time low I suppose. Have drank the water hundreds of times. I know the hollow from where the grave yards are. It goes into the creek below the bridge.

Cross-examined.—Don't know that there are any fish in the pond—never caught any. I have seen frogs in it. I lived ten or fifteen rods from it, seven years ago, right across the way from the malt-house. Never saw carts going from the pond to the malt-house. Have seen the pond look green in dry weather in summer. Never before five or six years ago. Never saw hogs wallowing in it. Have not taken any notice of it this summer. I have dug in the bank to make a hole to water the horse, some five or six years ago. Never had occasion for any water since. Never looked at the spring to see if there was water running from it. The little stream there now is a ditch from the street.

JOHN RUSSELL—sworn.

Examination direct.—I knew the Poor-house creek in '34. Drew water from it in the fall of '34 and spring of '35, from above and below the bridge. The water was good except that sometimes in a freshet it was riley. I have drank it. Don't know of its being used for cooking. I rode it to four different malt-houses on the hill—Mr. Taylor's, Mr. White's, and two others belonging, I believe, to Mr. Dunlap at that time.

Cross-examined.—Dipped some of it above the bridge. After it froze over, got some below the bridge—cutting a hole in the ice. This was a few yards below the bridge. I drew some for Mr. Taylor during the winter. It was very late in the fall when I commenced. Can't tell how long I continued to draw for him. I drew for him at different times—I think until some time in February, or the fore part of March—not certain about it. No recollection of cattle coming about there to drink. There was plenty of water there—a running stream. Never drew from the pond at all, nor from any other place except the creek. I have seen the Poor-house team, a great many times, dipping water to take to the Poor-house.

ROBERT WANDS—sworn.

Examination direct.—I have known the pond on Lark-street for twenty-five years or more—ever since the road was made that formed the side of it. Have passed it frequently. Should think it covered from half an acre to three-fourths when I first knew it. I have watered my horse there—not frequently. Never saw any dead animals in it. It is about three or four years since it filled up. The water looked white—whether from clay or what, I can't say, or from driving in. It looked muddy white at the bank of the road. Towards the middle and upper end it looked clear.

Cross-examined.—I should say there was no pond there before the road was made. That was, I think, about twenty years ago. It was a common ravine, and the pond was formed by running the road across it. Don't recollect whether a stream ran down the ravine before the road was built. For aught I know, the pond was a collection of surface water. Don't know the ground about it, or what there is to feed it. Never was in the rear of the pond, or followed up the ravine. I would not drink the water at any time—not if I could get other water, nor would I use it for cooking.

WILLIAM J. WRIGHT—sworn.

Examination direct.—Do not know the nature of the ground about there before the pond was made. Never went over it. Do you know when there was a running stream through there? I took it to be so. See the stream? Saw a place under the turnpike where the water was made to pass through. It was a small rivulet—quite a small one. Have passed the pond occasionally since it was made. I live in Bern. I pass the pond coming into town; sometimes very frequently, and when I go out. I have drove into it. Sometimes the horses would drink—sometimes they would not. Don't recollect seeing dead animals in the pond.

Cross-examined.—Don't know how lasting this rivulet was under the road. There was no living spring that fed it to my knowledge. Don't recollect in what season of the year this rivulet was formed. I travelled almost all seasons on the road. Have seen the pond at all seasons, I think. Was that water ever fit to drink? I

should not be willing to drink it. Would you have drank it at any season, winter, fall or summer, after it became a pond? Don't think I should, if I could have got any other. If in a suffering condition I might.

Friday morning, April 24.

THOMAS WAUGH—sworn.

Examination direct.—Have lived on the hill since the fall of '32, probably three-fourths of a mile from the creek. I know of the water being used for cooking and drinking. Can't say that it was so used from '32 up to '35. It was either in the fall of '34 or the beginning of '35. I brought some water from there myself, for Mr. Dunlap's malt-house. Have seen it used for cooking. The maltsters used the water. I have drank it. I considered it good, pure water. I lived a little above a quarter of a mile from the pond. Have passed it a good many times. Up to '35 never saw any dead animals in it. I have seen it flowing over the road, when it looked riley. That was after a rain. I have seen it at other times pretty clear.

Cross-examined.—Have seen boys in there bathing. The water was clear at these times. I have seen it clear in the fall except when there was a freshet—as clear as the river here. Was it such water as you should want your victuals cooked in? Don't know that I should have any objections, though I should prefer spring water. On account of cleanliness, was it such water as you would want victuals cooked in? If clear enough. Give your opinion, for family cooking? I don't know as I should. [In reply to the court.] I should not. Should you be willing to drink it? No. Do you know of this water being taken to Mr. Taylor's malt-house? No.

Direct resumed.—Would not be as willing to drink any such water, as to drink spring water.

Cross resumed.—If very thirsty, I could drink it.

GARRET W. RYCKMAN, (One of the prosecutors,) sworn.

Examination direct.—I know Mr. Harvey that was here as a witness—the first one of that name sworn. Don't know him by his christian name. Don't know him by the name of Mancius Harvey. Never heard him called so until now. Had a conversation with him in relation to the statement he had made about the brewers, on the 11th May, 1835. I took down the substance of the conversation within half an hour after it occurred. I have it now before me. I met him in Herkimer-street. I commenced a conversation in relation to the testimony which I understood he had given in to Mr. Delavan and Dr. Green. I inquired whether he was the authority on which the assertions or facts were stated. He said he was. I inquired when the water was ridden of which he spoke, and he said about eight years since. I inquired for whom he had ridden that water, and he said for Fidler and Taylor and Dunlap. I then inquired whether he thought Fidler and Taylor and Dunlap knew the fact that dirty water had been ridden. He said he did not believe it—he knew they wanted nothing but pure and wholesome water—and he continued, he did not believe the practice had been continued since. He further remarked that he believed ale was made of pure and wholesome water, and that he drank of it daily; that he believed Delavan was actuated by malicious motives in his publication against the brewers. He said he did not wish to testify, and had rather leave the city than not, but had not the means of going. And I urged him to stay of course—remarking to him that we were as anxious to elicit the facts, if dirty water had been used, as Mr. Delavan could possibly be. That is the substance of the conversation. I was then engaged in malting and brewing, and am now. I commenced a suit against Mr. Delavan.

Cross-examined.—Harvey did not state where the water was taken from. Nor did I inquire except as to the quality of the water. What did he say as to the quality of it? He said he was the one that had ridden the dirty water. What did he say as to the truth of the publication? He said he was the one that had ridden, which, I supposed, he meant as confirming it as being true. Said he believed ale was made of pure water? Yes, and as evidence of it, said he drank of it. Did he say where? He spoke in general terms. Do you use pure water? Yes. Are you very particular in that respect? Yes—nothing but pure water will make good ale, either. Do you get running water or that that is stagnant? Get it from the river, sir. Near the shore or out in the stream? Not a great way from the shore. Directly on the shore? There is a pipe running through into the river, with a rose on it. There are times when the water is riley. How far does the pipe run into the river? The rose is in the water. I have never attended to that. Mr. W—— has always attended to the manufacturing part of the business. We were formerly partners—dissolved a year ago this spring. Your brewery is in the city? Yes—on the dock, near the ferry. Have you been brewing and malting in other places? Yes. Have you always been careful to get pure running water? Always meant to be. Our malt-house is supplied from penstock water. We had a malt-house on the hill formerly. Do you know how many suits were commenced in the spring of '35, by the brewers? I think there were eight. The memorandum I have was made at the time I spoke of, and never altered in any particular.

JOHN W. HINCKLEY—sworn.

Examination direct.—Did you know Charles W. Harvey? Yes. Ever have any conversation with him in relation to his going or not going away from the city, and why he was induced to stay? I had a conversation with him. What was it? He said he intended to leave town, but that he should get \$50 from Delavan by staying to testify in this suit. I think it was then pending. When was this? I think it was in the fall of '35, or in the winter of '35 and '6.

Cross-examined.—I was then doing business in Hudson-street, just in the rear of ———'s store—practising as a physician. Was Dr. Harvey a student with you at that time? No. After that? No. He was assistant at the Alms-house when I was Alms-house physician. Were you and Harvey on intimate terms? No, sir; at no time on what I call intimate terms. He was not a particular friend of mine by any means. Were you and Dr. Harvey joking at that time? I never joked with him. He told me that of his own free will, on my office stoop. He was not my confidential friend—not on any terms. Don't know that we are on any terms. Were you requested by any body to get him discharged from the Alms-house by any of the brewers? No. Did you procure him to be discharged from the Alms-house? Yes. You have repeated all that occurred between you at the time? Pretty much, I believe. The substance of it? Yes. Who commenced the conversation? I did. What did he say first? Don't remember what in particular, but I remember distinctly that he said that to me. Remember any thing else he said? I thought he was rather indiscreet at the time. Did it ever occur to you that you misunderstood what he meant? No, sir, not at all. Very sure you were not on intimate terms with Dr. Harvey? No. How often did you see him? While at the Alms-house, three or four times a week. He was there probably eighteen months. The conversation alluded to was, I think, after he left the Alms-house. He was boarding above my office. Ever walk with him in the street? No. Why? Never thought his character very good. Never had any personal quarrel with him? No, sir, none at all.

Plaintiff's counsel.—Is he a real doctor? He merely adds the title from being a student.

Cross-examined.—Has he studied out his full time? Not unless he has studied since he left me. Did he study with you? No. He was at the Alms-house, and I gave a certificate of his being there. Do you know of his studying with other physicians? I know that Dr. Green and Dr. Eights had him in their offices. Don't know of his studying since. You say he is not a physician? Don't know of my own knowledge. When he left the city he went into the country—don't know where—some country village. Buffalo? No. How long after this conversation you speak of did he actually leave the city? Not a great while; a few weeks or days—might have been a few days. You did not walk the streets with him because his character was not good; did you think so when you spoke with him? Did you ever show him that you thought so? I have endeavored to let him know that I did not like his company. You have given him to understand that? Plain enough for a common man to understand. How long was that conversation after he left the Alms-house? Can't tell—might have been shortly after—recollection not distinct. Did you consider his character as bad at the Alms-house as after? I was not acquainted with him when he came to me; I afterwards ascertained that his character was not such as—Was your opinion of him at the Alms-house, such as it was afterwards? during the time he was there, was his character as bad as it was afterwards? Don't know as there was any difference. Did you give him a certificate when he left the Alms-house? Yes. At the time he left? I believe so, or previous to his leaving town. What was the nature of it? Merely certifying as to the time he had been studying medicine. Was that with a view to enable him to get admitted as a practitioner? Yes. Did you certify to his moral character? I don't recollect; if I did, I did it out of charity to the young man. I did not wish to injure him. Did you certify to his moral character? I don't recollect; if I did it, I did it from charitable motives. If you gave any certificate as to his moral character, it was that it was good? [The plaintiff's counsel objected to this question, and the court remarked that the inference was, (as what was done was from charitable motives,) that if any was given it was of good moral character.] Was you aware that the law required good moral character as well as clerkship? Yes. Are you a licentiate or a real doctor? Are you an M. D.? I am not.

Direct resumed.—Are you licensed to practice? Yes. A member of the County Medical Society? Yes.

HENRY RECTOR—recalled.

Examination direct.—The bridge over the creek is about a rod above the junction of the two streams. The location of the glue-house is as near where it is put down on the map as it could be located. The pond may be located a little too far south. I think the glue-house is, if anything, a little north of the centre of the square. It appears to stand on level ground; but it commences a descent immediately north. It begins to descend near the edge of the house. The city map is

on a scale, I believe, of 200 feet to the inch; [witness afterwards corrected this statement; saying that it was 400 feet to the inch.] The blocks laid down are some of them 10 chains. There are 5,280 feet in a mile. I think it a little short of a mile from the slaughter-house to the junction, following the line of the creek.

Cross-examined.—The wash of the land, immediately north of the glue-house, would go down into the pond. There is a drain from the glue-house going into the ravine entering the pond.

LAUNCELOT HOWARD—recalled.

Examination direct.—In '27 or '28 there were repairs made. It slipped my mind before. The sills of the building were cut off and we put a stone foundation round the whole building, and repaired the floors. This would need a very large amount of mortar. I know we were a long time completing it. The malt-house floors are 108 feet long; the kiln 22; making the whole building 130 feet. The wall laid was 3 or 4 feet deep, and 6 or 7 round the kiln possibly. Can't say whether the water for these repairs was put into the steep-tub. My impression is, the mortar for the kiln was made on the bank. The mortar for the floors must of necessity have been made inside. On reflection, I know mortar was made outside; and there was mortar made from water that was put into the steep-tubs. The tubs were well cleaned before they were used; so were the floors. I am satisfied that it was in '24 that the feeder was put into the well by McNab. So that the house was supplied with good water from that time—whatever was necessary—with scarcely an exception, for malting. The water in the well was good—sweeter than the Water-works' Company's. I consider the pond water better than the water-works. I have seen green stuff on the pond at the Shakers, where the aqueduct is supplied, more than I have seen on this pond.

Cross-examined.—I have seen water running from the Shaker pond; whether occasioned by springs or streams running in, I can't tell. You said you had seen the Shakers' pond more green than the big pond. Have you seen the water in the latter, green? The upper part of it—but then only during warm weather, and that only in a severe drought or something of that sort. I have seen the pond both clean and filthy. I should not like to use it. I have seen the water-works' water in the city, when I should'nt like to use it. Did you ever see the pond when you would like to use it for cooking? Not if I could get better water. I don't think it would injure any person. I have seen it when I should not object if I had not known these circumstances and seen it in other situations. If the water was ever infected, it was in the pond, not from the sources. The water was from springs or rain. Did you ever see the water in that pond in such a situation that you thought it fit to cook with? I have seen it clear enough. Have seen boys diving in it, and have seen them under the water. Have seen the pond in a very clean condition. Then the time when it was clean enough to cook with, was when boys were swimming in it? I have seen it clear in spring and winter. We have avoided using it for our malt-house. It was not our intention ever to use it. I never knew it to be used until informed of it. Informed of it? Whether it was so or not I don't know. I prepared it for the best of water. The Patroon's creek is a mile and a half or two miles from the malt-house, on a direct route. I have seen the pond decent looking. Seen families use it.

Direct resumed.—I knew there was a spring in a house owned by Crawford, as long ago as 1815, '16, '17. I think it must have run down Washington-st. From the location, I think it could not have got over into the pond.

JOHN ANDERSON—sworn.

Examination direct.—Have known the pond 30 years. Lived exactly opposite to it on Knox-street. I think it is all of 10 or 12 years since it began to fill up. Have often been there. Have bathed in it. Don't recollect any dead animals about it. The water was clear and pure. I have used it in my family for washing. Don't know that my folks ever cooked anything with it. I know of two springs there. Helped to sink the barrel for one myself. There was an outlet to it. Have seen horses drink out of it.

Cross-examined.—Don't know what made a pond of it, or what formed it. It was there when I first came to Albany. There was a road where Lark-street is, then. Never knew this piece of ground before it was covered with water. Don't know exactly how far from the pond these two springs were. They were upon the bank, 30 feet above the level of the pond formerly. The first I ever saw of them, was 20 years ago. Don't know that the barrel is there now. Have not been over there in two years. I saw the barrel last, all of 5 years ago. The water did not gush out of the top of the ground where the barrel was put down. We dug down and found water. Can't tell whether the other came out of the surface. I did not run out as free; but I suppose the water was just as good. A stream ran steady into the pond from both springs. Never knew it to fail. It was not a very large stream; probably an inch in diameter. It was all the year running, from one year's end to another. Never knew them to fail. Don't know of any other pond

or mud hole on the hill. The neighborhood is more thickly populated now than formerly. Don't know of any body that keeps cows about there, except Mr. —. Not many hogs kept. What there were, were shut up in the slaughter-house yard. Mr. Charles and Mr. Featherly, next door to me, have kept them.

HENRY RECTOR—recalled.

Examination direct.—The place marked on the creek below the bridge—is that the proportionate enlargement of the creek? No. I made it large to designate the spot.

Cross-examined.—Was you directed by any body to make it larger? No. I made it so myself to note the spot where water is taken out.

Plaintiff's counsel here exhibited the record of a mortgage to Mr. Delavan, on city property, to secure the payment of \$200,000, and rested.

THE DEFENCE RESUMED.

REV. DR. PETER BULLIONS—sworn.

Examination direct.—I am one of the Professors in the Albany academy. I know Charles W. Harvey. He was under my charge in the academy 4 or 5 years ago; about 6 months I had but little knowledge of him out of the academy. I have been in company with him out of doors, but not a great deal. As far as I know his character, I believe it to be good.

Cross-examined.—We generally know the character of a boy for truth from our intercourse with him. I only speak from my own knowledge of his character. I have never heard anything against it. Never heard his character called in question.

SETH C. HAWLEY, (Member of Assembly,) sworn.

Examination direct.—I reside in Buffalo. Am a member of Assembly from the county of Erie. I am acquainted with Dr. Harvey—have been three or four years. It is over three years, I think, since I knew him there. He resides in Buffalo. His character is good for aught I have ever heard. As good as any citizen of Buffalo? As far as I ever heard or knew.

Cross-examined.—Does he pass himself off as a doctor there? He is a dentist. What means have you of knowing much about him? I have employed him professionally in my family. He has had the honor of pulling teeth for your family? Yes. Any thing else? I have had some acquaintance with him for three or four years. Have met him often, as you would meet a man with whom you had a little business, but well acquainted. I have been particularly acquainted with his partner a longer time—of course, am acquainted with him. It takes two of them to pull a tooth, does it? There is a partnership between them—don't know whether it is joint or several as to that.

OTIS ALLEN—sworn.

Examination direct.—I have known Dr. Harvey four or five years. Never heard any thing against his character, that I recollect.

Cross-examined.—I have heard him well spoken of. [And witness went on state that he had had occasion to inquire as to his standing and character at Buffalo.]

JOHN WINNE—sworn.

Examination direct.—I am acquainted with Charles W. Harvey. I reside in Albany. His general character is good for all I know. I knew him before he went to Buffalo.

Cross-examined.—I have known him, I should think, some eight years—not intimately. I lived neighbor to him. I believe he studied in Dr. Eights' office—not positive. Can't say whether he studied in Dr. Groesbeck's office. I know he studied in Dr. Green's.

WILLIAM WHITE—sworn.

Examination direct.—I am a brewer and maltster. I am one of those in whose name a suit has been brought against Mr. Delavan for this publication. I commenced malting and brewing on the hill in the fall of '26. Continued up to the spring of '30, when I moved the brewing apparatus down, after the brewing season ended, to the dock. We continued our malt-house on the hill up to '35. I am a brother of John G. White, and of the other Mr. White sworn in this case. We were all in partnership on the hill. I was acquainted with the pond on Lark-street from '26 to the spring of '30. After that I was not so much on the hill, and of course don't know so much about it. I have seen dead animals in the neighborhood of the pond. Have you seen them on the banks sloping down towards the pond? Inclined—yes sir. What kind of animals? I could not say—a variety of them. Don't think I could name any particular animal I had ever seen there. Could you have seen animals if they had been in the water? I think it never was transparent enough to see any thing that was in it, if it was under the water. What is your opinion as to whether it requires clean water for malting or not? [Objection was taken to this inquiry.] Will such water make good beer? [This question was also objected to.]

Do you know of malting having been done with water out of that pond, in the condition you have described? Yes sir, I have done it myself. Have you manufactured beer from that water? Yes, and malt too. Was the beer made of such malt and water, marketable, saleable beer? Yes, sir, we have sold it.

The Court.—It was marketable, saleable beer? Yes. Do you mean good beer? Yes.

Examination resumed.—What time of the year was that water used for malting? [Objections.] Was it in the dry season or the wet season? I can tell you why we went to the pond for water. Why? When the well was dry on the premises, then we resorted to the pond for water. Of course, we did not go to the pond for water when we had it on the premises.

The Court.—Do you mean when there was a failure from drought or accidentally? Yes, and when it failed from the quantity used. From exhaustion of your fountain? Yes.

Examination resumed.—Did this commence usually in a dry or wet season? I don't know that it was confined to any particular time of the year. We often had it at different times of the year. Some seasons it would be very wet, and we had water enough. Describe what kind of water that was, when you could make marketable beer of it? Was it foul water? It was muddy water—not such water as I should like to drink. Was it such water as you could have been induced to drink, except under bodily suffering? I should have wanted water some time before I should have drank it, at any rate. Have you seen that water taken from the pond to the plaintiff's malt-house? Yes sir, I have.

The court here took a recess until

Three o'clock P. M.

Examination continued.—You stated you had seen this water taken from the pond to the plaintiff's malt-house—did you see it going into the malt-house? I have seen carts frequently putting water in there. Did you see if it went into the vessels within? I have seen it go into the steeps—seen carts unloading water there frequently. What was going on in the malt-house, when this water was going into the steep tubs? They were busy malting when I saw this water rode, I believe. Were they making mortar or plaster at that time? No sir. How frequently have you seen Mr. Taylor about there? I have seen him there frequently—not so frequently though as I have seen Mr. Fidler. About what time have you seen water poured in there? I could not say the particular time. It was during the season of '29 and '30, probably. Two or three seasons? Yes, I would put it at two seasons—'29 and '30—because in the spring of '30 I moved from the mill.

Plaintiff's counsel.—You mean the fall of '29 and '30? No, I mean the brewing seasons of '29 and '30.

The Court.—The first of these brewing seasons commenced in '28? Yes.

Examination resumed.—Never conversed with Mr. Taylor as to the use of this water.

Cross-examined.—I heard John G. White testify. Heard him state he had used the water. I allude to the same thing that he did. Are you a brewer by trade? I have followed it eight years. Never knew any thing about brewing until the fall of '27. I was the practical man. I conducted the inside of the brew-house. In the fall of '35, I left the business and have known nothing of it since. I mean by riley water, water that has earth in it. Never saw the water when I could honestly say it was as thick as cream with filth. Suppose you had not seen the steep tubs until the water was drawn off, and should then see the grain taken out and spread on the floor, should you know whether it had been malted with riley water or not? I think not—my opinion is I could not tell it.

The Court.—You could not tell from the appearance of the malt? No, I could not.

Cross resumed.—Do you understand the difference between riley water and putrid water? I should make a difference. Putrid water has an offensive smell? Yes—I should not think this was putrid water—not during the malting season at any rate. Suppose then putrid water had been used, under the circumstances stated before? I never knew an instance of the kind, and could not tell. Would it not smell just as bad after as before? My opinion would be that it would. The water you used was never bad enough to make your grain smell? No.

Direct resumed.—Can't say I ever observed any smell about the pond.

DR. HENRY GREEN—sworn.

Examination direct.—I have resided in the city twelve years on the 1st of May. Am a practising physician. Am acquainted with the pond on Lark-street. Whenever I have seen water there (it is sometimes dried up) it has been dirty, filthy water. Ever seen any particular color on it? Nothing more than the ordinary color of filthy water in places by the side of the street. I speak of the pond when fullest. When low it was still more turbid. Never noticed the appearance of green; but it looked very thick. Ever seen dead animals in and about? I recollect once seeing a dead hog lying partly on the margin and partly in the water. Never saw any

thing that looked like a spring there. I examined once and found what seemed to be something sunk down, and the water oozing through the mud. I could discover nothing like a spring of water there then. If there had been a spring, it was covered up with mud in the bottom of the ravine. I examined it four or five years ago. Then I saw a hole sunk with a tub in it in a dilapidated state, but there was no appearance of a spring. I examined again within a few days, and now there is no appearance of any thing, not even of a tub. Don't recollect whether it was a tub or boards put down. There was no water running from it whenever I have seen it. There was formerly water in the tub, but none running out. It was about level with the deposit of the banks of the pond, in the ravine, when I saw it in '34, in June or July of that year. In the middle ravine, running west, the water appears to concentrate a little, but it seems to be the oozing of water from the mud—there is, however, a very small quantity of water. In the other ravine there is very little oozing through the mud. There is now a little. The water does not seem to increase as you descend towards the basin; but the same quantity all the way down. The pond always seemed to me to be a collection of water that falls on the ground. The ground rises rapidly from the pond as far back as Washington square, and on the northwest up to the street where the rail-road is laid. That street rises all the way nearly to the Orphan Asylum. It appears to me the water along that ran down the northwest ravine. Another supply came from the ditch on the side of the road that runs off towards Paul Clark's. I have noticed that. It is the road ditch. The water I saw in the ravines was not confined to one spot, but issued from the banks along the surface of the ravines. I have noticed heaps of manure on the road to the Orphan Asylum, a little below it. Can't tell whether the wash of them gets into the pond. Never examined particularly.

BARENT P. STAATS, (Late Alderman,) sworn.

Examination direct.—I reside in the city. Have known the pond on Lark-street since 1814. I don't think it covered over half an acre then. I had occasion to pass it frequently from '21 to '32—a considerable portion of that time as Alms-house physician. I used to be out there sometimes three times a week. It was a dirty pool of water. I have seen dead dogs in it—dead geese—it is a goose pond. I have seen boys swimming in it—and I have seen geese and ducks. I have seen twenty or thirty geese at a time in it. The wash of the bones thrown out from the glue factory would drain off into the pond. Never examined it as minutely as I did in '32, (during the cholera,) when I was health officer. The neighbors supposed it contributed to the disease. It was stagnant, filthy water then—in fact, has always been. It was in July or August of that year that I examined it particularly. I thought it had a bad smell at the time. At that time I believe the drain was three or four feet above the bottom of the pond, and if I recollect, we ordered it to be lowered. Whenever there was a hard shower, and the pond filled up to the drain, it would run off. It never could run off except after a shower, for there was no supply above that I could perceive. Being lower than the hills around, which are clay principally, the water that falls runs down into it, of course. The principal sources of supply are from towards the burying grounds, from Spring-street, from State-street, and the road ditch from towards Paul Clark's. There may be springs there. I don't say there are not. There is a small stream from a little north of the glue-house, where the collection of bones is. I examined the creek in '32, near Buttermilk falls. I thought it infected then from the slaughter-house, which then stood on the Poor-house lot. At that time the water was bad. In a dry time the water is stagnant, standing in pools.

Cross-examined.—The old slaughter-house was below the junction of the two streams. I have seen women washing on the margin. We built shantees above, and not liking the water of the creek, we dug wells. They used the water for washing. Don't know that I ever saw water taken from the pond for washing. Have seen people drive in with wagons and horses, and to water. I have observed the water enough since '32, to know that it is not fit for use. There may have been springs there, but I could not discover any. The purity of rain water depends very much on what it comes in contact with as it falls. Pure rain water may be as good as spring water. I hardly ever drink water. Don't drink a pint in a year probably.

GEORGE W. WELCH—sworn.

Examination direct.—I know Charles W. Harvey. I was keeper of the Alms-house while he was there, and while Dr. Hinckley was physician. Dr. Hinckley placed him there. He boarded in my family. His character, while there, was good as far as I know. He behaved very well—a very gentlemanlike and fine young man. Never heard any thing against him since.

Cross-examined.—He was in my house between two or three months, I think. Did not know him before. Have met him sometimes in the street since. Don't recollect why he went away. He was speaking of it several days before he went—that he was going. I think Dr. Hinckley had another young man coming in his place.

DR. STAATS—recalled.

Examination resumed.—I knew Charles W. Harvey some time before he went to the Alms-house. I thought his character good. I recommended him to Dr. Hinckley as an assistant.

Cross-examined.—He did not study with me. I have seen him at Dr. Green's frequently. I think he studied with Dr. Eights. I have seen him frequently. Not intimate with him.

DR. GREEN—recalled.

Examination resumed.—Have know C. W. Harvey four or five years. He was in my office. Know nothing against him. Have heard nothing, except what I have heard since this trial commenced.

Cross-examined.—I was spoken to yesterday by Mr. Harvey. He intimated that he supposed his character would be questioned. I would believe him under oath as soon as any other man.

WILLIAM V. MANY—sworn.

Examination direct.—I examined the creek in March, 1835, from below the bridge up to the slaughter-house. After the publication referred to, charging the maltsters with using the creek water, to satisfy myself, I went up and examined it. At the slaughter-house there was a large pile of manure—entrails or offal, that had been thrown out. It extended to the bank of the creek. There was nothing that I could discover to prevent the draining of this manure into the creek. I should think it was as much as fifty feet wide, up and down the creek. In some places it was 3 inches deep; in others nearly a foot. I should think it had been put there the fall before. The water in the creek was then nearly as high as the banks. It had only to rise, I should think six inches, to sweep through the manure. The banks are a little inclined towards the stream. It was nearly level for about two or three hundred feet from the creek towards the slaughter-house, which stood twenty feet or more higher. In passing down the stream towards the bridge, I saw lodged on the banks deposits of the same kind of manure as that at the slaughter-house, in different places along down nearly to the bridge. Three different places I recollect very distinctly. I saw also the remains of a dead animal on the bank of the north stream, where the ground descends towards the stream. It was above the junction.

Cross-examined.—I think it was the carcass of a dead horse. It was on the stream running down from the burying ground. I went out of curiosity, to examine the creek. I looked at the water. It was riley and muddy. It was not bloody.

DAVID P. CLARK—(Elder in Rev. Dr. Sprague's Church)—sworn.

Examination direct.—I resided on the hill twenty-six years. [Witness described the situation of the burying grounds and the manner in which they are drained into the creek—and described a hollow or ravine, commencing in the Methodist burying ground and running through the corner of Dr. Sprague's (the Second Presbyterian) burying ground, across Hudson-street, and Lydius (through an arch) into the creek.] There is sometimes considerable of a puddle above its junction with Hudson-street, and in the Methodist and Catholic burying grounds. The greater part of Dr. Sprague's burying ground is clay. The ravine on the southeast corner is considerably deep—ten feet below the level I should think. This ravine carries off the surplus water from the burying ground and the slaughter-houses, of which there are three I think. This is the ravine that runs under Lydius-street, through an arch into the creek. These three slaughter-houses are right on the valley or ravine. Slaughtering is done there, I believe, all the year round. I am the clerk of Dr. Sprague's Church, and attend the burials. Frequently the water has to be dipped out the graves when dug. It is very impure water—exceedingly offensive—strongly impregnated with the decomposition of animal substances. As it is dipped out, it partly washes down into the ravine. Water sometimes rises in the graves a foot or a foot and a half. Frequently it is bailed out and straw put in the bottom to prevent its being seen. There is another ravine that used to commence above State-street before the rail-road was made. It runs through the Dutch burying ground, and through the Potters Field, where it becomes quite deep. I have seen the ends of coffins exposed there. Others are so near the surface, that by just putting down a stick you can feel them. I examined after the cholera season, and found the graves were very shallow—so much so that complaints were made to the board of health. Was this exposure caused by the water running down from above? It might have been partly that and partly negligence. Is the ground very wet there? It was then. In the spring and fall it is very wet—so much so that it is difficult getting there with carriages. I had occasion to pass the pond frequently on my route to the burying ground—sometimes a number of times in a week—sometimes not for months. I considered it impure water. It always had rather a dirty appearance. Sometimes I have seen a dead hog lying in the pond. Don't recollect any others distinctly. I have seen geese in it, and boys. As to any other standing water for geese to resort to, there used to be a kind of quagmire, in Spring-street, back of McNab's. Don't know whether it was there all the year round or not. There is an outlet to this quagmire, running now I believe, under State-street,

through the northwest ravine into this pond on Lark-street. At all events, before State-street was graded, this quagmire was one of the sources from which the pond was supplied. There used to be a small spring fifteen years ago on the middle ravine west of the pond. Sometimes there was a little water ran over the top of the barrel sunk there. In summer time, I believe, there is scarcely any thing running over there.

The court here took a recess until

Seven o'clock P. M.

THE PROSECUTION RESUMED.

GEORGE APPLY—sworn.

Examination direct.—I worked in Mr. Taylor's malt-house eight or nine months in '33—from September or October to the latter part of April or May. The water for malting was got exclusively from the well in the malt-house. None was carted that season to my knowledge. Know the pond while I worked there. I have seen it after a heavy shower rather riled—other times pretty clear. Some few times I have used the water for cooking. Never drank it except when coffee was made of it—always had plenty of good beer to drink there. I cooked with water from the malt-house well until towards spring, when it was rather warm. Never saw any dead animals in or about the pond.

Cross-examined.—My business was shovelling malt—sometimes pumped water into the tubs. I presume the pond water would make good malt—never saw it tried.

WILLIAM COMBE—sworn.

Examination direct.—I have been practically acquainted with brewing for twenty years. Never tried to make malt with putrid water. Do not think it would make good beer—nor filthy water. Never tried. Consider that malt requires pure water, as well as beer. The water can't be too pure. Filthy water would injure the flavor of the barley or malt.

Cross-examined.—I do think it would injure the flavor. We put in hops—that is all. That would not destroy the taste of bad water. Don't know this from experience. Never made beer from putrid water.

JACOB RAMSEY—sworn.

Examination direct.—Have known the pond from ten to fifteen years. I was a cartman. Used to pass frequently, and whenever my horse wanted a drink, I would drive in. Generally the water was clear. Have seen people draw water from there. Never drew any myself. Seen them taking away the water in casks. Can't tell where it went to. Don't remember to have seen dead animals in the pond.

Cross-examined.—Never saw any one drink it. I did not consider it the same as a running stream. It would answer for common use well enough—watering horses or cattle. I should judge it would answer to wash with, or to rinse clothes in, when I watered my horse there.

THOMAS TOPPING—sworn.

Examination direct.—I am a brewer—have been for the last seventeen years. I should think pure water highly necessary to make good malt or beer. Never tried whether impure water would make good malt or beer. I should be afraid to try it—afraid it would not answer the purpose.

THOMAS BLACK—sworn.

Examination direct.—I am a brewer. Have been brewing and malting together eighteen years. Pure water is necessary to make good malt or beer. I have never used impure water for malting. Have used rain water, and found it turned sour. That was stagnant water out of a cask. Never used any but the very best of water. The beer that soured was made from surface water. I was drove for water, and tried the experiment. Putrid water would give the malt a bad smell. I take the malt right out of the tub it is steeped in without washing it.

Cross-examined.—The barley, after being spread over the floors, is put into the kiln, which is kept very hot, and dried. I use the Water-works Company's water. I consider it pretty good—only after a rain, it is not quite so good. The experiment I spoke of, was tried in Scotland, with surface water—not to malt with, but to make beer. Tried the experiment five or six times. I was not then experienced. I did not know that it would make bad beer.

ISAAC WINNE—sworn.

Examination direct.—Have known the pond since 1812, or thereabouts. Have been bathing there time and time again. It was a common resort for bathing. Was frequently there from 1812 to 1818—not very often since. I considered it clear water. Never saw any dead animals in it.

Cross-examined.—I have seen geese there, and in the river.

JOHN McKNIGHT—sworn.

Examination direct.—I am a brewer—have been about fifteen years. I always considered pure water necessary to make good ale and good malt.

Cross-examined.—I learned my trade in Ireland. Never tried any but pure water. I brew now in Fox-street. I use penstock water.

SANFORD COBB—sworn.

Examination direct.—I am acquainted with Mr. Delavan. What is he estimated to be worth? I have heard a great many estimates—I should say, safely, from 3 to \$500,000.

The testimony on both sides here closed, and

Mr. WHEATON summed up on the part of the defendant, when the court adjourned to

Saturday, April 25.

Mr. BEARDSLY closed the defence to the jury, and

Messrs. REYNOLDS and STEVENS summed up on the part of the plaintiff.

The court, at six o'clock, took a recess until

Seven o'clock P. M.

THE CHARGE.

Judge CUSHMAN addressed the jury in substance as follows:

This action, gentlemen, is brought for two publications in the Evening Journal, in the month of February, 1835. They are alleged by the plaintiff to contain libellous matter, and he comes into court and asks, at your hands, a verdict for the injury he may have sustained. I need not go into a definition of a libel further, than to say that it consists in publishing or causing to be published anything calculated and designed to single out an individual, and to present him to the public in a ridiculous or odious light, or which imputes to him bad actions, or which tends to diminish his comforts or respectability.

For such a publication an action lies; and the plaintiff is entitled to damages without proof of any injury; the law implying that the act was done maliciously, or with intent to injure.

The law affords to every citizen the free use of the press to publish for the information or protection of the public; but it restrains this liberty by requiring an adherence to truth; and without this qualification this liberty cannot be exercised with impunity. But if a defendant is called upon to answer for any published statement, it is a perfect defence to show that the allegations complained of are true.

The publications in this case set forth, having been proved, the defence relied upon is that the published statements are true; and the proof on both sides has been chiefly directed to that point. As regards the libel itself, I have looked particularly through it with a view to see what are the substantial charges. And here I would remark, that in order to sustain a justification of a libel, the party defendant must verify the specific charges he has made. If he imputes acts calculated to hold up an individual to public odium, it is not enough that he proves upon the plaintiff other acts of a similar character. The identical charge made is the one to which he is confined, and which he must sustain substantially.

In looking through the declaration, I find that these are substantially the allegations upon which the suit is founded. That so long as six or seven years ago, the plaintiff's malt-house was supplied with water from stagnant pools, gutters and ditches; often in such a state as to be green on the surface; that such water for several seasons was collected and deposited in the malt-house for malting; that no attention was ever paid to cleanliness; that the water was often taken from puddles in which were dead animals; that when the water was low in the pools, holes were sometimes made in which a pail was sunk to get the water of which the malt was made; and that the sides of the pail sometimes came in contact with dead animals in a state of putridity; that water was carried to the malt-house which was nearly as thick as cream with filth; that the plaintiff relies on water taken from such places occasionally; that seven hogsheads were used in a steep-tub; and that ten or twelve inches of filth will settle at the bottom from that quantity of water. And the declaration sets forth that the defendant meant to charge that impure, dirty and filthy water, taken from stagnant pools, gutters and ditches, had, for years, been carted to the malt-house of the plaintiff; and that he had been guilty of using that water in preparing barley for malt.

The counsel have called on the court to state to the jury to what extent the defendant is bound to go to make out his justification. The defendant having charged that water was taken from pools, gutters and ditches, the point has been raised whether, if he adduces proof only of water having been taken from pools, it is a justification. Gentlemen, it would be a justification, provided the quality of the water, as to foulness, was such as to meet fully the description given of it in the publication in question. If the water is proved to be of that character, then—whether taken from one pool or two—whether from ditches or gutters—would make no difference; because substantially, the entire allegation that is of any importance would be proved. So, as regards the hole charged to have been made, it is no importance whether it was made through the ice or into the ground, particularly as the libel does not state which. The minutiae of the description are not material. If the allegations made, be all substantially proved, the defence is sustained without the proof of immaterial circumstances in the statement. At the same time, all the allegations as to the offensive character of the water that was used, must be made out by the defendant to sustain his defence.

It is for you to say, upon the evidence adduced, whether the defendant has proved the allegations made in the publications on which the declaration is founded. I shall not detain you by canvassing, particularly, the testimony in relation to the water from the Poor-house creek. It seems from the description given of the map, that there are two ravines meeting below the bridge. The northern ravine receives the wash of the burying grounds principally, and of certain establishments of a character to make the water foul. The southern ravine comes from near Wilson's slaughter-house; and these two form the junction below the bridge. Of course, as regards any evidence of water taken above the bridge in either ravines, (there being no communication above, between the waters of the

two,) nothing in the one could affect the other. The proof is, that the principal part of water taken from the creek was taken above the bridge, from the south ravine: some of the witnesses took it from below. But where the testimony is confined to the taking of water from the creek, without reference to either branch, it will be for you to say, whether the proof of the quality of the water sustains all the charges made by the defendant in the publications in question, as to the degree of its impurity.

Your attention, then, will be more particularly drawn to the state of what is called the big pond or pool. In relation to this, you perceive a very marked difference between the evidence on the part of the defendant and that on the part of the plaintiff. The defendant's witnesses in regard to the condition of that pool and the taking of water there, have been named to you, and elaborate and ingenious comments have been made by the counsel upon this branch of the evidence.

I, however, deem it proper to recapitulate a portion of the testimony, and to make some remarks as to its general character.

The publication being proved, the defendant calls witnesses for the purpose of showing that the publication is true, by proof that the water of the big pond, as it has been termed, was of the offensive character in every substantial particular described in the publications. That point the defendant is bound to establish in order to maintain his defence; and it is for the jury to say whether in this he has succeeded.

The witnesses called have been those who have lived in the neighborhood, or in the immediate vicinity of the pond; or who, residing in the city, have more or less frequently passed it; and, with greater or less opportunity, minutely observed the state of the pool and the drawing of the water. First, as regards the character of the water, the defendant has introduced Mr. Coulson, Judge Savage and others—some 16 or 18 in all. Mr. Coulson's testimony is distinct as to the offensive character of the water. His opportunities of observing he has stated to you. He had the glue factory mentioned. He described the water as what he called rotten water. In the fall, he said, the water in the pool was always bad and in a putrid state in warm weather. That during the whole year it was bad, except after showers. That the water would get green; and that putrid animals would be floating in it. That he has seen dogs and cats and hogs there; and a dead horse on the rising ground in the vicinity of it. That is his general description of it. Judge Savage states that he was in the habit of riding by this pond for several years prior to 1835. His statement is, that the water was always dirty—never saw it otherwise; that it was not in a condition to be used for food or drink; and that his horse refused to drink there. That he has seen dead animals there—dogs, hogs and cats, as Mr. Coulson had represented; and that he had observed this for several years, between 1827 and 1835. That is his representation of the condition of the pool. I have no desire to go through and state what each witness has said: but substantially each of the witnesses, Mr. Green, Mr. Middleton, Mr. Hughes, Mr. Wasson, Mr. Fassett, Mr. Lansing, Mr. Keith, Mr. Harvey, Mr. Ten Eyck, Mr. Clark, Mr. White and Mr. Staats, have stated that they have noticed there the dead animals mentioned, such as dogs, cats, hogs, and agree in the general description of the character of the water, slightly varying the language. Some describe it as stagnant, green, very dirty: others as green and nasty; green and filthy. Very impure, always (is Mr. Fassett's) at all seasons. That of Keith is, "pretty bad always." Harvey says, stagnant, dirty. Ten Eyck says, there was a good deal of stagnant water in the pool; has seen it very green; has seen dead animals there. Mr. Clark says, yellow, riley and muddy. Dr. Green says, dirty and filthy. Dr. Staats says, it was a dirty pool; when low, more thick and muddy. These are the general descriptions given by the defendant's witnesses of the water in this pool. Added to this you have the fact of the construction of Lark-street across the ravine; thus, making a dam to catch the water that falls, or that comes from the melting of the snow during the year. You have heard the position of the ground described, and the testimony in relation to the question, whether the pond is supplied with springs, of the manner in which it is visited by travellers with their teams—by the hogs that were about—of the fact in relation to its being the receptacle of the filthy matter above ground washing into it—a depository for dead animals—a place where they were sometimes drowned. As to the quantity of water in the pond, the estimates vary. Some say a half acre; others, an acre and a half. Originally, it appears to have been a very deep pool; but subsequently to have filled up until now, it would seem to be entirely filled. After the street was made, a sewer was formed to carry off the water after rising to a certain height. The water passed off there in great freshets; and you have heard the testimony as to its passing off at other times.

The principal witness relied upon by the defendant to prove particularly, the facts charged as to the use of the water, and whose testimony is more minute than that of others, is Chas. W. Harvey. You have heard his testimony fully commented on. It will be for you to say whether he has not described the water taken to the malt-house in all the terms mentioned in the publications. The particular term "as thick as cream," has been presented and urged as the language of the libel. It is not precisely that. The term cream is used; but the precise language is, "nearly as thick as cream;" and that is the language the defendant is bound to meet. The representation is, that water was carried to the malt-house nearly as thick as cream with filth. The fact, that water of this description was carried there, is to be made out in order to sustain the defence. You are then to look at the testimony as regards the taking of this water from this pool; (and Harvey testifies as to fifteen or twenty pools,) and say whether its character, as described by Harvey and the other witnesses, presents to your minds, substantially, the same character of water as that described in the published statement. Harvey states that the water, where he obtained it, was at times offensive; that it made him almost sick; that he obtained it in winter and in the fall; that for three or four years he was thus employed at times;—assisting his brother-in-law; that he went with the wagon to the malt-house where it was poured into the tub. Other witnesses state the fact, that water was carried from this pool to the malt-house: this witness more particularly describes the time. Mr. White and some of the plaintiff's witnesses testify that this water was taken to the malt-house, and during malting season. One of the witnesses states that he ran into the kiln to

warm himself while the water was running in. The defendant relies on this testimony as evidence that water was taken from this pool and other places of the description set forth in the paper on which the trial is brought.

As to the putridity of the animals, the substance of the allegation is, that the water was sometimes taken from beside a dead body in a state of putridity. Harvey states that after cutting holes in the ice and dipping up the water, the animals would be drawn to the hole, and would come pretty near getting into his pail; and that when thrust off they would come up again. You are to judge whether this would be a natural movement, supposing the water to contain dead animals; whether the dipping of water from a hole in the ice would have a tendency to cause floating matter to be attracted to the hole; whether, if floating, the animals were probably in a putrid state. These are matters which you will weigh and decide for yourselves.

The plaintiff has called a number of witnesses to show that such is not the character of the water; and a larger number, it has been said, have been sworn on the part of the plaintiff than on the part of the defendant. The number of witnesses, gentlemen, is never to be the governing consideration in such a case. You are to look at the character of the witnesses for intelligence and integrity; how far they may be under the influence of bias or interest, the relation in which they stand, and their opportunities of observation. Hence the value of an open examination; that the candor of a witness may be noted, the manner in which he testifies, and his willingness to tell the whole truth. While, therefore, you are not to lay out of view the number of witnesses, you are to look to the circumstances mentioned rather than to the number, to decide upon the weight which is to be given to the evidence adduced.

Mr. Howard is called to meet this evidence. He was a co-partner of the plaintiff down to '32. You have heard his examination, direct and cross; and it is for you to say what is the bearing of that testimony upon the character of the water. His general representation is, that this was water that he did not intend to use. His effort was to get other water; and you have heard the testimony as to the preparations made with that view; the syphon, the arrangement with McNab, the pipes for the collection of rain water. He states that there was some water drawn in '23 from a distance. He, however, testifies that he did not know of any water being drawn from this pool. The most he has said that would indicate that he understood it to be so, is, that he had heard that some trifle had been brought, but did not know it to be the fact. Ward's testimony is a general negative, as regards his knowledge of, or direction concerning, getting water from the pool. The testimony of Mr. Helse, Mr. Lowe, Mr. Watson, Mr. Rull, Mr. Hancock, Mr. Scace, Mr. Toomay, Mr. Hood, Mr. Shufelt, Mr. Couchman, Mr. White, Mr. Haswell, Mr. Hilton, Mr. Clawson, Mr. Sharp, Mr. Bradt, Mr. Waugh, and Mr. Anderson, has been adduced, principally bearing on this subject. These, with three or four exceptions, state that they have had opportunities of observing, (some of them having lived just in the vicinity,) and affirm, generally, that they have never seen any dead animals in the pond. Scace says he has seen dead hogs there; others have seen none. Mr. White, I think, states that he has seen them there. Some of them state that they have drank the water; one or two state they have used the water.

Plaintiff's counsel insisted that there were five.

The Court.—I mean for family use. There are not five that state they used it, except for washing.

Plaintiff's counsel named five or six.

The Court.—I do not find it so on my minutes. I have condensed the testimony to ascertain the fact as regards the general character of the water. You, gentlemen, will recall and scrutinize the testimony given, and regard the opportunities of the witnesses for observation, and their descriptions of the water. One of them, Mr. Scace, spoke of it as pretty good water in the spring and fall; and several of them, as clear; especially in the spring. Several say they would not use it, except in case of extremity. Others say they have seen it taken away in a tea-kettle, and in pails, and for washing. Several have taken it for washing. Cattle drink there; and travellers very frequently drive in to water. Now, gentlemen, you are to take all this testimony, give it its full weight and consideration, and exercise your own good sense in relation to it.

There is also the further evidence of several witnesses who swear there are springs there. One speaks of three, others of two; some speak of them as living springs. Others say there was water enough flowing from one spring to fill an inch bore. Some testify that barrels were sunk there. One witness places it as high on the bank as ten feet above the surface of the pond. The pond is described as having a bottom of clay. You are to say, looking at all the testimony as to the condition of the pond in drought and in freshet, whether the water was supplied by springs in whole or in part during the period when used; or whether by the water that falls. For if the pool was supplied by springs, and water was constantly running from it, the quality of the water would be very different from what it would be in the other case. The witnesses testify that in dry weather the water in the pond falls below the drain. More of the plaintiff's witnesses speak of the continuance of the flow of water, and of the supply from the ravines, than of those on the other side. You are to ascertain the character of the water from the testimony, whether supplied from springs below or from water above ground. If the water contained the bodies of dead animals, left there to decompose, you are to judge what effect it would have upon its quality, either standing or running off. And you must find it to be of the character set forth in the libel to sustain the defence.

The testimony of Harvey, (who states the strong points as to the character of the water on which the defendant relies,) the plaintiff says should not be credited. The testimony insisted on as discrediting Harvey, is that of Mr. Ryckman and Dr. Hinckley; and Judge C. here went into an examination and comparison of the testimony of these witnesses and that of Dr. Harvey; pointing out wherein they differed or appeared to differ—leaving it to the jury to say what weight was to be given to the testimony of the latter in view of the fact that he was corroborated as to many of the main facts to which he testified by other witnesses, who must be discredited if he was.

As to the point whether the plaintiff was cognizant of the fact, that water of the description charged, was used at his brewery in malting; the Judge charged that the allegation, substantially, was, that the plaintiff, by himself or his agent, used such water in making malt; and that the defendant must show enough to prove the plaintiff cognizant of the fact that it was so used. It is not necessary (said the Judge,) to prove that he saw the water put there, or directed it to be put there. You are to have testimony that satisfies you that the plaintiff knew that this water was used in malting. You are to look to the fact of the plaintiff's presence there, and his opportunities of knowing what was going on. It appears that the plaintiff was not as much at the malt-house as his partner. Mr. Coulson says he had seen him about the malt-house, Mr. White had seen him there, and Mr. Couchman had seen him there, he thinks, oftener than his partner, Mr. Fidler. This is the testimony relied upon by the defendant to satisfy you that the plaintiff knew what quality of water was used in preparing malt, and whence it was procured.

The plaintiff also urges that the fact is undeniable, that pure air and pure water are indispensable in making good malt as well as good beer; and that this should be regarded in weighing the evidence as to the fact of the use of foul water and of his knowledge of it. You have heard the testimony on this point and the comments upon it. The witnesses on the part of the plaintiff, with one exception upon this point, have testified that pure air and pure water are indispensable. One of the witnesses, Mr. White, used it to make malt and beer from the necessity of the case. From this evidence the plaintiff urges the improbability of the use of foul water with his knowledge, as the effect would be to injure his malt.

The testimony, gentlemen, is too voluminous to justify me in going through it all with minuteness; and the hour admonishes me that I should bring my remarks to a close. The question for you to decide is one of fact; and you are carefully to weigh and compare all the evidence when you retire to deliberate. The plaintiff alleges that the publications in question are calculated to do him great injury. The proof is, that the defendant is a man of large wealth. These are facts proper to be urged in reference to the amount of damages to be given by your verdict. It is also the rule, when the defendant in pleading, gives notice that he will justify the libel by showing it to be true, that this recharging the libel, if the defence fails, is an aggravation of the injury, and a ground for giving enhanced damages.

In every libellous publication the law implies that it was done with malice; and the plaintiff is not bound to show an injury in fact sustained, to entitle him to a recovery of damages. A reiteration of the libel in the pleadings if the defence fails, is a deliberate repetition of the injury, and justifies the claim for a greater amount in damages.

Upon the whole proof, you, gentlemen, are to say whether the defence has been made out. If you are satisfied that it has, then the defendant will be entitled to your verdict; for any citizen is at liberty to publish truth, although it may injuriously affect his neighbor; and especially should this right be sustained, when the facts published, if true, ought to be known to the community at large. If the facts published are proved true, the law presumes the motive good. If these publications are false, a deep injury has been inflicted upon the plaintiff in his business and his character; and the pecuniary situation of the defendant should be taken into consideration in deciding upon the amount of your verdict.

In view of all the testimony in this case, you will make up your verdict; and I am persuaded that in coming to the result you will be guided by the single purpose of awarding justice between these parties.

The jury retired at 9 o'clock P. M.; and after a consultation of about an hour agreed upon a verdict, which (under the previous direction of the court) was sealed up, and handed in on Monday. The verdict was **FOR THE DEFENDANT, WITH COSTS.**

Oath of Plaintiff to hold Defendant to bail.

SUPREME COURT.

JOHN TAYLOR,
vs.
EDWARD C. DELAVAN.

Albany, ss. John Taylor, the above plaintiff being duly sworn, says, that he has directed his attorneys to issue a capias in the above cause. That the cause of action which said suit is commenced, is for a gross, false, and scandalous libel, deeply injurious to the character of this deponent as a man, and calculated deeply and seriously to injure the business of this deponent as a brewer, of which said libel, the said defendant is the author, as this deponent is informed and believes, and which the said defendant procured to be published in the Albany Evening Journal of the 12th inst, and at other subsequent times.

And this deponent further says, that he is credibly informed, and verily believes that the said defendant intends leaving the United States with his family for some part of Europe the ensuing spring or summer, and is not expected to return for four years. That in pursuance of such intentions, as this deponent is informed and believes, the said defendant has advertised his mansion house where he now resides for sale, and this deponent verily believes it to be necessary to secure the payment of any judgment which he may recover in said suit, that the said defendant should be held to bail, and further saith not.

(Signed,) JOHN TAYLOR.

Sworn before me,
18th February, 1835,

JAMES McKOWN, Recorder of Albany.

[Held to bail in \$5,000.]