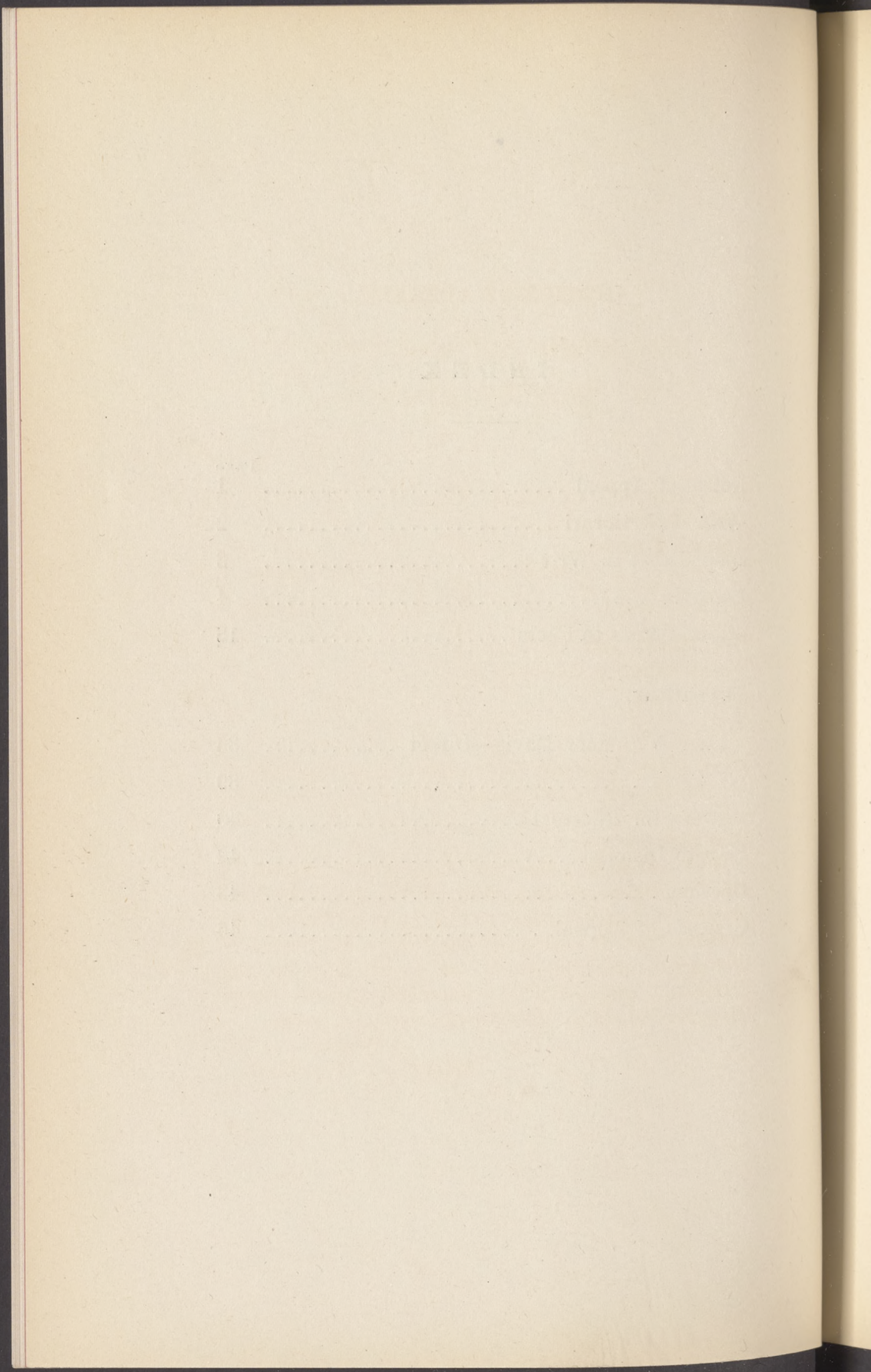


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NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

(Filed July 15, 1913)

10

THE DELAWARE AND ATLANTIC TELEGRAPH & TELEPHONE COMPANY,

Prosecutor,

vs.

THE MAYOR AND COUNCIL OF THE CITY OF BEVERLY

ON CERTIORARI.
NOTICE OF APPEAL.

20

*To G. Dore Cogswell, Esq., attorney of respondent,
the Mayor and Council of the City of Beverly.*

Dear Sir:

Take notice that the prosecutor above named, to wit, The Delaware and Atlantic Telegraph & Telephone Company, appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause, which affirmed the proceedings of the Common Council of the respondent, and dismissed the writ of error theretofore allowed with costs.

30

LEWIS STARR,
Attorney of Appellant.

WRIT OF CERTIORARI.

(Filed May 10, 1912)

NEW JERSEY, ss.:

[L. s.] The State of New Jersey to the Mayor
and Council of the City of Beverly,

10 GREETING:

We being willing, for certain reasons, to be certified of a certain resolution or motion passed by the Council of the City of Beverly, in the State of New Jersey, on the seventh day of July, nineteen hundred ten, which resolution or motion rescinded two former resolutions of said city, one granting to the Delaware and Atlantic Telegraph and Telephone Company power to use the public streets and highways of the City of Beverly for the transaction of its business, and the other approving a contract to be entered into between the Delaware and Atlantic Telegraph and Telephone Company, and the said City of Beverly, by whatever title or name said rescinding motion or resolution is designated, we do command you that the aforesaid resolution or motion passed by the Council of the City of Beverly on the seventh day of July, nineteen hundred ten, with the records of the meetings of said Council at which the said motion or resolution was introduced and passed,

20

30 together with all matters touching and concerning the same, as fully and entirely as before you they remain, to our Justices of the Supreme Court of Judicature at Trenton, on the tenth day of May, nineteen hundred twelve, you certify and send, together with this writ, that therein may be done what of right and according to the laws of this State should be done.

Witness William S. Gummere, Esq., Chief Justice of our Supreme Court, at Trenton, this eighteenth day of April, nineteen hundred twelve.

WM. RIDER, JR.,
Clerk.

LEWIS STARR,
Attorney.

AMENDMENT TO WRIT.

10

NEW JERSEY SUPREME COURT.

(Filed May 10, 1912)

THE DELAWARE AND ATLANTIC TELEGRAPH AND TELEPHONE Co.,

Prosecutor,

vs.

THE MAYOR AND COUNCIL OF THE CITY OF BEVERLY,

Respondents.

ON CERTIORARI.

20

AMENDMENT.

It is hereby agreed that the writ of certiorari issued in the above matter be amended so as to apply to any resolution or motion of rescission or reconsideration, no matter when adopted, referring to two former resolutions passed on the second day of June, 1910, relative to conferring certain rights to the prosecutor.

30

LEWIS STARR,
Attorney of Prosecutor.
G. DORE COGSWELL,
Attorney of Respondents.

RETURN.

(Filed May 20, 1912)

10 *To the Honorable Chief Justice and Associate Justices of the Supreme Court of Judicature of the State of New Jersey:*

20 I, Ellwood P. Rodman, City Clerk of the City of Beverly, in the County of Burlington, in obedience to the command of the writ hereto annexed, directed to the Common Council of the City of Beverly, do hereby certify and send to you, the said Justices, the certain resolution or motion passed by the Council of the City of Beverly, N. J., July 7, 1910, which resolution or motion rescinded two former resolutions of said city, one granting to the Delaware & Atlantic Telegraph & Telephone Co., power to use the public streets and highways of the City of Beverly for the transaction of its business and the other approving a contract to be entered into between the said company and the said City of Beverly. With the records of the meetings of said Council at which the said motion or resolution was introduced and passed, together with all matters touching and concerning the same, whereof mention is therein made, as fully as **30** before me the same remain.

In witness whereof I have hereunto set my hand and the seal of the said city this eleventh day of May, 1912.

ELLWOOD P. RODMAN,
City Clerk.

The regular stated meeting of the Common Council of the City of Beverly, was held in the City Hall on Thursday evening, May 5th, 1910.

The Delaware and Atlantic Telegraph and Telephone resolution, was read by title and after some discussion the same was withdrawn and placed in the hands of the Committee on Ordinance.

Adjourned.

An adjourned meeting of the Common Council of the City of Beverly was held in the City Hall on Friday evening, May 13th, 1910. 10

Mr. Kirk, Chairman of the Ordinance and Printing Committee, introduced the resolution and contract of the Delaware and Atlantic Telegraph and Telephone Company which was read and Mr. Kirk moved that the same be adopted as amended. The motion was lost.

Mr. Davis moved that the resolution and contract of the Delaware and Atlantic Telegraph and Telephone Company be laid over until the next regular meeting. Motion carried. 20

Adjourned.

An adjourned meeting of Common Council was held in the City Hall, on Thursday evening, May 19th, 1910.

Mr. Kirk, Jr., moved that Council go into Committee of Whole to consider the Delaware and Atlantic Telegraph and Telephone Company's contract. Motion carried. 30

Mr. Hazzard moved that the ordinance and printing committee make a report of the contract of the Delaware and Atlantic Telegraph and Telephone Company and of the Committee of Whole and that same be placed on the minutes. Motion carried.

Adjourned.

The regular stated meeting of the Common Council of the City of Beverly, was held in the City Hall on Thursday evening, June 2, 1910.

The following was read:

10 Be it Resolved that permission be and is hereby granted to the Delaware and Atlantic Telegraph and Telephone Company, its successors and assigns, to maintain and operate all of its poles, cross arms, cables, wires and other apparatus thereto belonging, as now erected and in place on, over, across and along the public streets, alleys and highways within the limits of the City of Beverly, in the County of Burlington, State of New Jersey; and to erect, maintain and operate, additional posts, poles, cables, wires, and all other necessary overhead apparatus on, over and along, and to construct its conduits, mains, pipes, cables, wires, manholes, distributing poles and all other necessary underground appli-
20 ances, in, under and through all of the public streets, alleys and highways within the limits of the said city, and to use the poles of other companies and to permit other companies to use its poles, upon such arrangements as the two companies may agree, provided;

1. That whenever the said company shall desire to erect, place or construct any poles, conduits or manholes, it shall present a plan or plans showing the location, number and size thereof to Common
30 Council of the City of Beverly for its approval or disapproval of the same; which plan or plans or a copy thereof with approval endorsed thereon shall be filed with the City Clerk.

In case the Common Council disapproves any plan or plans submitted it shall designate some other suitable location in a street, alley or highway in which

the said company may erect, place or construct its poles, conduits or manholes.

2. That all poles erected by the said company shall be neat and symmetrical and shall be so located as in no way to interfere with the safety or convenience of persons traveling on or over the said streets, alleys or highways; and in the work of installing and maintaining its underground system, the said company shall not open or encumber more of any street, alley or highway than will be necessary to enable it to perform same with proper economy and efficiency; nor shall it permit such opening or encumbrance to remain for a longer period than shall be necessary to do the work for which said opening shall have been made. 10

3. That all work shall be subject to the direction and authority of Common Council and under the supervision of the Street Committee of the said city, and said company shall replace and properly relay any sidewalk or street pavement which may have been displaced or damaged by it in the construction and maintenance of its system. 20

4. That the said company shall maintain all poles, cables, wires, conduits, ducts, mains, pipes, manholes, distributing poles and all other apparatus erected or constructed in good and safe order and condition and shall at all times fully indemnify, protect and save harmless the said city, from and against all actions, claims, suits, damages and charges, and against all loss and necessary expenditures arising from the erection, construction and maintenance of its system in said city, or from its neglect to maintain the said apparatus in good and safe order and condition. 30

5. That when conduits are constructed along any of the pole lines of said company the said company shall take down and remove as soon as possible but not to interfere with the operation of its system, all its poles and posts from which all of its wires have been taken and placed, underground, or upon which its wires have been abandoned and are not in use.
- 10** 6. That space on the poles erected or in the conduits laid shall be reserved, free of charge for the purpose of carrying two (2) wires of any fire alarm or police telegraph system now in use, or which may hereafter be adopted by said city; in no case, however, shall said wires carry high tension currents.
7. That the said company shall under its seal and by its proper officers, within thirty days of the adoption of this resolution signify in writing its acceptance of all the terms, conditions and regulations in this resolution contained, and shall, within the same period file with the City Clerk, its bonds in the sum of one thousand dollars (\$1000) conditioned to indemnify, protect and save harmless the said city, from and against all actions, claims, suits, damages and charges, and against all loss and necessary expenditures arising from the erection, construction or maintenance of its system in said city or from its neglect or failure to maintain the said apparatus in
- 20**
- 30** good and safe order and condition.
8. That the vitrified brick street pavements of said city shall not be displaced or torn up for the laying of conduits or appurtenances. Thirty days' notice of the intention of the said city at any time to pave any of its streets or highways shall be given

to the said company, before any street paving is done.

9. That nothing herein contained shall be construed to grant unto the said "The Delaware and Atlantic Telegraph and Telephone Company" any exclusive right or to prevent a grant of similar privileges to other companies.

10. That the said company shall pay unto the City Solicitor the sum of twenty-five dollars (\$25.00) for and in consideration of legal services rendered by him in connection with the preparation and drawing of the resolution. **10**

The resolution was adopted.

Mr. Kirk, Jr., offered the following resolution:

Be it resolved that the agreement submitted at this meeting by the Delaware and Atlantic Telegraph and Telephone Company be and the same is hereby approved as read and is ordered that said agreement be duly executed in duplicate under the corporate seal of the city and signed by the Mayor and President of Common Council and attested by the City Clerk upon its due and legal execution by the proper officers of said company and that a copy be filed with the City Clerk and also spread upon the minutes. **20**

Mr. Hazzard moved that the resolution be adopted, which was carried. **30**

Mr. Kirk, Jr., moved that when we adjourn we adjourn to meet on the 16th inst. at 8 o'clock. Motion carried.

Adjourned.

An adjourned meeting of the Common Council of

the City of Beverly was held in the City Hall, on Thursday evening, June 16th, 1910.

The acceptance and bonds of the Delaware and Atlantic Telegraph and Telephone Company was read. Mr. Davis of the Delaware and Atlantic Telegraph and Telephone Company was given the privilege of the floor and submitted plans of both aerial and underground work which they filed.

10 Mayor Roberts was given the privilege of the floor and opposed the papers of the D. & A. T. T. Co. and stated that he would not sign the papers unless compelled to.

Mr. Fish moved to reconsider the vote of the resolution of the D. & A. T. T. Co. The following yeas and nay vote was taken: Yeas—Mr. Fish, Mr. Hahle, Mr. Lockwood and Mr. Morrell, 4. Nays—Mr. Davis, Mr. Kirk, Jr., 2. Motion was carried.

20 Mr. Kirk, Jr., moved that the vote on the resolution of the D. & A. T. T. Co., be laid over until the next stated meeting. Carried.

Mr. Fish moved that when we adjourn we adjourn to meet on Thursday evening, June 30, 1910, at 8 o'clock. Motion carried.

Adjourned.

An adjourned meeting of the Common Council of the City of Beverly was held in the City Hall, on Thursday evening, June 30th, 1910.

30 Mr. Fish offered the following resolution:

Be it resolved that the agreement submitted at this meeting by the Delaware and Atlantic Telegraph and Telephone Company be and the same is hereby approved as read, and it is ordered that said agreement be duly executed in duplicate under the corporate seal of the city and signed by the Mayor

and President of Common Council and attested by the City Clerk, upon its due and legal execution by the proper officers of the said company, and that a copy be filed with the City Clerk and also spread upon the minutes was adopted, be reconsidered.

The same was by motion adopted.

Mr. Fish moved that further action on the resolution relating to the proposed contract between the City of Beverly and the Delaware and Atlantic Telegraph and Telephone Company be postponed until the next stated meeting. The motion was carried. 10

Adjourned.

The regular stated meeting of the Common Council of the City of Beverly was held in the City Hall, on Thursday evening, July 7th, 1910.

Mr. Kirk, Jr., stated that we have before us a resolution which upon its passage would require the proper officials of this city to execute on behalf of the city, an agreement or contract with the Delaware and Atlantic Telegraph and Telephone Company. 20

Mr. Hahle moved that the resolution be adopted. The resolution was on a vote lost.

Mr. Kirk, Jr., stated that also a resolution giving certain rights and privileges to the Delaware and Atlantic Telegraph and Telephone Company.

Mr. Hahle moved that the resolution be adopted. The resolution upon a vote of the members was declared lost.

Mr. Rodman moved that further action relating to a contract or ordinance between the City of Beverly and the Delaware and Atlantic Telegraph and Telephone Company be referred to the Ordinance and Printing Committee and the City Solicitor. The motion was carried. 30

Mr. Davis representative of the Delaware and Atlantic Telegraph and Telephone Company was given

the privilege of the floor and asked that further action be given them on the plans.

Mr. Hahle moved that action on the plans of the Delaware and Atlantic Telegraph and Telephone Company be deferred until the next stated meeting. The motion was carried.

Adjourned.

10 The regular stated meeting of Common Council of the City of Beverly was held in the City Hall on Thursday evening, August 4th, 1910.

Mr. Hahle moved that the plans of the Delaware and Atlantic Telegraph and Telephone Company be laid over until the next stated meeting. The motion was carried.

20 A lengthy communication from the Delaware and Atlantic Telegraph and Telephone Company was read and Mr. Fish moved that the same be referred to the Committee on Ordinance and Printing and the solicitor. The motion was carried.

Mr. Davis of the Delaware and Atlantic Telegraph and Telephone Company was given the privilege of the floor and stated that the communication merely asked for some action be taken with the matter.

Adjourned.

30 I, Ellwood P. Rodman, Clerk of the City of Beverly, do hereby certify that the foregoing is a true and correct copy of the minutes and record of the proceedings of the Common Council of the City of Beverly, as the same are now of record and in my custody.

In witness whereof, I have hereunto set my hand and seal this ninth day of July, 1912.

ELLWOOD P. RODMAN,
City Clerk.

[SEAL]

BEVERLY, N. J.
(Acceptance)

Camden, N. J., June 10th, 1910.

The Delaware and Atlantic Telegraph and Telephone Company accepts and hereby agrees to comply with all the terms, conditions, regulations and restrictions contained in a resolution granting unto it, its successors and assigns, permission to maintain and operate all of its poles, cross arms, cables, wires and other apparatus thereto belonging, as now erected and in place, on, over, across and along the public streets, alleys and highways within the limits of the City of Beverly, in the County of Burlington, State of New Jersey; and to erect, maintain and operate additional posts, poles, cables, wires and all other necessary overhead apparatus on, over and along, and to construct its conduits, mains, pipes, cables, wires, manholes, distributing poles and all other necessary underground appliances, in, under and through all of the public streets, alleys and highways within the limits of the said city, and to use the poles of other companies and to permit other companies to use its poles, upon such arrangements as the two companies may agree, adopted by the Council of the City of Beverly, in the County of Burlington and State of New Jersey, at a regular meeting held on the second day of June, A. D. 1910.

THE DELAWARE & ATLANTIC TELEGRAPH &
TELEPHONE COMPANY.

By (s) F. H. BETHELL,
Vice-President.

Attest: (s) W. S. PEIRSOLL,
Secretary.

KNOW ALL MEN BY THESE PRESENTS that The Delaware and Atlantic Telegraph and Telephone Company is held and firmly bound unto the City of Beverly, in the County of Burlington and State of New Jersey, in the sum of one thousand dollars (\$1,000.00), lawful money of the United States, to be paid to the said city, its certain attorney or assigns, for which payment well and truly to be made the said company binds itself, its successors or assigns, firmly by these presents.

SEALED with its seal and dated this 10th day of June, A. D. 1910.

WHEREAS, by a certain resolution adopted by the Council of the City of Beverly, in the County of Burlington and State of New Jersey, at a regular meeting held on the second day of June, A. D. 1910, the said The Delaware and Atlantic Telegraph and Telephone Company was granted permission to maintain and operate all of its poles, cross arms, cables, wires and other apparatus thereto belonging, as now erected and in place, on, over, across and along the public streets, alleys and highways within the limits of the City of Beverly, in the County of Burlington, State of New Jersey; and to erect, maintain and operate additional posts, poles, cables, wires and all other necessary overhead apparatus on, over and along, and to construct its conduits, mains, pipes, cables, wires, manholes, distributing poles and all other necessary underground appliances in, under and through all of the public streets, alleys and highways within the limits of the said city, and to use the poles of other companies and to permit other companies to use its poles, upon such arrangements as the two companies may agree.

AND WHEREAS, the said resolution contains, among other provisions, the following:

“7. That the said company shall, under its seal and by its proper officers, within thirty days of the adoption of this resolution signify in writing its acceptance of all the terms, conditions and regulations in this resolution contained, and shall, within the same period, file with the City Clerk, its bond in the sum of one thousand dollars (\$1,000.00) conditioned to indemnify, protect and save harmless the said city, from and against all actions, claims, suits, damages and charges, and against all loss and necessary expenditures arising from the erection, construction or maintenance of its system in said city, or from its neglect or failure to maintain the said apparatus in good and safe order and condition.”

NOW THE CONDITION of this obligation is such that if the said The Delaware and Atlantic Telegraph and Telephone Company shall and does in all things well and truly observe, comply with, perform, fulfill and keep all and every of the terms, requirements and conditions of the said resolution, as well as indemnify, protect and save harmless the said city, from and against all actions, claims, suits, damages and charges, and against all loss and necessary expenditures arising from the erection, construction or maintenance of its system in said city, or from its neglect or failure to maintain the said apparatus in good and safe order and condition, then this obligation to be void; otherwise to remain in full force and effect.

THE DELAWARE & ATLANTIC TELEGRAPH &
TELEPHONE COMPANY.

By (s) F. H. BETHELL,
Vice-President.

Attest: (s) W. S. PEIRSOLL,
Secretary.

STIPULATION AS TO FACTS.

NEW JERSEY SUPREME COURT.

(Filed May 20, 1912)

10	THE DELAWARE AND ATLANTIC TELEGRAPH AND TELEPHONE COMPANY, <i>Prosecutor,</i> vs. THE MAYOR AND COUNCIL OF THE CITY OF BEVERLY, <i>Respondent.</i>	}	ON CERTIORARI. STIPULATION OF FACTS.
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20

The following facts are agreed upon by the respective parties to the same extent as if proven by competent testimony, and are to be considered by the Court in the determination of the questions involved in the above cause.

1. The prosecutor is a corporation duly organized under the laws of the State of New Jersey, and pursuant to an Act of the Legislature of this State, entitled "An Act to Incorporate and Regulate Telegraph Companies," approved April 9, 1875, and the several acts amendatory thereof and supplemental thereto.

2. The prosecutor is the owner and possessor of a telephone plant in the City of Beverly, comprised

of poles and wires stretched in and maintained along the public highways of said city, pursuant to a resolution of the municipal authorities thereof, of which resolution Exhibit 1 attached hereto is a copy.

3. Exhibit 2, attached hereto and forming part hereof, is a copy of the acceptance, dated June 10, 1910, by the prosecutor, of the resolutions passed at the meeting of the Council of said city, June 2, 1910, referred to in the return to the writ of certiorari in the above cause, and presented to said Council on June 16th, 1910, as appears by said return. **10**

4. Exhibit 3, attached hereto and forming part hereof, is a copy of a bond presented by the prosecutor to the City Council of said city on the 16th of June, 1910, as shown by the return to the writ of certiorari in this cause.

5. Exhibit 4 is a copy of a contract executed by the prosecutor and presented to the City Council for execution by the corporate authorities of the city on the 16th of June, 1910, before the rescinding resolution, the validity of which is questioned in these proceedings, was passed. **20**

6. On June 2nd, 1910, the solicitor of the City of Beverly presented a bill, of which the following is a copy:

30

June 2, 1910.

The Delaware & Atlantic Telegraph & Telephone Co.
TO G. Dore Cogswell, Dr.

Legal services in connection with the preparation and drawing of Beverly City, N. J.

Resolution and agreement \$25.00

and it was paid by the prosecutor June 20th, 1910.

7. No written notice was given to the prosecutor on behalf of the respondent that it was proposed to pass the rescinding resolution which was adopted by the city on the 16th of June, 1910.

8. Exhibit 5, attached hereto, is a copy of a resolution adopted by the City Council of the respondent on the 7th of October, 1911.

10 9. When the prosecutor, in the latter part of 1911, attempted to comply with the requirements of said resolution, mentioned in the last preceding paragraph, and in addition thereto to exercise the privileges conferred by resolutions passed by the City Council on the 2nd day of June, 1910, by installing a cable instead of open wires, the corporate authorities of the city prevented any work from being done, and claimed that the latter resolution was not in effect, because the passage thereof had been reconsidered and rescinded.

20 10. Exhibit 6 is a copy of a letter written by the attorney of the prosecutor to the City Solicitor of said city, dated April 3, 1912.

11. On April 4, 1912, City Council passed a resolution, of which the following is a copy:

30 "That the letter received from Lewis Starr, Esq., counsel for the Delaware & Atlantic Telegraph and Telephone Company be referred to our city attorney for reply, and that it is the sense of this body that we take no steps at present to enjoin said company as suggested in said letter, but that the police committee are hereby instructed not to permit

said company to erect or place any additional wires or poles within the limits of this city, until such time as said company may have entered into a satisfactory contract or agreement with this city."

12. Exhibit 7, attached hereto and forming part hereof, dated August 4, 1912, is a copy of a communication presented by the prosecutor to the City Council and read by the Clerk thereof on August 4th, and referred to the Committee on Ordinance and Printing and the solicitor, as shown by the return of the writ of certiorari. **10**

13. Exhibits 2, 3 and 4 are now in the possession of the City Clerk of said city, and have never been returned to the prosecutor.

14. The City Council consists of nine members. **20**

15. All adjournments of the meetings of Beverly City Council noted in the copy of the minutes annexed to the writ of certiorari and returned therewith were duly and properly made, and said Council thereupon stood adjourned as noted.

16. The City Council of the respondent has never adopted any rule or regulation prescribing the time within which motions to rescind or reconsider shall be made. **30**

LEWIS STARR,
Attorney of Prosecutor.
G. DORE COGSWELL,
Attorney of Respondent.

EXHIBIT NO. 1.

BEVERLY, N. J.

10 An Ordinance to authorize the Delaware and Atlantic Telegraph and Telephone Company to establish a telephone exchange in the City of Beverly, New Jersey, and for that purpose granting them the privilege to erect poles on any street or alley within the limits of said city, and to place wires thereon.

Be it ordained and enacted by the Mayor, Clerk and Common Council of the City of Beverly in Common Council assembled, and it is hereby enacted by the authority of the same.

20 Section 1. That for ten years from the twenty-first day of March, eighteen hundred and ninety-nine, the Delaware and Atlantic Telegraph and Telephone Company, be, and they are hereby authorized and empowered to establish a telephone exchange in the City of Beverly, New Jersey, and for that purpose they are hereby granted the privilege of erecting poles, subject to the approval of Common Council or the proper Committee thereof, in, along and upon any street or alley in said city, and to place wires thereon; Provided, that the said poles shall be good, straight cedar or chestnut poles, and not less than six inches in diameter at the top and thirty feet high, and that said wires wherever they cross
30 any of the city streets, roads, alleys, avenues, public ways or private ways, open to the public, shall be at least twenty feet above the ground, and at all other points twenty feet above the ground, excepting where they enter buildings, in which case they shall in no instance interfere with the public use of the sidewalks; that the city to have free use of the telephone for city business.

Section 2. That the said Delaware and Atlantic Telegraph and Telephone Company agrees to indemnify and save harmless the said City of Beverly from and against all claims and demands for damage to person or property, or for cost and expenses of litigation connected therewith, or for compensation for or in connection with any injury, claim or demand in any way resulting from the removal, erection, maintenance or use of any of the said poles, wires or appurtenances, and further, that the said company, in removing, changing or erecting, poles, wires or appurtenances, shall at its own cost, replace all private or public property thereby disturbed or affected in as good condition as the same was before being so disturbed or affected. 10

Passed March 2nd, 1899.

WILLIAM A. BIRKHEAD,
President of Common Council.

Attest:

CHARLES F. STEVENSON,
City Clerk.

20

EXHIBIT NO. 2.

Camden, N. J., June 10th, 1910.

The Delaware and Atlantic Telegraph and Telephone Company accepts and hereby agrees to comply with all the terms, conditions, regulations and restrictions contained in a Resolution granting unto it, its successors and assigns, permission to maintain and operate all of its poles, cross arms, cables, wires and other apparatus thereto belonging, as now erected and in place, on, over, across and along the public streets, alleys and highways within the limits 30

of the City of Beverly, in the County of Burlington, State of New Jersey; and to erect, maintain and operate additional posts, poles, cables, wires and all other necessary overhead apparatus on, over and along, and to construct its conduits, mains, pipes, cables, wires, manholes, distributing poles and all other necessary underground appliances, in, under and through all of the public streets, alleys and high-ways within the limits of the said City, and to use
 10 the poles of other Companies and to permit other Companies to use its poles, upon such arrangements as the two Companies may agree, adopted by the Council of the City of Beverly, in the County of Burlington and State of New Jersey, at a regular meeting held on the Second day of June, A. D. 1910.

THE DELAWARE & ATLANTIC TELEGRAPH &
 TELEPHONE COMPANY.

[SEAL]

By F. H. BETHELL,
Vice-President.

20

Attest: W. S. PEIRSOLL,
Secretary.

EXHIBIT NO. 3.

KNOW ALL MEN BY THESE PRESENTS that
 30 the Delaware and Atlantic Telegraph and Telephone Company is held and firmly bound unto the City of Beverly, in the County of Burlington and State of New Jersey, in the sum of One Thousand Dollars (\$1,000.00), lawful money of the United States, to be paid to the said City, its certain attorney or assigns, for which payment well and truly to be made the said Company binds itself, its successors or assigns, firmly by these presents.

Sealed with its Seal and dated this 10th day of June, A. D. 1910.

WHEREAS, by a certain Resolution adopted by the Council of the City of Beverly, and the County of Burlington and State of New Jersey, at a regular meeting held on the Second day of June, A. D. 1910, the said The Delaware and Atlantic Telegraph and Telephone Company was granted permission to maintain and operate all of its poles, cross arms, cables, wires and other apparatus thereto belonging, as now erected and in place, on, over, across and along the public streets, alleys and highways within the limits of the City of Beverly, in the County of Burlington, State of New Jersey; and to erect, maintain and operate additional posts, poles, cables, wires and all other necessary overhead apparatus on, over and along, and to construct its conduits, mains, pipes, cables, wires, manholes, distributing poles and all other necessary underground appliances, in, under and through all of the public streets, alleys and highways within the limits of the said city, and to use the poles of other Companies and to permit other Companies to use its poles, upon such arrangements as the two Companies may agree.

AND WHEREAS, the said Resolution contains, among other provisions, the following:

“7. That the said Company shall, under its seal and by its proper officers, within thirty days of the adoption of this resolution signify in writing its acceptance of all the terms, conditions and regulations in this resolution contained, and shall, within the same period, file with the City Clerk, its bond in the sum of One Thousand Dollars (\$1,000.) conditioned to indemnify, protect and save

harmless the said City, from and against all actions, claims, suits, damages and charges, and against all loss and necessary expenditures arising from the erection, construction or maintenance of its system in said City, or from its neglect or failure to maintain the said apparatus in good and safe order and condition."

- 10** NOW THE CONDITION of this obligation is such that if the said The Delaware and Atlantic Telegraph and Telephone Company shall and does in all things well and truly observe, comply with, perform, fulfill and keep all and every of the terms, requirements and conditions of the said Resolution, as well as indemnify, protect and save harmless the said City, from and against all actions, claims, suits, damages and charges and against all loss and necessary expenditures arising from the erection, construction or maintenance of its system in said City, or from its neglect or failure to maintain the said apparatus in good and safe order and condition, then this obligation to be void; otherwise to remain in full force and effect.

THE DELAWARE & ATLANTIC TELEGRAPH &
TELEPHONE COMPANY.

[SEAL]

By (s) F. H. BETHELL,
Vice-President.

- 30** Attest: W. S. PEIRSOLL,
Secretary.

EXHIBIT NO. 4.

THIS AGREEMENT made this day of
A. D. 1910, by and between The Delaware
and Atlantic Telegraph and Telephone Company,
hereinafter called "COMPANY," party of the first
part; and the City of Beverly, in the County of Bur-
lington, State of New Jersey, hereinafter called
"CITY," party of the second part.

10

WITNESSETH, that "COMPANY" in consider-
ation of the adoption of a certain resolution grant-
ing permission to The Delaware and Atlantic Tele-
graph and Telephone Company, its successors and
assigns, to maintain and operate all of its poles,
cross arms, cables, wires and other apparatus there-
to belonging, as now erected and in place, on, over,
across and along the public streets, alleys and high-
ways within the limits of the City of Beverly, in the
County of Burlington, State of New Jersey, and to
erect, maintain and operate additional posts, poles,
cables, wires and all other necessary overhead ap-
paratus on, over and along, and to construct its
conduits, mains, pipes, cables, wires, manholes, dis-
tributing poles and all other necessary underground
appliances, on, under and through all of the public
streets, alleys and highways within the limits of the
said City, and to use the poles of other Companies
and to permit other Companies to use its poles, upon
such arrangements as the two companies may agree,
by the Council of "CITY" at a regular meeting held
on the day of A. D. 1910, hereby agrees
to install and maintain, free of charge four (4) tele-
phones at such locations along its lines in the City
of Beverly, at such time, as may be designated by
the Council of "CITY"; the said four (4) telephones

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30

include the one (1) installed and now maintained, free of charge, in the office of the Mayor of "CITY", and shall be used for municipal business only to all stations connected with the exchange to which the said telephones are connected.

"COMPANY" further agrees to furnish and erect on its poles, at its sole cost and expense, one (1) metallic copper wire circuit between the following locations:

- 10 Front and Broad Streets.
Beverly Fire Co., No. 1, Laurel St. S. of Oak St.
Hope Hose Co. No. 2 Cooper St. N. of 3rd St.
Warren and Van Sciver Streets.
Pine Street and Walton Avenue.
Putnan and Magnolia Streets.
Warren and Mt. Holly Streets.

- 20 "CITY" shall furnish, at its own expense, the fire alarm boxes and "COMPANY" shall, at its own expense, erect the said boxes and connect them to the circuit to be erected by it on its place, as herein provided.

"COMPANY" further agrees to extend at its sole cost and expense, the said circuit to such additional locations along its pole lines as "CITY" may designate from time to time.

- 30 The said circuit after its erection by "COMPANY" as hereinbefore provided, shall become the property of "CITY" to be used for police and fire alarm purposes, but the same shall not be used for carrying high-tension currents.

"COMPANY" further agrees to repair the said circuit from time to time, at its sole cost and ex-

pense, upon receipt of notice in writing from any official of "CITY" that repairs are required.

This agreement shall continue in force so long as "COMPANY," its successors and assigns enjoy the rights and privileges granted by the said resolution.

IN WITNESS WHEREOF the parties hereto have caused these presents to be properly executed, the day and year first above written.

THE DELAWARE & ATLANTIC TELEGRAPH & TELEPHONE COMPANY.

[SEAL]

By F. H. BETHELL,
Vice-President.

Attest: W. S. PEIRSOLL,
Secretary.

CITY OF BEVERLY.

By _____
President of Council.

Attest _____
City Clerk.

Mayor.

10

20

EXHIBIT NO. 5.

"WHEREAS" the lines, wires and cables of the Delaware and Atlantic Telegraph and Telephone Company are in very bad condition, hanging down into the streets and in some cases have fallen and are laying in the streets of this City, and by of liability to come in contact with electric light wires,

30

are a danger and a great menace to persons using the streets, and other wires of said Company hang so low that vehicles are apt to come in contact with them:

Therefore be it resolved by the Common Council of the City of Beverly, N. J., that the City Clerk notify said Company to at once repair their said property within the limits of this City.

10

EXHIBIT NO. 6.

April 3, 1912.

In re Beverly Ordinance.

G. Dore Cogswell, Esq.,
Camden, N. J.

Dear Dore:

20 I had a conference with Mr. Henderson today, and he advised me that Mr. Kunkle is of the opinion that the telephone plant at Beverly is in such a condition as to require immediate repairs to be done to it; and it will be much more satisfactory to the Company and result in improving the service for the inhabitants of the city to make needed extensions and improvements at the same time.

30 I feel—and in this opinion, I am sure you coincide—that the franchise granted in 1910 would permit this work to be done. We do not desire, however, to engage in any unnecessary litigation or undertake any work which will result in personal encounter between the city officials and the representatives of the telephone company.

The company is willing to have this question settled in any amicable way that you can suggest. I think it might be well for the company to notify

the city officials that it is their purpose to proceed with the repair work and extensions in accordance with the resolution of 1910, indicating the time sufficiently distant to permit the city to obtain an injunction to restrain this work if they deem such course advisable. In such proceeding, the status of the telephone company will be determined; and I think it will be much better for everybody to ascertain what the correct solution of the difficulty is.

I wish you would confer with the city officials regarding this letter, and advise me what attitude they will assume. 10

Very truly yours,

LEWIS STARR.

EXHIBIT NO. 7.

August 4th, 1910. 20

To the Council of the City of Beverly, Burlington Co., New Jersey.

Gentlemen:

At the regular meeting of Council held on the second day of June, A. D. 1910, a Resolution was unanimously adopted granting unto The Delaware & Atlantic Telegraph & Telephone Company, its successors and assigns, permission to maintain and operate its poles, cables, wires, etc., then in place and to erect, maintain and operate additional poles, cables, etc., as well as to construct, maintain and operate underground conduits and appliances there-to belonging, on, in, over, across and along, the public streets, alleys and highways within the limits of your City. 30

At the same meeting, immediately after the adop-

tion of the said Resolution, the following resolution was also unanimously adopted:

10 “Be it resolved that the agreement submitted at this meeting by The Delaware & Atlantic Telegraph & Telephone Company be and the same is approved as read, and it is ordered that said agreement be duly executed in duplicate, under the corporate seal of the City and signed by the Mayor and President of Common Council, and attested by the City Clerk upon its due and legal execution by the proper officers of the said Company, and that a copy be filed with the City Clerk and also spread upon the minutes.”

20 The agreement referred to in the said Resolution, provides for the installation and maintenance, free of charge, of three (3) telephones in addition to the telephone now maintained in the office of the Mayor, which said telephones are to be used for municipal business only, to all stations connected with the exchange with which the said telephones are to be connected.

30 It also provides that this Company shall furnish and erect on its poles, at its sole cost and expense, one (1) metallic copper wire circuit between seven (7) designated locations in your City, as well as erect five (5) alarm boxes (to be furnished by you), connect them with the said circuit and extend said circuit to such additional locations along its pole lines as may from time to time be designated by Council.

 These concessions were to be furnished by this Company in consideration of the adoption of the said Resolution and were granted so as to secure early action on the Resolution in order that proposed

underground construction could proceed along Warren Street. These concessions were insisted by your Honorable Body before favorable action could be secured upon the said Resolution.

At the above stated meeting, immediately after the adoption of the said Resolutions, the representative of this Company requested a meeting at which time it was desired to submit plans of proposed work for the consideration of your Honorable Body, as provided for in the first Section of the said Resolution, which reads as follows:— 10

“That whenever the said Company shall desire to erect, place or construct any poles, conduits or manholes, it shall present a plan or plans showing the location, number and size thereof, to Common Council, of the City of Beverly, for its approval or disapproval of the same; which plan or plans or a copy thereof, with approval endorsed thereon shall be filed with the City Clerk. 20

In case the Common Council disapproves any plan or plans submitted it shall designate some other suitable location in a street, alley or highway in which the said Company may erect, place or construct its poles, conduits or manholes.”

A motion was made, seconded and carried, that an adjourned meeting be held Thursday Evening, June 16th, 1910, for the purpose of considering the plans to be submitted by this Company. 30

At the last mentioned meeting the representative of this Company presented its acceptance of the Resolution, and its Bond in the sum of One Thousand Dollars (\$1,000.00), as provided in the Seventh Section of said Resolution, which reads as follows:—

10 “That the said Company shall, under its seal and by its proper officers, within thirty days of the adoption of this resolution signify in writing its acceptance of all the terms, conditions and regulations in this resolution contained, and shall, within the same period, file with the City Clerk, its bond in the sum of One Thousand Dollars (\$1,000.00) conditioned to indemnify, protect and save harmless the said City, from and against all actions, claims, suits, damages and charges, and against all loss and necessary expenditures arising from the erection, construction or maintenance of its system in said City, or from its neglect or failure to maintain the said apparatus in good and safe order and condition.”

20 A motion was made, seconded and carried that the acceptance and bond be filed.

The agreement hereinbefore referred to, properly executed on the part of this Company, and the plans covering proposed work were then submitted for consideration by this Company's representative.

A motion was made, seconded and carried, that the vote by which the first mentioned resolution was adopted be reconsidered. This Company's representative again requested that some action be taken with reference to the plans submitted.

30 A motion was made, seconded and carried, that action be deferred until the next stated meeting.

This Company has also paid to your Solicitor the fee for legal services rendered in connection with the said Resolution, as provided in the Tenth Section thereof, which reads as follows:

“That the said Company shall pay unto

the City Solicitor the sum of Twenty-five (\$25.00) Dollars for and in consideration of legal services rendered by him in connection with the preparation and drawing of this resolution."

At an adjourned meeting of your Honorable Body, held Thursday Evening, June 30th, 1910, the vote on the resolution authorizing the execution of the above-mentioned agreement on the part of your City, was on motion reconsidered and action on the resolution deferred until the next stated meeting at which time it was proposed to reconsider both the resolutions. 10

At the regular meeting of your Honorable Body, held Thursday Evening, July 7th, 1910, the said resolutions were rescinded by a majority vote. All the members of Council were not present as was the case when the resolutions were adopted. The matter of granting this Company an ordinance was then on motion referred to the Law and Ordinance Committee and your Solicitor. 20

The representative of this Company again requested that the plans submitted in accordance with the Resolution be either approved or some other location suitable for the purposes of this Company be designated.

A motion was made, seconded and carried that action on the plans be deferred until the next stated meeting to be held Thursday Evening, August 4th, 1910, (tonight). 30

As this Company has complied with all the requirements of the said Resolution in respect to the filing of plans of proposed work for your consideration, and desires to proceed with the work covered thereby as soon as possible, it desires that the said plans be either approved or another route suitable for its purposes be designated.

The representatives of this Company will be in attendance at this meeting, as they have been at all other meetings when the plans were to be considered, and have been instructed to furnish any information that your Honorable Body may desire in connection with said plans.

10 It has been the policy and desire of this Company to give your Honorable Body a reasonable length of time to consider and pass upon the plans submitted, but as two (2) months have elapsed since the adoption of the said Resolution, I trust that some action will be taken at the meeting tonight.

Very truly yours,

ROGER S. HENDERSON,
Right of Way Agent.

DEPOSITIONS.

NEW JERSEY SUPREME COURT.

<p>THE DELAWARE AND ATLANTIC TELEGRAPH AND TELEPHONE COMPANY, <i>Prosecutor,</i></p> <p>vs.</p> <p>THE MAYOR AND COUNCIL OF THE CITY OF BEVERLY, <i>Respondent.</i></p>	}	<p>ON CERTIORARI. DEPOSITIONS.</p>	<p>10</p>
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Depositions of witnesses in the above entitled cause taken before Edward I. Berry, a Supreme Court Commissioner, pursuant to agreement of counsel for the respective parties, this twenty-fourth day of September, A. D. nineteen hundred and twelve, at ten o'clock in the forenoon, in the presence of Lewis Starr, Esq., attorney for the prosecutor, and G. Dore Cogswell, Esq., attorney for the respondent. 20

Notice of the taking of the depositions and a rule therefor are waived, and it is agreed that the depositions be taken stenographically and the signatures of the witnesses waived. 30

CHARLES SUMNER DAVIS, SWORN.

By Mr. Starr.

Q. Mr. Davis, where do you live?

A. Philadelphia.

Q. And are you in the employ of the Delaware & Atlantic Telegraph & Telephone Company?

A. I am.

10 Q. Were you in the employ of that company in the months of June and July, 1910?

A. I was.

Q. In what capacity?

A. Assistant to the rights of way agent.

Q. Were you present at the meeting of City Council of Beverly on the second of June, 1910, at which was passed two resolutions with relation to the Delaware & Atlantic, one granting rights in the streets and the other providing for the execution of a contract?

20

A. I was.

Q. What request, if any, did you make in the Council meeting with reference to the approval of plans for construction of the work?

Mr. Cogswell: I want to get an objection in, Judge, that parol evidence cannot be taken to vary the minutes of City Council.

30 A. As soon as those resolutions were adopted I requested a meeting at which time they would consider our plans as provided for in the first section of the resolution. I think that is the way I made my request.

Q. And what was—

A. Council adjourned for two weeks, to June 16th, at which time they would take up the plans.

Q. Now, was that in the form of a motion or merely a statement made?

A. One of the members of Council made a motion; who it was I do not recall.

Q. And to the best of your recollection, what was the purport of that motion?

A. That Council adjourn to meet on Thursday evening, June 16th, to consider the plans of the Delaware & Atlantic Telegraph & Telephone Company. That is in substance what it was.

10

Q. Now, were you present at the meeting of Council on the 16th of June, 1910?

A. I was.

(Mr. Starr, representing the prosecutor, called upon Mr. Cogswell to produce the acceptance and bond and the contract referred to in the minutes attached as a return to the writ of certiorari in this cause.)

20

Mr. Cogswell: I forgot to get them. You may refer to them without the papers being actually produced.

Q. Now, will you state what you did with reference to the production or, rather, to the filing of any papers on the part of the Telephone Company with the City Clerk either at that meeting or just before it convened?

A. Just as the meeting was being called to order by the President, I went up to the desk and handed to the Secretary—I guess they call him the Secretary—

30

Mr. Cogswell: The City Clerk.

The Witness: The City Clerk, the acceptance and bond. That was all I did at that time.

Q. Well, now, after the meeting convened, what action did the meeting take with reference to the acceptance and bond?

(Objected to on the same ground as before stated.)

A. To the best of my recollection the City Clerk read the bond and acceptance, and a motion was made, seconded and carried that they be filed.

10 Q. What did you then do?

A. I then presented the agreement covering the free telephones and fire alarm service.

Q. That was executed by the Telephone Company, was it?

A. Executed on the part of the Delaware & Atlantic Telegraph & Telephone Company, and also plans covering proposed construction of underground conduits on Warren Street and side streets; I think there were some side streets.

20 Q. Now, was that presentation before the meeting voted to reconsider the resolution?

A. It was.

Q. And those papers which you presented to the City Clerk have never been returned to you?

A. No.

Q. They were retained by the Clerk?

A. They were.

30 Q. At the meeting which was held on the 16th of June, 1910, and prior to the time the motion was made to reconsider the former resolution, had you been advised that it was the purpose of Council to take any action at all for the reconsideration of such resolution?

A. I was not.

Q. No notice, either in writing or personally, was given to you of that contemplated action, was it?

A. It was not.

Cross-examination.

By Mr. Cogswell:

Q. However, you attended those meetings?

A. Oh, yes.

Q. Mr. Davis, in the minutes of Council it appears that a Mr. Davis moved several resolutions and so forth and entered into the proceedings of Council. You are not that Davis, are you?

10

A. Well, I can't tell from that question; possibly it refers to Mr. Davis the Councilman, I don't know.

Q. That is what I mean.

A. I can't tell.

Q. I want to make the distinction——

A. No, of course, I couldn't make any motions or anything like that.

Mr. Starr: Ask him if he is the Mr. Davis mentioned in the minutes as a member of Council.

20

The Witness: No, I am not.

Q. There was then a Mr. Davis who was a member of Council at that time, wasn't there?

A. Yes.

REASONS FOR REVERSAL.

NEW JERSEY SUPREME COURT.

(Filed May 20, 1912)

10	THE DELAWARE AND ATLANTIC TELEGRAPH AND TELEPHONE COMPANY, <i>Prosecutor,</i>	}	ON CERTIORARI.
	vs.		REASONS FOR
	THE MAYOR AND COUNCIL OF THE CITY OF BEVERLY, <i>Respondent.</i>		REVERSAL.

20

The prosecutor above named hereby assigns the following reasons for the vacation of the resolution passed July seventh, nineteen hundred and ten, removed by the writ issued in the above cause:

1. The City Council was without power or jurisdiction to pass said resolution.
- 30** 2. No notice was given the prosecutor that it was proposed to pass said resolution, which rescinded former resolutions adopted by the city, conferring rights upon the prosecutor.
3. After the prosecutor had accepted the resolution adopted on the second of June, nineteen hundred

and ten, by filing a written acceptance thereof and a bond, as required by the terms thereof, and paid to the City Solicitor the twenty-five dollars provided by the tenth paragraph thereof, the City Council had no authority whatever to reconsider and rescind said resolution.

4. After the prosecutor had accepted the resolution adopted on the second of June, nineteen hundred and ten, by filing a written acceptance thereof and a bond, as required by the terms thereof, and paid to the City Solicitor the twenty-five dollars provided by the tenth paragraph thereof, the City Council had no authority whatever to reconsider and rescind said resolution in the absence of notice to the prosecutor that it was the purpose of the City Council to take such action. **10**

5. The said resolution is in divers other respects illegal, unlawful, void, and of no effect. **20**

Attorney of Prosecutor.

RULE TO DISMISS.

NEW JERSEY SUPREME COURT.

(Filed April 5, 1913)

10 THE DELAWARE AND ATLANTIC TELEGRAPH AND TELEPHONE COMPANY,
Prosecutor,
 vs.
 THE MAYOR AND COUNCIL OF THE CITY OF BEVERLY,
Respondent. } ON CERTIORARI.
 RULE TO DISMISS.

20

The Court having heard the argument of counsel and inspected the proceedings of the Common Council of the City of Beverly, N. J., removed by the writ of certiorari in this cause and duly considered the same, do order that the said proceedings of Common Council be affirmed and that the writ of certiorari heretofore allowed be and the same is hereby dismissed with costs.

Entered April 5, 1913, on motion of

30

G. DORE COGSWELL,

Attorney for Respondent.

A true copy.

WM. C. GEBHARDT,

Clerk.

OPINION.

NEW JERSEY SUPREME COURT.

(Filed April 1, 1913)

THE DELAWARE AND ATLANTIC TELEGRAPH AND TELEPHONE COMPANY,

Prosecutor,

vs.

THE MAYOR AND COUNCIL OF THE CITY OF BEVERLY,

Respondent.

10

Argued Nov. 2, 1912. Decided April 1, 1913.

By consent, heard by a single Judge.

For the Prosecutor, MR. LEWIS STARR.

For the Defendant, MR. G. DORE' COGSWELL.

20

The opinion of the Court was delivered by VORHEES, J. The prosecutor is a duly organized New Jersey corporation, which by resolution of the authorities of the City of Beverly, obtained on March 2nd, 1899, for ten years, from the 21st day of March, 1899, to the 21st day of March, 1909, the authority to operate a telephone service in said city.

On June 2, 1910, a resolution was passed, granting to the company, an extension of its license. The min-

30

utes show that this meeting, after the passage of the resolution, was adjourned to meet on the 16th day of June, 1910, such adjourned meeting thus becoming a part of the meeting of June 2nd. The prosecutor then procured its bond, agreement and other papers, and they were brought to the adjourned meeting and were taken by the officers of the city, and are still held by them.

- 10 Meanwhile, at the adjourned meeting, a vote was taken and carried that there be a reconsideration of the resolution of the preceding meeting, by which the license was renewed. After this, a motion was made that the prosecutor's original resolution be laid over until the next stated meeting. An adjournment to meet June 30th, was then voted. There was a further postponement on June 30th, until July 7th. At the last mentioned meeting, the renewal proceedings were lost. This writ of certiorari was allowed April 19th, 1912, almost two years after the controversy arose.

20 At the meeting held July 7th, 1910, a representative of the prosecutor "asked that further action be given them on the plans," which action was held until the next meeting, on August 4th, a representative of the company was allowed to state that the communication theretofore made, merely asked that some action be taken upon the matter.

- 30 The whole point of defense is that the meeting, at which the resolution undoing the action of the Council, was an adjourned meeting of the one in which it was enacted, and that under *Styles vs. Lambertville*, 73 Law 90,

"A deliberative assembly may lawfully reconsider and annul a vote previously taken at the same meeting and that the session of the deliberative assembly, which is held in pursu-

ance of a special motion adopted at a regular meeting, to adjourn the meeting to a fixed time is a continuation of the regular meeting and at such session the assembly can do anything that it could have done at the earlier session."

It is said that the prosecutor paid the bill of the City Council, but that it was not paid until after the idea of adjournment had been provided, and I fail to find any elements of an estoppel as defined in *Central R. R. Co. vs. McCartney*, 39 Vr. 165, 175. 10

I conclude that the action to reconsider was done at the meeting of the Council when it was enacted. The resolution was rescinded before any act was done upon it, which tended to fix the rights of the prosecutor as a finality, and that the proceedings of the Council must be held to be proper in their form, and must be affirmed. 20

GROUND OF APPEAL.**NEW JERSEY
COURT OF ERRORS AND APPEALS.**

(Filed April 27, 1914)

10 Between
 THE DELAWARE AND AT-
 LANTIC TELEGRAPH &
 TELEPHONE COMPANY,
Prosecutor-Appellant,
 and
 CITY OF BEVERLY,
Respondent. } ON APPEAL.
 GROUNDS OF APPEAL.

20 The appellant states the following grounds of appeal:

1. The Supreme Court erred in affirming the proceedings of the Common Council of Beverly, and dismissing the writ of certiorari issued to review the same.

30 2. The Supreme Court should have reversed and set aside the rescinding resolution passed by City Council, which was reviewed by the writ of certiorari issued in the court below.

LEWIS STARR,
Attorney of Appellant.

I consent that the foregoing be filed out of time.

G. DORE' COGSWELL,
Attorney of Respondent.

**NEW JERSEY
COURT OF ERRORS AND APPEALS.**

THE DELAWARE AND ATLANTIC TELEGRAPH AND TELEPHONE COMPANY,

Prosecutor-Appellant,

vs.

THE MAYOR AND COUNCIL
OF THE CITY OF BEVERLY,

Respondents.

ON APPEAL FROM
SUPREME COURT.

BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF CASE.

This case, in the court below, was considered and decided upon the return to a writ of certiorari allowed therein, depositions taken by consent, and admitted facts stipulated between parties.

The writ was allowed to review the action of the City Council of Beverly, in reconsidering and rescinding a resolution, which had theretofore been adopted, granting to the prosecutor certain rights in the highways of the municipality, for the erection of poles, and conduct of its telephone business.

GROUND OF APPEAL.

The only ground for reversal is that the Supreme Court erred in affirming the proceedings of the municipal body, and dismissing the writ, for the reason that action of the latter in reconsidering the former resolution should have been reversed and set aside. (Case, page 46.)

The reasons for reversal, filed and urged in the court below, appear. (Case, pages 40-1.)

STATEMENT OF FACTS.

A chronological history of events leading up to the allowance of the writ of certiorari is as follows:

On March 2, 1899, the City Council of Beverly gave the prosecutor the right to erect poles, etc., along the highways of the city, and conduct a telephone business therein, for a period of ten years from March 21, 1899. This will appear by Exhibit 1, attached to the stipulation of facts. (Case, pages 20-1.)

Pursuant to such resolution, the prosecutor, which is a corporation organized under the laws of New Jersey, constructed a telephone plant in said city, and erected poles and strung wires along the public highways therein. (Case, page 16, line 35.)

On May 5, 1910, the prosecutor applied for a new resolution to continue business in Beverly, and erect poles in the public highways thereof, under the provisions of an amendment to the general telephone Act, passed in 1909, P. L. of that year, page 288, which provides that privileges of this character may be conferred by resolution or ordinance. (Case, page 5, line 4.)

A copy of the resolution thus presented appears. (Case, page 6, et seq.)

At a regular meeting of the City Council, held June 2, 1910, the resolution conferring the right to use the public highways of the city was duly passed, apparently without opposition. (Case, page 9, line 16.)

The resolution had been theretofore discussed at three other meetings, and considered by a committee. (Case, page 5.)

At the same meeting, it was resolved that an agreement, submitted by the prosecutor, be approved as read, and that it be duly executed in duplicate under the corporate seal of the city, and signed by the Mayor and President of Common Council, and attested by the City Clerk, upon its due and legal execution by the proper officers of the company, and that a copy be filed with the City Clerk and spread upon the minutes. (Case, page 9, line 17.)

The regular meeting of Council then adjourned to June 16, 1910. (Case, page 9, line 31.)

The agreement here referred to is Exhibit 4. (Case, page 25.)

It appears by the testimony of Mr. Davis that on the 2nd of June, 1910, at which time the resolution was adopted, he requested the Council to fix a time when they would consider plans to be presented to the City Council, in accordance with the first section of the resolution then adopted, and the Council then adjourned until June 16th, at which time they would take up the plans. The minutes, as attached to the return, are silent as to the object of the adjournment. (Case, page 9, line 31.)

This omission, however, is supplied by the testimony of Mr. Davis. (Case, page 37, line 7.)

On June 16, 1910, Mr. Davis was present, and, just

before the meeting was called to order, he handed to the City Clerk an acceptance of the resolution, executed by the executive officers of the prosecutor under date of June 10, 1910. (Case, page 37, line 30, et seq.)

This acceptance is dated June 10, 1910, and appears as Exhibit 2 attached to the stipulation of facts, (Case, page 21, line 24); the bond is dated the same day, also executed by the prosecutor, and appears as Exhibit 3. (Case, page 22, line 28.)

After the meeting convened, the City Clerk read the bond and acceptance, and a motion was made, seconded and carried that they be filed. (Case, page 38, line 7.)

Then Mr. Davis presented an agreement, which was required to be executed according to the terms of the second resolution passed June 2, 1900. (Case, page 38, line 8.)

This agreement had been then executed by the prosecutor under its corporate seal.

Davis also presented plans covering the proposed construction of underground conduits, and asked to have the same approved. (Case, page 38, line 9.)

The Clerk took the agreement, and it has ever since been retained by the city officers. This appears by the testimony of Mr. Davis. (Case, page 38, line 22.)

The minutes are silent as to the presentation of the contract executed on the part of the prosecutor, but it is quite evident that such paper was presented, because, immediately following the reference to the submission of plans, the Mayor of the city was given the privilege of the floor, and he stated that he would not sign the papers unless compelled to. (Case, page 10, line 9.)

The contract, which is Exhibit 4, was the only

paper which was required to be executed by the city officers.

Based upon the objection of the Mayor, one of the members of Council moved to reconsider the vote on the resolution of the prosecutor, and the vote stood four for reconsideration and two against. A vote of the adoption or rejection of the main resolution was then laid over until the next stated meeting and Council adjourned to June 30, 1910. (Case, page 10, line 13.)

On June 30, 1910, the minutes of the adjourned meeting show that Mr. Fish offered the following resolution: "Be it resolved that the agreement submitted at this meeting by the Delaware and Atlantic Telegraph and Telephone Company be and the same is hereby approved as read, and it is ordered that the agreement be duly executed in duplicate under the corporate seal of the city, and signed by the Mayor and President of Common Council, upon its due and legal execution by the proper officers of the company, and that a copy be filed with the City Clerk, and also spread upon the minutes and was adopted be reconsidered," which resolution was regularly adopted. (Case, page 10, line 30.)

It is evident that the Council, by this action, reconsidered the supplemental resolution approving the contract between the city and the prosecutor. The effect of this was to have both resolutions adopted June 2, 1910, reconsidered and rescinded, and restore the status which existed before any action was taken upon either.

Further action on the resolution relating to the contract was postponed until the next stated meeting. (Case, page 11, line 6.)

By this proceeding, both resolutions were rescinded to come up for consideration at the next stated meeting.

On July 7, 1910, the next stated meeting was held, and a motion was made to require the proper officers to execute, on behalf of the city, the said agreement with the prosecutor, which had been filed, and was then in the possession of the City Clerk. This resolution was lost. A motion was also made to pass the resolution theretofore adopted and reconsidered, conferring rights and privileges on the prosecutor, which motion was also lost. A motion was then made to refer to the ordinance and printing committee the agreement or ordinance between the prosecutor and the city, which was carried. (Case, page 11, line 16.)

On August 4, 1910, the next stated meeting was held, at which was presented a communication dated August 4, 1910, from the prosecutor, reciting in detail the situation of affairs, and insisting that the plans be approved, because the company had complied with all the terms and conditions of the two resolutions, and the city had no power or authority to reconsider and rescind such resolutions. (Exhibit 7, case, page 29, et seq.) This communication, as well as further consideration of the matter, was referred to the committee of ordinance and printing. (Case, page 12, line 16.)

On June 2, 1910, the day when the resolutions referred to were originally adopted, Mr. Cogswell, the Solicitor of the city, presented to the prosecutor a bill for \$25 for legal services in connection with the preparation and drawing of the resolution and agreement, which was to be paid in accordance with section 10 of the said main resolution. The prosecutor paid this bill to Mr. Cogswell on June 20, 1910. (Case, page 17, line 27.)

No written notice was given to the prosecutor, that it was intended on June 16, 1910, to rescind or reconsider, the resolutions which had been adopted on

June 2, 1910, neither was it intimated in any way to the prosecutor that such action was contemplated, until the resolution was submitted and adopted. (Case, page 18, line 1.) (Case, page 38, line 28.)

On October 7, 1911, the City Council passed a resolution (Exhibit 5 attached to the stipulation of facts) reciting that the lines, wires and cables of the prosecutor were in bad condition, hanging down in the streets, and were a danger and menace to persons using the highways, and requiring the City Clerk to notify the prosecutor to repair the property at once. (Case, page 27, line 30.)

It appears from paragraph 9 of the stipulated facts, that when the prosecutor, in the latter part of 1911, began to comply with the requirements of said resolution, and, in addition thereto, attempted to exercise the privileges conferred by resolutions passed June 2, 1910, by installing a cable instead of open wires, the city prevented any work from being done, and claimed that the latter resolution was not in effect, because the passage thereof had been reconsidered and rescinded. (Case, page 18, line 10.)

On April 3, 1912, the attorney of the prosecutor addressed a communication to the City Solicitor, which is attached to the stipulation of facts as Exhibit 6. (Case, page 28.)

The suggestion is made in this communication that the prosecutor undertake the work of repair, and, in addition thereto, exercise the privileges under the franchise resolution of 1910, and that the city, by injunction, attempt to restrain the work, in order to have the controversy settled.

On April 4, 1912, in response to such communication, the City Council passed a resolution which is incorporated in paragraph 11 of the stipulated facts, (case, page 18, line 28), advising the prosecutor that

no steps would be taken to enjoin the company as suggested in the letter, but that the police committee would be instructed not to permit the company to erect or place any additional wires or poles until the company had entered into a satisfactory contract or agreement with the city.

On April 18, 1912, the writ of certiorari was issued removing the two resolutions passed June 16, 1910. The writ itself refers to the resolutions of July 7, 1910. This is a mistake, and the error has been corrected by stipulation between the parties. (Case, page 3.)

STATEMENT OF LAW.

Upon these facts, which are either admitted or not seriously disputed, the prosecutor contended in the court below that the action of the City Council, in reconsidering or rescinding the two resolutions conferring rights to the prosecutor, must be set aside for several reasons.

FIRST.

Before the rescinding action was taken, an executed contract between the prosecutor and the city had been effectuated.

After the resolutions of June 2d were adopted, and before they were reconsidered, the prosecutor complied in every particular with the requirements of said resolutions by accepting the same, furnishing a bond in accordance with the provisions thereof, and executing, on its part, the contract referred to in the second one passed.

It also incurred an indebtedness to the City Solicitor of \$25, which was subsequently paid, although the bill was rendered before the rescinding action was taken.

The passage of the franchise resolution, the acceptance in writing of the terms thereof by the prosecutor, and filing thereof with the City Council, the filing and approval of the bond given in pursuance thereto, and the approval of the contract referred to in the latter resolution, amounted to a contract between the prosecutor and the city, which could not be abrogated or rescinded without the consent of both parties.

The incidents as to a valid contract with a municipal corporation are the same as with individuals.

20 *Am. & Eng. Enc.*, 2nd Ed., page 1156, § 5.

In the case of *Wharton vs. Stoughton*, 35 *Eq.* 266, the Court of Appeals of this State lays down this rule:

“The fact that parties negotiating a contract, contemplated that a formal agreement should be prepared and signed, is some evidence that they did not intend to bind themselves until the agreement was reduced to writing and signed. But, nevertheless, it is always a question of fact, depending upon the circumstances of the particular case, whether the parties had not completed their negotiations and concluded a contract definite and complete in all its terms, which they intended should be binding upon them, and which for greater certainty or to answer some requirement of the law they defined to have expressed in a formal written agreement.”

Parties may, without signing a written agreement, be bound by its terms, if they recognize and adopt its stipulations.

Marshall vs. Hann, 17 L. 425.

Our Court of Appeals also held, in *Commonwealth Insurance Company vs. Hallock*, 27 L. 645, that the acceptance of a proposition to insure completed a contract between the parties.

A franchise of this character, granted to a private corporation, and accepted and acted upon, is a contract within the meaning of the constitution of the United States, which declares that no State shall make any law impairing the obligation of contracts.

Dartmoth vs. Woodward, 4 *Wheat*. 518.

In *Capitol City, etc., Company vs. Des Moines*, 132 *W. Rep.*, 188, it was held that the approval of a contract and bond by Common Council created a contract.

From these authorities, it is perfectly manifest that the minds, so to speak, of the municipality and the prosecutor met when the franchise resolution was adopted, and its terms accepted by the document executed under the seal of the corporation, and received and filed by the former. Nothing further was required to be done. If the same condition of affairs existed with reference to individuals, it could not, in the slightest degree, be successfully urged that a valid contract had not been completed.

Furthermore, the same situation exists with relation to the second resolution. A written contract was presented to the municipal body and its form approved, and the municipal officers were directed

to execute the same when it was received in an executed condition from the prosecutor. This occurred before there was any suggestion that the former action of the municipal body should be reconsidered.

SECOND.

The prosecutor had no notice of the contemplated reconsideration.

The action of the City Council was entirely nugatory, because the prosecutor was not given any notice that it was proposed, on the part of the city, to rescind or reconsider the resolution theretofore adopted.

Am. Malleables Co. vs. Bloomfield, 83 L. 728;

Cape May, &c., vs. R. R. Company, 60 L. 224;

United Elec. Co. vs. Bayonne, 73 L. 410;

Railroad Co. vs. Jersey City, 72 L. 233.

THIRD.

The municipal body was without power or authority to pass the rescinding resolutions.

The power to rescind the resolutions became exhausted when final action was taken thereon, and the meeting adjourned without any suggestion that further consideration thereof was intended. The filing and acceptance of the paper signed by the prosecutor agreeing to the resolution, and filing the bond, completed the transaction so far as the parties were concerned, and no power whatever existed for one party

to reconsider its action, which had thus created a completed arrangement.

The decisions in New Jersey upon the question of reconsideration begin with *State vs. Foster*, 7 Law 101, where it was held that all deliberate bodies have the right to reconsider their proceedings as often as they think proper, and it is the final result only which is to be regarded as the thing done.

The Court of Appeals, in *Shreve vs. Crosley*, 36 Law 425, held that commissioners of appeal, in case of taxation, have a right to reconsider their opinion until such opinion has been officially promulgated by them.

The facts of this case show that the plaintiff presented an appeal to the commissioners to have a deduction allowed for debts; afterwards, and on the last day of their sitting, the plaintiff's attorney called the commissioners' attention to the appeal. The commissioners, after consulting with each other, determined to make the deduction of debts, and, without announcing their intention, marked privately such an allowance on a sheet of paper, which contained memoranda relating to other appeals; and, in the afternoon of the same day, they reconsidered the subject and allowed the assessment to stand in its original form, excluding the deduction claimed. Chief Justice Beasley, in considering the legal result from such facts, uses this language:

“This course of proceeding seems to me objectionable. All bodies, possessing a judicial capacity, have the competency to consult, resolve and reconsider, and they are not bound by their conclusions until such conclusions have been promulgated by their authority. In the present instance there was nothing to prevent the further action of the

“board but an unannounced opinion, formed while in private consultation. It is true that the agent of the prosecutors testifies that one of the commissioners told him that the board had determined to make the deduction which was claimed. But it is not pretended that such information was communicated to him while he was before the board, or by their authority. It does not even appear when or where this intelligence was conveyed. A single member could not bind the board by an unauthorized intimation of its purpose. Under the circumstances I see nothing wrong or illegal in the act of the commissioners in changing their views before such views had been officially announced or made known by them.”

The promulgation in the case under consideration, consisting of an adjournment for the purpose of receiving plans, to be submitted in accordance with the resolutions theretofore adopted, and, at the adjourned meeting, the acceptance of the consent of the prosecutor to be bound by the terms of the main resolution and the filing and approval of the bond and the supplemental contract.

The concluding sentence of the opinion of Chief Justice Beasley, in the authority last mentioned, would seem to support the proposition that the mere announcement of the passage of the resolutions, irrespective of any other act, would be a final promulgation of their action.

Later, the Supreme Court, in the case of *Whitney vs. Van Buskirk*, 40 *Law* 463, approved the rule above stated, and held that the right to reconsider existed until, by final vote, accepted as such by itself,

a conclusion is reached. It was there held that such final action is shown by an adjournment thereof, the public promulgation of its action, or any subsequent proceedings inconsistent with a purpose to review.

This seems to be the general view, not only recognized in the Courts of Law, but by rules regulating the deliberations of parliamentary bodies. The right to reconsider exists until the body, by some act on its part, reaches a final determination.

2 *McQuillin Mun. Corp.*, § 612.

The Supreme Court, in *Davidson vs. Shivers*, 41 *Law* 505, held that an assessor had a right to revise his opinion as to values, deductions and other matters involved in the assessment, until his determination, as to the amount of tax to be levied against the individual, is officially entered in his tax book.

Mr. Justice Dixon, in this case, cites with approval *Shreve vs. Crosley*, and holds that until the assessor had officially announced his determination and entered the same, he had judicial control of the whole subject, and could reconsider any matter involved in his final judgment. This opinion supports the proposition that after the determination is officially announced, it is unalterable.

We submit that the successive acts of the municipal body of the City Council of Beverly, after the passage of the two resolutions, constituted official announcement of the final determination of their previous action.

The Court of Appeals, in *Gulnac vs. Freeholders of Bergen*, 74 *Law* 543, holds that the right of a deliberative body to reconsider its action, in a matter of judicial or quasi judicial character, ceases when a final determination has been reached, and that by the

facts of that particular case, such determination is final as soon, at least, as the existence of the body ends. The facts of this decision show that a resolution was passed in December, and an attempt was made to reconsider the same, after a new board was organized, on January 1st.

Mr. Justice Swayze held, that as the body passing the original resolution ended on the first of the year, no power existed thereafter to reconsider such action.

Judge Green filed an opinion concurring in the affirmance of the judgment, but he reached this result by a line of reasoning different from that pursued in the prevailing opinion. The views expressed in such concurrent opinion support the contention which is now being advanced on behalf of the prosecutor in this case. The rule is there stated that any step taken by the municipal body, based upon its prior action, should be construed as a finality, to place the matter beyond the reach of the body by way of subsequent review.

The following quotation, from the opinion of Judge Green, is pertinent upon this question:

“It is, I think, within the doctrine of the
“foregoing cases, taken together, to hold that
“when, after the adoption of the resolutions
“of the first Monday of December, A. D. 1905,
“the next orderly step in the business of pro-
“viding a court house and county buildings,
“furnished and ready for occupancy, was tak-
“en, with the participation or acquiescence of
“the Board of Freeholders, unaffected by
“fraud, the matter passed beyond the reach
“of the board by way of subsequent review.
“Under the statutes of 1901 and 1902 already
“referred to, the next orderly step, after the

“adoption of the resolutions, was the appointment by the director of two members of the Board of Freeholders to constitute, with him, the county building committee. No fraud in the proceedings being alleged, and no objection being interposed, such appointment, publicly made, marked the end of the space and time for reconsideration.”

It might be added that the opinion in the case last mentioned is subsequent to that of *Stiles vs. Lambertville*, hereafter referred to.

It will be observed that the prevailing opinion does not consider any question except the one based upon the ending of the municipal body at the close of the year. Of course, that situation creates a condition when there can be no question that the municipal action, theretofore taken, has reached a final stage. We submit, however, that other matters and things may occur before the end of the existence of the municipal body, and even prior to the end of the meeting at which the action be taken, to indicate conclusively that final determination has been reached and a promulgation made. Under such circumstances, it is the result only which is the act of the body.

It was contended by the city that its Council had the authority to reconsider the resolutions passed June 2, 1910, because the meeting held on that day did not come to a legal end, but was adjourned until June 16th, when the rescinding action was taken. This might be the construction to be put upon the conduct of the parties, if it were not for the fact that the municipal body did take final action upon the resolutions under consideration at the former meeting. If the question had merely been left open, with

a view of some subsequent action, then it could probably be argued, with much force, that the right to reconsider continued until the legal termination of the meeting at which the action was taken; but this situation is not present. There had been a promulgation of the action by an adjournment to consider plans, and the acceptance, subsequently, of the prosecutor's consent to the resolution, and by filing its agreement and bond.

So far as the franchise resolution was concerned, the adoption by Council was a final and conclusive act, and nothing remained to be done to complete a valid contract based thereon, except the formal acceptance by the prosecutor. This was presented to and filed by the municipal body before it was even suggested that the resolution would be reconsidered. This amounted to a promulgation, so to speak, of the action taken by the municipal body, and created contractual rights in favor of the prosecutor, which could not be taken away without its consent, nor, at least, in the absence of notice and hearing.

Furthermore, the adjournment of the meeting was at the request of the prosecutor, for the purpose of permitting it to present its acceptance and have its plans approved. This action was certainly inconsistent with a purpose on the part of the municipal body to hold the matter in abeyance for review of what had already occurred.

The passage of the second resolution, authorizing the execution of the contract, the acceptance of the bond, and the filing of all the papers with the proper municipal officer, all done before it was suggested that the previous action would be reconsidered, indicate, so far as the municipal body was concerned, that by the passage of the resolution it was intended to take final action upon the question then under consideration.

The rendering of the bill for \$25, and the payment of the same, is also evidence that it was not thought nor suggested by any of the parties that the adoption of the ordinance was other than a final action.

The opinion of Mr. Justice Voorhees affirming the municipal action (case, page 43, et seq.), is based solely on the case of *Stiles vs. Lambertville*, 73 Law 90. We submit, however, that the facts in that case are materially different from the one under consideration, and the conclusion reached is not at all dispositive of the question here presented.

In the opinion in the *Stiles* case, Mr. Justice Dixon affirms the proposition contained in the cases of *State vs. Foster* and *Whitney vs. Van Buskirk*, but holds that the appointment of a member of the Excise Board is not such a final determination as would prevent a reconsideration of such election at an adjourned meeting. The opinion shows that the relator was appointed at a meeting held August 7, 1905, but, before the appointment was made, the City Council had resolved that when they adjourned they would adjourn to meet on August 14th. When the body reassembled on the latter date, a motion was made to reconsider the vote by which the relator had been appointed, and the motion then prevailed, and the matter of the appointment was laid over for one month. The Act of 1902, conferring power upon the Council to appoint a member of the Excise Board provided that such member should give bond as required by ordinance, and that such ordinance required each person appointed to take an oath and give bond to be approved by Council. The relator took the required oath on August 8th, and, on August 14th, when Council met, he tendered a bond which was refused, because of the reconsideration above stated. It will be observed that, in the recital of the

above facts, it does not appear that the municipal body did any act to indicate that it considered the appointment of the relator as a final determination. It could not be final until the bond of the relator was approved; neither had the City Council done anything inconsistent with a purpose to consider the action final.

There is present, in the Stiles case, a fact which may have influenced the Court in reaching the conclusion announced. A rule of Council existed, providing that when a motion or resolution had been carried, it should be in order for any member voting with the majority to move for a reconsideration at the same meeting. Any action taken by the body would be subject to this rule, and reconsideration might occur, regardless of the character of such action. There could not be a final determination of any matter until the end of the meeting at which it was considered, unless the rule be suspended.

It is stipulated, in the case under consideration, that Beverly City Council never adopted any rule prescribing the time within which motions, to rescind or reconsider, should be made. (Case, page 19, line 27.)

Under the facts as stated in the Stiles case, there was no promulgation or official announcement of the previous action of Council, which was subsequently reconsidered. In the absence of such a situation, the opinion is properly silent upon the effect of a promulgation, if one had been made.

It is contended, therefore, that the opinion in this case does not control the question under discussion. At least, the doctrine has never been affirmed by the Court of Appeals of this State, and, consequently, the question is novel, and, for the first time, here presented for determination. In the case under con-

sideration, however, everything that Council did evinced an intention to make the passage of the two resolutions a final determination of the questions then being passed upon.

It certainly cannot be successfully argued that if the acceptance and bond were presented at the same meeting, immediately after the resolutions had been adopted, that the Council could, at an adjourned meeting, rescind the action previously taken. This question is to be determined by the finality of the municipal action, or what the municipal body itself understood was to be result of its action; and there is nothing in the record or testimony to show that the Council had any notion that it possessed the power to reconsider or rescind its action, merely because the meeting was adjourned to some subsequent date. That the Council so considered their action as final, is shown by the presentation of the acceptance, and the action of the body directing that it be filed, and also the filing and approval of the bond and accompanying contract. How was it possible to more effectually promulgate its action? It was a public declaration that the body had reached a final determination of the matter under consideration.

In this case, there was involved more than public interests. The rights of the prosecutor necessarily must be recognized, and the prosecutor could not, in this way, have its privileges ruthlessly rescinded.

As an example of what the Courts consider to be final action, see *State vs. Phillips*, 79 Maine 506, where it was held that the election of an assessor by a board of aldermen, at a legal meeting, cannot be reconsidered at an adjourned session, and another person elected in his place.

FOURTH.

It was argued in the court below, although no reference thereof appears in the opinion of Mr. Justice Voorhees, that the testimony of Mr. Davis was incompetent to show that the City Council did, by appropriate action, approve the acceptance of the prosecutor, and direct its filing on June 16, 1910. The general rule is stated in *McQuillin Municipal Corporations*, Vol. 2, page 1378, which seems to permit the introduction of parole evidence to, at least, show that the body took some action which is not contained in the recorded minutes.

In support of this rule, we desire to call the Court's attention to the following cases:

Bigelow vs. Perth Amboy, 25 *Law* 297;

Dyer vs. Brogan, 70 *Cal.* 136;

Bridgeford vs. Tuscumbia, 16 *Fed.* 910;

Ross vs. Madison, 1 *Ind.* 281.

The theory upon which the Courts permit testimony *aliunde*, is that the rights of creditors and third persons cannot be prejudiced or destroyed by the neglect of corporate officers to keep a proper record.

It will be observed that the evidence given by Mr. Davis, upon these points, was not contradicted. The written minutes are silent to show the entire action taken by the municipal body. The inference must be that when the prosecutor presented its acceptance of the main ordinance, some action by the body was taken thereon. The fact that it was read by the Clerk of the Council and retained by him, is presumptive evidence, at least, that a consent was given to its filing, irrespective of any other fact and evidence.

The same situation exists with reference to the bond and the supplemental contract, and we submit that it cannot be found that these documents were not accepted by and filed with Council.

For the reasons above stated, we submit that the judgment of the Supreme Court should be reversed, and the rescinding resolutions, removed by the writ of certiorari, be set aside and vacated.

LEWIS STARR,
Of Counsel with Appellant.

NEW JERSEY
COURT OF ERRORS AND APPEALS.

THE DELAWARE AND ATLANTIC TELEGRAPH AND TELEPHONE COMPANY,

Prosecutor-Appellant,

vs.

THE MAYOR AND COUNCIL OF THE CITY OF BEVERLY,

Respondent-Appellee.

ON CERTIORARI.

BRIEF OF RESPONDENT-APPELLEE.

1. The respondent, the City of Beverly, is a municipality of the State of New Jersey, incorporated by virtue of the provisions of an act of the legislature entitled, "An Act to Incorporate the City of Beverly," approved March 20th, 1857. In pursuance of the provisions of an act of the Legislature entitled, "An Act Concerning the Corporate Title of Cities," approved April 22, 1911, its name was duly changed July 24th, 1911, to the "City of Beverly." The Mayor and nine Councilmen constituted the Common Council of the City, (Board of Commissioners now). The Mayor had a casting vote only. A majority of the whole number of members is a

quorum to transact business and Common Council elects one of its own members as president, and in case of his absence, appoints one other member present, chairman *pro tem*. *Laws 1875, page 406*. The president of Common Council may vote on any and all measures, resolutions, ordinances and applications, *Laws 1889, page 380*.

2. It is contended that the Common Council was without power or jurisdiction to reconsider its vote on the appellant's resolution. From the minutes of the Common Council, it appears that the resolution in question was passed at a regular stated meeting of the Common Council, June 2nd, 1910, and that said meeting was duly adjourned to meet June 16th, 1910, at 8 o'clock and at this adjourned meeting, after debate, one of the Councilmen moved to reconsider the vote on the resolution of the prosecutor, upon which motion a yea and nay vote was taken and the motion to reconsider was carried; after which, it was moved that the vote on the prosecutor's original resolution be laid over until the next stated meeting, after which the meeting duly adjourned to meet June 30th, 1910.

At the adjourned meeting, June 30th, 1910, it was moved and adopted that the resolution of the prosecutor be reconsidered and that further action be postponed until the next stated meeting.

At the next regular stated meeting of Common Council, held July 7th, 1910, it was moved that the resolutions be adopted; but although considered separately, upon a vote of the members were lost, and further action was referred to the City Solicitor and the Ordinance and Printing Committee of Council.

In *Stiles vs. Lambertville*, 73 N. J. L. 90; 62 Atl.

288, the Supreme Court held that a deliberative assembly may lawfully reconsider and annul a vote previously taken at the same meeting, and that the session of the deliberative assembly, which is held in pursuance of a special motion adopted at a regular meeting, to adjourn the meeting to a fixed time, is a continuation of the regular meeting, and at such session the assembly can do anything that it could have done at the earlier session.

See also *Cushing's Manual of Parliamentary Practice, New Edition, 1886, Section 255, and Section 256, as follows:*

255. It has now come to be a common practice in all our deliberative assemblies, and may consequently be considered as a principle of the common parliamentary law of this country, to reconsider a vote already passed, whether affirmatively or negatively.

256. For this purpose, a motion is made and seconded, in the usual manner, that such a vote be reconsidered; and if this motion prevails, the matter stands before the assembly in precisely the same state and condition, and the same questions are to be put in relation to it, as if the vote reconsidered had never been passed. Thus, if any amendment by inserting words is moved and rejected, the same amendment cannot be moved again; but, the assembly may reconsider the vote by which it was rejected, and then the question will recur on the amendment, precisely as if the former vote had never been passed.

* * * * *

The prosecutor's contract was not executed by the officers of the City, and no performance of the contract had been begun by the prosecutor, before the reconsideration of the resolutions and their subsequent loss on the vote.

Before any action is taken by the other party under a contractual measure the body may rescind its action thereon.

Red vs. Augusta, 25 Ga. 386, cited from 28 Cyc. 340.

3. The prosecutor attempted by parol evidence to vary the minutes of Common Council by adding thereto. See depositions of Charles Sumner Davis, (bottom page 3). Omission in the record cannot be supplied by parol evidence.

Cook vs. Manasquan, 76 Atl. 310.

4. The prosecutor's agent, Mr. Davis, was in attendance at the meeting of the Common Council, and therefore, it was not necessary to give notice of an intention to reconsider said resolutions. The City Solicitor was not paid the twenty-five dollars, as required by the terms of the prosecutor's resolution until June 20th, 1910, after the making of the motion to reconsider, of which the company had notice, because their agent, Mr. Davis, who was attending to this matter for the company, was present when the motion to reconsider was made and passed.

It is respectfully submitted that the judgment of the Supreme Court should be affirmed.

G. DORE' COGSWELL,

Of Counsel with Appellee.

