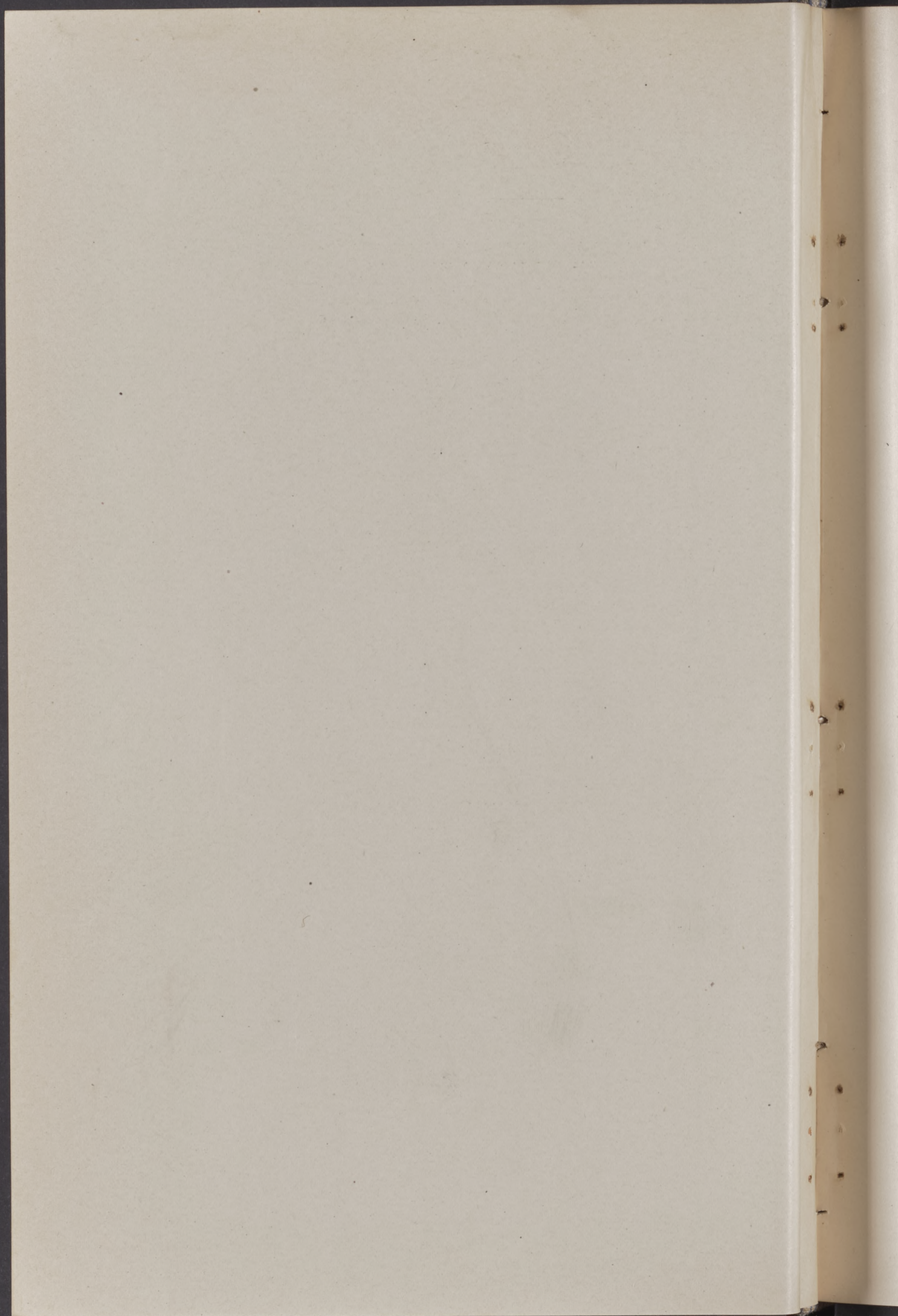


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NEW JERSEY

Court of Errors and Appeals

THE PEOPLE'S WATER COMPANY OF MILLVILLE, NEW JERSEY, <i>Complainant-Respondent,</i> <i>vs.</i> CITY OF MILLVILLE, <i>Defendant-Appellant.</i>	} On Bill for Specific Performance. } On Appeal from Chancery.
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10

COMPLAINT.

(Filed May 13, 1922.)

IN CHANCERY OF NEW JERSEY.

To His Honor, Edwin Robert Walker, Chancellor of the State of New Jersey:

The Complainant, People's Water Company of Millville, New Jersey, a corporation of the State of New Jersey, complains and says:

1. It is a corporation duly organized under the laws of the State of New Jersey and has exercised the functions and franchises of a public water company, supplying water for public and private use in the City of Millville and County of Cumberland.

2. On July 21, 1920, complainant made a proposal in writing to the City of Millville, the defendant herein, of which proposal a true copy is attached hereto as

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Exhibit A and as part of this Bill. In which proposal complainant offered to sell its entire plant to the defendant for the sum of \$125,000.00, clear of all incumbrances, to waive all claim for water rent in excess of \$10,000.00 yearly payments made by the City, to the time of settlement. All taxes due from complainant to defendant to be cancelled, the proposed purchase to be placed before the voters of the defendant at the fall election in November, 1920, and in said proposal it
10 was further provided that settlement be made on or before January 1, 1921.

3. The defendant, acting by its regularly constituted authority, its Board of Commissioners, by resolution adopted August 27, 1920, No. 360, of which resolution a copy is hereto attached as *Exhibit B* and as part of this Bill, resolved to submit said proposition of purchase to the voters at the November election of 1920.

4. At such election the adoption of the resolution approving of the purchase was submitted to the voters
20 of the defendant municipality. Said election resulted in the adoption of the said resolution.

5. Notice of the approval of the proposition was given by said defendant to complainant and the time of settlement was fixed for December 31, 1920.

6. Prior to which time the complainant procured the cancellation of an existing mortgage upon its property and of the bonds issued thereunder and made entire arrangements for the settlement.

7. On December 30, 1920, a writ of certiorari was
30 issued out of the Supreme Court of the State of New Jersey, bringing before said Court for review, the contract and agreement between the parties at the suit of William P. Adams et al., Prosecutors. On June 8, 1921, the Supreme Court of New Jersey filed its opinion affirming said contract as a legal and binding contract, dismissing said writ. The order dismissing same being filed in said Court June 15, 1921.

8. The Prosecutors appealed from the decision of the Supreme Court to the Court of Errors and Appeals,

which Court in February, 1922, filed its opinion sustaining said contract and dismissing the appeal, the remittitur being filed in the Clerk's Office in said month.

9. Pending the proceedings above set forth, the complainant continued to operate its plant and to furnish water to the City of Millville, which is its sole customer and has continued so to do up to the present time.

10. On May 19, 1921, Complainant served upon Defendant a sworn bill for \$5,000.00 to the Defendant, to which was attached a statement as the basis of the claim, 10 which recited, *inter alia*:

"Whereas the consummation of the contract on or before January 1, 1921, was delayed owing to an action now pending in the Supreme Court, and

Whereas because of said delay the Water Company has been without the use of the purchase price since January 1, 1921, and in addition has been paying the cost of operation of the plant since said date, the aggregate amount of interest on the purchase price and the operating expenses, exclusive of taxes, since January 1, 1921, amounting to a sum in excess of five thousand dollars (\$5,000.00), and 20

Whereas said Water Company, in view of its contract with the City, settlement under which was to have been made on or before January 1, 1921, and settlement as of which date will be made under the terms of contract, if and when the litigation now pending, or any other litigation which may hereafter be instituted shall result favorably to the City, the said Water Company is in the position of operating the plant from and after January 1, 1921, in the interest of the City, which is chargeable with interest on the purchase price, and operating expenses since said date, and 30

Whereas, if said litigation result in a determination that said contract of purchase is invalid, then there would be due to the People's Water

Company from the City of Millville, for water supplied since November 1, 1920, under the terms of the contract entered into under Ordinance No. 73 of the City, a sum in excess of \$5,000.00:

10 Therefore, in view of the foregoing, the People's Water Company respectfully requests the City of Millville to pay to it, on account, the sum of five thousand dollars without deduction for delinquent taxes, waiver of which is to be included in the agreed purchase price of the water plant, if the pending litigation be decided in favor of the City.

The attached bill is sworn to on the basis of the foregoing explanation, which is made a part of the claim."

A copy of the sworn bill is attached as "*Exhibit D*" and part of this Bill, and a copy of the attached statement is attached hereto as "*Exhibit E*" and part of this
20 Bill. Whereupon the Board of Commissioners of said defendant approved said bill and paid same by check accompanied by a letter which set forth that the check was in payment of the sworn Bill and statement, a copy of which letter is attached hereto as "*Exhibit F*" and part of this Bill.

11. Subsequently, on similar sworn bills, to each of which a statement similar in all respects to *Exhibit E*, excepting that they omitted the last paragraph relating to extensions, was attached, said City paid to Com-
30 plainant sums aggregating \$7,500.00, accompanying each remittance by letters similar to *Exhibit F*.

12. During the Summer of 1921, owing to contemplated permanent paving of certain streets in the City of Millville, it became necessary, in order that the public might be supplied with water, to install a large number of house connections. The City of Millville, defendant, accordingly, by Resolution of May 20, 1921, authorized and directed the Complainant Water Company to install such extensions and connections and

agreed to reimburse said Complainant therefor. A copy of this resolution is hereto attached as "*Exhibit G*," and part of this Bill. This resolution was held void in certiorari proceedings by the Supreme Court of New Jersey, on the ground that it appropriated money without having been laid over for the Statutory period, but such decision in no wise absolves the defendant from liability to pay said Complainant for the moneys so expended by it for the use of the City and upon the City's property.

10

13. On March 3, 1922, Complainant attended a meeting of the Board of Commissioners of said defendant, at Millville, and tendered to it a deed duly executed as required by law, conveying to said City the entire plant of Complainant as called for in said agreement of sale. Accompanying this deed was a letter from the Complainant which requested the payment of the \$125,000.00 consideration named in said deed, and setting forth that in making such tender and demand the Complainant did not waive its claim for interest from January 1, 1921, nor for operating expenses in excess of the payments made by the City during the period from January 1, 1921, to the date of the tender, nor for the sum of \$6,265.55, with interest, being the sum advanced by the Complainant for necessary connections and extensions at the request of the City during the Summer of 1921, nor for the value of supplies on hand. A copy of which letter is hereto attached as "*Exhibit C*," and as part of this Bill. The Board of Commissioners of said Defendant then and there received and retained said deed and now hold the same.

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30

14. On March 4, 1922, it being brought to the attention of the Complainant that said deed had affixed to it only \$62.50 of Federal Documentary Stamps, Complainant applied on that day to the City Clerk of Defendant for leave to affix an additional sum of \$62.50 of such stamps to the deed. The City Clerk refused to permit same to be done, whereupon said stamps were

left by Complainant in his possession with the request that they be affixed and cancelled.

15. The Complainant shows that at the time of making such tender there was owing by the defendant to the Complainant under the contract of purchase the following sums as of February 28, 1922:

	Purchase price	\$125,000.00
	Interest thereon from January 1, 1921, to February 28, 1922	8,750.00
10	Operating expenses, January 1, 1921, to February 28, 1922 (including operating supplies on hand January 1, 1921, and since purchased) ..	17,780.55
	For water furnished before January 1, 1921	1,666.66
	Cost of installation of service pipes in Summer of 1921, as requested by City	6,265.55
20	Total	<u>\$159,462.76</u>

Cr.

Paid on account	<u>12,500.00</u>
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Balance due Complainant as of Feb- ruary 28, 1922	<u>\$146,962.76</u>
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the total of which was then rightfully due and should have been paid by defendant. Since March 3, 1922, the
30 City has refused to fulfill its contract in any way or to make any payments whatsoever on account thereof to Complainant, which has continued to operate the plant as agent for the defendant. That such action was imperative on the part of the Complainant owing to the refusal and neglect of the defendant to take over and operate the plant on March 3, 1922, or at any date thereafter, while to have closed down and to have ceased to furnish water for private use and for fire purposes would have been a public calamity.

16. Complainant since December 31, 1920, has always been, and is now, willing to perform everything required of it under its said contract with the defendant, and is now ready and willing so to do.

17. Complainant shows that it has fully and entirely performed its part of said contract, while defendant has utterly neglected to perform any part of its obligations thereunder excepting the small payments on account made during the years 1921 and 1922, and that the City has declined to make any payments whatever on 10 account since March 3, 1922.

Complainant therefore, being without adequate remedy at law, prays your Honorable Court as follows:

1. That defendant may be required to answer this Bill without oath.

2. That defendant may be ordered to specifically perform its agreement of purchase as set forth in this Bill, and to make settlement with the Complainant as of January 1, 1921, including in such settlement the various items of charge in this Bill set forth. 20

3. That an account may be taken under the direction of this Court as to what amount is due from defendant to the Complainant by reason of said agreement.

4. That defendant may be decreed to pay said sum so found forthwith.

5. That your Complainant may have such further and other relief as equity shall require.

And your orator will ever pray, etc.

JNO. D. McMULLIN,
Solicitor for and of Counsel with People's Water Company of Millville, 03
New Jersey, Complainant.

EXHIBIT "A."

PEOPLE'S WATER COMPANY OF MILLVILLE, N. J.

Office: 112 North Broad Street,
Second Floor.

Address all Communications
to the Company.

10 PHILADELPHIA, PA., July 21, 1920.

GENTLEMEN:

We beg to bring to your attention the fact that the conditions under which we are operating our plant in Millville are such that we can no longer continue to operate the plant for the income that we are now receiving. We have been hoping to avoid litigation, which would be expensive to both the City and this Company, and as it is our desire to close up our affairs in Millville in an amicable way, we offer to sell our
20 entire plant to the City for the sum of \$125,000.00, clear of all encumbrances, and if this offer is accepted, we will agree to waive all claims for water rent which we claim to be due in excess of the \$10,000.00 yearly payments you have been making. The balance which we claim is now due (as of May 1st, 1920,) is \$32,271.09. It would also be understood that any balance due by this Company for taxes at the date of settlement would be cancelled.

If your Board promptly takes such action as is necessary to place this matter before the Electors of the
30 City at the general election to be held on the First Tuesday in November next, and will agree that if said election is favorable to the purchase of our property at the price and upon the terms above mentioned, settlement to be made on or before January 1st, 1921, our Company will postpone such action as it had contemplated to correct the unfavorable conditions under which we are now operating.

We would appreciate hearing from you upon the above matter at your earliest convenience.

PEOPLE'S WATER COMPANY OF MILLVILLE, N. J.

W. H. ROTH, *Vice President.*

EXHIBIT "B."

Resolution Number 360.

Whereas, the People's Water Company of Millville, 10
New Jersey, has submitted to the City of Millville, an
offer or proposal in writing, in the works and figures
following, to wit:

PHILADELPHIA, PA., July 31, 1920.

*To the Board of Commissioners, of the City of
Millville, Millville, New Jersey.*

GENTLEMEN:

We beg to bring to your attention the fact that
the conditions under which we are operating 20
our plant in Millville are such that we can no
longer continue to operate the plant for the in-
come that we are now receiving. We have been
hoping to avoid litigation, which would be ex-
pensive to both the City and this company, and
as it is our desire to close up our affairs in Mill-
ville and in an amicable way, we offer to sell our
entire plant to the City for the sum of \$125,-
000.00, clear of all encumbrances, and if this
offer is accepted, we will agree to waive all 30
claims for water rent which we claim is now
due (as of May 1st, 1920,) is \$32,271.09. It
would also be understood that any balance due
by this Company for taxes at the date of set-
tlement would be cancelled.

If your Board promptly takes such action as
is necessary to place this matter before the
electors of the city at the general election to be
held on the First Tuesday in November next, and

will agree that if said election is favorable to the purchase of our property at the price and upon the terms mentioned, settlement to be made on or before January 1, 1921, our Company will postpone such action as it had contemplated to correct the unfavorable conditions under which we are now operating.

We would appreciate hearing from you upon the above matter at your earliest convenience.

10

Yours very truly

PEOPLE'S WATER COMPANY OF MILLVILLE,
N. J.

By W. H. ROTH, *Vice President.*

As by the said writing, this day ordered filed with the Clerk, reference being thereto, had, will appear:

And whereas this Board is of opinion that it is advantageous to the City to accept said offer, but deems it proper and fitting that a matter of such importance
20 ought be submitted to the legal voters for their rejection or approval, and such submission may be had with but small expense, to the City, therefore,

Resolved By the Board of Commissioners of the City of Millville:

1. That the City of Millville does accept the aforesaid offer of the People's Water Company of Millville, New Jersey, and the Mayor is authorized and directed to sign and deliver to said corporation, forthwith upon this Resolution becoming operative, a writing authenticated by the seal of the City, attested by the Clerk, accompanied by a copy of this Resolution, notifying said corporation that the City accepts its said offer or proposal.
30

2. In order to pay for said plant, bonds shall be issued under and pursuant to the provisions of Ordinance Number 145, entitled, "An Ordinance for the Acquisition by the City of Millville of all the real estate, personal property and works and all the corporate rights, powers, franchises and privileges of the People's Water Com-

pany of Millville, N. J.," adopted December 31, 1915 and the ordinances supplemental thereto and mandatory thereof.

3. The Board of Commissioners, of its own notion pursuant to the authority granted by Section 17 of the Walsh Act as amended (*Suppl. C. S. 1114*), does hereby submit this resolution to the Electors of the City for adopting or rejection at the next general election to be held November second, 1920. The Clerk is directed to certify to the County Clerk this resolution, to the end 10 that said officer may cause this measure to be submitted with any other Public Question to be voted upon in the City of Millville by printing in proper form to be placed on the ballot as provided by Article XIII of the General Election Law (*P. L. 1920, p. 682*), and the Board of County Canvassers is requested to certify the result of said election, with respect to the matters aforesaid as provided by Section 8 of Article XX of said Election Law (*P. L. 1920, page 732*).

4. For the information of voters, this resolution shall 20 be published by the City Clerk in one or more newspapers circulating in the City once in each week of October next, provided that the same shall be published therein daily except Sunday from October 25th to November 2d next, inclusive of said dates.

5. The provisions of this Resolution shall remain inoperative until and unless the Electors shall vote to adopt the same at the election to be held as aforesaid, and in case the same shall then be adopted the provisions thereof shall immediately be of full force and effect; 30 provided, that the provisions of sections three and four shall be effective immediately upon the adoption of this resolution by the Board of Commissioners.

Adopted August 27, 1920.

Mayor.

W. J. SIMMERMAN,
SAMUEL D. BENNETT,
WALTER S. KATES,
W. S. WHEATON,

Attest:

JOHN S. HORTON, *Clerk.*

Commissioners.

EXHIBIT "C."

March 3, 1922.

*The Board of Commissioners of the City of Millville,
New Jersey.*

GENTLEMEN:

The People's Water Company of Millville, New Jersey, herewith tenders to you its deed for its entire plant and property, exclusive of accounts receivable, cash
10 and operating supplies on hand.

Pursuant to the agreement of purchase existing between yourselves and us we have dated this deed January 1, 1921, and have named the consideration in the deed at the purchase price agreed to be paid as of that date, \$125,000.00, for which amount we now ask payment.

As we have advised you at various times, we contend that under our agreement for the sale of this plant settlement was to be made as of January 1, 1921, and that since that date we have operated on behalf of the
20 City. We, therefore, claim that in addition to the \$125,000.00, the consideration for the plant as of January 1, 1921, you are indebted to us as follows:

Interest on \$125,000.00 from January 1, 1921, to February 28, 1922	\$8,750.00
Operating Expenses, January 1, 1921, to February 28, 1922 (includes operating supplies on hand 1/1/21 since purchased),	17,780.55
On account of water from December, 1920,	1,666.66
30 Cost of installing service pipes at request of City	6,265.55
Total	\$34,462.76
<i>Less</i>	
Paid on account	12,500.00
Balance due Company as of February 28, 1922	\$21,962.76

to which is to be added interest until paid as well as interest on the item of laying service pipes which should be adjusted.

In tendering this deed and requesting payment of the consideration therein mentioned we expressly reserve our claim to receive from the City the items set forth in the paragraph immediately preceding, and reserve the right to take any proceeding for the collection of the same which we may deem appropriate.

Our reasons for the above claims have been fully explained to you in detail, and our accounts showing how the figures are arrived at are open to your inspection at any time which you may name, and we will be glad to furnish you with any details regarding same which you may wish.

Yours respectfully,

PEOPLE'S WATER COMPANY OF MILLVILLE,
NEW JERSEY.

W. H. ROTH, *Vice President.*

20

MILLVILLE, N. J., May 19, 1921.

The City of Millville,

To People's Water Company of Millville, N. J., Dr.
For services, labor and supplies furnished to the City and
chargeable against appropriation.

State of Pennsylvania }
County of Philadelphia }^{ss.}

W. H. Roth, Vice President, being duly sworn on his oath saith that the following bill is correct in all its particulars.

W. H. ROTH.

Sworn and subscribed before me this 19th day of May, A. D. 1921.

ERWIN LYNDALL,
Notary Public.
Comm. Exp. April 1st, 1928.

To moneys due at this date on account, as
per statement attached \$5,000.00

I, the undersigned Director of the Board of Commissioners of the City of Millville, have examined the above account, and endorse it as correct, having authorized the expenditure for the same, in conformity with the city ordinances, and the rules, regulations and resolutions of the Board of Commissioners for the use and benefit
10 of the City of Millville.

Director.

EXHIBIT "E."

Whereas, under date of July 31, 1920, the People's Water Company of Millville, N. J., in a proposition to the Board of Commissioners of the City of Millville, offered to sell said Company's entire plant to the City
20 for the sum of One Hundred and Twenty-five Thousand (\$125,000.00) Dollars, clear of all encumbrance and subject to certain other conditions more fully set out in said proposition, also subject to settlement being made on or before January 1st, 1921, provided the electors of the City, at the general election held on the first Tuesday in November, 1920, voted favorably upon the proposition to purchase said Company's property, and

Whereas the Board of Commissioners of the City of Millville, at a meeting held on August 27th, 1920,
30 adopted a resolution accepting the aforesaid offer of the People's Water Company of Millville, N. J., subject to the approval of the same by the electors at the general election held on November 2d, 1920, and

Whereas at said general election held on November 2d, 1920, the electors voted favorably upon said proposition to purchase the property of the Water Company, and

Whereas said Company's offer, the resolution of the Board of Commissioners of the City of Millville, and

the approval of the same at the general election on November 2d, 1920, constituted a contract, settlement under which was to have been made on or before January 1st, 1921, and

Whereas the consummation of this said contract on or before January 1st, 1921, was delayed owing to an action now pending in the Supreme Court, and

Whereas, because of said delay the Water Company has been without the use of the purchase price since January 1st, 1921, and in addition has been paying the 10 cost of operation of the plant since said date, the aggregate amount of interest on the purchase price and the operating expenses, exclusive of taxes, since January 1st, 1921, amounting to a sum in excess of Five Thousand (\$5,000.00) Dollars, and

Whereas, said Water Company, in view of its contract with the City, settlement under which was to have been made on or before January 1st, 1921, and settlement as of which date will be made under the terms of the contract, if and when the litigation now pending, 20 or any other litigation which may hereafter be instituted, shall result favorably to the City, the said Water Company is in the position of operating the plant from and after January 1st, 1921, in the interest of the City, which is chargeable with interest on the purchase price and operating expenses since said date, and

Whereas, if said litigation result in a determination that said contract of purchase is invalid, then there would be due to the People's Water Company from the City of Millville, for water supplied since November 1, 30 1920, under the terms of the contract entered into under Ordinance No. 73 of the City, a sum in excess of \$5,000.00.

Therefore, in view of the foregoing, the People's Water Company respectfully requests the City of Millville to pay to it, on account, the sum of Five Thousand Dollars without deduction for delinquent taxes, waiver of which is to be included in the agreed purchase price

of the water plant, if the pending litigation be decided in favor of the city.

The attached bill is sworn to on the basis of the foregoing explanation, which is made a part of the claim.

Said Water Company also requests that the Board of Commissioners of the City of Millville adopt a Resolution, and furnish certified copy thereof to the Water Company, to the effect that if any extensions of water mains, or other improvements to the plant, are installed
10 by the Water Company, at the request or with the approval of the Board of Commissioners, the cost of said extensions or improvements shall be added to the purchase price of the plant, and paid for by the City at the time of settlement for the plant, under the agreement of purchase, if the contract of purchase be adjudged valid, and if the contract of purchase be adjudged invalid, then the expense of said extensions and improvements shall be borne by the Water Company.

All of which is respectfully submitted by the People's
20 Water Company of Millville, N. J., to the Board of Commissioners of the City of Millville, N. J., this 19th day of May, A. D. 1921.

PEOPLE'S WATER COMPANY OF MILLVILLE, N. J.
(Signed) W. H. ROTH, *Vice President.*

EXHIBIT "F."

City of Millville, New Jersey
Office of City Commissioners

30

May 21, 1921.

People's Water Company, 112 N. Broad Street, Philadelphia, Pa.

GENTLEMEN:

Enclosed herewith please find order on the Treasurer of the City of Millville in the sum of Five Thousand Dollars, which is tendered in accordance with bill presented by your Mr. Roth to the Board of Commissioners of the City of Millville, at their regular meeting on Fri-

day, May 20th, 1921, and in conformity with agreement attached to said bill.

At the request of Mr. Roth, I also enclose certified copy of Resolution adopted by the Board at the meeting referred to.

Very truly yours,

J. S. HORTON,
City Clerk.

EXHIBIT "G."

10

Copy of Resolution No. 408.

Resolved, that if any extensions of water mains or other improvements to the plant of the People's Water Company are installed by the Water Company, at the request or approval of the Board of Commissioners, the cost of said extensions or improvements shall be added to the purchase price of the plant, and paid for by the City at the time of settlement for the plant, under the agreement of purchase, if the contract of purchase be adjudged valid, and if the contract of purchase be adjudged invalid, then the expenses of said extensions and improvements shall be borne by the Water Company. 20

Adopted May 20, 1921.

WALTER H. FELMEY, *Mayor.*

W. J. SIMMERMAN,

WALTER S. KATES,

W. FRED. WARE,

Attest:

Commissioners. 30

JOHN S. HORTON, *Clerk.*

IN CHANCERY OF NEW JERSEY.

BETWEEN THE PEOPLE'S WATER COMPANY OF MILLVILLE, NEW JERSEY, <i>Complainant.</i> AND THE CITY OF MILLVILLE, A COR- 10 PORATION, <i>Defendant.</i>	}	On Bill for Spe- cific Perform- ance.
--	---	---

ANSWER.

(Filed May 19, 1922.)

Answering the bill the defendant says:

1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11. Paragraphs one to
 20 eleven are admitted.

12. Paragraph twelve is admitted except the statement that the decision in the paragraph referred to in no wise absolves the defendant from liability to pay said complainant for the moneys so expended by it for the use of the City and upon the City's property, which statement is a recital of a conclusion of law, merely; and the defendant denies the validity of such conclusion of law, and leaves the determination of the same to the court.

13. Paragraph thirteen is admitted, except as to the
 30 charge contained in paragraph thirteen that the Board of Commissioners received and retained said deed and now hold the same. And in that behalf this defendant says that the deed was handed with a letter to the City Clerk in the presence of the Board of Commissioners, and that the City Clerk has retained said deed and still holds the same. Whether or not in law there was a delivery and acceptance of the deed this defendant submits to the court.

14. Paragraph fourteen is admitted.

15. Paragraph fifteen is denied. The defendant says that at the time of the making of the tender of the deed there was owing from the defendant to the complainant under the contract of purchase the sum of One Hundred Twenty-five Thousand Dollars (\$125,000.), without interest. And defendant says that interest was not chargeable on the purchase price because, by reason of the restraining effect of the writ of certorari in *Adams v. Millville*, referred to in paragraph seven, the complainant was restrained from conveying the property to the defendant until after the conclusion of the litigation, during all of which time the complainant had possession of the water plant and the rents, issues and profits thereof. And this defendant avers it would be contrary to the principles of equity to decree to the complainant interest on the purchase price during the period for which interest is claimed on said purchase price in paragraph fifteen of the bill. 10

Further answering paragraph fifteen the defendant says that it has no knowledge of operating expenses from January 1, 1921, to February 28, 1922 (including operating supplies on hand January 1, 1921, and since purchased), and leaves complainant to its proof regarding those items. But defendant says that it is not chargeable with said operating expenses, whatever the amount might have been nor is it entitled to the rents, issues and profits of the property. 20

Further answering paragraph fifteen defendant says that if it is chargeable with the value of the water furnished before January 21, 1921, in the sum of \$1,666.66, that said obligation of the City of Millville has no relevancy to the issues framed in the bill of complaint, and that such charge is not in any wise related to the specific performance prayed for in the bill. 30

Further answering paragraph fifteen this defendant admits the allegations contained in that paragraph as to cost of installation of pipes in the summer of 1921, as requested by the City, \$6,265.55; but because of the judgment of the Supreme Court that the contract for the

cost of installation of service pipes was unlawful the defendant cannot admit that it is legally liable for this item. But in this behalf the City of Millville says that if it is lawful to pay said item for the house connections, in addition to the agreed purchase price of the plant, \$125,000, this defendant has been ready and willing to comply with such lawful decree in that behalf as the Chancellor may deem equitable and just.

10 And further answering paragraph fifteen defendant says that the attitude of the City of Millville regarding the payment by the City of the moneys demanded in paragraph fifteen is set forth in the letter of its City Solicitor to People's Water Company of Millville, New Jersey, a copy of which is set forth in state of the case hereinafter referred to Sir John Franklin, prosecutor v. John S. Horton, City Clerk of Millville et al, respondents, at page 40.

20 Further answering paragraph fifteen this defendant further says that it is not true that since March 3d, 1922, the City has refused to fulfill its contract in any way to complainant, which has continued to operate the plant as agent for defendant; but in that behalf the defendant says that it did on its part, immediately upon the affirmance by the Court of Errors of the judgment of the Supreme Court in the certiorari case Adams v. Millville, referred to in paragraph seven and eight of the complaint, attempt to proceed by proper action to raise the money to pay the purchase price of the water plant by the adoption of an Ordinance of the
30 City of Millville known as Ordinance No. 207, a copy of which Ordinance is set forth at page nine in the attached state of the case in Franklin v. Horton. After the adoption of said Ordinance, to wit, on April 15, 1922, Honorable Charles C. Black, Justice of the Supreme Court, allowed a writ of certiorari to review the said Ordinance No. 207, which writ of certiorari and the proceedings thereon are still pending in the Supreme Court of the State of New Jersey, and this defendant attaches hereto the state of the case in said action, con-

taining a copy of said writ of certiorari and the return thereto together with the depositions and all other proceedings relating to said writ of certiorari and prays that the said state of the case may be admitted and taken as part of this answer. And this defendant says that the reason that it has not complied with said contract of purchase and paid the purchase money is because of the allowance of the two writs of certiorari, the first being that allowed in Adams v. Millville referred to in the bill of complaint, and the second being the writ of certiorari allowed in Franklin v. Horton contained in the attached state of the case and this defendant says that it does recognize the validity of its said obligation to purchase said water plant and that it has made, in good faith, attempts to purchase said plant but has been and now is restrained from so doing by the legal proceedings above referred to, whereof complainant has had notice because it was made a party to defendant in the case Adams v. Millville and is now a party to defendant in the case Franklin v. Millville.

10

20

Further answering paragraph fifteen this defendant says that it admits that the complainant has continued to operate the water plant, in fact, but whether in law its acts in that behalf are to be taken in law or in equity, as its own acts or whether they are to be deemed the act of an agent for the City, is a point which this defendant respectfully submits to the decision of this honorable court.

16. Paragraph sixteen is admitted.

17. Paragraph seventeen is denied but defendant admits that the complainant has been ready and willing to perform its contract at all times but says that on its part it has been ready and willing to perform but hitherto has been restrained by the writs of certiorari allowed against it as was hereinbefore stated.

30

Answer by way of Plea in Bar.

The contract of purchase referred to in the bill of complaint, was necessarily made on the condition necessarily to be implied that the City of Millville should have time to raise the money according to law to pay for the plant. Since the contract was entered into the City of Millville has diligently and in good faith endeavored to take proper proceedings to raise the purchase price of the water plant, but hitherto it has been, by legal proceedings, to wit, the proceedings in certiorari in Adams v. Millville and Franklin v. Millville, hereinbefore mentioned in the answer, restrained and prevented, and now is restrained and prevented, from performing its contract with the People's Water Company of Millville, New Jersey, and is hindered, restrained and prevented from paying the purchase price of said plant. Complainant's action is premature for that defendant could not specifically perform if so decreed by this honorable court without being in contempt of the Supreme Court for violation of the stay of the writ of certiorari in Franklin v. Millville referred to in the answer.

In support of this plea the City of Millville begs leave to produce before this honorable court the record of the proceeding in the said two causes in certiorari, William P. Adams, prosecutor, v. John S. Horton, City Clerk, City of Millville, the City of Millville, and the People's Water Company of Millville, New Jersey, and Sir John Franklin, prosecutor, v. John S. Horton, City Clerk of Millville et al, the state of the case in said last mentioned causes being hereto attached and made a part of this plea.

LOUIS H. MILLER,

Solicitor and Counsel of Defendant, City of Millville.

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NOTICE OF APPEAL.

(Filed July 12, 1921.)

NEW JERSEY SUPREME COURT.

WILLIAM P. ADAMS, *et al.*,
Prosecutors,

vs.

JOHN S. HORTON, Clerk of
the City of Millville, the
CITY OF MILLVILLE and
PEOPLES' WATER COM-
PANY OF MILLVILLE, NEW
JERSEY,

Defendants.

10

Notice of Appeal.
On Certiorari.

20

*L. H. Miller, Attorney of Defendant, City of Millville
and John S. Horton, City Clerk; and J. Fithian
Tatem, Attorney of Defendant, Peoples' Water
Company of Millville, New Jersey:*

Gentlemen:

Take Notice that the prosecutors, William P. Adams, and S. J. Franklin, above named, appeal to the Court of Errors and Appeals from the whole of the judgment in this cause, by which the writ of certiorari issued therein was dismissed with costs.

LEWIS STARR,
*Attorney of Prosecutors
and Appellants.*

[ENDORSED]

Due and legal service of the within notice is hereby acknowledged for Peoples' Water Company of Millville, N. J. J. Fithian Tatem, Atty.
July 5, 1921.

10 Due and legal service of the within notice on City of Millville and John S. Horton, Clerk, is hereby acknowledged.
July 2/21. Louis H. Miller.

WRIT OF CERTIORARI.

NEW JERSEY SUPREME COURT.

THE STATE OF NEW JERSEY, ss.

20 *The State of New Jersey to John S. Horton, City Clerk, City of Millville, Greetings:*

We being willing for certain reasons to be certified of a certain contract and
(Seal) agreement made between the City of Millville by its Board of Commissioners and the Peoples' Water Company of Millville, N. J., for the acquisition by the City of Millville of the water works of said Peoples' Water
30 Company:

We do command you that the aforesaid contract and agreement with the records of the meetings of the Board of Commissioners at which said contract and agreement was authorized, entered into and adopted, together with all things touching and con-

cerning the same, and the passing, approving and enacting of any ordinance or resolution of the said Board of Commissioners authorizing or ratifying said contract or agreement, as fully and entirely as before you they remain, to our Justices of the Supreme Court of Judicature at Trenton, on the fifteenth day of January, nineteen hundred and twenty-one, 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. 10

Witness, William S. Gummere, Esq., Chief Justice of our Supreme Court, at Trenton, this thirtieth day of December, nineteen hundred and twenty.

ENOCH L. JOHNSON,
Clerk.

LEWIS STARR,
Attorney.

20

30

ENDORSEMENT OF WRIT.

NEW JERSEY SUPREME COURT.

The State, William P. Adams,
Prosecutor.

vs.

10 John S. Horton, City Clerk, City of Millville; The
City of Millville; and the Peoples' Water
Company of Millville, N. J.
Respondents.

Case No. 1.

Contract.

In Certiorari.

20

Writ.

Returnable Jan. 15, 1920.

I Allow This Writ. Let It Be Sealed, Dated Dec.
30, 1920.

CHAS. C. BLACK, J. S. C.

LEWIS STARR, Attorney,
4th and Market Sts., Camden, N. J.

30

(COPY OF RETURN, ENDORSED ON WRIT.)

The contract, agreement and proceedings within mentioned, together with all things touching or concerning the same, I do certify and send to the Jus-

tices of our Supreme Court of Judicature, as within I am commanded.

In witness whereof I have heretofore set my hand and caused the seal of the City of Millville to be hereto affixed, this fourteenth day of January, 1921.

(SEAL)

JOHN S. HORTON,
City Clerk, City of Millville.

COPY OF LETTER FROM THE PEOPLES'
WATER COMPANY OF MILLVILLE, NEW
JERSEY, ADDRESSED TO THE BOARD
OF COMMISSIONERS OF THE CITY OF
MILLVILLE, NEW JERSEY, UNDER DATE
OF JULY 31, 1920, AND FILED AUGUST
27, 1920, IN CONNECTION WITH THE
ABOVE RESOLUTION NO. 360.

10

PEOPLES' WATER COMPANY OF MILLVILLE,
N. J.

20

Office: 112 North Broad Street,
Second Floor.

Address all Communications
to the Company.

Philadelphia, Pa., July 21, 1920.

30

To the Board of Commissioners
of the City of Millville,
Millville, New Jersey.

Gentlemen:—

We beg to bring to your attention
the fact that the conditions under which we are oper-

ating our plant in Millville are such that we can no longer continue to operate the plant for the income that we are now receiving. We have been hoping to avoid litigation, which would be expensive to both the City and this Company, and as it is our desire to close up our affairs in Millville in an amicable way, we offer to sell our entire plant to the City for the sum of \$125,000.00, clear of all encumbrance, and if this offer is accepted, we will agree to waive all
10 claims for water rent which we claim to be due in excess of the \$10,000.00 yearly payments you have been making. The balance which we claim is now due (as of May 1st, 1920,) is \$32,271.09. It would also be understood that any balance due by this Company for taxes at the date of settlement would be cancelled.

If your Board promptly takes such action as is necessary to place this matter before the Electors of the City at the general election to be held on the
20 First Tuesday in November next, and will agree that if said election is favorable to the purchase of our property at the price and upon the terms above mentioned, settlement to be made on or before January 1st, 1921, our Company will postpone such action as it had contemplated to correct the unfavorable conditions under which we are now operating.

We would appreciate hearing from you upon the above matter at your earliest convenience.

Yours very truly,

30 PEOPLES' WATER COMPANY OF MILLVILLE,
N. J.

W. H. ROTH, Vice-President.

R'r

(Take up with Solicitor Miller, 8-20-'20)

Filed August 27, 1920.

J. S. HORTON,
City Clerk.

EXTRACT FROM THE MINUTES OF THE
BOARD OF COMMISSIONERS OF THE
CITY OF MILLVILLE, NEW JERSEY.

Millville, New Jersey, August 27, 1920.

The Board of Commissioners met in regular session with Director Simmerman presiding. Members present Simmerman, Bennett, Kates and Wheaton. Absent, Kurtz.

* * * * *

10

Resolution Number 360, referring to a proposal of the Peoples' Water Company of Millville, New Jersey, to sell their entire plant to the City for the sum of \$125,000.00, clear of all encumbrance, and offering to waive all claims for water rent claimed to be due if this offer is accepted, provided any balance due the City for taxes at the date of settlement shall be cancelled; and further, proposing to postpone such action has had been contemplated if this Board takes the necessary action to place the matter before the electors of the City, at the next general election, and made settlement on or before January 1, 1921, if the result of the election is favorable to the purchase, and providing that the City does accept the aforesaid offer, contingent upon the approval of the electors, at the general election on November 2, 1920. This resolution also directed the clerk to certify this resolution to the county clerk to the end that said officer may cause this measure to be submitted and voted upon in the City of Millville in conformity with the statute. This resolution was adopted by the following votes: Yeas, Simmerman, Bennett, Kates and Wheaton.

20

30

RESOLUTION NUMBER 360.

Whereas, the Peoples' Water Company of Millville, New Jersey, has submitted to the City of Millville, an offer or proposal in writing, in the works and figures following, to wit:—

Philadelphia, Pa., July 31, 1920.

To the Board of Commissioners,
of the City of Millville,
10 Millville, New Jersey.

Gentlemen:—

We beg to bring to your attention the fact that the conditions under which we are operating our plant in Millville are such that we can no longer continue to operate the plant for the income that we are now receiving. We have been hoping to avoid litigation, which would be expensive to both the City and this company, and as it is our desire to close up
20 our affairs in Millville and in an amicable way, we offer to sell our entire plant to the City for the sum of \$125,000., clear of all incumbrance, and if this offer is accepted, we will agree to waive all claims for water rent which we claim to be due in excess of the \$10,000 yearly payment you have been making. The balance which we claim is now due (as of May 1st, 1920,) is \$32,271.09. It would also be understood that any balance due by this Company for taxes at the date of settlement would be cancelled.

30 If your Board promptly takes such action as is necessary to place this matter before the electors of the city at the general election to be held on the First Tuesday in November next, and will agree that if said election is favorable to the purchase of our property at the price and upon the terms mentioned, settlement to be made on or before January 1, 1921, our Company will postpone such action as it had con-

templated to correct the unfavorable conditions under which we are now operating.

We would appreciate hearing from you upon the above matter at your earliest convenience.

Yours very truly

PEOPLES WATER COMPANY OF MILLVILLE, N. J.

By W. H. ROTH,
Vice President.

As by the said writing, this day ordered filed with the Clerk, reference being thereto, had, will appear: 10

And whereas this Board is of opinion that it is advantageous to the City to accept said offer, but deems it proper and fitting that a matter of such importance ought to be submitted to the legal voters for their rejection or approval, and such submission may be had with but small expense to the City, therefore,

RESOLVED By the Board of Commissioners of the City of Millville: 20

1. That the City of Millville does accept the aforesaid offer of the Peoples' Water Company of Millville, New Jersey, and the Mayor is authorized and directed to sign and deliver to said corporation, forthwith upon this Resolution becoming operative, a writing authenticated by the seal of the City, attested by the Clerk, accompanied by a copy of this Resolution, notifying said corporation that the City accepts its said offer or proposal. 30

2. In order to pay for said plant, bonds shall be issued under and pursuant to the provisions of Ordinance Number 145, entitled, "An Ordinance for the Acquisition by the City of Millville of all the real estate, personal property and works and all the

corporate rights, powers, franchises and privileges of the Peoples' Water Company of Millville, N. J.," adopted December 31, 1915, and the ordinances supplemental thereto and mandatory thereof.

3. The Board of Commissioners, of its own notion pursuant to the authority granted by Section 17 of the Walsh Act as amended (Suppl. C. S. 1114,) does hereby submit this resolution to the Electors of the City for adopting or rejection at the next general
10 election to be held November second, 1920. The Clerk is directed to certify to the County Clerk this resolution, to the end that said officer may cause this measure to be submitted with any other Public Question to be voted upon in the City of Millville by printing in proper form to be placed on the ballot as provided by Article XIII of the General Election Law (P. L. 1920, p. 682,) and the Board of County Canvassers is requested to certify the result of said
20 election, with respect to the matters aforesaid as provided by Section 8 of Article XX of said Election Law (P. L. 1920, page 732.)

4. For the information of voters, this resolution shall be published by the City Clerk in one or more newspapers circulating in the City once in each week of October next, provided that the same shall be published therein daily except Sunday from October 25th to November 2nd next, inclusive of said dates.

5. The provisions of this Resolution shall re-
30 main inoperative until and unless the Electors shall vote to adopt the same at the election to be held as aforesaid, and in case the same shall then be adopted, the provisions thereof shall immediately be of full force and effect; provided, that the provisions of section three and four shall be effective immediately

upon the adoption of this resolution by the Board of Commissioners.

Adopted August 27, 1920.

.....Mayor.
W. J. SIMMERMAN,
SAMUEL D. BENNETT,
WALTER S. KATES,
W. S. WHEATON,
Commissioners.

Attest:

JOHN S. HORTON, Clerk.

10

PROOF OF PUBLICATION—RESOLUTION
NUMBER 360.

STATE OF NEW JERSEY, }
COUNTY OF CUMBERLAND, } ss.

20

W. E. MIDDLETON, of full age, being duly sworn according to law, on his oath deposes and says that he is the publisher of the "Millville Daily Republican," a newspaper published in the City of Millville, in the County of Cumberland, and State of New Jersey; and that the notice, of which the annexed printed slip is a true copy, was printed and published in the said newspaper on the 7th day of October, nineteen hundred and twenty, and continued to be printed and published in the said newspaper for 11 30 times at least once in each week, the last publication of said notice being on the 2nd day of November, nineteen hundred and twenty, and that the dates on which said publications were made as aforesaid are: October 7-14-21-25-26-27-28-29-30. November 1-2, 1920.

W. E. MIDDLETON.

Sworn to and subscribed before me this second day of November, nineteen hundred and twenty.

(Seal) MAUDE F. HANKINS,
Notary Public of New Jersey.

(The annexed printed slip referred to in above Proof of Publication, is a true copy of Resolution No. 360, adopted August 27, 1920, and shown with
10 the addition of the caption "Notice to Voters, City of Millville.")

PROOF OF PUBLICATION—RESOLUTION
NUMBER 360.

STATE OF NEW JERSEY, }
COUNTY OF CUMBERLAND, } ss.

20

R. L. VAN HOOK, of full age, being duly sworn on her oath saith, that she is the agent of the Evening News Company, publishers of the Bridgeton Evening News, a newspaper printed and published at Bridgeton, in the County of Cumberland, in the State of New Jersey; that the City of Bridgeton is the county seat of said county and is the municipality in said county, having the largest population by the last preceding federal and state census, and
30 that the notice, of which the annexed is a printed copy, was published in said newspaper eleven times, and that the dates on which said publication was so made as aforesaid are,

October 4, 11, 18, 25, 26, 27, 28, 29, 30, 1920, and November 1, 2, 1920.

REBA L. VAN HOOK.

Subscribed and sworn to before me this 3rd day
of January, A. D., 1921.

J. ROY OLIVER,
Atty.-at-Law of N. J.

(The annexed printed copy referred to in above
Proof of Publication is a true copy of Resolution No.
360, adopted August 27, 1920, and shown with the
addition of the caption, "Notice to Voters, City of 10
Millville.")

EXTRACT FROM THE MINUTES OF THE
BOARD OF COMMISSIONERS OF THE
CITY OF MILLVILLE, NEW JERSEY.

Millville, New Jersey, October 29, 1920.

20

The Board of Commissioners met in regular ses-
sion with Director Simmerman presiding. Members
present Simmerman, Bennett, Kates and Wheaton.
Absent, Kurtz.

* * * * *

Resolution Number 366, with a public letter at-
tached, giving reasons why this Board favors the
adoption of Resolution No. 360, and directing the
Clerk to publish the same, daily until the close of
the next election, was adopted by the following vote: 30
Yeas, Simmerman, Bennett, Kates and Wheaton.

RESOLUTION NUMBER 366.

Whereas, this Board, in any by Resolution No. 360, has submitted to the legal voters the question of the acceptance or rejection of the proposal made in writing by the Peoples Water Company of Millville, New Jersey, dated July 31, 1920, to sell its entire plant to the City, and whereas in said resolution it is recited that this Board is of the opinion that it is advantageous to the city to accept said proposal; and requests have come to the Commissioners from various sources that the Board make known to the public reasons on which such option favoring the purchase of the water plant on the terms offered by the Company is founded, and it is proper and advisable, under the circumstances, that the Board make known to the public its reasons in the premises:

And, whereas such reasons are fairly set forth and stated in the public letter annexed to this Resolution, without reference to the point whether or not, within a reasonable period of time and by expenditure of a reasonable sum for house connections, said water plant, if owned and operated by the public, might be made a paying proposition. Therefore,—

Resolved by the Board of Commissioners of the City of Millville, that the Public Letter hereto attached expresses concisely and fairly the reasons why this Board believes that Resolution 360 providing for the purchase by the City of Millville of the entire plant of the Peoples' Water Company, of Millville, N. J., ought be adopted by the legal voters of the City at the election to be held next Tuesday, November 2, 1920, and that for the information of our citizens, this resolution, and the attached Public Letter of the Commissioners forming a part

thereof, be published by the Clerk in one or more of the newspapers circulating in this city, daily until the close of the next election.

Adopted October 29, 1920.

.....Mayor.
W. J. SIMMERMAN,
SAMUEL D. BENNETT,
WALTER S. KATES,
W. S. WHEATON,

Commissioners. 10

Attest:

JOHN S. HORTON, Clerk.

A PUBLIC LETTER.

VOTERS CAN NOW SETTLE WATER PROBLEM ONCE FOR ALL. 20

To the Voters of Millville:

On Tuesday, November 2nd, an opportunity will be given you to vote for or against the purchase, by the City, of the entire plant of the Peoples' Water Company, for the sum of One Hundred and Twenty-Five Thousand dollars, (\$125,000.00) and the waiver of past due taxes, free and clear of all encumbrances; a claim against the city for a large sum for water service to be released if the plant is bought by the city. The letter of the Company containing the offer is being published each day in the local papers, and reference is made to it for certainty regarding the proposition made to the city by the Company. 30

If this purchase is approved, the Company agrees to waive its claim against the city, which on May 1, 1920, amounted to \$32,271.00 and now amounts to \$55,176.04, and which covers a balance each year for water service. Suits have been entered in the Supreme Court by the Company for the collection of \$32,271.00 of this amount, which still are pending in the courts.

10 On April 23, 1918, the City Commission issued a statement in which the history of the water problem was presented. As everyone in Millville is familiar with the events which lead the City officials twenty years ago to endeavor to provide the people with an adequate water supply, which could not be had from the Millville Water Company, it is unnecessary to go into the details in this communication.

20 The people have already voted to adopt the Water Act of 1875, authorizing the city to purchase a municipal water plant thereby indicating their desire to take the matter of water service into their own hands. Believing this is still the desire of the citizens of Millville, your Commissioners have agreed to purchase the water plant of the Peoples' Water Company at the price and terms aforesaid, subject to the approval by the voters of the city.

30 We have no hesitancy in stating that the value of the property we would secure is very greatly in excess of the amount to be paid therefore, and at present prices of material and labor the plant would undoubtedly cost nearly three times as much as we are asked for it. It is, therefore, a good business proposition for the City to purchase this plant at this time.

In addition to the financial value, there is a more important aspect and that is the people will then control the service of a commodity without

which we could not live. We can control extension of water mains for fire service or for domestic use to newly developed sections, which cannot secure service now.

If we permit the Peoples' Water Company to continue operation rather than to purchase their plant, several things might be done by the Company which would be detrimental to the interests of Millville.

First: Because of the decisions of our Supreme Court and the Court of Errors and Appeals, the Peoples' Water Company claim they could make application to the Board of Public Utility Commissioners for approval of a rate higher than the one set out in our contract with the Company. Your Commissioners were advised some time ago that the Company contemplated doing this and we have no doubt this action will be taken by the Company if the City does not purchase the plant. 10

Second: The suits which have been brought by the Company for the collection of the \$32,271.00 above referred to, have not been brought to trial, as the Company is awaiting the outcome of the election. If the election is favorable to the purchase, the suit will be dropped and the claim cancelled. If the purchase is not approved, then, we are informed by the Company, the suits will be pressed to a conclusion and new suits brought for the additional claims accruing since May 1, 1920. 20

Third: Should the Company succeed in establishing its claim to a higher rate, we might be compelled to pay this rate not only for the balance of the term of our contract, which is about six years, but perhaps indefinitely thereafter. 30

Fourth: Under similar circumstances in other cities where competition between utilities has ex-

isted for a long while, utilities eventually get together and consolidate the plants under some arrangement satisfactory to themselves and then proceed to collect from the public the highest possible rates. There is a possibility of this situation arising in Millville if we do not take advantage of the opportunity now given to purchase the Peoples' Water plant.

10 Fifth: The quality of the water furnished by the Peoples' Water Company's plant is excellent, while the water furnished by the Millville Water Company's plant has often been the subject of considerable complaint. Under municipal ownership, everyone will be assured of water service of the highest quality at all times. It is a thoroughly established fact, that pure and wholesome water in large quantities can be obtained from artesian wells, the source of supply of the plant of the Peoples Water Company.

20 After considering the water question from every standpoint, your Commissioners strongly recommend that the voters support the proposition to purchase the water plant of the Peoples' Water Company at the election on November 2nd.

Dated October 29, 1920.

Respectfully,

.....Mayor.

W. J. SIMMERMAN,
SAMUEL D. BENNETT,
WALTER S. KATES,
W. S. WHEATON,

Commissioners.

PROOF OF PUBLICATION—RESOLUTION
NUMBER 366.

STATE OF NEW JERSEY, }
COUNTY OF CUMBERLAND, } ss.

W. E. MIDDLETON, of full age, being duly sworn according to law, on his oath desposes and says that he is the publisher of the "Millville Daily Republican," a newspaper published in the City of Millville, in the County of Cumberland, and State of New Jersey; and that the notice, of which the annexed printed slip is a true copy, was printed and published in the said newspaper on the first day of November, nineteen hundred and twenty, and continued to be printed and published in the said newspaper for two times, at least once in each week, the last publication of said notice being on the second day of November, nineteen hundred and twenty; and that the dates on which said publication were made as aforesaid are: November 1-2, 1920.

W. E. MIDDLETON.

Sworn to and subscribed before me this second day of November, nineteen hundred and twenty.

MAUDE F. HANKINS,
Notary Public of New Jersey. (Seal)

(The annexed printed slip referred to in above Proof of Publication is a true copy of Resolution No. 366 and a Public Letter, adopted and dated October 29, 1920, and shown with the addition of the caption "Public Information for Voters of Millville.")

PROOF OF PUBLICATION—RESOLUTION
NUMBER 366.

STATE OF NEW JERSEY, }
COUNTY OF CUMBERLAND, } ss.

10 R. L. VAN HOOK, of full age, being duly sworn on
her oath saith, that she is the agent of the Evening
News Company, publishers of the Bridgeton Eve-
ning News, a newspaper printed and published at
Bridgeton, in the County of Cumberland, in the
State of New Jersey; that the City of Bridgeton is
the county seat of said county and is the munici-
pality in said county, having the largest population
by the last preceding federal and state census, and
that the notice, of which the annexed is a printed
copy, was published in said newspaper three times,
20 and that the dates on which said publication was so
made as aforesaid are, October 30, November 1, No-
vember 2, 1920.

REBA VAN HOOK.

Subscribed and sworn to before me, this 10th
day of January, A. D., 1921.

GEORGE HERING,
Notary Public. (Seal)

30 (The annexed printed copy referred to in the
above Proof of Publication is a true copy of Resolu-
tion No. 3 and a Public Letter, adopted and dated
October 29, 1920, and shown with the addition of the
caption "Public Information for Voters of Mill-
ville.")

EXTRACT FROM THE MINUTES OF THE
BOARD OF COMMISSIONERS OF THE
CITY OF MILLVILLE, NEW JERSEY.

Millville, New Jersey, November 12, 1920.

The Board of Commissioners met in regular session with Director Simmerman presiding. Members present Simmerman, Bennett, Kates and Wheaton.

* * * * *

10

The Clerk presented the certificate of the Cumberland County Board of Elections, showing the official canvass of the result of the election held in the City of Millville on the Second day of November, 1920, and giving the vote upon the question, "Shall the Resolution of the Board of Commissioners of the City of Millville, known as Resolution No. 360, providing for the purchase by the City of Millville of the entire plant of the Peoples' Water Company of Millville, New Jersey, be adopted?"

20

"Yes" received 2711 votes, and "No" received 1294 votes. On motion of Director Wheaton the statement was ordered filed, the returns entered upon the minutes, and the matter referred to Director Wheaton and Solicitor Miller to proceed with the approval, by competent authority, of the necessary bond issue; and to take any further action necessary to complete the transaction of the purchase. This motion prevailed by the following vote: Yeas, 30
Simmerman, Bennett, Kates and Wheaton.

10 A STATEMENT OF THE RESULT OF AN ELECTION HELD IN THE CITY OF MILLVILLE, CUMBERLAND COUNTY, NEW JERSEY, ON THE SECOND DAY OF NOVEMBER, A. D., 1920, TO ELECT A CHOSEN FREEHOLDER FOR THE FIFTH WARD, TOGETHER WITH THE PUBLIC QUESTION VOTED UPON, MADE BY THE BOARD OF COUNTY CANVASSERS OF SAID COUNTY (FILED NOVEMBER 12, 1920. JOHN S. HORTON, CITY CLERK).

Shall the Resolution of the Board of Commissioners of the City of Millville, known as Resolution Number 360, providing for the purchase by the City of Millville of the entire plant of the Peoples' Water Company of Millville, N. J., be adopted?

	First Ward:	Yes.	No.
20	First District,	237	61
	Second District,	181	20
	Third District,	212	27
	Second Ward:		
	First District,	306	108
	Second District,	291	70
	Third Ward:		
	First District,	190	213
	Second District,	194	270
	Fourth Ward:		
30	First District,	120	75
	Second District,	308	126
	Third District,	203	106
	Fifth Ward:		
	First District,	292	135
	Second District,	177	83
	Whole number of votes,	2711	1294

We do hereby certify, that the foregoing is a true, full and correct statement of the result of the election above mentioned, as the same is exhibited by the statements produced and laid before the Board of County Canvassers, according to law, that the same exhibits the number of the names in the signature copy registers and the register of voters, the number of names of the voters in the poll book of the election districts, respectively, and of the ballots rejected, the whole number of the names in the signature copy registers and the register of voters, the whole number of names of the voters in the poll book of the several election districts, the name of each person for whom any vote or votes were cast, the number of votes cast for each person in each election district, and the whole number of votes cast for each person for each office designated, and also specifies each public question voted upon, and the number of votes cast thereupon in each election district respectively and the whole number of votes cast thereupon in the several election districts as they appear by the statements so produced and laid before the said board. 10 20

IN WITNESS WHEREOF, we have hereunto set our hands this eighth day of November, A. D., 1920.

JOHN OGDEN,
CHARLES F. HEADLEY,
FERDINAND R. JONES,
E. C. REBER,
Board of County Canvassers. 30

Attest:

(SEAL) L. H. HOGATE, Clerk.

A statement of the determination of the Board of County Canvassers, relative to an election held in

the City of Millville, in the County of Cumberland, for the election of a chosen freeholder, Fifth Ward, and the public question submitted, the said board do determine that at the said election, Zorobabel Gas-kill was duly elected Chosen Freeholder for the Fifth Ward, and that upon the following public question, "Shall the Resolution of the Board of Commissioners of the City of Millville, known as Resolution Number 360, providing for the purchase
 10 by the City of Millville of the entire plant of the Peoples' Water Company of Millville, N. J., be adopted?" "Yes" received twenty-seven hundred eleven votes and "no" received twelve hundred ninety-four votes.

I do hereby certify that the foregoing is a true, full and correct statement of the determination of the Board of Canvassers therein mentioned. In witness whereof, I have hereunto set my hand, this eighth day of November, 1920.

20

JOHN OGDEN,

Chairman of the Board of County Canvassers.

Attest:

L. H. HOGATE, Clerk.

(SEAL)

EXTRACT FROM THE MINUTES OF THE
 BOARD OF COMMISSIONERS OF THE
 CITY OF MILLVILLE, NEW JERSEY.

30

Millville, New Jersey, November 19, 1920.

The Board of Commissioners met in regular session with Director Simmerman presiding. Members present, Simmerman, Bennett, Kates and Wheaton.

* * * * *

On motion of Mr. Wheaton, the Clerk was instructed to notify the Peoples' Water Company of

the result of the election held November 2, 1920, in reference to the purchase of their plant. This motion prevailed by the following vote: Yeas, Simmerman, Bennett, Kates and Wheaton.
Kates and Wheaton.

COPY OF LETTER TO PEOPLES' WATER COMPANY, 10

Pursuant to the instructions of above motion:

W. J. SIMMERMAN,
Director of Revenue and Finance.

SAMUEL D. BENNETT,
Director of Public Safety.

WALTER S. KATES,
Director of Streets and Public
Improvements. 20

W. SCOTT WHEATON,
Director of Parks and Public
Buildings.

CITY OF MILLVILLE, NEW JERSEY.

Office of City Commissioners.

LEWIS E. KURTZ, Mayor.

November 22, 1920.

Peoples Water Company,
112 N. Broad Street,
Philadelphia, Pa. 30

Gentlemen:—

At a regular meeting of the Board of Commissioners of the City of Millville, on Friday, November 19, 1920, the Clerk was instructed to inform you that the returns of election held in Mill-

ville on Tuesday, November 2nd, showed a majority favoring the adoption of Resolution No. 360, providing for the purchase of your plant by the City.

Very truly yours,
J. S. HORTON,
City Clerk.

10 EXTRACT FROM THE MINUTES OF THE
BOARD OF COMMISSIONERS OF THE
CITY OF MILLVILLE, NEW JERSEY.

Millville, New Jersey, December 3, 1920.

The Board of Commissioners met in regular session with Mayor Felmey presiding. Members present, Felmey, Simmerman, Bennett, Kates and Wheaton.

* * * * *

- 20 City Solicitor Miller reported having visited New York and consulted with Caldwell and Raymond, in reference to the validity of a bond issue for the purchase of the Peoples' Water Company plant, and stated that Mr. Caldwell approved this bond issue; and further reported that the titles to the property were now being examined, and the proceedings working out satisfactorily.

30

RESOLUTION NUMBER 261.

A Resolution providing for the purchase by the City of Millville of all the real estate, personal property and works, and all the corporate rights, powers and franchises and privileges of the Peoples'

Water Company of Millville, N. J., for the price or sum of one hundred and twenty-five thousand dollars (\$125,000.00) lawful money, and the allowance of certain delinquent taxes assessed against said company and its property in this city prior to the taxing year 1917.

WHEREAS, by section two of ordinance number 145 of the City of Millville, it was ordained as follows:

“2. The Mayor and other members of the Board 10
of Commissioners and the majority of them are
hereby made, constituted and appointed agents
of the City of Millville to negotiate, on the part of
the City, an agreement with the owner or owners for
the purchase of said real estate, personal property
and works and all the corporate rights, powers,
franchises and privileges of the said Peoples' Water
Company of Millville, N. J., and the said agents are
required and directed to use all reasonable means
and endeavor in good faith to come to an agreement 20
as to the price and terms of the purchase thereof
with the owner or owners of said real estate, per-
sonal property and works and corporate rights,
powers, franchises and privileges aforesaid, and said
agents shall proceed in said matter with all conven-
ient diligence and dispatch and shall make report
in the premises within thirty days after this ordi-
nance shall become effective, or as soon thereafter
as conveniently may be. In case the city can ac-
quire said land and other property by agreement 30
with the owner or owners, the Director of Revenue
and Finance and the Treasurer are authorized and
directed to pay to said owner or owners the agreed
purchase price according to the terms of the agree-
ment; and all further directions and proceedings for
the acquisition of said property and franchises shall

be by resolution, or further or supplementary or amendatory ordinance of the Board of Commissioners. The agents of the City hereinbefore appointed shall not enter into any final contract or agreement, on behalf of the city, for acquisition of said property and franchises without making report to, and being duly authorized by resolution or supplemental ordinance of the Board of Commissioners."

- 10 AND, WHEREAS, afterwards, on the thirtieth day of November, 1917, the Mayor and all other members of the Board of Commissioners, constituted and appointed agents of the City of Millville in and by said Section Two of said ordinance Number 145, submitted to the Peoples' Water Company of Millville, N. J., mentioned in said ordinance Number 145, a conditional proposal in writing for the purchase by the City of Millville, of all the real estate, personal property and works and all the corporate rights, franchises and privileges of said
- 20 Peoples' Water Company of Millville, N. J., a corporation of New Jersey, which conditional proposal is in the words and figures following, that is to say. "To the Peoples' Water Company of Millville, N. J., Gentlemen:

- 30 If your company, by appropriate corporate action, assented to by your bondholders, in consideration of the benefits to your company thereon arising, will grant to the City of Millville, the right, option and privilege hereinafter outlined, the subscribers, Commissioners of the City of Millville, agents of the City in this behalf under the provisions of Section Two of Ordinance Number 145 of said City will by appropriate proceedings make report to the Board of Commissioners of such right, option and privilege with recommendation that said

board do submit to the electors of said city, the question of the exercise of said option at a special election to be held for that purpose on or before May first, next, or at some other election if any shall be held within said time where said question may lawfully be submitted to the electors. The right, option and privilege which the subscribers ask your Company to grant to the City of Millville is as follows:

The City of Millville shall have the right, option 10
and privilege of purchasing from your Company, all of the real estate, personal property and works and all the corporate rights, powers, franchises and privileges of the Peoples' Water Company of Millville, New Jersey, at any time before September 2nd, next, at the price hereinafter mentioned, provided that the City of Millville, by due corporate action, shall, on or before July 15th, next, by writing, under the seal of the City, notify said Peoples' Water Company, of Millville, New Jersey, 20
that the City has elected to exercise such right, option and privilege of purchase of the aforesaid real estate, personal property and works, and all the corporate rights, powers, franchises and privileges of said Company. And in case the City shall fail to give such notice of its election to exercise said option, on or before July 15th, next, then said right, option and privilege of purchase is expired; and if within said time, to wit: on or before July 15th, next, the City shall give such notice of its exercise 30
of said option, then the sale shall be consummated, and settlement made on September 1st, next, at (12) o'clock, noon, at the Millville National Bank, Millville, New Jersey; or at an earlier date, or other place in Philadelphia, or New Jersey, at the option of the City, whereof, it shall give notice to the Company.

The price or consideration, at which the City shall have the right, option and privilege of purchasing said plant, as aforesaid, shall be (a) One Hundred Twenty-five Thousand Dollars (\$125,000.-00) lawful money of the United States of America, which money shall be paid in cash, or by certified check, or certified City Warrant, to the order of the Peoples' Water Company of Millville, New Jersey.

10 And (b) the satisfaction and cancellation of record by the City of Millville, of all taxes levied and assessed against said Company in the City of Millville, and remaining in arrears, and unpaid at the time of settlement, providing that the taxes for 1917 shall be paid by the Company, or allowance thereafter, made to the City in settlement. The said option shall provide that the title to the said real estate, personal property and works, and all the corporate rights, powers, franchises and privileges of
20 said Company, shall be free and clear of all incumbrances, excepting the aforesaid taxes, and shall be conveyed by good and sufficient deed or deeds of conveyance, with full covenants of warranty.

Included in said deeds of conveyance, shall be:
(1) a surrender of the contract with the City of Millville, existing under the provisions of Ordinance No. 73, and (2) a general release to the City, against all claims and demands whatsoever, except such claims as shall have arisen at the time of settlement for water service supplied to the City of Mill-
30 ville, by the Company, under contract, from and after November 1st, 1917; settlement for which service shall be made by the City under the terms of the contract, as a transaction entirely separate and apart from the purchase of the plant, property and franchises, as aforesaid, upon an exercise of said option.

AND WHEREAS, the said Peoples' Water Company of Millville, New Jersey, has accepted said conditional proposals, and thereby has granted to the City of Millville, the option of said conditional proposal mentioned, as appears by a resolution of the Board of Directors of said Corporation, a certified copy of which was transmitted by said Company to the City of Millville, and is now on file with the City Clerk, and which resolution reads as follows, viz:

10

Resolved, That the right, option and privilege of purchasing the property of this Company is hereby given to the Commissioners of the City of Millville, New Jersey, under the terms outlined by said Commissioners in their communication to this Company, dated, November 30th, 1917.

Further resolved, That said communication from the Commissioners of the City of Millville, be filed with, and form a part of the minutes of this meeting.

20

AND WHEREAS, afterward, the Mayor and all other members of the Board of Commissioners, agents of the City, as aforesaid, in that behalf, did make report in writing to the Board of Commissioners of the City of Millville, on the seventh day of December, 1917, to the effect that after numerous interviews and negotiations, the said agents had procured from the Peoples' Water Company of Millville, New Jersey, an option for the purchase of all the real estate, personal property and works, and all the corporate rights, powers, franchises and privileges of the Peoples' Water Company of Millville, New Jersey, upon the terms stated in the conditional proposal, and acceptance hereinbefore, in this resolution, recited and set forth. And recommend-

30

ing that the Board of Commissioners of the City of Millville, do, by appropriate proceedings, submit to the electors of the City of Millville, on or before May 1st, next, the question whether the City of Millville shall exercise the aforesaid option and privilege of purchase.

10 AND WHEREAS, the Board of Commissioners of the City of Millville, has made careful investigation, and given due consideration of the matter of the purchase of the aforesaid property, works and franchises, upon the terms stated in the said conditional proposal, and acceptance, and the said Board believes that it is for the best interest of the City of Millville, and its inhabitants, and taxpayers, that the City do exercise said right, option and privilege of purchase, and do acquire the said property, works and franchises for the price or consideration specified in said option, but the said Board of Commissioners has decided that a question of such importance to the public, ought to be submitted to the
20 qualified electors of the City for their determination.

 Therefore, Resolved by the Board of Commissioners of the City of Millville. (1) That the City of Millville doth elect to exercise and shall exercise its aforesaid right, option and privilege of purchase, of all of the aforesaid real estate, personal property and works, and all of the corporate rights, powers, franchises, and privileges of the Peoples' Water Company, of Millville, New Jersey, a corporation of
30 New Jersey, upon the precise terms and conditions and for the price or consideration in said option, set forth and declared. (2) That immediately after the adoption of this resolution by the electors of the City, and on or before July 15th, 1918, the Mayor shall notify the Peoples' Water Company of Millville, New Jersey, by writing, under the seal of the

City attested by the Clerk, that the City of Millville has elected to exercise said option, and shall transmit to said Company, a certified copy of this resolution.

That the bonds of the City of Millville provided for by said Ordinance No. 145, and the ordinances supplemental thereto, and amendatory thereof, shall be issued and sold at public sale according to law, forthwith, after the adoption by the electors of this resolution, in the sum of One Hundred Twenty-five 10
Thousand Dollars (\$125,000.00) or so much thereof, as shall be necessary. And the proceeds of the sale of said bonds shall be applied towards payment of the purchase price of all the aforesaid real estate, personal property and works, and all the rights, powers, franchises and privileges of said Company.

All other, or further proceedings necessary for the consummation of the purchase of said property and franchises, and the issue of said bonds shall be had by resolution or by ordinances supplemental to 20
said ordinance No. 145.

(3) This resolution shall go into effect immediately, but its provisions, except as to the referendum herein contained, shall remain inoperative until, and unless a majority of the qualified electors voting thereon, shall vote in favor thereof, at the special election herein as mentioned; and the question of the adoption of this resolution, shall be, and hereby is submitted by the Board of Commissioners, of its own motion, to the qualified electors of the 30
City of Millville, at a special election which is hereby called, and shall be held in said City on Tuesday, the 30th day of April, next, and notice of said special election shall be given, and said election shall be held and the returns thereof made, canvassed and certified by the proper officers in the manner provided by law.

The expense of said special election shall be paid from the appropriation for special elections heretofore provided in the local budget, and taxing resolution for the current fiscal year.

Adopted by the Board of Commissioners of the City of Millville, the first day of March, 1918.

(Signed),

THOMAS WHITAKER, Mayor.

WILBERT J. SIMMERMAN,

SAMUEL D. BENNETT,

WALTER S. KATES,

LEWIS E. KURTZ,

Commissioners.

10

Attest:

JOHN S. HORTON,
Clerk.

20

STATE OF NEW JERSEY, }
CITY OF MILLVILLE, } ss.

I, JOHN S. HORTON, Clerk of the City of Millville, hereby certify the foregoing to be true copies of the resolutions, ordinances, minutes and proceedings therein recited, as compared with the originals of record in my office.

30 In witness whereof, I have hereto set my hand and caused the seal of the City of Millville to be hereto affixed, this fourteenth day of January, 1921.

JOHN S. HORTON,

(Seal)

Clerk of the City of Millville.

Me. 1, 1918.

REASONS.

NEW JERSEY SUPREME COURT.

THE STATE, WILLIAM P.
ADAMS,

Prosecutor,

vs.

JOHN S. HORTON, City
Clerk of the City of Mill-
ville, *et als.*,

Respondents.

10

Reasons.
On Certiorari.
Case No. 1.

The prosecutor above named, by Lewis Starr, his attorney, appears and prays that the contract and agreement entered into between the City of Millville and the Peoples' Water Company of Millville, New Jersey, for the acquisition by the City of Millville of the Water Works, property and franchises of the Peoples' Water Company be set aside, annulled and, for nothing holden, for the following reasons:

20

1. The said contract and agreement was made by and between the parties thereto without any sufficient legal power and authority, either by legislative or municipal action.

30

2. The said contract was *ultra vires* the City of Millville.

3. The Commissioners of the City of Millville did not possess any legal power or authority to enter into the contract.

4. Ordinance No. 145, as adopted by the Commissioners of Millville in December 31, 1915, does not constitute any sufficient legal authority or power to authorize the Commissioners of Millville to enter into the contract with Peoples' Water Company.

10

5. The power and authority of the Commissioners of Millville to enter into the said contract with the Peoples' Water Company, cannot be predicated or based upon ordinance No. 145, because the power and authority conferred thereby became exhausted when the proceedings instituted thereunder, failed to result in the purchase of the water works as contemplated by the terms thereof by the refusal of the voters of Millville to approve of said purchase as expressed at the election held April 13, 1918.

20

6. The Commissioners of Millville did not possess any power or authority, legislative or municipal, to resume negotiations with the Peoples' Water Company in 1920, which resulted in the passage of resolution No. 360, because there was no valid or subsisting ordinance in existence authorizing the purchase of the water works by the Peoples' Water Company.

30

7. Said resolution No. 360, adopted August 27, 1920, is insufficient in law to authorize and empower the commissioners to enter into the contract or agreement for the purchase of said water works.

8. At the time of the making of the contract and agreement between the City of Millville and the said Peoples' Water Company, the city had no funds in hand with which to pay the contract price and no bonds had been issued, the proceeds of which could be used for the purpose of paying the contract price.

9. The method adopted by the city to raise funds to pay the contract price was improper and illegal, because the power conferred by ordinance 145 had been exhausted and could not be exercised when the resolution for the issue of bonds was adopted. 10

10. The bonds could not be lawfully issued pursuant to the terms of ordinance 152, adopted August 18, 1916.

11. Section 17 of the Walsh Act, under which the commissioners submitted the question of the election relative to the purchase of the water works of the Peoples' Water Company to the vote of the people of Millville, was repealed by Chapter 116 of the Laws of 1919 and, therefore, no legal authority existed for the submission of said question to the voter, under the Walsh Act. 20

12. Chapter 116 of the Laws of 1919, by which Article 32 of the Home Rule Act was amended, provides a specific method for submission of questions to the vote of the people of the municipality, which method was not pursued by the Commissioners and, therefore, the said election was inoperative and void. 30

13. The question of the approval or rejection of the plan to purchase the water works of the Mill-

ville Water Company was not submitted by the commissioners to the voters of Millville in the form required by law.

14. The said contract and agreement and all proceedings taken thereunder are illegal, void, and made and taken without proper legislative or municipal authority.

10

LEWIS STARR,
Attorney of Prosecutor.

[ENDORSEMENT.]

NEW JERSEY SUPREME COURT.

CASE NO. 1.

20

THE STATE, WILLIAM P. ADAMS,
Prosecutor,

vs.

JOHN S. HORTON, CITY CLERK OF THE CITY
OF MILLVILLE, ET ALS.,
Respondents.

ON CERTIORARI.

REASONS.

30

LEWIS STARR, Atty.,
4th and Market Sts., Camden, N. J.

ADDITIONAL REASONS.

NEW JERSEY SUPREME COURT.

10

WILLIAM P. ADAMS,	}	Case No. 1. On Certiorari. Additional Reasons.
<i>Prosecutor,</i>		
vs.		
JOHN S. HORTON, City		
Clerk, and Others,		
<i>Respondents.</i>		

20

15. At the time of the making of the contract and agreement and when the obligation to purchase the plant was insured, no money had been appropriated by the City of Millville for the payment of the contract price.

LEWIS STARR,
Attorney of Prosecutor.

30

[ENDORSEMENT.]

NEW JERSEY SUPREME COURT.

WILLIAM P. ADAMS,
Prosecutor,

vs.

10 JOHN S. HORTON, CITY CLERK AND OTHERS,
Respondents.

CASE NO. 1.

ON CERTIORARI.

ADDITIONAL REASONS.

20 LEWIS STARR, Attorney,
4th and Market Sts., Camden, N. J.

30

COPY OF RETURN.

EXTRACTS FROM THE MINUTES OF THE
BOARD OF COMMISSIONERS OF THE
CITY OF MILLVILLE, NEW JERSEY.

Millville, New Jersey, November 19, 1915.

The Board of Commissioners met in regular session with Mayor Geig presiding. Members present, 10
Geig, Whitaker, Corson, Kates and Ware.

* * * * *

Ordinance No. entitled "An Ordinance for the Acquisition by the City of Millville of all the real estate, personal property and works, and all the corporate rights, powers, franchises and privileges of the Peoples' Water Company of Millville, New Jersey," was introduced, read by the Clerk and laid over under the rules.

20

Millville, New Jersey, December 3, 1915.

The Board of Commissioners met in regular session with Mayor Geig presiding. Members present, Geig, Whitaker, Corson, Kates and Ware.

* * * * *

A communication from Mr. S. J. Franklin, requesting a postponement for two weeks of the hearing on the proposed ordinances for acquiring the plants of the two water companies, was received and ordered filed. 30

Ordinances Number 144 and 145, providing for the acquisition of the real estate, personal property and works, and all the corporate rights, powers,

franchises and privileges of the Millville Water Company and the Peoples' Water Company of Millville, New Jersey, were taken up in regular order, and the titles read by the Clerk, after which Mr. Corson moved that both ordinances be laid over for one week for further consideration and amendment. This motion was passed by the following vote: Yeas, Whitaker, Corson, Kates, Ware and Geig.

10 City Solicitor Miller stated that it would probably be desirable to amend these ordinances in reference to form of bonds.

EXTRACTS FROM THE MINUTES OF THE
BOARD OF COMMISSIONERS OF THE
CITY OF MILLVILLE, NEW JERSEY.

20 Millville, New Jersey, December 10, 1915.

The Board of Commissioners met in regular session with Mayor Geig presiding. Members present, Geig, Whitaker, Corson, Kates and Ware.

* * * * *

30 Solicitor Miller stated that after a conference with Treasurer Worstall and Director Whitaker, it had been decided to make no change in form of Ordinances Nos. 144 and 145, relating to the issue of bonds. Mr. Corson's motion that final action on proposed ordinances for acquisition of the plants, etc., of the Millville Water Company and of the Peoples' Water Company, be deferred until next Friday, was passed by the following vote: Yeas, Whitaker, Corson, Kates, Ware and Geig.

Millville, New Jersey, December 17, 1915.

The Board of Commissioners met in regular session with Mayor Geig presiding. Members present, Geig, Whitaker, Corson, Kates and Ware.

* * * * *

Two communications from the Municipal League in reference to proposed ordinances for acquisition of the two water plants, were read and ordered filed by the following vote: Yeas, Whitaker, Corson, Kates, Ware and Geig. 10

Mr. Newell Corson, president of the Municipal League, assured the Board that sincere desire for information prompted these letters.

Ordinances proposed as Nos. 144 and 145, and providing for the acquisition of the real estate, personal property and works, and all the corporate rights, powers, franchises and privileges, of the Millville Water Company and of the Peoples' Water Company were taken up in regular order and the titles read by the Clerk. Mr. Ware moved that final 20 action on both ordinances be postponed until an adjourned meeting, Thursday, December 23rd, at 3.30 o'clock P. M., and that when we adjourn it be until Thursday, December 23rd, 1915, at 3.30 o'clock P. M.

EXTRACTS FROM THE MINUTES OF THE
BOARD OF COMMISSIONERS OF THE 30
CITY OF MILLVILLE, NEW JERSEY.

Before taking a vote on this motion, Mayor Geig invited any citizen in the room to take part in the discussion. Dr. A. R. Slade, stated that he had no desire to unduly delay the action of the Commis-

sioners, but thought the public should have fuller information. At the suggestion of Mayor Geig, a portion of the report of Alton D. Adams, Engineer, dealing with the water situation in Millville was read by the Clerk.

Millville, New Jersey, December 23, 1915.

- 10 The Board of Commissioners met in adjourned session at 3.30 P. M. with Mayor Geig presiding. Members present, Geig, Corson, Kates and Ware. Absent, Whitaker.

- 20 Mayor Geig stated that the principal object of the adjourned session was for further consideration of the two proposed ordinances for the acquisition by the City of the two water plants, and invited anyone present to express views on the matter. Mr. Corson moved that owing to the absence of Mr. Wood, who had requested a hearing and of Director Whitaker, who was detained by illness, that final action on the two ordinances, providing for the acquisition by the City of the two water plants, be postponed until the next regular meeting. Mr. Kates seconded the motion, which was passed by the following vote: Yeas, Corson, Kates, Ware and Geig.

Millville, New Jersey, December 24, 1915.

- 30 The Board of Commissioners met in regular session with Mayor Geig presiding. All members present but Mr. Whitaker.

* * * * *

Ordinances proposed as Nos. 144 and 145, were taken up in regular order and the titles read by the

Clerk. Mr. Corson moved, seconded by Mr. Kates, that action on these two ordinances be postponed until the next regular meeting. This motion was carried by the following vote: Yeas, Corson, Kates, Ware and Geig.

EXTRACTS FROM THE MINUTES OF THE
BOARD OF COMMISSIONERS OF THE 10
CITY OF MILLVILLE, NEW JERSEY.

Millville, New Jersey, December 31, 1915.

The Board of Commissioners met in regular session with Mayor Geig presiding. Members present, Geig, Corson, Kates, Ware and Whitaker.

* * * * *

Ordinance Number 144 was read in full by the Clerk. Mayor Geig invited Mr. Walter Wood to speak, and Mr. Wood talked at length on the water situation. Mayor Geig and Director Corson asked Mr. Wood several questions in reference to the subject. Mr. B. Frank Buck addressed the Board and presented a petition of protest against the adoption of the proposed ordinances, for acquiring the properties of either or both of the water companies operating in Millville. Mr. Buck asked the privilege of adding more names to this petition if final action on the ordinances is not taken today. The petitions were ordered read, and the Clerk read same in full. Mr. Buck at this time presented another communication, signed by numerous citizens, requesting the Board to try out a certain plan advanced by Alton D. Adams, for at least one year, before making any further move in the matter. Mayor Geig directed the Clerk to read the communication in full, and said 30

communication or petition was read in full. Mr. Franklin, Mr. Buell, Mr. Corson, Mr. Ware, Mr. Whitaker, Mayor Geig, Solicitor Miller, and Mr. Wood all took part in a thorough discussion after which Mayor Geig ordered the roll call.

* * * * *

10 Ordinance Number 145, providing for the acquisition of the real estate, personal property and works, and all the corporate rights, powers and franchises, and privileges of the Peoples' Water Company of Millville, New Jersey, was taken up in regular order and read in full by the Clerk, after which the Clerk was directed by the Mayor to call the roll on the adoption of the ordinance. The roll was called and Ordinance No. 145 adopted by the following vote: Yeas, Whitaker, Corson, Kates, Ware and Geig.

20

ORDINANCE NUMBER 145.

30

AN ORDINANCE FOR THE ACQUISITION BY THE CITY OF MILLVILLE, OF ALL THE REAL ESTATE, PERSONAL PROPERTY AND WORKS AND ALL THE CORPORATE RIGHTS, POWERS, FRANCHISES AND PRIVILEGES OF THE PEOPLES' WATER COMPANY OF MILLVILLE, N. J.

Whereas, the Board of Commissioners of the City of Millville deems it proper and of public necessity that the City of Millville acquire all the real estate, personal property and works, and all the corporate

rights, powers, franchises and privileges of the Peoples' Water Company of Millville, N. J., a corporation of New Jersey, for the purpose of supplying said city and the inhabitants thereof with water for public and private use and consumption thereof.

The Board of Commissioners of the City of Millville do ordain.

1. It is hereby determined that the City of Millville shall acquire, forthwith, for public use, all the real estate, personal property and works, and all the corporate rights, powers, franchises and privileges of the Peoples' Water Company of Millville, N. J., a corporate of New Jersey, for the purpose of supplying said city and the inhabitants thereof with water for public and private use and consumption; and the Board of Commissioners, of said city doth decide, upon full investigation of said matter and doth ordain, determine and declare that the acquisition of all said property and franchises is necessary, convenient and proper for the public use.

2. The Mayor and other members of the Board of Commissioners and the majority of them are hereby made, constituted and appointed agents of the City of Millville to negotiate, on the part of the City, an agreement with the owner or owners for the purchase of the said real estate, personal property and works and all the corporate rights, powers, franchises and privileges of the said The Peoples' Water Company, Millville, N. J.; and the said agents are required and directed to use all reasonable means and endeavor in good faith to come to an agreement as to the price and terms of the purchase thereof with the owner or owners of said real estate, personal property and works and corporate rights, powers, franchises and privileges aforesaid, and said agents shall proceed in said matter with all convenient diligence and dispatch and shall make report in the

premises within thirty days after this ordinance shall become effective, or as soon thereafter as conveniently may be. In case the city can acquire said land and other property by agreement with the owner or owners, the Director of Revenue and Finance and the Treasurer are authorized and directed to pay to said owner or owners the agreed purchase price according to the terms of the agreement, and all further directions and proceedings for the acquisition of said property and franchises shall be by resolution or further or supplementary or amendatory ordinances of the Board of Commissioners. The agents of the city hereinbefore appointed shall not enter into any final contract or agreements, on behalf of the city, for acquisition of said property and franchises without making report to, and being duly authorized by resolution or supplemental ordinance of the Board of Commissioners.

3. If the city cannot acquire said real estate, personal property and works and all the corporate rights, powers, franchises and privileges of The Peoples' Water Company of Millville, N. J., by agreement with the owner, whether by reason of disagreement as to the price, or the legal incapacity of the owner, or inability in the owner to convey valid title or by any other cause, the said real estate, personal property and works and all the corporate rights, powers, franchises and privileges of the said Water Company shall then be acquired and taken for public use by condemnation pursuant to the provisions of the statute "An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use" (2C, S. pp. 2182 &c., and the acts supplemental thereto and amendatory thereof and such other statutes of this state as may be applicable to said condemnation proceedings; and the City Solicitor shall institute and pros-

ecute said condemnation proceedings with all convenient speed.

4. In order to pay the agreed purchase price of the said property and franchises, if an agreement for the purchase of the same be concluded with the owner, or in order to pay the costs of condemnation proceedings and the award of the commissioners, or assessment by a jury of the value of said property and franchises and the damages sustained, and for the other purposes hereinafter in Section five of this ordinance mentioned, bonds of the City of Millville shall be issued in the sum of one hundred and twenty-six thousand dollars or so much thereof as may be necessary, provided, that the issue of additional bonds in any further sum shall be authorized by a supplemental or other ordinance if required for said purposes in case the agreed purchase price of said property and franchises, or the award of commissioners in condemnation proceedings or the assessment by a jury of the value of said property and franchises and damages sustained by the taking thereof, and the costs of condemnation proceedings shall exceed one hundred and twenty-six thousand dollars and the city shall stand by any such award or assessment and elect not to abandon said condemnation proceedings as permitted by Section 15 of the statute above recited (3C. S. pp. 2187, 2188). 10 20

5. Said bonds shall be issued under the authority of the act entitled "An Act to enable cities to supply the inhabitants thereof with pure and wholesome water" (1 C. S. 823), and the acts supplemental thereto and amendatory thereof, which act has heretofore been duly adopted in this city pursuant to the provisions and requirements of Section 16 of said act; provided, that said bonds may be issued under the authority and provisions of Chapter 117 of the Laws of the Legislature of New Jersey, Ses- 30

sion of 1914, if the Board of Commissioners shall by resolution so direct; the proceeds of the sale of said bonds shall be applied and used for the purpose of defraying all the expenses and the cost of purchase of the aforesaid real estate, works, property, rights, franchises, privileges and appurtenances of the Peoples' Water Company of Millville, N. J., and of maintaining and extending the same, and for the purchase of materials, the laying of mains in and
10 about the city or leading from or connecting it with its source of supply and constructing all works necessary for the accomplishment thereof.

All of said bonds shall bear date December first, nineteen hundred and fifteen, shall be payable thirty years after date; shall bear the seal of the city, be signed by the Mayor and the director of Revenue and Finance, countersigned by the Treasurer and attested by the Clerk; shall be either coupon bonds or registered bonds at the option of the holder; all
20 coupons shall bear the signature of the Treasurer in facsimile; said bonds shall bear interest at the rate of five per centum per annum, payable semi-annually and shall be payable both principal and interest at the Millville National Bank; and the property and credit of the city shall be pledged for payment of the same.

The Treasurer shall dispose of said bonds at public sale for the best price that can be obtained, but at not less than par and accrued interest. Record
30 of all said bonds shall be kept by the Treasurer and all moneys received therefrom shall be deposited in the Millville National Bank or other bank or banks, designated from time to time by a majority of the Board of Commissioners, and shall be drawn upon by said Treasurer only for the purpose for which the same were issued as hereinbefore declared and specified, and all said moneys shall be inviol-

ably applied for said purposes only, and for none other, and only when said Treasurer shall be so ordered by proper warrant or warrants issued by the Board of Commissioners of said city. Said bonds shall be in such form as the Board of Commissioners, shall, by resolution, provide.

6. A sinking fund for the redemption of said bonds is hereby established. Such portions of the moneys received from the water rents or prices paid for the use of water, and interest on arrears of water rents, as may remain after paying all expenses and costs for purchasing water works or for constructing and maintaining water works, and raising and distributing the water, and salaries, wages and incidental expenses and charges, shall be applied by the Board of Commissioners, first, to the payment of the interest upon the debt created for the purchase and construction of the works and next, to the purchase of the bonds issued therefor, if the same can be obtained at reasonable rates; or if that cannot be effected, then to be safely invested by the Commissioners of the sinking fund of this city for the redemption of said bonds when due. There shall be raised annually by taxation the amount of the deficiency, if any, in the water revenues for the payment (1) of the interest on the debt hereby authorized and created and cost of managing and keeping in repair and operation of the water works with three per centum thereof added to cover losses and deficiencies to be ascertained and certified in the manner provided for by Section 13 of said act (1 C. S. 823) and (2) a sum sufficient, when added to the water revenues applicable for the purpose, to make up an amount equivalent to $2\frac{1}{2}$ per centum of all said bonds issued and at the time outstanding, for the retirement of the bonds at maturity; which taxes shall be levied, assessed and collected in the

same manner as other taxes, and the amount thereof assessed and collected for interest shall be paid by the taxing officers to the Treasurer, and the amount thereof assessed for sinking fund shall be paid by said taxing officers to the Sinking Fund Commissioners of the city appointed under the provisions of Ordinance No. 142 to be invested by them and allowed to remain as a sinking fund for the retirement of said bonds at maturity.

- 10 7. If the authority of the city to take any of the proceedings or to do any of the acts, matters or things hereinbefore provided for under the authority of those several statutes particularly above recited shall be brought in question it is the intention of the Board of Commissioners to rest their authority not alone upon those several statutes, but upon the city charter, the act P. L. 1895, P. 769 (2C. S. 2198), and all and every other of the statutes of this state granting power and authority to this municipality in the premises.

- 20 8. All other proceedings of the Board of Commissioners required to be had, if any, touching the matters in this ordinance contained shall be by further or amendatory or supplemental ordinances or by resolutions of the Board of Commissioners.

9. All resolutions or ordinances or parts of resolutions or ordinances inconsistent herewith are hereby repealed. This ordinance shall take effect ten days after its publication, as provided by law.

- 30 Adopted December 31, 1915.

HARRY J. GEIG, Mayor,
THOMAS WHITAKER,
ROLAND B. CORSON,
WALTER KATES,
W. FRED WARE,

Commissioners.

Attest: JOHN S. HORTON, Clerk.

The Proof of Publication of the notice of the introduction of Ordinance Number 145, also Proof of Publication of Ordinance after adoption were presented as evidence at City Hall, Millville, New Jersey, January 21, 1916, before Edward I. Berry, Supreme Court Commissioner, in case of John Franklin, Prosecutor, vs. City of Millville and Peoples' Water Company, Respondents, and cannot now be found in the files of the City Clerk.

10

EXTRACTS FROM THE MINUTES OF THE
BOARD OF COMMISSIONERS OF THE
CITY OF MILLVILLE, NEW JERSEY.

Millville, New Jersey, August 4, 1916.

The Board of Commissioners met in regular session with Mayor Whitaker presiding. Members present Whitaker, Corson, Kates, Ware and Kurtz. 20

* * * * *

Director Corson filed with the Clerk a statement of the financial condition of the City of Millville as of August 4, 1916. A true copy of this statement is shown on pages 112 to 115, and is the same statement referred to in Ordinance 151 and 152, supplemental to Ordinances 144 and 145.

* * * * *

Mr. Ware introduced an ordinance supplemental to Ordinance 145, which was read by the Clerk and laid over for two weeks under the law. 30

* * * * *

Prior to the introduction of the supplemental ordinances, to ordinances Numbers 144 and 145, referred to on page 110, Mr. Ware filed with the Clerk statements from City Engineer Wade, giving the probable periods of usefulness of the improvements

or properties for which bonds are proposed to be authorized.

Millville, August 18, 1916.

The Board of Commissioners met in regular session with Mayor Whitaker presiding. Members present, Whitaker, Corson, Kates, Ware and Kurtz.

* * * * *

- 10 Ordinance No. 152, a supplement to the ordinance entitled "An Ordinance for the Acquisition by the City of Millville of all the real estate, personal property and works, and all the corporate rights, powers, franchises and privileges of the Peoples' Water Company of Millville, N. J., adopted December 31, 1915, and known as Ordinance No. 145 of the City of Millville, was adopted by the following vote: Yeas, Corson, Kates, Ware, Kurtz and Whitaker.

20

ORDINANCE NUMBER 152.

- 30 A SUPPLEMENT TO THE ORDINANCE ENTITLED "AN ORDINANCE FOR THE ACQUISITION BY THE CITY OF MILLVILLE OF ALL THE REAL ESTATE, PERSONAL PROPERTY AND WORKS, AND ALL THE CORPORATE RIGHTS, POWERS, FRANCHISES AND PRIVILEGES OF THE PEOPLES' WATER COMPANY OF MILLVILLE, N. J.," ADOPTED DECEMBER, 31, 1915, AND KNOWN AS ORDINANCE NUMBER 145 OF THE CITY OF MILLVILLE.

Whereas, because of the provisions of Chapter 252 of the Laws of 1916 (P. L. 1916, page 525, &c.), authorizing and regulating the issuance of bonds

and other obligations and the incurring of indebtedness by cities and other municipalities certain modifications in said Ordinance Number 145, are required to be made to the end that the terms of said ordinance providing for the issue of bonds by the City shall be in conformity with the said statute of 1916, therefore,

The Board of Commissioners of the City of Millville, do ordain:

1. All of the bonds to be issued under the provisions of the ordinance to which this ordinance is a supplement shall bear date August first, nineteen hundred and sixteen; said bonds shall be for not more than one thousand dollars nor less than one hundred dollars each; shall be payable in not exceeding thirty years from their date in annual installments commencing August first, nineteen hundred and eighteen, and no installment shall be made for more than fifty per centum in excess of the amount of the smallest prior installment. Said installment shall be equal in amount as nearly as may be and in sum multiple of one hundred dollars. The precise amount of each said annual installment of bonds shall be fixed by supplemental ordinance when the total amount of bonds necessary to be issued for the purpose of said Ordinance Number 145 shall have been ascertained. 10 20

2. Said bonds shall be sold in the manner provided by Section 6 of Chapter 252 of the Laws of 1916 (P. L. 1916, page 532, &c.).

3. This municipality shall temporarily finance the carrying out of the purpose for which this ordinance and the ordinance to which this is a supplement is authorized to issue bonds by borrowing money and issuing from time to time temporary improvement notes, to an aggregate amount not in excess of the amount for which said bonds may be 30

issued, which improvement notes shall state in general terms the purpose for which they are issued, and shall mature in not exceeding one year from their date, and shall bear interest at the rate of five per centum (5 per cent.) per annum, payable semi-annually. Said improvements notes shall be payable both as to principal and interest at the Millville National Bank; said notes may from time to time be renewed by the issuance of new notes of the same maturity and rate of interest and shall also be subject to call, but such renewed notes shall not be renewed after six years after the purpose for which they were issued has been carried out. The issuance of such improvement notes shall be authorized by resolution of the Board of Commissioners and shall be executed as in this ordinance and in the ordinance to which this is a supplement is provided for the long term bonds, and said improvement notes and the issuance thereof shall be in all respects in accordance with the provisions of Section 13 of said Chapter 252 of the Laws of 1916. The proceeds of the sale of said bonds shall be used and applied so far as may be necessary for the redemption of any said temporary improvement notes that may have been issued.

4. Said bonds and said improvement notes shall be signed by the Mayor and the Director of Revenue and Finance, attested by the Clerk and countersigned by the Treasurer, and shall bear the seal of the City; and the coupons, if any, shall be signed by the facsimile signature of the Treasurer. Said bonds and said improvement notes shall be payable in lawful money of the United States of America, both as to principal and interest, at the Millville National Bank, and both said bonds and said improvement notes shall be in such form as may be provided by resolution of the Board of Commissioners. Said

coupon bonds, if any, may be registered as to principal only or as to both principal and interest. The Treasurer shall be transfer agent and registrar of said bonds.

5. The proceeds of said bonds or improvement notes issued under said Ordinance Number 145 and this supplemental ordinance shall be paid to the Treasurer of the City, who shall in no event disburse of the same except to pay the expense of issuing and selling the same and for the purpose or purposes for which such Bonds or improvement notes were issued. If for any reason, any part of such proceeds are not applied to or necessary for such purpose or purposes the Board of Commissioners of this City may reappropriate the proceeds remaining unapplied to pay the principal of any outstanding bonds. 10

6. Pursuant to the provisions of Section 2 of said Chapter 252 of the Laws of 1916 (P. L. 1916, page 525, &c.) it is hereby certified and declared:

(a) The probable period of usefulness of the improvement or property for which said bonds and said improvement notes are authorized is forty years. 20

(b) The average assessed valuation of the taxable real property (including improvements) of this municipality computed upon the next preceding three valuations thereof in the manner provided by Section 12 of said Act is four millions, seven hundred eighteen thousand, two hundred and ninety-three dollars. 30

(c) The net debt of this municipality computed in the manner provided in Section 12 of Chapter 252 of the Laws of 1916 is one hundred eight thousand, five hundred seven dollars and ten cents.

(d) The statement required by Section 12 of said Chapter 252 of the Laws of 1916 (P. L. 1916, pp. 535, 536, &c.) has been made and was filed with the

City Clerk on the fourth day of August, 1916, as required by said Act of the Legislature.

7. This ordinance shall be attested by the Clerk and shall be published once in the manner prescribed in Section 2 of Chapter 525 of the Laws of 1916; and the Clerk shall publish with this ordinance a statement in the form provided by sub-division 1 of Section 2 of said Act. The bonds authorized by this ordinance and said Ordinance Number 145, 10 to which this ordinance is a supplement, shall not be issued nor delivered until after thirty days shall elapse from and after the date that this ordinance shall be published.

8. Said bonds shall recite that they are issued pursuant to the provisions of Chapter 252 of the Laws of 1916, and in all respects the sale issuance and delivery of said bonds and said improvement notes shall conform to said act of the Legislature.

9. Such portions of the moneys received from the 20 water rents or prices for the use of water and interest on arrears of water rents, as may remain after paying all expenses and costs for purchasing water works or for constructing and maintaining water works and raising and distributing the water, and salaries, wages and incidental expenses and charges shall be applied by the Board of Commissioners, first for the payment of interest upon the debt created for the purchase and construction of the works, and next, to the purchase of bonds issued 30 therefor, if the same can be obtained at reasonable rates, or if that cannot be effected, then to be safely invested by the Commissioners of the Sinking Fund of this City for the redemption of said bonds and improvement notes when due. There shall be raised annually by taxation the amount of the deficiency, if any, in the water revenues for the payment (1) of the interest on the debt authorized and created

by said Ordinance Number 145, and this supplemental ordinance and the cost of managing and keeping in repair and operation the water works, with three per centum thereof added to cover losses and deficiencies to be ascertained and certified be in the manner provided in Section 13 of the Act entitled, "An Act to enable cities to supply the inhabitants thereof with pure and wholesome water" (1 C. S. 823, &c.) and (2) a sum sufficient, when added to the water revenues applicable for the purpose, to 10 make up an amount equivalent to the installments of said bonds that shall accrue and fall due each year for the retirement of each of such installments of bonds at maturity; which taxes shall be levied, assessed and collected in the manner as other taxes and the amount thereof assessed and collected for interest shall be paid by the taxing officer to the Treasurer, and the amount thereof assessed for the retirement of said bonds shall also be paid by the 20 taxing officers to the Treasurer for the retirement of the installments of said bonds as the same shall fall due. The Sinking Fund Commissioners shall, on the first day of July of each year, pay to the Treasurer from the moneys which have come into their hands as a sinking fund for that purpose the balance of the moneys required for the retirement of bonds falling due on August first of that year.

10. All ordinances and parts of ordinances inconsistent herewith are hereby repealed; and this ordinance shall take effect immediately upon its 30 publication as provided by law.

Adopted August 18, 1916.

THOMAS WHITAKER, Mayor.
ROLAND B. CORSON,
LEWIS E. KURTZ,
WALTER S. KATES,
W. FRED WARE,
Commissioners.

Attest:

JOHN S. HORTON, Clerk.

PROOF OF PUBLICATION—SHOWING INTRO-
DUCTION OF ORDINANCE 152.

COUNTY OF CUMBERLAND, }
10 STATE OF NEW JERSEY, } ss.

W. E. Middleton, of full age, being duly sworn according to law, on his oath deposes and says that he is the publisher of the Millville Daily Republican, a newspaper printed and published at the City of Millville, in the County of Cumberland, and State of New Jersey; and that the notice of which the annexed printed slip is a true copy, was printed and published in the said newspaper on the 7th day of
20 August, nineteen hundred and sixteen, and continued to be printed and published in the said newspaper for one time, and that the dates on which said publications were made as aforesaid are: August 7, 1916.

Sworn to and subscribed to
before me this 15th day of
August, nineteen hundred W. E. MIDDLETON.
and sixteen.

MAUDE F. HANKINS,
30 (SEAL) Notary Public of New Jersey.

The printed slip referred to is a true copy of Ordinance Number 152 as shown above with the addition of the caption "City of Millville, Notice" and "Notice is hereby given that an ordinance, a copy of which is hereinafter set out, was introduced before the Board of Commissioners of the City of Mill-

ville, on Friday, August 4th, 1916, and the same remains on file in the office of the City Clerk open to the inspection of all persons interested therein, and that said ordinance will be considered by the Board of Commissioners on final passage, on Friday, August 18, 1916, at 3.30 o'clock in the afternoon, at the Commission Chamber in the City Hall, in the City of Millville, N. J., when and where any persons interested therein may be heard for or against the passage of the same. Following is a copy of the proposed ordinance referred to." 10

PROOF OF PUBLICATION—ADOPTION OF
ORDINANCE 152.

20

STATE OF NEW JERSEY, }
COUNTY OF CUMBERLAND, } ss.

W. E. Middleton, of full age, being duly sworn according to law, on his oath deposes and says that he is the publisher of the "Millville Daily Republican," a newspaper printed and published at the City of Millville, in the County of Cumberland, and State of New Jersey; and that the notice, of which the annexed printed slip is a true copy, was printed and published in the said newspaper on the 21st day of August, nineteen hundred and sixteen, and continued to be printed and published in the said newspa- 30

per for one time, and that the dates on which said publication were made as aforesaid are:

August 21, 1916.

Sworn to and subscribed to

before me this 22nd day of W. E. MIDDLETON.

August, nineteen hundred
and sixteen.

MAUDE F. HANKINS,

(SEAL) Notary Public of New Jersey.

- 10 (The printed slip referred to is a true copy of Ordinance Number 152, shown above, with the addition of the Caption "City of Millville;" also with the addition of the following paragraph at the bottom of the advertisement: "The foregoing Ordinance was adopted on the 18th day of August, 1916. The bonds authorized thereby will be issued and delivered after the 20th day of September, 1916, and any suit, action or proceeding to set aside or vacate this Ordinance must be begun on or before said
- 20 last mentioned date.

JOHN S. HORTON,

Clerk of the City of Millville.")

EXTRACT FROM THE MINUTES OF THE
BOARD OF COMMISSIONERS OF THE
CITY OF MILLVILLE, NEW JERSEY.

Millville, New Jersey, December 10, 1920.

- 30 The Board of Commissioners met in regular session with Mayor Felmey presiding. Members present, Felmey, Simmerman, Bennett, Kates and Wheaton.

* * * * *

Resolution No. 372, authorizing the Director of Revenue and Finance to advertise for sealed proposals for the purchase of \$126,000 Water Bonds,

authorized to be issued by Ordinance No. 145, was adopted by the following vote: Yeas, Simmerman, Bennett, Kates, Wheaton and Felmev.

Resolution No. 373, authorizing the Director of Revenue and Finance to provide blanks for bidders for the bonds to be issued under the provisions of Ordinance No. 145, was adopted by the following vote. Yeas, Simmerman, Bennett, Kates, Wheaton and Felmev.

10

RESOLUTION NUMBER 372.

Be It Resolved By the Board of Commissioners of the City of Millville, New Jersey:

Section 1. That the Director of Revenue and Finance be and he hereby is authorized to insert in the Millville Daily Republican, the Bridgeton Evening News and a financial paper published in New York City or Philadelphia, Pennsylvania, an advertisement calling for sealed proposals for the purchase of One Hundred Twenty-six Thousand (\$126,000) Dollars Water Bonds of the City of Millville authorized to be issued by Ordinance Number 145, adopted by the Board of Commissioners of the City of Millville on the 31st day of December, 1915, such proposals to be received and opened at a meeting of this Board to be held on the thirty-first day of December, 1920. Such advertisement shall be in such form as the Director of Revenue and Finance shall deem best, may require a deposit of cash or a certified check to accompany each bid and may require that the bidders use printed form of proposal to be furnished by the City.

Section 2. Said bonds, the endorsement thereon and the interest coupons thereto attached shall be in substantially the following form, to wit:

No. \$1000.00

UNITED STATES OF AMERICA,
STATE OF NEW JERSEY,
CITY OF MILLVILLE,
WATER BOND.

The City of Millville, in the State of New Jersey, hereby acknowledges its indebtedness for value received and promises to pay to the bearer, or, if this bond be registered, to the registered holder hereof, on the first day of December, 1945, the sum
10 of

ONE THOUSAND DOLLARS,

with interest thereon at the rate of five per centum (5 per cent.) per annum, payable semi-annually on the first day of June and the first day of December in each year upon surrender of the annexed interest coupons as they severally become due. Both principal and interest of this bond are payable in lawful money of the United States of America at the Millville National Bank in the City of Millville, New
20 Jersey.

At the request of the holder, this bond will be registered as to principal or as to principal and interest, in accordance with the provisions endorsed hereon.

This bond is one of an issue of like date, amount and tenor, issued for the purpose of defraying all the expenses and the cost of purchase of the real estate, works, property, rights, franchises, privileges and appurtenances of the Peoples' Water
30 Company of Millville, New Jersey, and of maintaining and extending the same, and for the purchase of materials, the laying of mains in and about the City, or leading from or connecting it with source of supply and constructing all works necessary for the accomplishment thereof for the purpose of supplying said City and the inhabitants thereof with water

for public and private use and consumption, under the authority of an act entitled, "An act to enable cities to supply the inhabitants thereof with pure and wholesome water," approved the 21st day of April, 1876 (Compiled Statutes, page 823), and the acts supplemental thereto and amendatory thereof, and is authorized by an ordinance of the Board of Commissioners of said City, adopted the 31st day of December, 1915, and duly published, as required by law, and a resolution of said Board duly adopted. 10

It is hereby certified that all conditions, acts and things essential to the validity of this bond exist, have happened and have been done and that every requirement of law effecting the issue thereof has been duly complied with, and that the issue of bonds of which this is one is within every debt and other limit prescribed by the Laws and Constitution of said State.

The faith and credit of said City are hereby pledged to the punctual payment of the principal and interest of this bond according to its terms. 20

IN WITNESS WHEREOF, the City of Millville has caused this bond to be signed by its Mayor, countersigned by its Director of Revenue and Finance and City Treasurer and attested by its City Clerk under the corporate seal of the said City, and the coupon attached hereto to be authenticated by the facsimile signatures of said Director of Revenue and Finance and City Treasurer, and this bond to be dated as of the first day of December, 1915.

Countersigned: 30

.....
 City Treasurer. Mayor.

Attest:

.....
 City Clerk Director of Revenue and Finance.

WE HEREBY CERTIFY, That we have this day cut off and cancelled all the unmatured coupons attached to this bond and that the within bond is hereby converted into a registered bond, with the interest payable thereon semi-annually. Both principal and interest will be payable to the registered holder named in the registration blank below, his assignee or legal representative, at the times and place expressed on the face of this bond. The interest on request will be remitted by mail in New York Exchange.

Dated Millville, N. J.

.....
Mayor.

.....
City Treasurer.

This bond may be registered as to principal under the signature of the City Treasurer below, and shall thereafter be transferrable only by a written assignment of the registered owner or his attorney duly acknowledged or proved, such transfer to be endorsed hereon and entered on the books of said City Treasurer kept for that purpose. Such transfer may be to "Bearer." The coupons will remain payable to bearer, unless all of them shall be surrendered and canceled, as evidenced by the execution of the foregoing conversion certificate provided for that purpose.

30 Name of
Date of Registry Registered Holder City Treasurer
COUPON.

No. \$25.00

The City of Millville, in the STATE OF NEW JERSEY, will pay to the bearer Twenty-Five Dollars (\$25) on the first day of 19 , at the Millville National Bank, Millville, New Jersey,

being the semi-annual interest then due on its water bond.

City Treasurer. Director of Revenue
and Finance.

Adopted December 10, 1920.

WALTER H. FELMEY, Mayor.
W. J. SIMMERMAN,
SAMUEL D. BENNETT,
WALTER S. KATES,
W. S. WHEATON,
Commissioners.

Attest:

JOHN S. HORTON, Clerk.

PROOF OF PUBLICATION—RESOLUTION
NUMBER 372. 20

STATE OF NEW JERSEY, }
COUNTY OF CUMBERLAND, } ss.

W. E. Middleton, of full age, being duly sworn according to law on his oath deposes and says that he is the publisher of the Millville Daily Republican, a newspaper published in the City of Millville, in the County of Cumberland and State of New Jersey; and that the notice of which the annexed printed slip is a true copy, was printed and published in the said newspaper on the 16th day of December, nineteen hundred and twenty, and continued to be printed and published in the said newspaper for three weeks successively, at least once in each week,

the last publication of said notice being on the 30th day of December, nineteen hundred and twenty; and that the dates on which said publication were made as aforesaid are:

December 16-23-30, 1920.

Sworn to and subscribed be-

fore me this 31st day of W. E. MIDDLETON.

December, nineteen hun-
dred and twenty.

10 MAUDE F. HANKINS,
(SEAL) Notary Public of New Jersey.

(The annexed printed slip referred to in Proof of Publication is a true copy of the printed form herewith.)

20 PROOF OF PUBLICATION—RESOLUTION
NUMBER 372.

STATE OF NEW JERSEY, }
COUNTY OF CUMBERLAND, } ss.

30 R. L. VanHook, of full age, being duly sworn on her oath saith, that she is the agent of the Evening News Company, publishers of the Bridgeton Evening News, a newspaper printed and published at Bridgeton, in the County of Cumberland, in the State of New Jersey; that the City of Bridgeton is the County Seat of said County and is the municipality in said County having the largest population by the last preceding federal and State census, and that the notice, of which the annexed is a printed copy, was published in said newspaper three times,

and that the dates on which said publication was so made as aforesaid are:

December 14-21-28, 1920.

Subscribed and sworn to be-

fore me, this 12th day of REBA L. VANHOOK

January, A. D. 1921.

J. ROY OLIVER,

Atty. at Law of N. J.

(The annexed printed copy referred to in Proof of Publication is a true copy of the printed form 10 herewith.)

BLANK PROPOSAL AND ADVERTISEMENT.

\$126,000.00 Five Per Cent. Water Bonds of the City of Millville, New Jersey.

Sealed proposals will be received until Friday, December thirty-first, 1920, at 3.30 o'clock P. M., at which time the proposals will be opened before the Board of Commissioners, in the Commission Chamber, at the City Hall, Millville, New Jersey, for the purchase of Water Bonds of the City of Millville, New Jersey, of the par value of \$126,000.00, subject to the following conditions:

All bids must be enclosed in sealed envelopes, directed to Wilbert J. Simmerman, Director of Revenue and Finance of the City of Millville, Millville, New Jersey, and must be accompanied by cash or certified check for two per cent. of the par value of bonds bid for, which check shall be drawn to the order of the City of Millville, and made payable at some lawful incorporated bank or trust company of

- New Jersey, Pennsylvania or New York, which check or cash shall be deemed and held a guaranty that the bidder presenting the same will be bound by and will comply with the terms of his bid and this notice. No bid will be received for less than par and accrued interest. All bids must be delivered to the Director of Revenue and Finance on or before the thirty-first day of December, 1920, at 3.30 o'clock P. M., when the same will be opened by the said
- 10 Director of Revenue and Finance in the presence of the Board of Commissioners of the City of Millville at the Commission Chamber, in the City Hall, Millville, New Jersey. Bonds will be delivered to the successful bidder or bidders at the office of the Treasurer of the City of Millville, on Saturday, the fifteenth day of January, 1921, at twelve o'clock noon, when and where the balance of the purchase price must be paid in cash or certified check as afore-
- 20 said; and in case any bidder shall fail or refuse to pay for and receive any bonds allotted to him, according to the terms of this notice, his deposit afore-
- 30 said shall be forfeited to the city, and said bonds so allotted may then be awarded to the next highest bidder, or again be advertised and sold by the Board of Commissioners; and in case any of said bonds are so awarded to the next highest bidder, he will be required to pay for and receive the same within ten days after notice so to do. The Board reserves the right to reject any or all bids. All proposals will be subject to the provisions stated in the bids and in this notice contained. **Bidders must use the printed form of proposals furnished by the City which may be had on application to the City Treasurer, the Director of Revenue and Finance, or the City Clerk.** Bids must be stated in words and figures. All bids not in accordance with the above directions will be rejected.

Said bonds are to bear date December first, 1915; will be issued in denominations of \$1,000 each; bear interest at the rate of Five per centum (5 per cent.) per annum, payable semi-annually, June 1 and December 1, are payable both principal and interest at the Millville National Bank, Millville, New Jersey; and the principal is payable on December first, 1945. Said bonds are coupon bonds with privilege of registration as to principal only or as to both principal and interest. Interest on fully registered bonds will, on request of owner, be remitted by mail in New York exchange. 10

The said Water Bonds are to be issued under and pursuant to the provisions of Ordinance No. 145, adopted by the Board of Commissioners of the City of Millville, December thirty-first, 1915 (prior to the enactment of Chapter 252 of the Laws of 1916, commonly known as the Pierson Act, the provisions of which as to serial maturities, method of sale, etc., are in the opinion of counsel not applicable to this issue) for the purpose of paying the contract price of the purchase by the city of the property and franchises of the Peoples' Water Company of Millville, New Jersey. The validity of said ordinance has been affirmed by the Court of Errors and Appeal of New Jersey. 20

The legality of this issue of bonds has been approved by Caldwell and Raymond, Attorneys, 115 Broadway, New York City, New York, a copy of whose opinion will be furnished any purchaser of the bonds on request. 30

Dated December tenth, 1920.

WILBERT J. SIMMERMAN,
Director of Revenue and Finance of the City
of Millville, City Hall, Millville, N. J.

FINANCIAL STATEMENT.

	Assessed valuation, real estate, 1920,	
	except 2d class railroad property,	\$5,903,825.00
	Assessed valuation 2d class railroad	
	property, 1920,	50,290.00
	Assessed valuation, personal estate,	
	1920,	2,094,075.00
10	Total valuation, 1920,	8,048,190.00
	Bonding Debt (including this issue),	465,377.16
	Water Bonds,	\$126,000.00
	Sinking Funds,	75,547.22
	Net Bonded Debt,	\$263,829.94
	Floating Indebtedness,	None
	Cash balance,	55,490.92
20	Population, 1920,	14,760.00

PROPOSAL FOR MILLVILLE IMPROVEMENT
BONDS.TO THE DIRECTOR OF REVENUE AND
FINANCE OF THE CITY OF MILLVILLE.

30

For one hundred twenty-six thousand dollars [\$126,000] par value of the City of Millville five per cent. Water Bonds, dated December first, 1915, referred to in the annexed advertisement, which is hereby made a part of this proposal, the undersigned will pay

..... Dollars [.....].
together with the accrued interest on said bonds to
the date of delivery and will accept delivery of said
bonds at the office of the Treasurer of the City of
Millville, N. J., on the fifteenth day of January, 1921,
at twelve o'clock noon.

Cash or certified check payable to the order of
the City of Millville, in the sum of.....

.....Dollars [\$],

the same being two per cent. of the par value of the 10
bonds hereby bid for, accompanies this proposal and
is to be returned to

.....
upon the sale of the bonds, provided this proposal is
not accepted, otherwise to be retained by the said
city until the delivery of the bonds and the payment
thereof as above stated, when said deposit will be
applied toward the purchase price; and the same
may be retained to the use of said city as and for
liquidated damages and not as a penalty in case the 20
undersigned fails to make such payment of the pur-
chase price according to the terms of this proposal.

Dated.....19

.....
P. O. Address

NOTE—No addition to or alteration in the printed
portion of the above proposal shall be made and the
same must not be detached from the annexed adver-
tisement.

30

RESOLUTION NUMBER 373.

Resolved, That the Director of Revenue and
Finance cause to be printed a sufficient number of

blanks for bidders for the bonds to be issued under the provisions of Ordinance Number 145 of the City of Millville; and also, that he cause to be printed, forthwith, ready for execution by the proper officers of the City, the bonds provided for by said Ordinance to the end that the same may be executed by the proper officers and delivered to the purchaser or purchasers.

Adopted December 10th, 1920.

10

WALTER H. FELMEY, Mayor.
W. J. SIMMERMAN,
SAMUEL D. BENNETT,
WALTER S. KATES,
W. S. WHEATON,

Commissioners.

Attest:

JOHN S. HORTON, Clerk.

20

PUBLIC INFORMATION FOR VOTERS OF
MILLVILLE.

RESOLUTION NO. 366.

30

Whereas, This Board in and by Resolution No. 360, has submitted to the legal voters the question of the acceptance or rejection of the proposal made in writing by the Peoples' Water Company of Millville, New Jersey, dated July 31, 1920, to sell its entire plant to the city, and whereas in said resolution it is recited that this Board is of the opinion that it

is advantageous to the city to accept said proposal; and requests have come to the Commissioners from various sources that the Board make known to the public reasons on which such opinion favoring the purchase of the water plant on the terms offered by the company is founded, and it is proper and advisable, under the circumstances, that the board make known to the public its reasons in the premises;

And whereas such reasons are fairly set forth as stated in the public letter annexed to this resolution, without reference to the point whether or not within a reasonable period of time and by expenditure of a reasonable sum for house connections, the said water plant, if owned and operated by the public, might be made a paying proposition; therefore,

Resolved, By the Board of Commissioners of the City of Millville, that the Public Letter hereto attached expresses concisely and fairly the reasons why this Board believes that Resolution 360 providing for the purchase by the City of Millville of the entire plant of the Peoples' Water Company of Millville, N. J., ought to be adopted by the legal voters of the city at the election to be held next Tuesday, November 2, 1920, and that, for the information of our citizens, this resolution, and the attached Public Letter of the Commissioners forming a part thereof, be published by the Clerk in one or more of the newspapers circulating in this city, daily until the close of the next election.

Adopted October 29th, 1920.

.....Mayor.
W. J. SIMMERMAN,
SAMUEL D. BENNETT,
WALTER S. KATES,
W. S. WHEATON,
Commissioners.

STATE OF NEW JERSEY, }
COUNTY OF CUMBERLAND, } ss.

I, JOHN S. HORTON, Clerk of the City of Millville, hereby certify the foregoing to be true copies of the resolutions, ordinances, minutes and proceedings therein recited, as compared with the originals of record in my office.

10 In witness whereof I have hereto set my hand and caused the seal of the City of Millville to be hereto affixed, this fourteenth day of January, 1921.

(Seal) JOHN S. HORTON,
Clerk of the City of Millville.

20

30

DEPOSITIONS.

NEW JERSEY SUPREME COURT.

WILLIAM P. ADAMS, <i>Prosecutor,</i>	}	Case No. 1. On Certiorari of Contract. On Petition to Quash. Depositions.	10
vs.			
JOHN S. HORTON, Clerk City of Millville, THE CITY OF MILLVILLE, and THE PEOPLES' WATER COMPANY of Millville, N. J., <i>Defendants.</i>			

WILLIAM P. ADAMS, <i>Prosecutor,</i>	}	Case No. 2. On Certiorari of Bond Issue. On Petition to Quash. Depositions.	20
vs.			
JOHN S. HORTON, Clerk City of Millville, THE CITY OF MILLVILLE, and THE PEOPLES' WATER COMPANY of Millville, N. J., <i>Defendants.</i>			

30

Depositions and other evidence in the above stated cause taken this 31st day of January, A. D. 1921, at 10 o'clock A. M., at the Court House, Camden, New Jersey, before Edward I. Berry, Supreme Court Commissioner, pursuant to notice annexed,

the taking of said depositions having by consent been adjourned to this time. Present, Lewis Starr, Esq., for the prosecutor; Louis H. Miller, Esq., for the City of Millville, and J. Fithian Tatem, Esq., for The Peoples' Water Company of Millville, New Jersey.

It is agreed that the depositions shall be taken stenographically and the signatures of the witnesses waived.

10

It is agreed between counsel that the writ, return, record, proceedings and testimony in both of these cases be printed together. Also that the testimony taken under the rule to show cause hereunder shall be used in the above stated cases, and
20 that the record, the return, the proceedings and testimony in each of the cases designated as Nos. 1 and 2 may be used on the argument and considered by the Court in the disposition of both causes.

It is further stipulated between counsel:

1. That the City of Millville accepted the provisions of the Walsh Act of 1911.

2. That the City also adopted the General Water Act of April 21, 1876.

3. That resolution No. 261, offered in evidence
30 on the taking of depositions on the rule to show cause was adopted on March 1, 1918, as is therein recited.

4. That an election was held on April 17, 1918, in the City of Millville, under the provisions of Resolution 261, which resulted as follows: In favor of said resolution, 663 votes were cast, and against said resolution 818 votes were cast.

5. That the communications from the Millville Municipal League which were presented in the year 1915, together with the list of names attached thereto, a copy of which communications are returned with the writ, need not be printed.

6. That the statement of the financial condition of the City of Millville, as of August 4, 1916, as appears in the return, need not be printed.

7. That the certificate of the city engineer as to the period of the usefulness of the improvement 10 need not be printed.

JOHN S. HORTON, sworn.

By Mr. Starr:

Q. Mr. Horton, you are the city clerk of the City of Millville, are you? 20

A. Yes.

Q. And been city clerk for how long?

A. Over six years.

Q. And have you here the book of minutes of the Commissioners covering the period of time that you have been acting as clerk?

A. Yes.

Q. Were you clerk in 1915?

A. Yes.

Q. When ordinance 145 was passed? 30

A. Yes.

Q. And been clerk ever since continuously?

A. Yes.

Q. On the 27th of August, 1920, had any appropriation been made by the City of Millville to provide \$125,000 to purchase the plant of the Peoples' Water Company?

A. I don't recall any such action.

Q. Had any bonds at that time been issued and sold for the purpose of raising funds to buy the plant on that day?

A. Not to my recollection.

Q. And has the City of Millville ever made any appropriation of funds to purchase the plant of the Peoples' Water Company?

10 A. By a resolution in my return which authorizes the sale of bonds; they were duly advertised, and so forth.

Q. Is that the only action that the Commissioners have ever taken with reference to the appropriation of the funds to buy the plant?

A. As relating to the contract or the proposal in question.

Q. And up until the time of the service of the writs of certiorari upon you no bonds had been issued or sold—that is a fact, isn't it?

20 A. Not to my knowledge.

Q. After the adoption of Resolution 360, did you as clerk, send a certified copy of that Resolution to the Peoples' Water Company?

A. I did.

Q. Do you remember on what day it was sent?

A. Not from memory, I can't give the date.

Q. Was there a letter with it?

30 A. It is my recollection that I dictated a letter enclosing a certified copy and stating in that letter that the action was taken by direction of the Board of Commissioners at a stated meeting.

Q. The resolution was adopted apparently on the 27th of August, 1920; how soon after that did you transmit a certified copy of the resolution?

A. I have no way of fixing the exact date, Judge, of that.

Q. Well, it was before the election was held, then, was it?

A. Yes, undoubtedly before.

Q. Then after the election, the only communication you had, or the city had, with the Peoples' Water Company, was the letter which you wrote, transmitting to the company the result of the election, a copy of which appears in your return?

A. I could not answer that; I could only testify as to what part I might have to do.

10

Q. I mean, as far as you are concerned.

The Witness: Yes, as far as I am concerned I merely followed the directions of the Board of Commissioners at a stated meeting, and transmitted in writing the result of that election to the Peoples' Water Company.

Cross-examination.

By Mr. Miller:

20

Q. Mr. Horton, there had been proceedings for the acquisition of this plant and the payment of the purchase price by ordinance, had there not?

A. Yes.

Q. What is the number of it—what is the number of the original ordinance?

A. 145.

Q. And a copy of that was returned with the writ, wasn't it?

30

A. Yes.

Q. Was there a supplemental or amendatory ordinance?

A. Ordinance 152, a supplemental ordinance to 145.

Q. That has been sent up with the writ, too?

A. Yes.

Q. So that when you state that there had been no proceedings providing for the purchase of this plant, you did not mean to have the court infer that these ordinances had been repealed or rescinded in any way, did you?

A. Well, I did not get the intent of the question just from that angle, Mr. Miller.

10 Q. Well, they haven't been repealed, have they?

A. Oh, no. I did not take it that there had been no ordinance provision made; there had been an ordinance provision for the raising of this money.

Q. Which are still in force?

A. Yes.

Q. Did you send a copy, a certified copy of Resolution 360, to the Peoples' Water Company of Millville, N. J., at some time?

20 A. I think it has been presented here in evidence, hasn't it? I think I saw it across the room being passed around.

Q. And you did at some time notify the company of the result of the election?

A. I did.

WILLIAM P. ADAMS, SWORN.

30 By Mr. Starr:

Q. Mr. Adams, you are the prosecutor in these writs, are you?

A. Yes, sir.

Q. Where do you reside?

A. Millville, New Jersey.

Q. And how long have you lived there?

A. All my life.

Q. How old are you?

A. Twenty-seven.

Q. Do you own real estate?

A. Yes, sir.

Q. In Millville?

A. Yes, sir.

Q. You pay taxes on that real estate?

A. Yes, sir.

10

Cross-examination.

By Mr. Miller:

Q. Mr. Adams, you are the prosecutor of both these writs, are you not?

A. Yes, sir.

Q. Your employment is what?

A. I am employed by the High Pressure Construction Supply Company as salesman.

20

Q. Who is the general manager of that company?

A. Mr. S. J. Franklin.

Q. What office, if any, does Water Wood hold in that company?

A. I couldn't say.

Q. He is the dominating factor, isn't he?

A. I really don't know.

Q. Where is their office?

A. 233 High Street, Millville.

Q. That is the office of the gas, water and electric companies, isn't it?

30

A. It is.

Q. What has Mr. Walter Wood to do with the gas, water and electric companies, if anything?

A. I couldn't say just what office he holds.

Q. Is he the dominating influence in the management of the companies?

A. I couldn't swear to it; it is generally presumed that he is.

Q. What office does Mr. Franklin hold in the water company?

A. I couldn't answer that.

Q. Is it an important office—he is general manager, isn't he?

10 A. I couldn't tell you; I don't work for the water company.

Q. Is he an officer?

A. I don't know.

Q. Is he an officer in the gas company?

A. Yes, I happen to know that.

Q. In the electric light company?

A. Yes.

Q. You knew that the question of the purchase of this plant was submitted at an election in 1918, 20 didn't you?

A. Yes, sir.

Q. And the people voted not to buy it?

A. Yes.

Q. And you know there was an election held in 1920 on the question of purchase, didn't you?

A. Yes, sir.

Q. You voted at that election?

A. I voted.

Q. You voted against it?

30 A. Naturally.

Q. How did you know that the question was going to be submitted at the election? Did you see in the papers an advertisement of Resolution 360, a copy of it?

A. I remember seeing something about the election, yes.

- Q. What property do you own in Millville?
A. House and lot at the corner of Sixth and Mulberry Streets.
Q. What is the value of it?
A. About \$3,000.00.
Q. What is your equity in it—is it mortgaged?
A. Mortgaged.
Q. How much mortgage?
A. The mortgage is about \$1400.00, partially paid.
Q. Are you the litigant in this suit—that is, are you paying the expenses of it? 10
A. I am not.
Q. Who is?
A. I don't know.
Q. Who requested you to appear as prosecutor?
A. Mr. Franklin asked me if I cared to appear.
-

SIR JOHN FRANKLIN, SWORN.

20

By Mr. Starr:

- Q. Mr. Franklin, where do you reside?
A. Millville, New Jersey.
Q. How long have you lived there?
A. About twenty years, eighteen to twenty.
Q. What is your age?
A. Fifty-six.
Q. Do you own property? 30
A. Yes, sir.
Q. Real estate?
A. Yes, sir.
Q. Are you a taxpayer—do you pay your taxes?
A. Yes, sir.

Cross-examination.

By Mr. Miller:

Q. What do you pay taxes on, real estate on Second Street?

A. Real estate, 112 North Second Street.

Q. A residence, isn't it?

10 A. A residence, yes, rented to George Thomas, who lives there.

BOTH SIDES REST.

[ENDORSEMENT.]

20

NEW JERSEY SUPREME COURT.

William P. Adams,

Prosecutor,

vs.

John S. Horton, Clerk City of Millville, the City
of Millville and The Peoples' Water Company
of Millville, N. J.,

Defendants.

30

Case No. 1.

On Certiorari of Contract.

On Petition to Quash.

Depositions.

William P. Adams,

Prosecutor,

vs.

John S. Horton, Clerk City of Millville, The City
of Millville and The Peoples' Water Company
of Millville, N. J.,

Defendants.

Case No. 2.

On Certiorari of Bond Issue.
On Petition to Quash.
Depositions.

10

COMMISSIONER'S FEES.

Prosecutor:

To 1 sitting,	\$4.00
To swearing 3 witnesses @ .25,	.75
To taking 15 fol. of evidence @ .30,	4.50
	\$9.25

20

Respondents:

To taking 12 fol. of evidence @ .30	\$3.60
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EDWARD I. BERRY, S. C. C.

30

PETITION TO QUASH WRIT.**NEW JERSEY SUPREME COURT.**

10	WILLIAM P. ADAMS, <i>Prosecutor,</i> vs. JOHN S. HORTON, City Clerk, City of Millville; THE CITY OF MILLVILLE; and the PEOPLES' WATER COMPANY OF MILLVILLE, N. J., <i>Defendants-in-Certiorari.</i>	}	On Certiorari of Contract. (Case No. 1.) Petition to Quash Writ.
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20

To his Honor Charles C. Black, Justice of the Supreme Court:

The City of Millville and the Peoples' Water Company of Millville, New Jersey, respectfully show unto your Honor:

30 1. That in the year 1915, an ordinance of the City of Millville, known as Ordinance 145, was adopted, providing for the acquisition, by purchase or condemnation, of the plant of the Peoples' Water Company, of Millville, New Jersey.

2. The validity of that ordinance was reviewed by this Honorable Court on certiorari, as well as the

validity of the proceedings resulting in the adoption by the elector of the Water Act of 1876, referred to in the ordinance. The Supreme Court adjudged, that the proceedings resulting in the adoption of the Water Act of 1876, were valid, and Ordinance Number 145 was affirmed by this Court. Said judgments were affirmed by the Court of Errors July 6, 1916.

Wood vs. Millville;

Franklin vs. Millville, 89 N. J. L. 646.

10

3. Afterward, on August 18, 1916, Ordinance Number 152 was adopted, modifying the form of bonds to conform to the provisions of the Pierson Act (P. L. 1916, p. 525). The ordinance was published, and appended to the ordinance was the following published notice:

"The foregoing ordinance was adopted on the 18th day of August, 1916. The bonds authorized thereby will be issued and delivered after the 20th day of September, 1916, and any suit, action or proceeding to set aside or vacate the ordinance must be begun on or before the said last mentioned date.

20

John S. Horton,
Clerk of the City of Millville."

4. Negotiations between the city and the water company for the purchase of the plant were carried on and resulted in an offer invited by the city to purchase the plant, on certain terms, subject to the approval of the voters. The electors voted in the negative on that proposition.

30

5. Further negotiations between the parties led to the offer by the water company to the city for a

sale of the entire plant on certain terms; which offer was accepted subject, however, to the approval of the voters at the then next general election to be held November 2, 1920. Said proposal was dated July 31, 1920, and Resolution 360 was adopted August 27, 1920. A copy of said resolution is annexed and made a part hereof.

6. Pursuant to the directions contained in the
10 resolution, it was advertised in the local papers once in each week of October last, and was published daily except Sunday from October 25, to November 2, 1920. The proposition submitted also was published on the sample and official ballots. Thus wide publicity was given to the Resolution No. 360.

7. The election held November 2, 1920, resulted as follows: Yes, 2711; No, 1294, and so the resolution thus submitted was adopted. The return or certifi-
20 cate of the county board of canvassers was made November 6, 1920. The local newspapers made the usual reports of the result of said election touching the adoption or rejection of Resolution 360.

8. On November 19, 1920, the city government by the governing body, ordered the clerk to notify the Peoples' Water Company of the result of said election; and a letter was accordingly forwarded by the city clerk to the water company. The officers of the
30 water company were also informed in like manner as was the public in general of the result of said election. And on November 12, 1920, when the certificate of the result of the election was laid before the commissioners and filed by the clerk, Director Wheaton and Solicitor Miller were instructed to proceed with approval by competent authority of the

necessary bond issue and to take any action necessary to complete the transaction of the purchase. On December 3, 1920, the city solicitor reported (as was the fact) that he had visited New York and consulted with Caldwell & Raymond, in reference to the validity of the bond issue, and further reported that the titles to the property were now being examined, and the business concerning the purchase of the plant proceeding satisfactorily.

10

9. In connection with the title, learning from Mr. W. H. Roth, its vice-president, that there was a trust mortgage of \$150,000 on the plant, the city solicitor notified him that the city would not only require the mortgage cancelled but, also, would require cancellation, and deposit with the city government, of all of the bonds secured by the mortgage. Mr. Roth undertook to secure cancellation and surrender of the bonds and satisfaction of the mortgage in time for the settlement December 31, 1920, 20 the time fixed by the proposal accepted by Resolution No. 360; and on December 22, 1920, wrote the city solicitor as per letter attached and made part hereof.

10. On December 29, 1920, W. H. Roth, vice-president of the water company, lodged with the city solicitor (1) the said trust mortgage for \$150,000 of bonds (2) a warrant for satisfaction of same; (3) a certain prior mortgage, discovered by the city 30 to be open on record, to secure \$100,000 of bonds; and (4) a warrant for satisfaction of the same. Said city solicitor retained the two mortgages, but returned the warrants to Mr. Roth, requesting that the usual prothonotary's certificate of authority of the notary be attached. On December 31, 1920, at 2.30

P. M., said W. H. Roth delivered said satisfaction pieces to the city solicitor, who now has custody of both mortgages and both satisfaction pieces.

11. The warrant for satisfaction of the \$150,000 mortgage was dated December 29, 1920; and was proved December 22, 1920, before Frank N. Jardine, notary public of Pennsylvania; and the prothonotary's certificate (No. 46227) is dated December 30,
10 1920. The warrant for satisfaction of the \$100,000 mortgage bears date December 29, 1920, and was proved before the said notary the same day, and the prothonotary's certificate (No. 46226) attached bears date December 30, 1920.

12. By said warrant for satisfaction of said \$150,000 trust mortgage it is recited:

20 "And whereas it appears to the satisfaction of this company (the trust company) that the bonds issued under and secured by said mortgage have been paid and satisfied in full, both as to principal and interest, for which reason the aforesaid request (for cancellation of the trust mortgage) can properly be granted."

And a like recital appears in the warrant for satisfaction of the other mortgage, although that is not here material.

30 13. In fact, as the Peoples' Water Company of Millville, New Jersey, charges and said city is informed by W. H. Roth, vice-president of said company and likewise charges, there were outstanding, in the hands of *bona fide* holders, for value on December 22, 1920, \$150,000 par value of valid bonds secured by said trust mortgage in that sum and the holders of said bonds, upon the faith and credit of

the agreement for sale of said water plant to the City of Millville, and upon the definite understanding and agreement then made between said bondholders and the Peoples' Water Company of Millville, New Jersey, that the purchase price of \$125,000 expected to be received by said company on consummation of the sale of its plant to the City of Millville under the terms set forth in Resolution 360, would be paid and distributed amongst said bondholders, *pro rata*, said bondholders surrendered up and cancelled their said \$150,00 par value of bonds, in good faith, and to the end that the title to this property would be cleared in time for the settlement, agreed upon as December 31, 1920. 10

14. Under the circumstances mentioned not only have said bondholders surrendered up their bonds but all of said issue of \$150,000 par value of bonds outstanding December, 1920, as aforesaid were mutilated and destroyed; and the same now are in possession of the water company in that condition. 20

These petitioners therefore aver that the writ of certiorari allowed herein December 30, 1920, ought be quashed because:

First. The prosecutor alleges as a reason against the making of the contract only a technical point concerning the wording of the ballot a question that should have been presented to the Justice of the Supreme Court, prior to the election, under Section of the Election Law, and it is now too late to raise that point. 30

Second. The affidavit presented on application for the writ points out a form of question framed

by the "Home Rule" Act, but ignores Article XIII, Sections 13, 14, 15 and the form of ballot of the general Election Law, P. L. 1920, pp. 690, 691, 692, 693.

Third. Prosecutor is in gross laches in that he waited so long before applying for the writ that securities of the par value of \$150,000 and of the actual cash value of \$125,000 have been destroyed, in the reasonable effort of the water company and its
10 creditors, in good faith to clear the title of the plant ready for settlement at any early, specified day.

Fourth. The laches of the prosecutor has placed the city in a position where its interests as a purchaser are jeopardized, for that timely objection to the form of ballot (if defective) would have permitted the election officials to correct the ballot in order of the Justice of the Supreme Court.

For the reasons aforesaid, and forasmuch as many
20 of the matters aforesaid were not presented to the Justice when the writ was prayed for, defendants pray the writ may be quashed.

LOUIS H. MILLER,

Attorney of City of Millville.

J. FITHIAN TATEM,

*Attorney Peoples' Water
Company of Millville, N.*

J.

STATE OF NEW JERSEY, }
CUMBERLAND COUNTY, } ss.

LOUIS H. MILLER, being duly sworn, on his oath deposes and says:

I am one of the officers of the City of Millville having knowledge of the acts of the city government related or referred to in the foregoing petition, which I have read; and I also had the transaction with the Peoples' Water Company recited in the petition. So far as those matters are concerned, they are true. 10

Concerning the cancellation of the bonds, some time early in July, Mr. W. H. Roth, vice-president of the Peoples' Water Company, called at my office, and we discussed the title to the water plant. He disclosed to me the fact of the existence of a trust mortgage for \$100,000 securing a large amount of bonds, nearly all of which I understood from him were in the hands of people or interests friendly to the American Pipe and Construction Company, said to own a majority of the Peoples' Water Company stock. I requested Mr. Roth to not only have the trust company authorize the mortgage cancelled at settlement, but also to turn over to the city the bonds, cancelled, because there we would always be able to prove by checking the bonds that all of them had been cancelled and surrendered; and I pointed out that this practice had been adopted by me in April, 1920, when I passed title to the Cumberland Glass Manufacturing Plant, on which was a bond issue of \$1,000,000.00 and which plant had been sold to the Illinois Glass Company, and that the Illinois counsel had insisted on surrender of the cancelled bonds as a muniment of title. Mr. Roth sug- 20 30

gested that an incineration certificate ought be satisfactory, but on my insistence he undertook to get the bonds and have them cancelled and turned over to the city at the settlement. On December 22nd, 1920, the company wrote a letter as per copy attached, to which I replied, a copy of my letter being also attached. On December 28th, 1920, Mr. Roth came to my office with the two cancelled mortgages and the two satisfaction pieces, as stated in the petition. I
10 have kept the mortgages ever since and now have them. The two satisfaction pieces, as stated, were returned to Mr. Roth, who brought them to my office again on December 31, 1920, with the prothonotary's certificates attached. When he came into my office, on this last occasion I told him that the writ of certiorari had been allowed.

William P. Adams is a young man who works in the Gas, Water and Electric office, of which Mr. S. J. Franklin is general manager and Mr. Walter
20 Wood is treasurer, those gentlemen being the prosecutors in Wood vs. Millville and Franklin vs. Millville. Hence it is reasonable to infer, and I believe, he was especially interested in the question of the adoption of Resolution 360 and in a position to be informed so that he might promptly prosecute a writ of certiorari, or question the legality of the wording on the ballot he now complains of.

LOUIS H. MILLER.

30 Sworn to and subscribed before me this 24th day of January, 1921.

(Seal)

MARY F. LYONS,
*A Foreign Commissioner of
Deeds for New Jersey.*

STATE OF PENNSYLVANIA, }
CITY OF PHILADELPHIA, } ss.

WILLIAM H. ROTH, of full age, being duly sworn according to law, on his oath says that he is the vice-president of the Peoples' Water Company of Millville, N. J., and that H. Bayard Hodge is the treasurer of said company; that deponent and said Hodge have had charge of the negotiations and arrangements between the City of Millville and the said Peoples' Water Company relative to the purchase by said city of the water plant located at Millville owned by said company; that deponent has read the foregoing petition and the statements therein contained relative to the negotiations between the said city and the Peoples' Water Company of Millville, N. J., are true. 10

Deponent further says that some time in July, 1920, deponent called at the office of Louis H. Miller, Esq., city solicitor of the City of Millville, New Jersey, and discussed with said Miller the matter of the transfer to the said City of Millville of the title to the water plant in question; that deponent stated to the said Miller that there existed a trust mortgage for \$150,000.00 to secure that amount par value of the outstanding bonds, and said Miller then advised deponent that upon the settlement it would be necessary not only to produce a proper satisfaction piece to cancel the said mortgage, but that all the bonds must be duly cancelled and turned over to the city before the said Miller would approve the purchase; that deponent at that time suggested to said Miller that the customary method should be followed, which was that the bonds should be destroyed by burning, and that an incineration certifi- 20 30

cate to that effect, executed by the trust company which was the trustee for said bonds, should be sufficient; but upon the insistence of the said Miller, deponent agreed that the bonds should be actually mutilated and delivered to said Miller, as the representative of the City of Millville.

10 Deponent further says that on December 29th, 1920, deponent visited Millville, N. J., and went to the office of Louis H. Miller, Esq., the city solicitor of said City of Millville, taking with him the two cancelled mortgages and the two satisfaction pieces, as stated in the petition; that owing to the fact that the satisfaction pieces did not have attached thereto the prothonotary's certificates deponent took them with him to Philadelphia and caused said prothonotary's certificates to be attached, and on December 31st, 1920, took the said satisfaction pieces, with the said certificates duly attached, and delivered them to the said Miller; that it was on the occasion of
20 this visit to Millville on December 31st, 1920, that deponent first received notice of the issuance of a writ of certiorari in this case.

Deponent further says that in order to pass a valid and clear title to the property, which it was intended and proposed that the Peoples' Water Company should convey to the City of Millville, it was necessary to obtain from the holders and produce for cancellation the entire \$150,000.00 of bonds outstanding, secured by the mortgage for \$150,000.00
30 above mentioned; that the said bonds were a first lien upon the property and franchise of the Peoples' Water Company of Millville, N. J., and in order to pass a title to said property to the City of Millville clear of all incumbrances, it was necessary that said bonds should be cancelled and the mortgage securing the same satisfied of record; that with this pur-

pose deponent secured the assent of the holders of all of the said bonds to the surrender and cancellation thereof, and their further consent to accept in full payment for said bonds the purchase price of \$125,000.00 agreed to be paid by the City of Millville to the Peoples' Water Company of Millville, N. J., for said property; that deponent further says it is impossible to again place the holders of said bonds in the position that they were prior to the cancellation thereof, and that unless settlement is allowed 10
to proceed in accordance with the plans as contemplated and agreed an irreparable injury will be suffered by the holders of the said bonds.

WILLIAM H. ROTH.

Sworn to and subscribed before me this 21st day of January, 1921.

MARY F. LYONS.

(Seal)

*A Foreign Commissioner of
Deeds for New Jersey.*

20

PEOPLES WATER COMPANY OF MILLVILLE,
N. J.

Office: 112 N. Broad St.

Philadelphia, Pa., December 22d, 1920.

Lewis Miller, Esq.,

City Attorney,

Millville, N. J.

Dear Sir:—

30

We have received from West End Trust Company, Trustee under mortgage of Peoples Water Company of Millville, N. J., dated January 1904, and recorded in the Clerk's Office of Cumberland County, Certificate of Satisfaction of said mortgage.

We have also received from them the bonds which have been duly cancelled, together with the unmatured coupons from January 1st, 1921 to January 1st, 1924, both inclusive, and an incineration certificate stating that all matured coupons have been destroyed.

We desire to know whether you prefer that we should satisfy the mortgage at this time or deliver the mortgage and satisfaction piece to you at time of
10 settlement.

Yours truly,
PEOPLES WATER COMPANY OF
MILLVILLE, N. J.

H.r

H. Bayard Hodge, Treasurer.

December 27, 1920.

Peoples Water Co., &c.

20 112 N. Broad Street,
Second Floor, Philadelphia, Pa.

In Re: City of Millville Water Bonds.

Gentlemen:

I beg to acknowledge receipt of your letter of December 22, referring to the satisfaction of the trust mortgage dated January 14, 1904. It will be satisfactory if you deliver the mortgage at the time of the settlement together with the cancelled bonds and the incineration certificate stating that the ma-
30 tured coupons have been destroyed. However, since you have received the cancelled bonds, incineration certificate and satisfaction piece, you may as well now proceed to cancel the trust mortgage so that the title will be cleared for the settlement.

In this connection I suppose the mortgage shown on the records dated May 1, 1901, to the West End

Trust and Safe Deposit Company to secure an issue of \$100,000.00 of 5% bonds will also be cancelled of record, and at the time of the settlement I will be very glad if you will produce whatever documents may be necessary to show the satisfaction of this earlier mortgage.

You will also find in the files of the American Pipe Company, an assignment of the rights of the Peoples Water Company to receive the money mentioned in the sixth section of Ordinance No. 70. Ordinance 10
No. 70 was superseded by Ordinance No. 73, the latter ordinance being the one under which the present contract was made and which is yet in force. It might be that the American Pipe Company was subrogated to the right of the Peoples Water Company to receive the rentals under Section 6 of Ordinance 73, when that ordinance was substituted for Ordinance 70. At any rate I think it will be wise to get a release from the American Pipe Company to the Water Company and its successors and assigns 20
with respect to this document. The assignment referred to is dated..... 1901, and was recorded August 9, 1901, in Book J of Miscellaneous Records for Cumberland County, page 371 &c.

Yours very truly,
City Solicitor of Millville.

RULE TO SHOW CAUSE.

NEW JERSEY SUPREME COURT.

	WILLIAM P. ADAMS,	
	<i>Prosecutor,</i>	
10	vs.	
	JOHN S. HORTON, City	} On Certiorari of Contract. On Petition to Quash. Rule to Show Cause.
	Clerk, City of Millville;	
	THE CITY OF MILLVILLE;	
	and the PEOPLES' WATER	
	COMPANY OF MILLVILLE,	
	N. J.,	
	<i>Defendants.</i>	

- 20 On reading and filing the petition to quash the writ of certiorari allowed herein, and for good cause therein shown, it is on this 24th day of January, 1921, on motion of Louis H. Miller, attorney of City of Millville, and J. Fithian Tatem, attorney of the Peoples' Water Company of Millville, N. J., ordered that the prosecutor show cause before the Supreme Court, at the State House in the City of Trenton, on the third Tuesday of February, 1921, at 10.30 o'clock in the forenoon, why the allocatur should not be set
- 30 aside and the writ of certiorari herein quashed, as having been improvidently granted.

And it is further ordered that the parties or any of them have leave to take affidavits, on two days notice, to be read on the argument of said cause and on the coming in of this rule; and that a copy of this rule and of said petition and the affidavits annexed to the same be served on the prosecutor or his at-

torney within two days from this date and that for the purpose of such service copies certified by either one of the attorneys of the petitioners may be used.

Let this rule be entered.

CHAS. C. BLACK,
J. S. C. T.

DEPOSITIONS.

NEW JERSEY SUPREME COURT.

10

WILLIAM P. ADAMS,
Prosecutor.

vs.

JOHN S. HORTON, City
Clerk, City of Millville;
THE CITY OF MILLVILLE;
and the PEOPLES' WATER
COMPANY OF MILLVILLE,
N. J.,

Defendants.

Case No. 1.
On Certiorari.
On Petition to Quash.
Depositions.

20

Depositions and other evidence in the above stated cause taken this 31st day of January, A. D. 1921, at 10 o'clock A. M., at the Court House, Camden, New Jersey, before EDWARD I. BERRY, Supreme Court Commissioner, pursuant to notice annexed, the taking of said depositions having by consent been adjourned to this time. 30

PRESENT:

LEWIS STARR, Esq., for the prosecutor.
LOUIS H. MILLER, Esq., for the City of Millville,
and J. FITHIAN TATEM, Esq., for the Peoples'
Water Company of Millville, New Jersey.

(It is agreed that the depositions shall be taken stenographically and the signatures of the witnesses waived.)

10 (It is agreed between counsel that the record, re-
turn, proceedings and testimony in both of the writs
of certiorari may be used on the argument and con-
sidered by the Court in the disposition of the rule
to show cause in case No. 1.)

20 (It is stipulated between counsel that the record
and proceedings on file with the clerk of the Supreme
Court in the two cases, Wood vs. Millville and Frank-
lin vs. Millville, on certiorari, in which cases were
reviewed the validity of Ordinance No. 145, referred
to in the petition herein and the election for the
adoption of the Water Act of 1876, may be used on
the argument and considered as in evidence, and that
the printed book in said cases may be used on the
argument.)

30 (It is also stipulated between counsel that resolu-
tion No. 261 was adopted by the commissioners on the
1st of March, 1918, a copy of which is introduced in
evidence and marked Exhibit 1 for the respondents;
and that pursuant to the resolution a special election
was held as therein provided on the 13th of April,
1918, which resulted as follows: 663 votes were cast
in favor of the purchase and 818 were cast against
the purchase.)

(Said paper is marked Exhibit R1 for the respon-
dents.)

WILLIAM H. ROTH, sworn.

By Mr. Tatem:

Q. Mr. Roth, you are connected with the Peoples' Water Company of Millville?

A. Yes, sir.

Q. In what capacity?

A. Vice-president.

Q. How long have you been connected with that company?

A. Since the early part of 1917.

Q. Mr. Roth, in the summer of 1920, there were some negotiations between the City of Millville and the Peoples' Water Company relative to the proposed sale by the water company to the city of the water plant at Millville, were there not?

A. There were.

Q. And in the course of these negotiations, you visited Millville and had an interview with Mr. Miller, the city solicitor?

A. I did.

Q. Kindly state what took place at that interview?

A. Mr. Miller raised the question as to the company's ability to transfer the property to the city clear of incumbrance, and to give a clear title. Mr. Miller explained to me that in turning over the property he wanted us to deliver to him not only the cancelled mortgages but also the cancelled bonds, stating his reason for requesting that was that he had had a transaction with some corporation in which that was required. I told him that was not usual in the transfer of a public utility property, that an incineration certificate of the trustee showing that the bonds were cancelled and incinerated, ought to

be sufficient, but he demanded that the bonds themselves be turned over. So on behalf of the company I agreed to see that that was done, and in due course the company did have the bonds cancelled and ready for delivery.

Q. What was the amount of the bonds outstanding?

A. \$150,000.

Q. Secured by a mortgage given to what trust company?

A. Given to the West End Trust Company, Philadelphia.

Q. Had all the \$150,000 of bonds actually been used?

A. The whole \$150,000 had been signed and certified by the trustee, and they were all out of the water company's possession.

Q. I show you a mortgage, entitled, "Mortgage, Peoples' Water Company of Millville, N. J. to West End Trust Company," which mortgage was dated January 14, 1904, in the sum of \$150,000, to secure that amount of bonds of the denominations therein set forth, this mortgage having been recorded in the clerk's office of Cumberland County in Book No. 75 of Mortgages, page 547, and so forth, and in Book No. 15 of Chattel Mortgages, page 34, and so forth, which mortgage has just been handed to me by Mr. Miller, and I ask you if that is the mortgage referred to as securing the bonds in question?

A. It is.

(Said mortgage is offered in evidence and marked Exhibit R2 for the respondents.)

(It is stipulated between counsel that the printing of the said mortgage is waived, and it is agreed

that there is nothing endorsed or written on the face of the mortgage to show that it is cancelled of record.)

Q. Now, Mr. Roth, in the month of December, 1920, you again visited Mr. Miller in connection with the proposed sale of this water plant to the city, did you not?

A. I did.

Q. On or about December——

10

A. The 29th; on December 29th I called on Mr. Miller.

Q. Kindly state what took place at that time?

A. I called on Mr. Miller on December 29, 1920, in connection with the title to our property, settlement for which was to be made on or before January 1, 1921, under the terms of our agreement, and at that time I turned over to Mr. Miller the mortgage that has just been proved, also an old mortgage, dated in 1901, and two satisfaction pieces cancelling both mortgages, those satisfaction pieces having been executed by the West End Trust Company, trustee. Mr. Miller, in examining these papers for the purpose of giving me a receipt for them, discovered that the two satisfaction pieces did not have attached thereto a prothonotary's certificate showing that the notary public who took the acknowledgments of the trust company's officers was authorized to do so, and therefore returned the two satisfaction pieces to me with the request that we have the prothonotary's certificate attached. I took them back to Philadelphia, and on December 31st I returned the same satisfaction pieces to Mr. Miller with the prothonotary's certificate attached thereto. On December 29th, I left with Mr. Miller the two original mortgages and took his receipt for the same.

20

30

Q. I show you a paper purporting to be a satisfaction piece, duly authorized by the directors of the West End Trust Company, directing the officers of said company to satisfy the mortgage heretofore presented and marked Exhibit R2, and I ask you if this is the paper which you presented to Mr. Miller at the time of the interview to which you have testified?

A. It is the same paper.

10 Q. And afterward did you obtain the prothonotary's certificate which is now attached to this satisfaction piece?

A. Yes.

Q. And what did you subsequently do with the satisfaction piece?

A. After taking it away from Mr. Miller's office on December 29th, I took it back to Philadelphia, and on December 30, 1920, secured the prothonotary's certificate, and on December 31st, I returned
20 the satisfaction piece with the prothonotary's certificate attached, to Mr. Miller in Millville.

Mr. Miller: I would like to have this satisfaction piece spread at length on the stenographer's minutes.

Mr. Starr: I haven't any objection.

(Said paper is offered in evidence, marked Exhibit R3 for respondents, and read as follows):
30

“RESOLUTION.

WHEREAS, request has been made by the Peoples Water Company of Millville, N. J., that this company should authorize the discharge from record and cancellation of the mortgage executed by the Peoples Water Company of Millville, N. J. to

West End Trust Company, Trustee, dated January 14th, 1904, and recorded in the Clerk's Office of Cumberland County, at Bridgeton, N. J., in Book No. 15 of Chattel Mortgages, page 314 &c., on January 22nd, 1904 and in Book No. 75 of Mortgages pages 547 &c., on January 22nd, A. D. 1904, said mortgage having been given to secure an issue of One hundred and Fifty Thousand Dollars first mortgage bond of said Peoples Water Company of Millville, N. J.

10

AND WHEREAS, it appears to the satisfaction of this company that the bonds issued under and secured by said mortgage have been paid and satisfied in full, both as to principal and interest, for which reason the aforesaid request can properly be granted:

THEREFORE BE IT RESOLVED, That the Officers of this Company be, and they are hereby authorized and directed to execute under the Corporate seal of this company a discharge of mortgage, 20 and also to execute any and all other papers and to do and perform any and all other acts necessary and proper to the end that said mortgage may be cancelled and satisfied of record.

KNOW ALL MEN BY THESE PRESENTS, That West End Trust Company, a corporation organized and existing under the laws of the State of Pennsylvania, does hereby certify that a certain mortgage bearing date the 14th day of January A. D. 1904, made and executed by Peoples Water Com- 30 pany of Millville, N. J., a corporation of New Jersey, to West End Trust Company, and recorded in the Clerk's Office of Cumberland County, at Bridgeton, N. J., in Book No. 15 of Chattel Mortgages, page 314 &c. on January 22nd, 1904, and in Book No. 75 of Mortgages, page 547 &c., on January 22nd, A. D.

1904, has been fully paid and satisfied; and the said West End Trust Company does hereby consent that the said mortgage may be discharged of record.

IN WITNESS WHEREOF, the West End Trust Company has caused these presents to be signed by its president and attested by its secretary and its corporate seal to be hereunto affixed this 22nd day of December A. D. 1920.

WEST END TRUST COMPANY

10

By O. E. Wolbert.

Vice-President.

ATTEST:

Robert L. Morgan.

Asst-Secretary.

(Seal.)

State of Pennsylvania }
County of Philadelphia } ss.

20 Be it remembered, that on this twenty-second day of December A. D. nineteen hundred and twenty, before me the subscriber a Notary Public in and for the Commonwealth of Pennsylvania residing in the City of Philadelphia, personally appeared Robert L. Morgan, who I am satisfied is the person who signed the foregoing Discharge of Mortgage as the Assistant-Secretary of the West End Trust Company, the corporation named in and which executed said discharge, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as such
30 Officer aforesaid; and that the foregoing discharge of mortgage made by said West End Trust Company, and sealed with its corporate seal is the voluntary act and deed of said West End Trust Company made by virtue of authority from its Board of Directors. All of which is hereby certified.

Robert L. Morgan.

I hereby certify that I am not a Stockholder, Director or Officer of the bank, Banking Institution or Trust Co., party hereto.

(Signed) Frank N. Jardine.

Frank N. Jardine

Notary Public

Commission Expires March 23, 1921.

46227.

Form No. 27.

IN THE COURTS OF COMMON PLEAS OF 10
PHILADELPHIA COUNTY.

STATE OF PENNSYLVANIA, }
County of Philadelphia. }

I, Henry F. Walton, Prothonotary of
the Courts of Common Pleas of said
(Seal) County, Which are Courts of Record,
having a common seal, being the officer
authorized by the laws of the State of
Pennsylvania to make the following certificate, do
Certify, That Frank N. Jardine, Esquire, whose 20
name is subscribed to the certificate of the acknowl-
edgment of the annexed Instrument and thereon
written, was at the time of such acknowledgment a
Notary Public for the Commonwealth of Pennsyl-
vania, residing in the County aforesaid, duly com-
missioned and qualified to administer oaths and
affirmations and to take acknowledgments and
proofs of Deeds or Conveyances for lands, tenements
and hereditaments to be recorded in said State of
Pennsylvania, and to all whose acts, as such, full 30
faith and credit are and ought to be given, as well
in Courts of Judicature as elsewhere; and that I am
well acquainted with the handwriting of the said
Notary Public and verily believe his signature
thereto is genuine, and I further certify that the
said instrument is executed and acknowledged in

conformity with the laws of the State of Pennsylvania.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this 30th day of December in the year of our Lord one thousand nine hundred and twenty. (1920).

Henry F. Walton.

Prothonotary."

10 Q. I show you a paper purporting to be a mortgage dated May 1, 1901, between the Peoples' Water Company of Millville, N. J., and the West End Trust Company, to secure a proposed bond issue of \$100,000, which mortgage is recorded in the Cumberland County Clerk's Office aforesaid, in Book 66 of Mortgages, page 256, &c., and in Book 13 of Chattel Mortgages, page 197, &c., and ask you if this is the mortgage of \$100,000 to which you have testified?

A. It is.

20 (Said paper is offered in evidence and marked Exhibit R4 for respondents.)

(It is agreed that this mortgage is not to be printed in the record, and that there is no endorsement showing that the mortgage was satisfied of record.)

30 Q. When you took the mortgage which has just been offered and marked Exhibit R4 to Mr. Miller, on the occasion of the interview to which you have testified, did you take with you the satisfaction pieces covering that mortgage?

A. I did.

Q. I show you a satisfaction piece dated December 29, 1920, and ask you if that is the paper which you presented to Mr. Miller?

A. It is the same paper.

Q. Did you at Mr. Miller's request then take that paper back to Philadelphia and secure the prothonotary's certificate?

A. I did.

Q. And what did you do with it subsequently?

A. I secured a prothonotary's certificate and returned the satisfaction piece with the prothonotary's certificate attached thereto to Mr. Miller on December 31, 1920, in Millville.

10

(It is agreed that this satisfaction piece shall be offered in evidence and marked Exhibit R5, and spread at length on the stenographer's minutes. Said paper read as follows):

"WHEREAS, request has been made by the Peoples Water Company of Millville, N. J., that this Company should authorize the discharge from record and cancellation of the Mortgage executed by the Peoples Water Company of Millville, N. J. to West End Trust Company, Trustee, dated May 1st, 1901 and recorded in the clerk's office of Cumberland County at Bridgeton, N. J. in book No. 66 of Mortgages, page 256, etc., on the 22nd day of May A. D. 1901, said mortgage having been given to secure an issue of One hundred thousand dollars first mortgage Bonds of said Peoples Water Company of Millville, N. J.

20

AND WHEREAS it appears to the satisfaction of this Company that the Bonds issued under and secured by said mortgage have been paid and satisfied in full both as to principal and interest, for which reason the aforesaid request can properly be granted:

30

THEREFORE BE IT RESOLVED, that the Officers of this Company be, and they are hereby au-

thorized and directed to execute under the corporate seal of this company a discharge of mortgage, and also to execute any and all other papers and to do and perform any and all other acts necessary and proper to the end that said mortgage may be cancelled and satisfied of record.

KNOW ALL MEN BY THESE PRESENTS, That the West End Trust Company, a corporation organized and existing under the laws of the State of Pennsylvania, do hereby certify that a certain mortgage bearing date the first day of May, A. D. 1901, made and executed by the Peoples Water Company of Millville, New Jersey, a corporation of New Jersey, to the West End Trust Company, and recorded in the clerk's office of Cumberland County at Bridgeton, N. J., in book No. 66, page 256, etc., on the 22d day of May, A. D. 1901, has been fully paid and satisfied and the said West End Trust Company does hereby consent that the said mortgage may be discharged of record.

IN WITNESS WHEREOF, the West End Trust Company has caused these presents to be signed by its president and attested by its secretary and its corporate seal to be hereunto affixed this 29th day of December A. D. 1920.

WEST END TRUST COMPANY,

By O. E. Wolbert,
Vice-President.

ATTEST:

Robert L. Morgan.

Assistant Secretary.

(Seal.)

Witness.

W. H. Conger, Jr.

Thomas Evans.

STATE OF PENNSYLVANIA, }
COUNTY OF PHILADELPHIA. } ss.

Be it remembered, that on this 29th day of December, A. D. nineteen hundred and twenty, before me the subscriber, a Notary Public in and for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared Robert L. Morgan, who I am satisfied is the person who signed the foregoing discharge of mortgage as the Assistant Secretary of the West End Trust Company, the corporation named in and which executed said discharge, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as such Officer aforesaid; and that the foregoing discharge of mortgage made by said West End Trust Company, and sealed with its corporate seal is the voluntary act and deed of said West End Trust Company made by virtue of authority from its Board of Directors. All of which is hereby certified. 10 20

I hereby certify that I am not a Stockholder, Director or Officer of the Bank, Banking Institution or Trust Co., party hereto.

Frank N. Jardine.

Frank N. Jardine.

Notary Public.

30

Seal.)

Commission Expires
March 28, 1921.

46228

Form No. 27.

IN THE COURTS OF COMMON PLEAS OF
PHILADELPHIA COUNTY.STATE OF PENNSYLVANIA, }
County of Philadelphia. }

Acknowledgment (Notary.)

10 I, Henry F. Walton, Prothonotary, of the
Courts of Common Pleas of said County,
(Seal.) which are Courts of Record having a
common seal, being the officer authorized
by the laws of the State of Pennsylvania
to make the following Certificates, do Certify that
Frank N. Jardine, Esquire, whose name is sub-
scribed to the certificate of the acknowledgment of
the annexed Instrument and thereon written, was
at the time of such acknowledgment a Notary
Public for the Commonwealth of Pennsylvania, re-
siding in the County aforesaid, duly commissioned
and qualified to administer oaths and affirmations
20 and to take acknowledgments and proofs of Deeds
or conveyances for lands, tenements and heredita-
ments to be recorded in said State of Pennsylvania,
and to all whose acts, as such, full faith and credit
are and ought to be given, as well in Courts of Judi-
cature as elsewhere; and that I am well acquainted
with the handwriting of the said Notary Public and
verily believe his signature thereto is genuine, and
I further certify that the said Instrument is executed
and acknowledged in conformity with the laws of
30 the State of Pennsylvania.

IN TESTIMONY WHEREOF, I have hereunto
set my hand and affixed the seal of said Court, this
30th day of December, in the year of our Lord one
thousand nine hundred and twenty. (1920).

Henry F. Walton.
Prothonotary."

Q. As a matter of fact, Mr. Roth, had the bonds which were secured by this mortgage marked Exhibit R3, been previously cancelled or destroyed?

A. Yes, they were cancelled in 1904.

Q. So that the only bonds actually outstanding as representing a valid indebtedness against the plant of the Peoples' Water Company consisted of the \$150,000 of bonds issued under and secured by the mortgage presented and marked Exhibit R1?

A. Yes.

Q. Mr. Roth, at the time you went down to Mr. Miller's office did you take with you the cancelled bonds?

A. No.

Q. From whom did you receive the mortgages and the satisfaction pieces referred to which you took down to Mr. Miller's office?

A. I received them from the treasurer of the company, Mr. H. Bayard Hodge.

Q. You mean the treasurer of the Peoples' Water Company?

A. Yes, sir.

Q. If you know, who made arrangements with the trust company relative to the cancellation of these mortgages and the giving of the satisfaction pieces?

A. Mr. Hodge, the company's treasurer.

Q. Since you took the mortgages and the satisfaction pieces back from Mr. Miller's office have they been in your custody since?

A. They have been in the custody of Mr. Hodge, the treasurer of the company.

Mr. Starr: What was that?

(The last question and answer read by the stenographer.)

The Witness: I meant the bonds, the cancelled bonds had been in the custody of the treasurer. The mortgages and satisfaction pieces have been in Mr. Miller's hands.

Cross-examination.

By Mr. Starr:

10 Q. Mr. Roth, you said a moment ago that Mr. Hodge had made arrangements with the trust company with reference to the cancellation of the mortgages?

A. Yes.

Q. Have you any personal knowledge of the circumstances under which those arrangements were made?

20 A. Yes, as an officer of the company Mr. Hodge and I discussed the matter as to how that should be done, and it was arranged that he, as treasurer, should have care of that transaction.

Q. And he was the one that had the negotiations with the trustee?

A. Yes.

Q. The first conversation as detailed by you with Mr. Miller occurred sometime in the summer of 1920, as I understand it?

30 A. In July, yes. Well, that was not really the very first; it was in connection with this particular transaction. We had been negotiating for some years.

Q. Yes, but I am speaking about with reference to this particular transaction when you discussed the method by which the bonds were to be cancelled?

A. Yes.

Q. That was in the summer of 1920?

A. That is true.

Q. And you had no further communications with him with respect to that particular subject matter until the 29th of December?

A. Yes, we had some correspondence and I think some telephone conversations leading up to what happened in December the cancellation of the mortgages.

Mr. Starr: We can stipulate, can we not, that 10
those satisfaction pieces have never been presented to the county clerk for the formal satisfaction of the record of the mortgages?

Mr. Miller: That is positively true, Judge; I wouldn't use them at all, nor do I think I would have given them up to Mr. Roth; I would let them stay there. We will stipulate that they have not been recorded.

Q. When you had the conversation with Mr. Mil- 20
ler in the summer of 1920, were the bonds secured by the 1904 mortgage in the hands of the individual holders?

A. Yes.

Q. And when were they gathered in?

A. In December, 1920.

Q. Who had to do with that, you or Mr. Hodge?

A. Both of us.

Q. And was any receipt given?

30

A. Yes.

Q. Have you the form of the receipt?

A. Yes.

Q. A copy of the receipt? Let me have the copy, will you please?

(Witness hands paper to examining counsel.)

Q. Have you a list of the holders of the bonds, or can you give me the names of all of the bondholders?

A. At that time there was but one bondholder.

Q. And that was the American Pipe and Construction Company?

A. Yes.

Q. And when did that corporation acquire the title to the bonds, all of the bonds?

10 A. It acquired title to some of them some years ago, and in the early part of 1920 acquired title to the balance.

Q. So that when the Peoples' Water Company made the proposition to sell the plant which is shown by the communication, sometime in July of 1920, the American Pipe & Construction Company was the owner of all of the bonds of the Peoples' Water Company?

20 A. Yes, that is to say, it was either owner or controlled them through the deposit of the bonds as collateral for a note, as set out in that receipt; they had possession of the bonds.

Q. Well, did anybody have any interest in the bonds, any of the bonds, except the American Pipe and Construction Company, when the proposition was made to the city to sell the plant?

A. No.

Q. And the bonds were in the possession of the American Pipe & Construction Company?

30 A. They were.

Q. And were they ever turned over to the trustee?

A. Yes.

Q. When?

A. In December, 1920, for the purpose of cancellation and securing the satisfaction of the mortgages, or of the mortgage, rather.

Q. I notice that in your testimony on direct examination by Mr. Tatem you were asked whether or not all those bonds were issued, and you did not answer that categorically; you said they were certified, and they had been delivered by the trustee. As a matter of fact, were they all issued and outstanding as obligations of the company?

A. They were so regarded by us; whether you would regard them so legally I don't know, but the fact is this: Some of the bonds, as stated in that receipt, were issued by the company as collateral security for notes. 10

Q. And those notes were held by what —

A. By the American Pipe & Construction Company.

Q. So that the bonds then being owned by the Peoples' Water Company, were issued and delivered to the American Pipe & Construction Company as collateral security for the indebtedness of the Peoples' Water Company to that corporation, is that right? 20

A. Yes, that is right.

Q. So they were either the absolute owner or had the bonds under a pledge?

A. Yes.

Q. By the Peoples' Water Company for a debt?

A. That is right.

Q. And does the American Pipe and Construction Company own the stock of the Peoples' Water Company? 30

A. It owns the majority of it.

Q. It controls the corporation?

A. It does.

Q. What is the total capitalization, authorized capitalization of the Peoples' Water Company?

A. \$100,000.

Q. And what proportion of that is owned by the American Pipe & Construction Company?

A. \$98,950.00.

Q. Did the West End Trust Company, as trustee, give any receipt to either the American Pipe and Construction Company or the Peoples' Water Company when these bonds were surrendered for cancellation?

A. The West End Trust Company gave this satisfaction piece, which the company regarded as a receipt for the bonds.

Q. But there was no other receipt given?

A. I don't think so; the treasurer can answer that question; I was not handling that end of the transaction.

Q. When were the bonds actually surrendered to the trustee, on what day?

A. On some day in December, 1920, I think on the dates that the satisfaction pieces were dated, but there again I will have to refer you to the treasurer.

Q. Is Mr. Hodge here?

A. Yes, he is here.

Mr. Starr: May I have this receipt marked as an exhibit?

Mr. Tatem: Yes.

(Said receipt is offered in evidence and marked Exhibit P1 for the prosecutor, and read as follows):
December 14, 1920.

The American Pipe & Construction Company,
112 North Broad Street,
Philadelphia, Pa.

Gentlemen:

We hereby acknowledge receipt of \$10,000.00 of First Mortgage Bonds of this Company, Nos. 141

to 150 inclusive, of the denomination of \$1,000.00 each, with coupons due January 1st, 1921, et seq attached, also \$140,000.00 of First Mortgage Bonds Nos. 1 to 140 inclusive, of the denomination of \$1,000.00 each, with coupons due January 1st, 1921, et seq. attached.

All of these bonds have been turned over by you to this company, at our request, in order to enable us to have cancelled of record the mortgage dated January 14th, 1904, created to secure the issue of 10 the above mentioned bonds, it being necessary to cancel this mortgage in order that our plant may be turned over to the City of Millville, N. J., with which City we have a contract, as evidenced by our proposition to said City dated July 31st, 1920, and the acceptance of same by resolution of the Board of Commissioners of said City at a meeting held on August 27th, 1920, under which the City agrees to purchase our plant for the sum of \$125,000.00, and settle for the same on or before January 1st, 1921. 20

The above mentioned bonds are turned over to this Company by you, and received by us, with the distinct understanding that:—

First: The \$10,000.00 of bonds first above mentioned, which your Company owns, are to be paid at face value immediately this Company receives payment of the purchase price for our plant from the City of Millville. In the meantime this Company has issued to the American Pipe & Construction Company a demand note, dated December 14th, 30 1920, with interest, in the sum of \$10,000.00, which is to be held by your Company until the payment mentioned has been made.

Second: The \$140,000.00 of bonds have been heretofore held by the American Pipe & Construction Company as collateral security for notes issued by

this Company for construction of our plant, and it is understood that the American Pipe & Construction Company is surrendering these bonds to our Company merely as an accomodation in order that the mortgage above referred to, may be cancelled of record for the reasons above stated.

It is also understood and agreed that as soon as settlement is made with the City of Millville on or before January 1st, 1921, this Company will pay
10 over to the American Pipe & Construction Company the entire proceeds from the sale of our plant to said City, less such expenses as our Company may have in connection with closing up its affairs, which payment it is understood, will be accepted by the American Pipe & Construction Company as in full settlement for said \$10,000.00 of Bonds and the notes for which said \$140,000.00 of bonds have been heretofore held as collateral, the total amount of said notes being \$183,884.65; also as in full settlement for
20 other notes aggregating \$235,274.04, issued to the American Pipe & Construction Company by our Company, from time to time, all of which notes the American Pipe & Construction Company is to surrender to the Peoples Water Company of Millville, N. J., for cancellation at the time of the settlement above mentioned.

Yours very truly,
PEOPLES WATER COMPANY OF
MILLVILLE, N. J.

30

(Signed)

By Rob't. Wetherill.

President.

(Signed)

ATTEST: H. B. Hodge.

(Seal.)

Secretary."

Q. There was no consideration paid the American Pipe & Construction Company by the Peoples' Water Company other than mentioned in this receipt which is marked Exhibit P1, was there?

A. No.

Q. And did Mr. Miller give you any receipts when you turned over the satisfaction pieces or the mortgages?

A. He did.

Q. May I see those, please?

10

(Papers are handed examining counsel.)

(Mr. Starr: I offer in evidence the receipts signed by Mr. Miller, dated December 29, 1920, and ask that that be marked Exhibit P2 and copied in the record; also a receipt dated December 31, 1920, and ask that that be marked Exhibit P3 and copied in the record.

(Said receipts are marked respectfully Exhibits P2 and P3 for prosecutor and read as follows):

20

"Millville, N. J. December 29th, 1920.

I Louis H. Miller, Solicitor of the City of Millville, New Jersey, acknowledge having received this day from the Peoples Water Company of Millville, New Jersey the following documents:

1. A certain trust mortgage dated May 1, 1901 given by the Peoples Water Company of Millville, New Jersey to the West End Trust and Safe Deposit Company to secure \$100,000. of bonds of the company recorded May 22, 1901, in the Cumberland County, New Jersey Clerk's Office in Book 66 of Mortgages page 256 &c., and also in Book No. 13 of Chattel Mortgages page 197 &c;

30

2. A certain other trust mortgage given by the Peoples Water Company of Millville, New Jersey,

to the West End Trust Company to secure \$150,000. bonds of the Company dated January 18, 1904 and recorded in said Clerk's Office on January 22, 1904, in Book 75 of Mortgages page 547 &c. and in Book No. 15 of Chattel Mortgages pages 34 &c.

(Signed) Louis H. Miller."

"Millville, N. J. December 31, 1920.

Received this thirty-first day of December, 1920, at 2.30 o'clock p. m. from Peoples Water Company
10 of Millville, New Jersey, two satisfaction pieces, one for satisfaction of record of mortgage of Peoples Water Company to West End Trust Co., trustee, dated January 14, 1904; and the other for satisfaction of the mortgage Peoples Water Co., to West End Trust Co., Trustee, dated May 1, 1901.

NOTE: The above satisfaction pieces were tendered me December 29, 1920, but returned to the Peoples Water Co., so that the usual Prothonotary's certificate could be attached to the proof.

20 (Signed) Louis H. Miller,
City Sol'r of Millville, N. J."

(It is agreed that the writs of certiorari in both of the cases was served upon the city clerk between ten and twelve o'clock A. M. on December 31, 1920.)

Q. Now, Mr. Roth, can you give me the date when the board of directors of the West End Trust Company passed the resolution, a copy of which is attached to the satisfaction piece with reference to the
30 1904 mortgage?

A. I cannot give you the date.

By Mr. Tatem:

Q. What was the first knowledge that you had, Mr. Roth, of the allowance of the writ of certiorari?

A. The first knowledge that I had of that was when Mr. Miller informed me on the afternoon of December 31, 1920, when I delivered the satisfaction pieces to him with the prothonotary's certificates attached.

Q. And that was when you received from Mr. Miller the receipt for these papers dated December 31, at 2.30 P. M.?

A. Yes.

Q. Were you down there for the purpose of bidding upon the city bonds in connection with this matter?

A. Yes, I had a bid in my pocket in proper form, with a certified check of the proper amount to be deposited with the bid.

Q. Was this for the bonds which it was proposed that the city should issue in payment for this plant?

A. Yes.

By Mr. Starr:

20

Q. Were you acting for the Peoples' Water Company or the American Pipe & Construction Company?

A. The bid was one of the American Pipe & Construction Company.

Q. And if the bonds had been issued, the understanding was that the American Pipe & Construction Company were to take the city bonds in exchange for the bonds that they had surrendered to the trust company?

A. Well, the receipt there speaks for itself upon that.

Q. Was there any arrangement between the two corporations except that disclosed by the receipt?

A. No.

Q. Did you know that the writ of certiorari was served on the Peoples' Water Company on the morning of the 31st?

A. I did not.

Q. By the chief engineer, or the engineer in charge of the plant at Millville?

A. I did not; I did not see him on the 31st.

Q. Well, you have since discovered that that was a fact, haven't you?

10 A. Yes.

Q. It was served in the morning on him?

A. The paper actually reached our office on the following Monday, which was the 3rd of January.

Q. Are you an officer also of the American Pipe & Construction Company?

A. I am.

Q. In what capacity?

A. I am secretary and assistant treasurer.

20

H. BAYARD HODGE, sworn.

By Mr. Tatem:

Q. Mr. Hodge, you are connected with the Peoples' Water Company of Millville?

A. I am.

Q. In what capacity?

30 A. Secretary and treasurer.

Q. How long have you been connected with that company?

A. Since the early part of 1917.

Q. You, together with Mr. Roth, had charge of the negotiations which took place between the Peoples' Water Company and the City of Millville,

relative to the proposed sale by the company of its water plant to the city?

A. Yes, sir.

Q. Attached to the petition to quash the writ in this case, there is a copy of a letter dated December 22, 1920, addressed to Louis Miller, Esq., city attorney, Millville, New Jersey, and signed, "Peoples' Water Company of Millville, N. J., H. Bayard Hodge, Treasurer." Is that a true copy of a letter which you sent to Mr. Miller on behalf of the 10
Peoples' Water Company?

A. Yes, sir.

Mr. Starr: Have you got the original here?

Mr. Miller: I turned it over to Tatem, whose stenographer copied it.

Mr. Starr: Well, if you say that is a copy, I will take it. 20

Mr. Tatem: It is a true copy; I thought we had it here.

Q. There is also attached to the petition a copy of a letter purporting to be written by Mr. Miller as city solicitor of Millville, to the Peoples' Water Company, dated December 27, 1920, which is apparently in reply to your letter of December 22, 1920; is that a copy of a letter which was received from Mr. Miller by your company? 30

A. Yes, sir.

Q. Mr. Hodge, in preparation for the proposed consummation of the sale of this property to the City of Millville, will you kindly state what was done by you as treasurer of the Peoples' Water Company?

A. When Mr. Roth reported his conversation with Mr. Miller in regard to the surrender of the cancelled bonds, the board of directors of the Water Company on December 14th, at a meeting, authorized the officers to present the bonds to the West End Trust Company for cancellation, and requested the West End Trust Company to satisfy the January, 1904, mortgage of record and cancel the bonds.

- 10 Mr. Starr: Now, it seems to me, Mr. Fithian, if we are to be bound by the action of the directors, we ought to have those minutes. Have you got the minute book here?

Mr. Tatem: I think we have.

Mr. Starr: I think you ought to put in evidence the minute of the action of the board.

- 20 Mr. Tatem: We will put it in.*

Mr. Starr: It may or may not be material, I don't know, but if I am to be bound by it I think we ought to have the formal action.

Q. In pursuance to that direction by the directors what did you do as treasurer of the company?

- 30 A. As treasurer of the company I received from the American Pipe & Construction Company the bonds which they owned, and the bonds which they held as collateral for the loans, and they were delivered to Mr. W. H. Conger, Jr., assistant trust officer of the West End Trust Company, together with a certified copy of the resolution requesting the satisfaction of the mortgage and cancellation of the bonds.

Q. How many of those bonds did you deliver to Mr. Conger for the purpose of cancellation?

A. The entire issue, \$150,000.00.

Q. What coupons did you also deliver at that time?

A. We delivered at the same time all the coupons with the request that numbers one to thirty-three sent up there be incinerated, and thirty-four to maturity be cancelled, all unmatured coupons to be cancelled.

10

Q. Are the bonds purporting to be issued by the Peoples' Water Company of Millville, N. J., and secured by a mortgage of the West End Trust Company, dated January 1, 1904, and numbered from one to 150 inclusive, each of said bonds being in the principal sum of \$1,000—are those the bonds which you have testified that you presented to Mr. Conger, for cancellation?

A. They are.

Q. I show you a lot of coupons which have evidently been detached from the bonds in question, as said coupons are numbered respectively from 1 to 150, and are coupons of the serial numbers from Nos. 34 to 40 inclusive, and ask you if those are the coupons which you at the same time presented to Mr. Conger for cancellation?

20

A. They are.

Q. After these bonds and coupons had been presented by you to Mr. Conger, kindly state what was done with them as far as your knowledge goes?

30

A. They were re-delivered to me as treasurer of the Peoples' Water Company, together with an incineration certificate for the matured coupons, and a satisfaction piece for the mortgage, and the original copy of the mortgage dated January 1, 1904.

Q. Where is that incineration certificate—have you the incineration certificate?

A. Yes.

Q. To which you have referred, with you?

A. Yes, sir (handing paper to examining counsel).

Mr. Tatem: I will offer this in evidence and ask that it be marked Exhibit R6 for the respondent.

(Said paper so marked.)

10 Q. When you spoke of receiving from Mr. Conger a satisfaction piece at the same time you received the cancelled bonds I ask you if the satisfaction piece which has been offered and marked Exhibit R3 is the paper to which you refer?

A. It is.

Q. In what condition were the bonds and coupons in question at the time they were re-delivered to you by the West End Trust Company?

A. They were perforated.

20 Q. I ask you to examine the specimen of these bonds and coupons, and ask you if, when re-delivered to you, they were in the same condition as they are now?

A. Yes, sir, they were.

Q. For the record, how would you describe that condition?

A. Cancelled by perforation.

Q. And does that cancellation extend to your knowledge to each and all of these bonds and coupons?

30 A. Yes, sir.

Q. Subsequent to the date when you received from the trust company these cancelled bonds and coupons and the satisfaction piece relating to the mortgage of January 1, 1904, did you again visit the West End Trust Company in connection with this matter?

A. Yes, sir.

Q. And for what purpose?

A. Mr. Roth reported that Mr. Miller had discovered that the mortgage dated 1901 given by the Peoples' Water Company to the West End Trust Company, trustee, had not been satisfied of record. I went over to see Mr. Conger, and in looking up the files, their files, we found that it was marked off their books, but in searching the original records they found the original mortgage, and that it had not been satisfied of record. They also delivered to me at the same time an incineration certificate for the \$100,000 of bonds, together with the coupons. 10

Q. Have you that certificate?

A. Yes, sir.

(Said incineration certificate is offered in evidence and marked Exhibit R7 for respondents.)

Q. At the same time, did Mr. Conger deliver to you a satisfaction piece covering the mortgage of May 1, 1901? 20

A. Yes, sir.

Q. I show you a paper purporting to be a satisfaction piece authorizing the satisfaction of the mortgage made by the Peoples' Water Company of Millville to the West End Trust Company as trustee, dated May 1, 1901, which satisfaction piece is Exhibit R5 for the respondents, and ask you if that is the satisfaction piece which you received from Mr. Conger? 30

A. It is.

Q. And at the same time did you receive the original mortgage dated May 1, 1901?

A. I did.

Q. Which is marked Exhibit R4 for the respondents?

A. I did.

Mr. Tatem: The bonds from No. 1 to No. 150, both inclusive, are offered as one exhibit, Exhibit R10 for the respondent, and it is agreed that they are all for \$1,000 each and in the same form except for the numbering. It is further agreed that all of said bonds are perforated in numerous places through the body of the bond and through the signatures and seals thereof by a perforated stamp containing the letters, "W. E. T. Co. December 16,
10 1920."

Mr. Miller: I will request Mr. Tatem to produce the original bonds at the argument for inspection by the Supreme Court.

Mr. Tatem: The coupons which have been detached from said bonds, being coupons numbered 34 to 40 inclusive, and falling due according to the terms thereof from January 1, 1921, to January 1, 1924, inclusive, and having been detached from
20 bonds No. 1 to No. 150 inclusive, are presented with numerous perforations through each and every of said coupons, each of said coupons being in the sum of \$25.00.

Cross-examination.

By Mr. Starr:

Q. Now, Mr. Hodge, was there any receipt given
30 to the Peoples' Water Company at the time the bonds were surrendered to the trust company?

A. No, sir, the delivery of the certified copy of the resolution with the bonds and the knowledge that the satisfaction piece and cancelled bonds were handed back was considered sufficient.

Q. No other paper was passed between the parties?

A. No, sir.

Q. Now, on what date did the Peoples' Water Company receive the bonds from the American Pipe & Construction Company?

A. The early part of December, 1920; I don't remember the exact date.

Q. And on what date did the Peoples' Water Company pass the bonds along to the trust company? 10

A. About the 15th or 16th of December.

Q. And then did the Peoples' Water Company have the possession of those bonds for a matter of a week or ten days or more?

A. Well, I don't exactly remember the date, but they were delivered to the trustee within a couple of days after the Peoples' Water Company's board met.

Q. And are you an officer of the American Pipe & Construction Company? 20

A. I am.

Q. What is your official connection with that corporation?

A. Vice-president and treasurer.

Q. And when were the bonds returned to you as treasurer of the Peoples' Water Company from the trust company?

A. About the 22nd of December, 1920.

Q. And they have been in your possession ever since? 30

A. Yes, sir.

Q. Who is president of the Peoples' Water Company?

A. Mr. Robert Wetherill.

Q. And what is his official connection, if any, with the American Pipe & Construction Company?

A. President.

Q. And you are the vice-president of the Construction Company and Mr. Roth is vice-president of the Peoples' Water Company?

A. Yes.

Q. Are there interlocking directors of the two corporations?

A. Well, Mr. Wetherill and myself—yes, some of the board are interlocking.

10 Q. How many directors are directors of both boards?

A. To tell you the truth—don't put this down—I don't remember who is on the Peoples' board; there are two of us, Mr. Wetherill and myself, I am sure of; there are only two.

Q. Have you in your possession any formal contract executed between the Peoples' Water Company and the city with reference to the acquisition of this plant?

20 A. We have a letter from the city accepting our offer to sell the plant.

Q. Have you the original of that here?

A. Yes, Mr. Roth has it.

Mr. Starr: Mr. Roth has produced the paper referred to, and it is stipulated that it is a certified copy of Resolution No. 360, which is already in the record.

30 Q. And no other formal document or paper was signed between the water company and the city with reference to the purchase of the property?

A. No, sir.

Q. You received, did you not, from Mr. Horton, after the election was had, a formal notification of the result of the election?

A. Yes, sir.

Q. And is that the communication (showing witness paper)?

A. Yes, sir.

Q. Dated December 22, 1920, signed, "John S. Horton, City Clerk"?

A. Yes.

(It is stipulated that this letter is also in the return to the writ of certiorari.)

Q. You made a proposition, did you not, to the city to sell the plant, and that was incorporated in Resolution 360? 10

A. Yes, sir.

Q. And it is a fact, is it not, that the Peoples' Water Company replied to the communication of November 22, 1920, by letter dated the same day?

A. It is.

(Said letter is introduced in evidence, and marked Exhibit P4, and read as follows): 20

"November 22, 1920.

Mr. John S. Horton,
City Clerk,
Millville, N. J.

Dear Sir:

We beg to acknowledge receipt of your letter of the 22nd advising us of the result of the election held on Tuesday, November 2nd. We note that a majority favored the adoption of Resolution No. 360, providing for the purchase of our plant by the City. 30
We are prepared to go ahead with whatever is necessary to close the matter up whenever the City is ready.

Yours truly,
People's Water Company of Millville, N. J.,
W. H. Roth,
Vice-President."

WILLIAM H. CONGER, JR., SWORN.

By Mr. Tatem:

Q. Mr. Conger, you are connected with the West End Trust Company of Philadelphia?

A. I am.

Q. In what capacity?

10 A. Assistant trust officer.

Q. And as assistant trust officer, it was within your department to have to do with the cancellation of the bonds secured by the trust mortgage given to your company by the Peoples' Water Company of Millville?

A. It is.

Q. Will you kindly state your connection therewith, and just what was done by you or under your authority?

20 A. About the 15th or 16th, I am not exactly sure of the date, I think it was the 15th of December, 1920—Mr. Hodge came in to see me with reference to the cancellation of the bonds and the satisfaction of the mortgage for \$150,000 for which we were trustee, the mortgage of 1904, and he handed me a resolution, a certified copy of a resolution adopted at a meeting of their board on the 14th of December, requesting that we cancel the bonds and satisfy the mortgage.

30 Q. I show you a paper purporting to be a certified copy of the resolution adopted by the board of directors of the Peoples' Water Company of Millville, N. J., at a meeting held December 14, 1920, with the seal of the Peoples' Water Company of Millville impressed thereon, and signed by H. Bayard Hodge, secretary, and ask you if this is a cer-

tified copy of the resolution directing the cancellation of the mortgage in question to which you have testified?

A. It is.

Mr. Tatem: We will offer that and have it marked Exhibit R8 for respondent.

(Said paper so marked.)

Q. In accordance therewith what did you then proceed to do, Mr. Conger?

A. We cancelled the entire issue of bonds Nos. 1 to 150, \$1000.00 each, with all coupons from Nos. 34, on, that is, the unmatured coupons; we cancelled them by perforation by our regular cancellation machine; and the overdue coupons were cremated, that is, up to No. 33, on each bond.

Q. Now, I show you the bonds which have been offered in evidence, and ask you if those are the bonds to which you refer, and whether the method of cancellation by perforation by stamp "W. E. T. Co." and the date, December 16, 1920, is the method usually taken for cancelling said bonds?

A. It is; in fact, it is the only method we use.

Q. Did you also at the same time perforate the coupons which were detached from said bonds, being coupons Nos. 34 to 40 inclusive?

A. We did.

Q. The coupons which had fallen due prior to January 1, 1921, you stated were destroyed by incineration?

A. Yes, they were cremated.

Q. Have you any proof of that destruction with you?

A. Yes, I have; this is our only copy of this, though, that I have.

Q. The incineration certificate which has been offered and marked Exhibit R6 for the respondent, is the certificate which was executed by your company showing the destruction by burning of the coupons on those bonds which fell due prior to January 1, 1921?

A. Covers coupons Nos. 1 to 33 on each bond, yes.

Q. After these bonds and the coupons which fell due on January 1, 1921, and subsequent dates, had
10 been cancelled, as you have described, what did you then do with them?

A. On the 22nd of December, I returned them to the Peoples' Water Company and wrote a letter for the attention of Mr. Hodge; here is a copy of it, if you want that—showing that I send him the cancelled bonds and the certificate of incineration as well as the executed satisfaction piece; I think that is what you call it, a satisfaction piece.

Q. I show you a letter dated December 22, 1920,
20 addressed to the Peoples' Water Company, attention of Mr. Hodge, and signed by you as assistant trust officer of the West End Trust Company?

A. Yes.

Q. And ask you if that is the letter which you wrote to the Peoples' Water Company in regard to the satisfaction of the mortgage and the cancellation of the bonds in question and the return of said bonds to the Peoples' Water Company?

A. It is.

30 Q. And the signature on said letter is your signature?

A. It is not my signature; it was signed for me in my department; it was my letter.

(Said letter is marked Exhibit R9 for respondents.)

Q. After those bonds secured by the \$150,000 mortgage had been returned, as set forth in the letter of December 22, did you then have any further negotiations with the Peoples' Water Company in regard to the mortgage of 1901?

A. Yes, Mr. Hodge came over to see me and informed me that we had never satisfied the original mortgage of \$100,000 dated May 1, 1901. I went to my records and found that my records were marked closed and ended, and the matter was entirely cleared from the books, but upon looking into the papers, getting out the old papers, we found the original cremation certificate, executed back in 1904, I think about June, by Mr. Wolbert, who was still connected with us as vice-president and treasurer: 10

Q. I show you the cremation certificate which has been offered and marked Exhibit R4 for respondent, and ask you if that is the certificate to which you refer?

A. That is, and following that we then executed a satisfaction piece in order that the mortgage might be formally stricken from the record, ended and closed out of existence. 20

Q. The satisfaction piece which you stated was executed by your company to satisfy the mortgage dated May 1, 1901, is the satisfaction piece which was offered in this case and marked Exhibit R5 for the respondent?

A. Yes, that is correct.

Q. What is the date on which that satisfaction piece was executed? 30

A. December 29, 1920.

Q. And to your knowledge was a prothonotary's certificate attached thereto subsequent to that time?

A. I don't recall that, I can't say that; I would have to guide myself entirely by this.

Q. You had no personal knowledge?

A. No. Pardon me, I might say that I looked after the execution of this, as you can see by my signature; it was executed by the other officers guided by my own witnessing.

Q. Did you also then at the same time deliver to Mr. Hodge for the Peoples' Water Company the original mortgage dated May 1, 1901, in the sum of \$100,000?

10 A. I did, yes, sir.

Q. The mortgage which you so delivered is the one which was presented and marked Exhibit R4 for respondent?

A. Yes.

Q. You testified that at the time the bonds secured by the \$150,000 mortgage were cancelled and re-delivered to the Peoples' Water Company, there was executed on behalf of your company a satisfaction piece covering said mortgage, the same having been executed on December 22, 1920?

20 A. Yes.

Q. I show you the satisfaction piece which has been offered and marked Exhibit R3 for the respondent, and ask you if that is the satisfaction piece covering the \$150,000 mortgage in question?

A. It is.

Q. I further ask you if that satisfaction piece was executed and delivered on the date which it bears, December 22, 1920.

30 A. It was.

No cross-examination.

(The bonds numbered 1 to 150, heretofore offered in evidence are now marked as one exhibit, Exhibit R10 for respondent, and the coupons from said bonds which were offered are marked as one exhibit, Exhibit R11 for respondent.)

RESPONDENTS' REST.

Mr. Starr: We have no testimony.

10

EXHIBITS.

EXHIBIT P1 FOR PROSECUTOR.

December 14, 1920.

The American Pipe & Construction Company,
112 North Broad Street,
Philadelphia, Pa.

20

Gentlemen:—

We hereby acknowledge receipt of \$10,000.00 of First Mortgage Bonds of this Company, Nos. 141 to 150 inclusive, of the denomination of \$1,000.00 each, with coupons due January 1st, 1921, et seq. attached also \$140,000.00 of First Mortgage Bonds, Nos. 1 to 140 inclusive, of the denomination of \$1,000.00 each, with coupons due January 1st, 1921, et seq. attached.

30

All of these bonds have been turned over by you to this Company, at our request, in order to enable us to have cancelled of record the mortgage dated January 14th, 1904 created to secure the issue of the above mentioned bonds, it being necessary to cancel

this mortgage in order that our plant may be turned over to the City of Millville, N. J., with which City we have a contract, as evidenced by our proposition to said City dated July 31st, 1920, and the acceptance of same by resolution of the Board of Commissioners of said City at a meeting held on August 27th, 1920, under which the City agrees to purchase our plant for the sum of \$125,000.00, and settle for the same on or before January 1st, 1921.

- 10 The above mentioned bonds are turned over to this Company by you, and received by us, with the distinct understanding that:—

First: The \$10,000.00 of bonds first above mentioned, which your Company owns, are to be paid at face value immediately this Company receives payment of the purchase price for our plant from the City of Millville. In the meantime this Company has issued to the American Pipe & Construction Company a demand note, dated December 14th,
20 1920, with interest, in the sum of \$10,000.00, which is to be held by your Company until the payment mentioned has been made.

Second: The \$140,000.00 of bonds have been heretofore held by the American Pipe Construction Company as collateral security for notes issued by this Company for construction of our plant, and it is understood that the American Pipe & Construction Company is surrendering these bonds to our Company merely as an accommodation in order
30 that the mortgage above referred to, may be cancelled of record for the reasons above stated.

It is also understood and agreed that as soon as settlement is made with the City of Millville on or before January 1st, 1921, this Company will pay over to the American Pipe Construction Company the entire proceeds from the sale of our plant to

said City, less such expenses as our Company may have in connection with closing up its affairs, which payment, it is understood, will be accepted by the American Pipe & Construction Company as in full settlement for said \$10,000.00 of Bonds and the notes for which said \$140,000.00 of bonds have been heretofore held as collateral, the total amount of said notes being \$183,884.65; also as in full settlement for other notes aggregating \$235,274.04, issued to the American Pipe & Costruction Company by our 10 Company, from time to time, all of which notes the American Pipe & Construction Company is to surrender to the Peoples Water Company of Millville, N. J., for cancellation at the time of the settlement above mentioned.

Yours very truly,
PEOPLES WATER COMPANY OF
MILLVILLE, N. J.

(Signed)

By Robt Wetherill
President

20

(Seal)

(Signed)

ATTEST: H B Hodge
Secretary.

EXHIBIT P2 FOR PROSECUTOR.

Special Master in Chancery
Supreme Court Commissioner

Bell
Telephone 38 30

LOUIS H. MILLER

Counsellor-at-Law

Millville, N. J.

Millville, N. J. December 29th, 1920.

I, Louis H. Miller, Solicitor of the City of Millville, New Jersey acknowledge having received this

day from the Peoples Water Company of Millville, New Jersey the following documents:

10 1. A certain trust mortgage dated May 1, 1901 given by the Peoples Water Company of Millville, New Jersey to the West End Trust and Safe Deposit Company to secure \$100,000. of bonds of the company recorded May 22, 1901 in the Cumberland County, New Jersey Clerk's Office in Book 66 of Mortgages page 256 &c., and also in Book No. 13 of Chattel Mortgages page 197 &c;

2. A certain other trust given by the Peoples Water Company of Millville, New Jersey, to the West End Trust Company to secure \$150,000. bonds of the company dated January 18, 1904 and recorded in said Clerk's office on January 22, 1904, in Book 75 of Mortgages page 547 &c and in Book No. 15 of Chattel Mortgages pages 34 &c and for a warrant for the satisfaction of said mortgages.

Louis H. Miller

20

EXHIBIT P3 FOR PROSECUTOR.

Special Master in Chancery

Bell

Supreme Court Commissioner

Telephone 38

LOUIS H. MILLER

Counsellor-at-Law

Millville, N. J.

Millville, N. J. December 31, 1920.

30 Received this thirty-first day of December 1920, at 2.30 o'clock p. m. from Peoples Water Company of Millville, New Jersey, two satisfaction pieces, one for satisfaction of record of mortgage of Peoples Water Company to West End Trust Co., trustee, dated January 14, 1904; and the other for satisfac-

tion of the mortgage Peoples Water Co., to West End Trust Co., Trustee, dated May 1, 1901.

NOTE: The above satisfaction pieces were tendered me December 29, 1920, but returned to the Peoples Water Co., so that the usual Prothonotary's certificate could be attached to the proof.

Louis H. Miller

City Sol'r of Millville, N. J.

10

EXHIBIT R1 FOR RESPONDENT.

Mch 1, 1918

Resolution Number 261

A Resolution providing for the purchase by the City of Millville of all the real estate, personal property and works, and all the corporate rights, powers and franchise and privileges of the Peoples' Water Company of Millville, N. J., for the price or sum of one hundred and twenty-five thousand dollars (\$125,000.00) lawful money, and the allowance of certain delinquent taxes assessed against said company and its property in this city prior to the taxing year 1917. 20

WHEREAS, by section two of ordinance number 145 of the City of Millville it was ordained as follows:

"2 The Mayor and other members of the Board of Commissioners and the majority of them are hereby made, constituted and appointed agents of the City of Millville to negotiate, on the part of the City, an agreement with the owner or owners for the purchase of said real estate, personal property and works and all the corporate rights, powers, franchises and 30

privileges of the said Peoples' Water Company of Millville, N. J.; and the said agents are required and directed to use all reasonable means and endeavor in good faith to come to an agreement as to the price and terms of the purchase thereof with the owner or owners of said real estate, personal property and works and corporate rights, powers, franchises and privileges aforesaid, and said agents shall proceed in said matter with all convenient diligence and
10 despatch and shall make report in the premises within thirty days after this ordinance shall become effective, or as soon thereafter as conveniently may be. In case the city can acquire said land and other property by agreement with the owner or owners, the Director of Revenue and Finance and the Treasurer are authorized and directed to pay to said owner or owners the agreed purchase price according to the terms of the agreement; and all further directions and proceedings for the acquisition
20 of said property and franchises shall be by resolution, or further or supplementary or amendatory ordinance of the Board of Commissioners. The agents of the City hereinbefore appointed shall not enter into any final contract or agreement, on behalf of the city, for acquisition of said property and franchises without making report to, and being duly authorized by resolution or supplemental ordinance of the Board of Commissioners."

AND, WHEREAS, afterwards, on the thirtieth
30 day of November, 1917, the Mayor and all other members of the Board of Commissioners, constituted and appointed agents of the City of Millville in and by said Section Two of said ordinance Number 145, submitted to the Peoples' Water Company of Millville, N. J., mentioned in said ordinance Number 145, a conditional proposal in writing for the purchase

by the City of Millville of all the real estate, personal property and works and all the corporate rights, powers, franchises and privileges of said People's Water Company of Millville, N. J., a corporation of New Jersey, which conditional proposal is in the words and figures following, that is to say:

"To the People's Water Company of Millville, N. J.

Gentlemen:

If your company, by appropriate corporate action, 10
assented to by your bondholders, in consideration of
the benefits to your company thereon arising, will
grant to the City of Millville, the right, option and
privilege hereinafter outlined, the subscribers, Com-
missioners of the City of Millville, agents of the
City in this behalf under the provisions of Section
Two of Ordinance Number 145 of said City will by
appropriate proceedings make report to the Board
of Commissioners of such right, option and privilege
with recommendation that said board do submit to 20
the electors of said city, the question of the exercise
of said option at a special election to be held for
that purpose on or about May first, next, or at some
other election if any shall be held within said time
where said question may lawfully be submitted to
the electors. The right, option and privilege which
the subscribers ask your Company to grant to the
City of Millville is as follows:

The City of Millville shall have the right, option
and privilege of purchasing from your Company, 30
all of the real estate, personal property and works,
and all the corporate rights, powers, franchises and
privileges of the Peoples' Water Company of Mill-
ville, New Jersey, at any time before September 2nd,
next, at the price hereinafter mentioned, provided
that the City of Millville, by due corporate action,

- shall, on or before July 15th, next, by writing, under the Seal of the City, notify said People's Water Company, of Millville, New Jersey, that the City has elected to exercise such right, option and privilege of purchase of the aforesaid real estate, personal property and works, and all the corporate rights, powers, franchises and privileges of said Company. And in case the City shall fail to give such notice of it's election to exercise said option, on or before
- 10 July 15th, next, then said right, option and privilege of purchase is expired; and if within said time, to wit: on or before July 15th, next, the City shall give such notice of it's exercise of said option, then the sale shall be consummated, and settlement made on September 1st, next, at twelve (12) O'clock, noon, at the Millville National Bank, Millville, New Jersey; or at an earlier date, or other place in Philadelphia, or New Jersey, at the option of the City, whereof, it shall give notice to the Company.
- 20 The price or consideration, at which the City shall have the right, option and privilege of purchasing said plant, as aforesaid, shall be (a) One Hundred Twenty-five Thousand Dollars (\$125,000.00) lawful money of the United States of America, which money shall be paid in cash, or by certified check, or certified City Warrant, to the order of the People's Water Company of Millville, New Jersey.
- 30 And (b) the satisfaction and cancellation of record by the City of Millville, of all taxes levied and assessed against said Company in the City of Millville, and remaining in arrears, and unpaid at the time of settlement, providing that the taxes for 1917 shall be paid by the Company, or allowance thereafter, made to the City in settlement. The said option shall provide that the title to the said real estate, personal property and works, and all the cor-

porate right, powers, franchises and privileges of said Company, shall be free and clear of all incumbrances, excepting the aforesaid taxes, and shall be conveyed by good and sufficient deed or deeds of conveyance, with full covenants of warranty.

Included in said deed or deeds of conveyance, shall be: (1) a surrender of the contract with the City of Millville, existing under the provisions or ordinance No. 73, and (2) a general release to the City, against all claims and demands whatsoever, 10 except such claims as shall have arisen at the time of settlement for water service supplied to the City of Millville, by the Company, under contract, from and after November 1st, 1917; settlement for which service shall be made by the City under the terms of the contract, as a transaction entirely separate and apart from the purchase of the plant, property and franchises, as aforesaid, upon an exercise of said option.

AND WHEREAS, the said People's Water Com- 20 pany of Millville, New Jersey, has accepted said conditional proposal, and thereby, has granted to the City of Millville, the option of said conditional proposal mentioned, as appears by a resolution of the Board of Directors of said Corporation, a certified copy of which was transmitted by said Company to the City of Millville, and is now on file with the City Clerk, and which resolution reads as follows, viz:

Resolved—that the right, option and privilege 30 of purchasing the property of this Company is hereby given to the Commissioners of the City of Millville New Jersey, under the terms outlined by said Commissioners in their communication to this Company, dated, November 30th, 1917.

Further resolved—that said communication from the Commissioners of the City of Millville, be filed with, and form a part of the Minutes of this meeting.

AND WHEREAS, afterward, the Mayor and all other members of the Board of Commissioners, agents of the City, as aforesaid, in that behalf, did make report in writing to the Board of Commissioners of the City of Millville, on the seventh day of
10 December, 1917, to the effect that after numerous interviews and negotiations, the said agents had procured from the People's Water Company of Millville New Jersey, an option for the purchase of all the real estate, personal property and works, and all the corporate rights, powers, franchises and privileges of the People's Water Company of Millville, New Jersey, upon the terms stated in the conditional proposal, and acceptance hereinbefore, in this resolution, recited and set forth. And recom-
20 mending that the Board of Commissioners of the City of Millville, do, by appropriate proceedings, submit to the electors of the City of Millville, on or before May 1st, next, the question whether the City of Millville shall exercise the aforesaid option and privilege of purchase.

AND WHEREAS, the Board of Commissioners of the City of Millville has made careful investigation, and given due consideration of the matter of the purchase of the aforesaid property, works and fran-
30 chises, upon the terms stated in the said conditional proposal, and its acceptance, and the said Board believes that it is for the best interest of the City of Millville, and it's inhabitants, and tax payers, that the City do exercise said right, option and privilege of purchase, and do acquire the said property, works and franchises for the price or consideration spec-

ified in said option, but the said Board of Commissioners has decided that a question of such importance to the public, ought to be submitted to the qualified electors of the City for their determination.

Therefore—Resolved by the Board of Commissioners of the City of Millville. (1) That the City of Millville doth elect to exercise and shall exercise it's aforesaid right, option and privilege of purchase, of all of the aforesaid real estate, personal property and works, and all of the corporate rights, powers, franchises, and privileges of the People's Water Company, of Millville, New Jersey, a corporation of New Jersey, upon the precise terms and conditions, and for the price or consideration in said option, set forth and declared. (2) That immediately after the adoption of this resolution by the electors of the City, and on or before July 15th, 1918, the Mayor shall notify the People's Water Company of Millville, New Jersey, by writing, under the seal of the City attested by the Clerk, that the City of Millville has elected to exercise said option, and shall transmit to said Company, a certified copy of this resolution.

That the bonds of the City of Millville provided for by said ordinance No. 145, and the ordinances supplemental thereto, and amendatory thereof, shall be issued and sold at public sale according to law, forthwith, after the adoption by the electors of this resolution, in the sum of One Hundred Twenty-five Thousand Dollars (\$125,000.00) or so much thereof, as shall be necessary. And the proceeds of the sale of said bonds shall be applied towards payment of the purchase price of all the aforesaid real estate, personal property and works, and all the rights, powers, franchises and privileges of said Company.

All other, or further proceedings necessary for the consummation of the purchase of said property

and franchises, and the issue of said bonds shall be had by resolution or by ordinances supplemental to said ordinance No. 145.

- (3) This resolution shall go into effect immediately, but its provisions, except as to the referendum herein contained, shall remain inoperative until, and unless a majority of the qualified electors voting thereon, shall vote in favor thereof, at the special election herein as mentioned; and the question of
10 the adoption of this resolution, shall be, and hereby is submitted by the Board of Commissioners, of its own motion, to the qualified electors of the City of Millville, at a special election which is hereby called, and shall be held in said City on Tuesday, the 30th day of April, next, and notice of said special election shall be given, and said election shall be held, and the returns thereof made, canvassed and certified by the proper officers in the manner provided by law.

- 20 The expense of said special election shall be paid from the appropriation for special elections heretofore provided in the local budget, and taxing resolution for the current fiscal year.

Adopted by the Board of Commissioners of the City of Millville, the first day of March, 1918.

(SIGNED)

THOMAS WHITAKER Mayor.

HILBERT J. SIMMERMAN

SAMUEL D. BENNETT

30

WALTER S. KATES

LEWIS S. KURTZ

ATTEST:

JOHN S. HORTON.

Clerk.

- (Exhibit R2, see Testimony, p. 19.)
 (Exhibit R3, see Testimony, p. 21.)
 (Exhibit R4, see Testimony, p. 25.)
 (Exhibit R5, see Testimony, p. 26.)

EXHIBIT R6 FOR RESPONDENT.

This is to certify that at Philadelphia, Pennsylvania, December 22, 1920, the undersigned witnessed 10
 the incineration of coupons Nos. 1 to 33 inclusive
 from Bonds Nos. 1 to 150 et seq, being all of the
 matured coupons from the entire issue of \$150,000.00
 of First Mortgage 5% Bonds of the Peoples Water
 Company of Millville, New Jersey, dated January
 1st, 1904.

Thomas Evans
 Edward W. Stille

State of Pennsylvania }
 County of Philadelphia } ss 20

Thomas Evans and Edward W. Stille both of the
 City of Philadelphia, being sworn according to law,
 depose and say that they did in the presence of each
 other incinerate and destroy on the 22 day of De-
 cember, A. D. 1920, coupons from the First Mort-
 gage Bonds of the Peoples Water Company of Mill-
 ville, New Jersey, as set forth in the above state-
 ment further deponents saith not.

Thomas Evans
 Edward W. Stille 30

Sworn and subscribed to
 before me this 22 day of De-
 cember, A. D., 1920

Frank N. Jardine

Notary Public

Commission Expires March 23, 1921.

EXHIBIT R7 FOR RESPONDENT.

CREMATION CERTIFICATE.

THIS IS TO CERTIFY, that we the undersigned have this day in the presence of each other, DESTROYED the following described securities BY BURNING THE SAME TO ASHES.

- 100 Bonds No 1 to 100 both inclusive of the Peoples
10 Water Co. of Millville N. J. Issued under Mortgage dated May 1st 1901 and recorded in Cumberland Co BK 66—P 256 &c. and all coupons therewith being all coupons issued with the Bonds.

The West End Trust & Safe Deposit Co.

Chas. E. Wolbert

Treas.

Dated Broad St. and So Penn Square
Philada., this Sixth
day of June 1904

- 20 Witness to all signatures,
Robert L. Morgan

EXHIBIT R8 FOR RESPONDENT.

- Certified copy of the Resolution adopted by the Board of Directors of the Peoples Water Company of Millville, N. J., at a meeting held on December
30 14th, 1920.

RESOLVED: That the officers be and they hereby are, authorized and directed to deliver to the West End Trust Company, Trustee under the First Mortgage of this Company dated January 1st, 1904 for cancellation, the \$150,000. of First Mortgage 5% bonds of this Company, being all of the bonds au-

thorized by said mortgage, together with coupons No's 1 to 40 both inclusive, being all the coupons originally attached to said bonds.

BE IT FURTHER RESOLVED: That the West End Trust Company, Trustee, be and it is hereby requested to satisfy said Mortgage dated January 1, 1904, and cancel the bonds and coupons issued thereunder and deliver the satisfied mortgage and cancelled bonds and coupons to the Treasurer of this Company.

10

I, H. Bayard Hodge, do hereby certify that the foregoing is a true and correct copy of the Resolution adopted by the Board of Directors of the Peoples Water Company of Millville, N. J. at a meeting held on December 14th, 1920.

H. Bayard Hodge
Secretary

EXHIBIT R9 FOR RESPONDENT.

20

WEST END TRUST COMPANY

Broad St. & South Penn Square.

Charles B. Dunn,
President

William L. Nevin,
Vice-president

Charles E. Wolbert,
Vice-pres. Treas. and Secy.

30

John M. Strong,
Trust Officer

Robert L. Morgan,
Asst. Treas. and Asst. Secy.

William H. Conger, Jr.,
Asst. Trust Officer

Samuel L. Hayes,
Asst. Treas. and Asst. Secy.

Francis T. Reinhart,
Asst. Treas. and Asst. Secy.

Philadelphia, December 22, 1920.

Peoples Water Company,
114 North Broad Street,
Philadelphia, Penna.

Attention Mr. Hodge.

10 Gentlemen:—

In the matter of satisfaction of mortgage of the Peoples Water Company, I am enclosing herewith cancelled bonds Nos. 1 to 150 for one thousand Dollars each; also cancelled coupons covering January 1921, July 1921, January 1922, July 1922, January 1923, July 1923 and January 1924.

We also enclose two copies of the incineration certificate covering coupons Nos. 1 to 33 inclusive duly acknowledged.

20 Also enclosed find an order to satisfy mortgage covering the above bonds duly executed by this Company as recorded in the Clerk's office, Cumberland County book No. 115 of chattel mortgage page 314, etc.; also a bill of Mr. Jardine, care of West End Trust Company, which I will ask you to remit to him direct.

Yours very truly,

W. H. Conger, Jr.,
Assistant Trust Officer.

E:K

Per

30 Encls.

OPINION.

(Filed June 8, 1921.)

NEW JERSEY SUPREME COURT.

February Term, 1921.

10

WILLIAM P. ADAMS,
Prosecutor,
vs.
JOHN T. HORTON, *et al.*,
Defendants.

20

Two writs of certiorari involving contract and bond issue of the City of Millville.

Argued February Term, 1921.

Decided June Term, 1921.

LEWIS STARR, For Prosecutor.

LOUIS H. MILLER, For City of Millville.

J. FITHIAN TATEM, For Peoples' Water Co.

30

Argued before TRENCHARD, MINTURN and KALISCH,
J. J.

PER CURIAM:

These cases were argued together, one being a certiorari to review a contract, and the other being a

certiorari to review a bond issue of the City of Millville. It was conceded at the argument that the bond issue could not be sustained and upon motion of the solicitor of the city the proceedings involving that question were discontinued. The other question involved motions to dismiss, and the controversy is reduced to the question of the validity of proceedings and resolutions upon the part of the City of Millville to purchase the Peoples' Water Company.

- 10 That question in turn depends largely upon whether or not a certain ordinance known as Ordinance 145 passed in 1916, was actually in existence and operative, and thus legally presented a foundation for the proceedings to purchase the water works. We think that this ordinance presented a basis for the municipal action taken. By Section 1 it provides that it is hereby determined that the City of Millville shall acquire forthwith, for public use, the Peoples' Water Company. By Section 2 the Mayor and members
- 20 of the board of commissioners were constituted agents to negotiate on the part of the city an agreement for the purchase. Said agents were required to use all reasonable means to reach an agreement with all convenient speed and report the result within thirty days after the ordinance became effective or as soon thereafter as conveniently may be. Section 3 provides that if the city cannot acquire the property by agreement, it shall proceed to condemn the same. It appears that the city endeavored to
- 30 agree and apparently could not reach an agreement, and then finally in the summer of 1920, its official received an offer from the Peoples' Water Company offering to sell the plant to the city for \$125,000. The city thereupon passed a resolution accepting that proposition, contingent upon favorable action to that effect upon a referendum to the voters to be submitted in November, 1920.

The resolution expressly provided that it should take effect only if and when such favorable action was taken by the people. In November at the general election the matter was submitted to the people. They voted favorably, and we may fairly say in that situation that as against the prosecutor of this writ, the favorable vote of the people automatically resulted in a contract between the city and the Peoples' Water Company.

The prosecutor of this writ, who is a taxpayer, 10 complains that before the contract could spring into existence there must have been as a condition precedent a meeting of the minds; and that there was no such meeting of the minds, as he contends, certain notices were not given to the Peoples' Water Company by the city counsel to effectuate the result. It may be that the Peoples' Water Company might so contend, and that the city might also assume that position, but as a fact neither of them occupies that mental status so that we may therefore 20 assume that this contract sprang into existence early in November, 1920, as the result of the referendum. But we think the conclusive point which is dispositive of this contention, is that there was laches upon the part of the prosecutor in contesting the matter. It was open to him to apply for a writ in the summer of 1920 to review the validity of the resolution, which was a public proceeding of which he must have been cognizant. It was also open to him to apply for his writ upon the favorable action of the voters in No- 30 vember, 1920, and this he failed to do in either instance. He waited until December 30th, or 31st, and then obtained this writ with the result that an entire proceeding of a public nature involving a large financial expenditure is delayed, not in its incipiency, but at a time when after labor and expense and a

possible change of the legal rights of the parties, properties, and securities involved, and upon the threshold of its execution have created at least equities, which it is too late now to disturb in the public interest. In such a situation the law requires diligence and not inaction if a party seeks to challenge the legality of a proceeding involving a public interest.

- 10 McKevitt vs. Hoboken, 16 Vr. 482;
 McGurty vs. Newark, 100 Atl. 849;
 Street Impt. Assn. vs. Ocean City, Id. 568;
 Carver vs. Camden, 49 Vr. 293;
 Lindabury vs. Clinton Township, 93 L. 96.

This conclusion must result in a dismissal of the writ upon which argument was heard, with costs, and such will be the order.

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ORDER.

(Filed June 15, 1921.)

NEW JERSEY SUPREME COURT.

WILLIAM P. ADAMS,
Prosecutor,

vs.

JOHN S. HORTON, Clerk of
 the City of Millville, the
 CITY OF MILLVILLE and
 the PEOPLES' WATER COM-
 PANY OF MILLVILLE, N. J.,
Defendants in
Certiorari.

On Certiorari.
 (Case No. 1—
 Contract.)

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The defendant, John S. Horton, clerk of the City of Millville, having made return to the writ of certiorari herein, certifying a certain contract and agreement made between the City of Millville by its Board of Commissioners and the Peoples' Water Company of Millville, New Jersey for the acquisition by the City of Millville of the water works of said Peoples' Water Company as by the writ of certiorari and return herein reference being thereto had will more particularly appear; and this cause having been brought on for argument before the Court, in the presence of the counsel of the respective parties; and the Court having read and consid-

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ered the depositions taken herein; and the argument of counsel thereon having been heard and considered by the Court; and it appearing to the Court that the proceedings removed by the said writ of certiorari are lawful, and also, that the prosecutor was in laches in prosecuting his said writ of certiorari, and no good cause being shown or appearing to the contrary:

10 It is on this fifteenth day of June, 1921, on motion of Louis H. Miller, attorney of the City of Millville and J. Fithian Tatem, attorney of Peoples' Water Company of Millville, New Jersey, Ordered that the said writ of certiorari be and the same hereby is dismissed, with costs of the defendants to be taxed.

Entered this fifteenth day of June, 1921, on motion of

LOUIS H. MILLER,
*Attorney of Defendants, City
of Millville, and John S.
Horton, City Clerk.*

20

J. FITHIAN TATEM,
*Attorney of Defendant, Peo-
ples' Water Company of
Millville, N. J.*

30

REASONS FOR REVERSAL.

(Filed Aug. 1, 1921.)

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

WILLIAM P. ADAMS, *et al.*,
Prosecutor-Appellant,

vs.

JOHN S. HORTON, City Clerk
of City of Millville, CITY
OF MILLVILLE, and PEOPLES'
WATER COMPANY OF
MILLVILLE,

Respondents.

On Appeal from
Supreme Court.
Reasons for Reversal.

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The appellants above named, by Lewis Starr, their attorney, urge the following reasons for the reversal of an order entered in the Supreme Court on June 15, 1921, in the above entitled cause, dismissing the writ of certiorari allowed therein with costs.

1. In the record and proceedings aforesaid, and also in the giving of judgment in the Supreme Court, there is a manifest error in this, to wit: that it appears by the record aforesaid, that the writ of certiorari issued out of the said Court in the said cause, was dismissed, whereas the said Supreme Court should not have dismissed said writ, but should

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have reversed the proceedings of the commissioners of Millville, removed by said writ, and set aside and vacated the contract and agreement between the City of Millville and the Peoples' Water Company, for the acquisition of the water works, property and franchise of the latter corporation.

- 10 2. Because the Supreme Court dismissed said writ of certiorari for the reasons stated, whereas the said Supreme Court should have retained said writ, and on the record and proceedings before it, reversed the proceedings of the commissioners of the City of Millville, and set aside the contract as aforesaid.

A. Because the said Supreme Court decided that the proceedings removed by the said writ of certiorari were lawful, whereas the same were unlawful, and they should have been reversed.

- 20 4. Because upon the record and proceedings before the said Supreme Court, the latter should have decided that the contract and agreement between the City of Millville and the Peoples' Water Company of Millville, for the acquisition by the City of Millville of the water works, property and franchise of the Peoples' Water Company, should for the reasons alleged in the said Supreme Court be set aside, annulled, and decreed to be for nothing holden, because:

- 30 (a) The said contract and agreement was made by and between the parties thereto without any sufficient legal power and authority, either by legislative or municipal action.

(b) The said contract was *ultra vires* the City of Millville.

(c) The commissioners of the City of Millville did not possess any legal power or authority to enter into the contract.

(d) Ordinance No. 145, as adopted by the commissioners of Millville on December 31, 1915, does not constitute any sufficient legal authority or power to authorize the commissioners of Millville to enter into the contract with Peoples' Water Company.

10

(e) The power and authority of the commissioners of Millville to enter into the said contract with the Peoples' Water Company, cannot be predicated or based upon ordinance No. 145, because the power and authority conferred thereby became exhausted when the proceedings instituted thereunder, failed to result in the purchase of the water works as contemplated by the terms thereof by the refusal of the voters of Millville to approve of said purchase as expressed at the election held April 13, 1918.

20

(f) The commissioners of Millville did not possess any power or authority, legislative or municipal, to resume negotiations with the Peoples' Water Company in 1920, which resulted in the passage of Resolution No. 360, because there was no valid or subsisting ordinance in existence authorizing the purchase of the water works by the Peoples' Water Company.

30

(g) Said resolution No. 360, adopted August 27, 1920, is insufficient in law to authorize and empower the commissioners to enter into the contract or agreement for the purchase of said water works.

(h) At the time of the making of the contract and agreement between the City of Millville and the

said Peoples' Water Company, the city had no funds in hand with which to pay the contract price and no bonds had been issued, the proceeds of which could be used for the purpose of paying the contract price.

(i) The method adopted by the city to raise funds to pay the contract price was improper and illegal, because the power conferred by ordinance 145 had been exhausted and could not be exercised when the
10 resolution for the issue of bonds was adopted.

(j) The bonds could not be lawfully issued pursuant to the terms of ordinance 152, adopted August 18, 1916.

5. That the said Supreme Court erred in holding that the prosecutor was in laches in prosecuting his writ of certiorari.

LEWIS STARR,
Attorney for Appellant.

20

30

RULE AFFIRMING JUDGMENT.

NEW JERSEY COURT OF ERRORS AND APPEALS.

The State, WILLIAM P. ADAMS, <i>et al.</i> , Prosecutor-Appellant,	10
vs.	
JOHN S. HORTON, Clerk of the City of Millville, the CITY OF MILLVILLE, and the PEOPLES' WATER COMPANY OF MILLVILLE, NEW JERSEY, Defendants-Respondents.	20
	On Appeal. On Appeal from the Supreme Court. Rule Affirming Judgment.

This cause having been duly argued at the November term of this court by Lewis Starr, Esquire, of counsel with the prosecutor-appellants, and Louis H. Miller, of counsel with the defendants-respondents, City of Millville and John S. Horton, Clerk of the City of Millville, and William D. McMullin, attorney of Peoples' Water Company of Millville, N. J., and the Court having considered the same, and finding no error in the record or proceeding in the Supreme Court;

It is thereupon ordered and adjudged that the judgment of the Supreme Court removed by appeal in this cause be affirmed with costs in this court and in the Supreme Court to be taxed, and that the record be remitted to the Supreme Court to be pro-

ceeded with in accordance with this judgment and the practice of said court.

On motion of

LOUIS H. MILLER,
*Attorney of City of Millville,
defendants-respondents.*

JNO. D. McMULLIN,
*Attorney of Peoples' Water
Co.*

10

[ENDORSED.]

“(Filed Feb 15 1922)

Thomas F. Martin,
Clerk.”

STATE OF NEW JERSEY.

DEPARTMENT OF STATE.

20

I, THOMAS F. MARTIN, Secretary of State of the State of New Jersey and ex-officio Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby certify that the foregoing is a true copy of Rule Affirming Judgment, between the State, William P. Adams, et al., Prosecutor-Appellant, vs. John S. Horton, Clerk of the City of Millville; the City of Millville and the Peoples Water Company of Millville, New Jersey, Defendants-Respondents, as the same is taken from and compared with the original filed Feb. 15, 1922, and now remaining on file in my office.

30

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal of said Court at Trenton, this fifteenth day of February A. D. 1922.
(Seal)

THOMAS F. MARTIN,
Secretary of State.

NEW JERSEY SUPREME COURT.

S. J. FRANKLIN,

*Prosecutor,**vs.*

JOHN S. HORTON, CITY CLERK

OF MILLVILLE ET AL.,

*Respondents.*On Certiorari.
CASE.

WRIT.

10

THE STATE OF NEW JERSEY, ss.:

The State of New Jersey to John S. Horton, City Clerk, City of Millville, Greetings:

We being willing, for certain reasons, to be certified of a certain ordinance (SEAL) adopted by the Board of Commissioners of the City of Millville, County of Cumberland and State of New Jersey, on the 17th day of March, 1922, known as Ordinance No. 20207.

We do command you that the said ordinance passed by the said Board of Commissioners on the 17th day of March, nineteen hundred and twenty-two, and the records of the meetings of said Commissioners at which said ordinance was introduced and passed, together with all things 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 15th day of April, nineteen hundred and twenty- 03 two, 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 5th day of April, nineteen hundred and twenty-two.

ENOCH L. JOHNSON,

Clerk.

LEWIS STARR,

Attorney.

4 MILL.

RETURN.

The ordinance, records and proceedings within mentioned, together with all things touching the same as fully and entirely before me, they remain, I do certify and send to the Justices of our Supreme Court of Judicature, as within I am commanded.

10 In witness whereof I have hereto set my hand and caused the seal of the City of Millville to be hereto affixed this twelfth day of April, 1922.

(SEAL) JOHN S. HORTON,
Clerk of the City of Millville.

[ENDORSED]

New Jersey Supreme Court.
The State, S. J. Franklin,
Prosecutor,

vs.

20 John S. Horton, City Clerk, City of
Millville; The City of Millville, and
the People's Water Company of Mill-
ville, N. J.,

Respondents.

In Certiorari.

Writ.

Lewis Starr, Atty.,
4th & Market Sts.,
Camden, N. J.

30 Returnable April 15, 1922.

I allow this writ. Let it be sealed.
Dated Apl. 15, 1922.

This writ is allowed upon condition that the case be brought on for hearing as soon as the Court can hear the same and that application be made forthwith by the prosecutor, for a hearing by the Court.

CHAS. C. BLACK, J. S. C.

*Extract from Minutes of Board of Commissioners of
the City of Millville.*

MILLVILLE, New Jersey, March 3, 1922.

The Board of Commissioners met in regular session with Mayor Felmey presiding. Members present—Felmey, Simmerman, LaDow, Kates, and Ware.

* * * * *

A proposed Ordinance, supplementing and amending the ordinance known as Ordinance No. 145, entitled 10
“An Ordinance for the acquisition by the City of Millville of all real estate, personal property and works, and all the corporate rights, powers franchise and privileges of the Peoples Water Company of Millville, N. J.,” adopted December 31, 1915, was introduced and the Clerk authorized to advertise same for further consideration on Friday, March 17th, by the following vote: Yeas, Simmerman, LaDow, Kates, Ware and Felmey.

20

*Copy of Proof of Publication of Introduction of
Ordinance.*

PROOF OF PUBLICATION.

STATE OF NEW JERSEY,
COUNTY OF CUMBERLAND, ss.

W. E. Middleton, of full age, being duly sworn according to law, on his oath deposes and says that he 30
is the Publisher of the “Millville Daily Republican,” a newspaper published in the City of Millville in the county of Cumberland and State of New Jersey; and that the notice, of which the annexed printed slip is a true copy, was printed and published in the said newspaper on the 7th day of March, nineteen hundred and twenty-two, and continued to be printed and published in the said newspaper for one time, at least once in

each week, the last publication of said notice being on the day of nineteen hundred and , and that the dates on which said publications were made as aforesaid are: March 7, 1922.

(Signed) W. E. MIDDLETON.

Sworn to and subscribed before me this 10th day of April, nineteen hundred and twenty-two.

(Signed) MAUDE F. HANKINS.

10

Notary Public of New Jersey.

Copy of Advertisement of Introduction of Ordinance.

City of Millville.

Public Notice.

Notice is hereby given that an Ordinance, of which the following is copy, was introduced before the Board
20 of Commissioners of the City of Millville, on Friday, the 3rd day of March, Nineteen Hundred and Twenty-two, and is now on file with the City Clerk and will be considered by said Board for final passage on Friday, the 17th day of March, Nineteen Hundred and Twenty-two, at three-thirty o'clock P. M. at the Commission Chamber in the City Hall, Millville, New Jersey, when and where all persons interested therein may be heard for or against the passage of the same:

30 An Ordinance further supplementing and amending the Ordinance known as Ordinance Number 148, entitled "An Ordinance for the acquisition by the City of Millville of all real estate, personal property and works, and all the corporate rights, powers, franchise and privileges of the Peoples Water Company of Millville, N. J.," adopted December 31, 1915.

The Board of Commissioners of the City of Millville do Ordain:

1. All the bonds to be issued under the provisions of said ordinance number 145 to which this ordinance

is supplementary and amendatory shall bear date March first, nineteen hundred and twenty-two; said bonds shall be in the sum of one thousand dollars each; shall be issued to the amount of one hundred twenty-five thousand dollars; the principal of said bonds shall be payable as follows, to wit, five thousand dollars thereof on March first, 1923, and five thousand dollars thereof on the first day of March in each year thereafter until the whole amount of said bonds shall have been paid.

2. The bonds and the temporary notes authorized by said Ordinance 145 and the supplemental ordinance 152, and the issuance and sale of the same, shall in all respects be in accordance with the provisions of Chapter 252 of the Laws of 1916, and the acts supplemental thereto and amendatory thereof. The Board of Commissioners shall proceed to issue and make sale according to law of the entire issue of bonds hereby authorized, subject to the provisions of the statute (P. L. 1920, page 469) and the acts supplemental thereto and amendatory thereof.

3. The proceeds of the said temporary notes or bonds or so much thereof as may be necessary, shall be applied and used for the payment of the agreed purchase price of the plant of the Peoples Water Company of Millville, N. J., upon the terms set forth in Resolution Number 360, adopted by the Board of Commissioners August 27, 1920, subject to approval by the electors of the city, and approved and adopted by said electors at the general election held November 2, 1920. Immediately upon delivery and acceptance of the deed of said water plant the city shall assume charge and control of said property and thereafter the same shall be operated and maintained by the city according to law. The proper officers of the city shall proceed to make settlement as soon as conveniently may be for the purchase of said water plant, upon the terms agreed to in said Resolution 360.

4. The sinking fund commissioners shall, on or before the first day of February of each year pay to the Treasurer from the moneys which have come into

their hands as a sinking fund for the purpose the balance of the moneys required for the retirement of bonds falling due on March first of that year.

5. Pursuant to the provisions of Section 2 of Chapter 252 of the Laws of 1916, as amended (P. L. 1920, p. 236), it is hereby certified:

10 (a) The probable period of usefulness of the improvement or property for which said bonds and said improvement notes are authorized, as determined by the Board of Commissioners, is thirty-five years.

(b) The average assessed valuation of the taxable real property (including improvements) of this municipality computed upon the next preceding three valuations thereof in the manner provided by section 12 of Chapter 252 of the Laws of 1916, and the acts supplemental thereto and amendatory thereof is \$5,984,083.

20 (c) The net debt of this municipality computed in the manner provided by said section 12 of Chapter 252 of the Laws of 1916, and the acts supplemental thereto, and amendatory thereof, is \$168,989.35.

(5) The debt statement of the city required by section 12 (1) of said Chapter 252 of the Laws of 1916, and the acts supplemental thereto and amendatory thereof, was made by the chief financial officer of this municipality and by him filed with the City Clerk during the month of January of this year (1922).

30 (e) The supplemental debt statement required by Section 12 (2) of said act as amended (P. L. 1920, pp. 238, 239) was made by said chief financial officer on the third day of March, 1922, and filed by him with the City Clerk on the same day.

6. This ordinance shall be attested by the Clerk and shall be published in the manner prescribed in section 11 of Chapter 252 of the Laws of 1916; and the clerk shall publish with this Ordinance a statement as provided by said division (1) of section 2 of said act, as amended (P. L. 1917, page 805). The bonds authorized by this ordinance shall not be issued or delivered until after thirty days shall elapse from and

after final passage. Publication of this ordinance at length shall be made by the clerk after final passage hereof.

7. All ordinances and parts of ordinances inconsistent herewith are hereby repealed; and this ordinance shall take effect immediately upon its publication as provided by law.

By order of the Board of Commissioners.

JOHN S. HORTON, *City Clerk.*

10

Extract from Minutes of Board of Commissioners of the City of Millville.

MILLVILLE, N. J., March 17, 1922.

The Board of Commissioners met in regular session with Mayor Felmeý presiding. Members present—Felmeý, Simmerman, LaDow, Kates and Ware.

* * * * *

Ordinance No. 207, an ordinance further supplement- 20
ing and amending the ordinance known as No. 145, entitled "An Ordinance for the acquisition by the City of Millville of all the real estate, personal property and works, and all the corporate rights, powers, franchise and privileges of the Peoples Water Company of Millville, New Jersey," adopted December 31, 1915, was adopted by the following vote: Yeas, Simmerman, LaDow, Kates, Ware and Felmeý.

Prior to the adopting of this Ordinance, Mayor Felmeý invited any person to speak for or against the 30
adoption of the same, but no person appeared.

Copy of Ordinance Number 207.

An Ordinance further supplementing and amending the Ordinance known as Ordinance Number 145, entitled "An Ordinance for the acquisition by the City of Millville of all the real estate, personal property and

works, and all the corporate rights, powers, franchises and privileges of the Peoples Water Company of Millville, N. J.," adopted December 31, 1915.

The Board of Commissioners of the City of Millville do Ordain:

1. All of the bonds to be issued under the provisions of said ordinance number 145 to which this ordinance is supplementary and amendatory shall bear date March first, nineteen hundred and twenty-two; said bonds shall
10 be in the sum of one thousand dollars each; shall be issued to the amount of one hundred and twenty-five thousand dollars; the principal of said bonds shall be payable as follows, to wit, five thousand dollars thereof on March first, 1923, and five thousand dollars thereof on the first day of March in each year thereafter until the whole amount of said bonds shall have been paid.
2. The bonds and the temporary notes authorized by said Ordinance 145 and the supplemental ordinance 152, and the issuance and sale of the same, shall in all re-
20 spect be in accordance with the provisions of Chapter 252 of the laws of 1916, and the acts supplemental thereto and amendatory thereof. The Board of Commissioners shall proceed to issue and make sale according to law of the entire issue of bonds hereby authorized, subject to the provisions of the statute (P. L. 1920, page 469) and the acts supplemental thereto and amendatory thereof.
3. The proceeds of the said temporary notes or bonds or so much thereof as may be necessary, shall be applied
30 and used for the payment of the agreed purchase price of the plant of the Peoples Water Company of Millville, N. J., upon the terms set forth in Resolution Number 360, adopted by the Board of Commissioners August 27, 1920, subject to approval by the electors of the city, and approved and adopted by said electors at the general election held November 2, 1920. Immediately upon delivery and acceptance of the deed for said water plant the city shall assume charge and control of said property and thereafter the same shall be operated and maintained

by the city according to law. The proper officers of the city shall proceed to make settlement as soon as conveniently may be for the purchase of said water plant, and upon the terms agreed to in said Resolution 360.

4. The sinking fund commissioners shall, on or before the first day of February of each year pay to the Treasurer from the moneys which have come into their hands as a sinking fund for the purpose the balance of the moneys required for the retirement of bonds falling due on March first of that year. 10

5. Pursuant to the provisions of Section 2 of Chapter 252 of the Laws of 1916, as amended (P. L. 1920, p. 236), it is hereby certified:

(a) The probable period of usefulness of the improvements or property for which said bonds and said improvement notes are authorized, as determined by the Board of Commissioners, is thirty-five years.

(b) The average assessed valuation of the taxable real property (including improvements) of this municipality computed upon the next preceding three valuations thereof in the manner provided by section 12 of Chapter 252 of the Laws of 1916, and the acts supplemental thereto and amendatory thereof, is \$5,984,083.00. 20

(c) The net debt of this municipality computed in the manner provided by said section 12 of Chapter 252 of the Laws of 1916, and the acts supplemental thereto and amendatory thereof, is \$168,989.35.

(d) The debt statement of the city required by section 12 (1) of said Chapter 252 of the Laws of 1916, and the acts supplemental thereto, and amendatory thereof, was made by the chief financial officer of this municipality and by him filed with the City Clerk, during the month of January of this year (1922). 30

(e) The supplemental debt statement required by section 12 (2) of said act, as amended (P. L. 1920, pp. 238, 239), was made by said chief financial officer on the 3d day of March, 1922, and filed by him with the City Clerk on the same day.

6. This ordinance shall be attested by the Clerk and shall be published in the manner prescribed in section 11 of Chapter 252 of the Laws of 1916; and the Clerk shall publish with this Ordinance a statement as provided by said division (1) of section 2 of said act, as amended (P. L. 1917, page 805). The bonds authorized by this ordinance shall not be issued or delivered until after thirty days shall elapse from and after final passage. Publication of this ordinance at length shall
10 be made by the clerk after final passage hereof.

7. All ordinances and parts of ordinances inconsistent herewith are hereby repealed; and this ordinance shall take effect immediately upon its publication as provided by law.

Adopted March 17th, 1922.

WALTER H. FELMEY, *Mayor.*

W. J. SIMMERMAN,

A. M. LADOW,

WALTER S. KATES,

W. FRED WARE,

20

Attest:

Commissioners.

JOHN S. HORTON, *Clerk.*

The foregoing ordinance was adopted on the 17th day of March, 1922.

The bonds authorized thereby will be issued and delivered after the 18th day of April, 1922, and any suit, action or proceeding to set aside or vacate this ordinance must be begun within twenty days after publication of this statement.

30

JOHN S. HORTON,
Clerk of the City of Millville.

*Copy of Proof of Publication of Adoption of Ordinance
No. 207.*

PROOF OF PUBLICATION.

STATE OF NEW JERSEY, }
COUNTY OF CUMBERLAND, } ss.

W. E. Middleton, of full age, being duly sworn according to law, on his oath deposes and says that he is the Publisher of the "Millville Daily Republican," a newspaper published in the City of Millville, in the county of Cumberland and State of New Jersey; and that the notice of which the annexed printed slip is a true copy, was printed and published in the said newspaper on the 22d day of March, nineteen hundred and twenty-two and published in the said newspaper for one time, the last publication of said notice being on the day of nineteen hundred and and that the date on which said publication was made as aforesaid is: March 22, 1922.

(Signed) W. E. MIDDLETON.

Sworn to and subscribed before me this 24th day of March nineteen hundred and twenty-one.

(Signed) MAUDE F. HANKINS,
Notary Public of New Jersey.

*Copy of Advertisement of Adoption of Ordinance
No. 207.*

30

City of Millville.

Public Notice.

Ordinance No. 207.

An Ordinance further supplementing and amending the Ordinance known as Ordinance Number 145, entitled "An Ordinance for the acquisition by the City of Millville of all real estate, personal property and works, and all the corporate rights, powers, franchises and

privileges of the Peoples Water Company of Millville, N. J.," adopted December 31, 1915.

The Board of Commissioners of the City of Millville do Ordain :

1. All of the bonds to be issued under the provisions of said ordinance number 145 to which this ordinance is supplementary and amendatory shall bear date March first, nineteen hundred and twenty-two; said bonds shall be in the sum of one thousand dollars each; shall be
10 issued to the amount of one hundred twenty-five thousand dollars; the principal of said bonds shall be payable as follows, to wit, five thousand dollars thereof on March first, 1923, and five thousand dollars thereof on the first day of March in each year thereafter until the whole amount of said bonds shall have been paid.

2. The bonds and the temporary notes authorized by said Ordinance 145 and the supplemental ordinance 152, and the issuance and sale of the same, shall in all respects be in accordance with the provisions of Chapter
20 252 of the Laws of 1916, and the acts supplemental thereto and amendatory thereof. The Board of Commissioners shall proceed to issue and make sale according to law of the entire issue of bonds hereby authorized, subject to the provisions of the statute (P. L. 1920, page 469) and the acts supplemental thereto and amendatory thereof.

3. The proceeds of the said temporary notes or bonds or so much thereof as may be necessary, shall be applied and used for the payment of the agreed purchase price of the plant of the Peoples Water Company of Millville,
30 N. J., upon the terms set forth in Resolution Number 360, adopted by the Board of Commissioners August 27, 1920, subject to approval by the electors of the City, and approved and adopted by said electors at the general election held November 2, 1920. Immediately upon delivery and acceptance of the deed for said water plant the city shall assume charge and control of said property and thereafter the same shall be operated and maintained by the city according to law. The proper officers

of the city shall proceed to make settlement as soon as conveniently may be for the purchase of said water plant, upon the terms agreed to in said Resolution 360.

4. The sinking fund commissioners shall, on or before the first day of February of each year pay to the Treasurer from the moneys which have come in their hands as a sinking fund for the purpose the balance of the moneys required for the retirement of bonds falling due on March first of that year.

5. Pursuant to the provisions of Section 2 of Chapter 10 252 of the Laws of 1916, as amended (P. L. 1920, p. 236), it is hereby certified:

(a) The probable period of usefulness of the improvement of property for which said bonds and said improvement notes are authorized, as determined by the Board of Commissioners, is thirty-five years.

(b) The average assessed valuation of the taxable real property (including improvements) of this municipality computed upon the next preceding three valuations thereof in the manner provided by section 12 of Chapter 252 of the Laws of 1916, and the act supplemental thereto and amendatory thereof, is \$5,984,083. 20

(c) The net debt of this municipality computed in the manner provided by said section 12 of Chapter 252 of the Laws of 1916, and the acts supplemental thereto and amendatory thereof, is \$168,989.35.

(d) The debt statement of the City required by section 12 (1) of said Chapter 252 of the Laws of 1916, and the acts supplemental thereto and amendatory thereof, was made by the chief financial officer of this municipality and by him filed with the City Clerk, during the month of January of this year (1922). 30

(e) The supplemental debt statement required by section 12 (2) of said act as amended (P. L. 1920, pp. 238, 239) was made by said chief financial officer on the third day of March, 1922, and filed by him with the City Clerk on the same day.

6. This ordinance shall be attested by the Clerk and shall be published in the manner prescribed in section

11 of Chapter 252 of the Laws of 1916; and the clerk shall publish with this Ordinance a statement as provided by said division (1) of section 2 of said act, as amended (P. L. 1917, page 805). The bonds authorized by this ordinance shall not be issued or delivered until after thirty days shall elapse from and after final passage. Publication of this ordinance at length shall be made by the Clerk after final passage hereof.

10 7. All ordinances and parts of ordinances inconsistent herewith are hereby repealed; and this ordinance shall take effect immediately upon its publication as provided by law.

Adopted March 17, 1922.

WALTER H. FELMEY, *Mayor.*

W. J. SIMMERMAN,

A. M. LADOW,

WALTER S. KATES,

W. FRED WARE,

Attest:

Commissioners.

20 JOHN S. HORTON, *Clerk.*

Statement.

The foregoing ordinance was adopted on the seventeenth day of March, 1922.

The bonds authorized thereby will be issued and delivered after the eighteenth day of April, 1922, and any suit, action or proceeding to set aside or vacate this ordinance must be begun within twenty days after the publication of this statement.

30

JOHN S. HORTON,
Clerk of the City of Millville.

STATE OF NEW JERSEY, }
CITY OF MILLVILLE, } *ss.*

I, JOHN S. HORTON, Clerk of the City of Millville, do hereby certify the foregoing to be true copies of the ordinance, minutes, records and proceedings therein recited, as compared with the originals of record in my office.

In Witness Whereof, I have hereto set my hand and caused the seal of the City of Millville to be hereto affixed this twelfth day of April, 1922.

(SEAL) JOHN S. HORTON,
Clerk of the City of Millville.

NEW JERSEY SUPREME COURT.

S. J. FRANKLIN,
Prosecutor,
vs.

JOHN S. HORTON, CITY CLERK
OF MILLVILLE; THE CITY
OF MILLVILLE AND PEOPLES
WATER COMPANY OF MILL-
VILLE, NEW JERSEY,
Respondents.

On Certiorari.
DEPOSITIONS.

10

20

Depositions of witnesses taken in the above-entitled cause, pursuant to an order therefor dated the 15th day of April, 1922, at the City hall, Millville, New Jersey, on the 20th day of April, 1922, at 10:30 o'clock in the forenoon, before Henry O. Burt, Esq., Master in Chancery, by consent of the parties, in the presence of Louis Starr, attorney of prosecutor, and Louis H. Miller, attorney of the respondents, John S. Horton and the City of Millville.

It is agreed between the parties that the depositions 30
may be taken before Henry O. Burt, Esq., Master in Chancery of New Jersey.

It is agreed that notice of the taking of these depositions be waived and that they be taken stenographically and the signature of witnesses waived.

HENRY O. BURT,
A Master in Chancery of New Jersey.

By Mr. Miller—I wish to announce that I represent and appear here for John S. Horton, City Clerk and the City of Millville. I do not represent the Peoples Water Company of Millville, New Jersey.

It is understood that these depositions are to be submitted to John D. McMullen, attorney for the Peoples Water Company and approved by him or his presence waived.

10 Mr. Starr—I offer in evidence a supplement to the City Charter of the City of Millville, by act of the Legislature of the State of New Jersey, approved March 27, 1873, P. L. of that year, page 446.

Mr. Miller—I object to the admission of that because it is not material or relevant to this issue so far as disclosed. What is the purpose of counsel in offering this?

Mr. Starr—It is to show the history of the City of Millville with reference to the acquisition of the water plant and as to the authority of the city to issue bonds for that purpose.

20 Mr. Miller—Then, I object to the introduction of the charter on the ground that that question has been litigated in two previous suits in the Supreme Court. The suit of Wood against Millville and Franklin *v.* Miller. These two cases were before the Court I think in 1916. That case went to the Court of Errors and Appeals and the judgment of the Supreme Court affirmed Ordinance 145, of which ordinance this Ordinance 207 is a supplement of, and was affirmed by the Court of Errors. Again, in the case of Adams against Millville, the
30 legality of Ordinance 145 and of Ordinance 152 were affirmed by the Supreme Court and the judgment of the Supreme Court was affirmed by the Court of Errors and Appeals and in those cases the authorities of the City of Millville to purchase this water plant were disposed of and the question of the power of the city in that behalf is *res adjudicata* and the introduction of this charge seems to be an attempt to again litigate the same subject matter.

John S. Horton, being duly sworn according to law on his oath deposes and says:

Direct examination, by Mr. Starr:

Q. Mr. Horton, are you the city clerk of the City of Millville?

A. Yes.

Q. How long have you been city clerk?

A. For more than seven years.

Q. What is the present form of the municipal government in the City of Millville? Is it governed by the Walsh Act? 10

A. Yes.

Q. When did Millville begin to be governed by the Walsh Act?

A. In 1913.

Q. Are you the custodian of the books and records of the city?

A. Certain classes of books and records.

Q. Of the record of the proceedings of the commissioners? 20

A. I am.

Q. And of the City of Millville before the commissioners were elected?

A. I am.

Q. Will you state whether or not the city ever approved of the General Water Act of 1876?

By Mr. Miller—I object to the clerk being interrogated on that point as the question is not germane to this issue and therefore was settled in the case of *Wood and Franklin vs. Millville*, 30 tested by the Supreme Court and the decision affirmed by the Court of Errors and Appeals.

A. I am not qualified to answer it without perusing some records.

Mr. Starr—We stipulated that before.

Q. When did they adopt the provisions of the General Water Act of April 21, 1876?

Mr. Miller—It was tested in the prior litigation.

A. My memory is not clear on that adoption.

Q. Will you turn to the records of the city proceedings of the city council to determine whether or not that is effective?

A. You want me to stop now?

Mr. Starr—Yes.

Mr. Miller—I object on the ground that the clerk is asked to testify to a conclusion of law.

A. I find a record in the minutes of the proceedings
10 of the city council, under date of June 4, 1912, which reads as follows:

“The recorder submitted the following report and the result of the special election held June 11, 1912, City of Millville. I have to report the following result of the special election held June 11, 1912, for or against the adoption for this city of the provisions of an act of Legislature of the State of New Jersey, entitled ‘An act to enable cities to supply the inhabitants thereof with
20 pure and wholesome water,’ * * * and acts amendatory thereto and supplemental thereof. The whole number of ballots cast was 876. The whole number of ballots for was 531. The whole number of ballots against was 345. The whole number of ballots rejected was 107. I also submit to you the report sheets or statement of the Board of Elections of the several election districts.

Signed L. H. HOGATE,

City Recorder.”

30

Q. In what book does that record appear?

A. It appears in the book of minutes of the city council of the City of Millville, on pages 320, 321.

Mr. Starr—I offer in evidence the record of that book as read by that clerk.

Q. Please turn to the minutes of the meeting of the Board of Commissioners of December 31, 1915? Have you the minutes there of December 31, 1915?

A. Yes, I have.

Mr. Starr—I offer in evidence that portion of the minutes which led to the adoption of Ordinance 145.

Mr. Miller—I object to that on the ground that Ordinance 145 went before the Supreme Court for review on *certiorari* in 1916 and the legality of the ordinance was affirmed by the judgment of the Supreme Court and the judgment was subsequently affirmed on appeal in the case of W. P. Adams, prosecutor, *vs.* John S. Horton, 10 and all questions, therefore, appertaining to Ordinance 145 are *res adjudicata*. In support of my objection I now offer in evidence the entire record and proceedings in those cases, particularly the case of said Adams *vs.* John S. Horton of the City of Millville, in which a writ of *certiorari* was allowed, tested December 30, 1920, on which judgment was entered by the Supreme Court on June 15, 1921, and which judgment was affirmed by the Court of Errors and Appeals, 20 by rule entered February 15, 1922. A certified copy of that rule for judgment in the Court of Appeals I also offer in evidence.

Mr. Starr—I object to the offer of Mr. Miller upon the ground that it is entirely out of order in the present state of proceedings taken before the Master and that any evidence offered is irrelevant, immaterial and improper.

Mr. Burt—Copy of rule is marked *Exhibit R 1*. 30

Q. Will you also turn to your ordinance book, showing record of Ordinance 145? I now offer in evidence Ordinance 145.

Mr. Miller—The same objection as noted above.

Mr. Starr—It is agreed that the printed copy of the minutes of December 31, 1915, and Ordinance 145, which I now produce, may be used and marked as an exhibit in lieu of the originals.

Mr. Burt—Minutes and ordinance marked *Exhibit P 1*.

Q. Mr. Horton, will you also turn to the minutes of the commissioners of August 18, 1916, with reference to the adoption of Ordinance 152. I offer in evidence that portion of the minutes of the meeting of August 18, 1916, which led to the adoption of Ordinance 152.

10 Mr. Miller—I make the same objection as was made before. The Court in the case of *Adams vs. John S. Horton, the City of Millville and the People's Water Company of Millville, New Jersey*, to which I have already referred, all questions pertaining to Ordinance 152 and the method of its adoption and the legality of it have been disposed of and is *res adjudicata*.

Q. Now, please turn to ordinance book in which is shown the record of Ordinance 152. I offer that ordinance in evidence.

Mr. Miller—I make the same objection.

20 Mr. Starr—It is agreed that the printed copy of the minutes and Ordinance 152 may be used in lieu of the originals and marked as *Exhibit P 2*.

Q. Mr. Horton, also turn to the minutes of the Board of Commissioners of March 1, 1918, Resolution 261. I offer in evidence the records of the commissioners, showing the adoption of Resolution 261.

30 Mr. Miller—I object on the following ground: Resolution 261 is a resolution providing for the purchase by the City of Millville of the property, etc., which was brought before the Supreme Court for review in the case of *Adams vs. Horton*, to which I have referred. The resolution and election thereunder were held to be valid by the Supreme Court and that judgment was affirmed by the Court of Errors. This appears by the record of the Supreme Court in the case which I have already offered in evidence.

Q. Please turn to the resolution book. I offer in evidence Resolution 261.

Mr. Miller—I object to it on the same ground as above stated.

Mr. Starr—It is agreed that the proceedings adopting Resolution 261 as printed be offered in evidence and marked in lieu of the originals.

Mr. Burt—Let it be marked *Exhibit P 3*.

Mr. Miller—That last objection is withdrawn. Resolution 261 provided for an election which was held in the City of Millville and which resulted in a negative vote. This resolution is printed in the case of Adams *vs.* Horton which I have already offered in evidence on page 24 of the printed case. I object to the introduction of that resolution and the minutes relating to it because they are not relevant to this issue. 10

Q. Please turn to the minutes of the commissioners on which was reported the resolution of the election held April 17, 1918, under the provisions of Ordinance 261? 20

A. I find in the records a statement of the result of a special election held April 30, 1918, for or against the adoption of Resolution 261.

Q. How many votes for and how many against?

A. It is not totaled here, the original returns are inserted in the original records—the twelve districts. I have made a total and find the total vote for is 663 and the total vote against is 818.

Q. Please turn to the minutes of August 27, 1920, with reference to the adoption of Resolution 360. I offer in evidence that portion of the minutes relating to the adoption of Resolution 360. 30

Mr. Miller—I object to that as that is a resolution for election. I object to the introduction of these minutes on the ground that they refer to the adoption of Resolution 360 which was brought before the Supreme Court in the case of Adams *vs.* Horton to which I have already re-

ferred and the records and proceedings in which case I have already offered in evidence in support of previous objections, and the ordinance referred to and the legality of all proceedings relating to the same have been affirmed by the Court of Errors and are *res adjudicata* and are not relevant to this case.

Q. Please refer to your resolution book showing Resolution 360. I offer that resolution in evidence.

10

Mr. Miller—I object to it on the same ground as above stated. I object to it on still another ground and that is that this resolution of itself and the minutes providing for its adoption do not now constitute an independent record but that resolution having been before the Supreme Court for review becomes only part of a record because the judgment of the Supreme Court itself, touching the legality becomes inseparably a part of it and it is not proper to introduce a mere part of the record without introducing the whole and the only apparent object of the prosecutor in now offering these papers is to litigate again the same question as in *Adams vs. Horton* and in prior cases which involved the legality of Ordinance 145.

20

Mr. Starr—It is agreed that the printed copy of the minutes of August 27, 1920, and of Resolution 360 may be introduced in evidence in lieu of the original records and marked *Exhibit P 4*.

30

Q. Please turn to the minutes of the commissioners of November 12, 1920. Do those minutes show the statement of the results of the election held November 2, 1920, with relation to the adoption of Resolution 360. I offer in evidence the records showing result of elections.

Mr. Miller—If the introduction of the result is proper then I make the same form of objection.

Mr. Starr—It is agreed that the printed copy of the minutes showing the results of the election may be introduced in evidence and marked in lieu of the original *Exhibit P 5*. It is agreed that the prosecutor, S. A. Franklin, is a taxpayer, voter, resident and freeholder of the City of Millville. It is also admitted that he is the general manager of the Millville Water Company which owns and operates a water plant in the City of Millville. We now rest.

10

Mr. Miller—I now call Mr. Horton as a witness on behalf of the defense in certiorari.

Q. Horton, will you please produce from the files of the city a letter written by the Peoples' Water Company to myself, Louis H. Miller, city solicitor and also my reply thereto; also another letter written by the Peoples' Water Company of Millville, New Jersey to the Board of Commissioners of the City of Millville and also a certain deed of the Peoples' Water Company of the City of Millville. The letters I refer to were written since January 1, 1922.

20

The witness produces from the files a letter on the letter-head of Peoples' Water Company, dated Philadelphia, Pa., February 16, 1922, addressed to Louis H. Miller, Esq., City Solicitor of Millville, New Jersey, signed Peoples' Water Company, of Millville, New Jersey, W. H. Roth, vice-president, also a carbon copy of a document purporting to be a reply to that letter and a letter dated February 22, 1922, addressed to W. Fred Ware, director of public property, signed Louis H. Miller, city solicitor.

30

Mr. Starr—I object to the materiality of these documents on the ground that they are self-serving and are irrelevant with reference to any question involved in this case which will necessarily arise under the writ of certiorari allowed herein.

Mr. Burt—Let the offer of exhibit be marked *Exhibit R 2*.

10 Mr. Miller—I would state on the record and now announce to the attorney of prosecutor that the purpose of the City of Millville and the clerk, John S. Horton, is to deny the entering of the allocatur on the ground that the writ was improperly issued and the exhibit I have just offered ought to be in not only because they are part of the record of the transaction of the City of Millville relating to the purchase of this plant, but also for the purpose of showing the injurious effect to either the water company or the city. That is the injury that is being suffered by either one of these parties by the allowing of this writ of certiorari. The clerk also produces a letter on the letter-head of the Peoples' Water Company of Millville, New Jersey, dated March 3, 1922, filed by John S. Horton, city clerk, addressed to the Commissioners of the City of Millville, New Jersey and signed by W. H. Roth, vice-president, which letter is attached by temporary fasteners to a deed dated the 1st day of January, 1921, and purporting to have been executed by the Peoples' Water Company under its seal in the presence of two witnesses, and which appears to have been duly approved before Robert E. Long, Commissioner of Deeds for New Jersey, which I also offer in evidence.

20 Mr. Starr—Objected to on the ground that it is immaterial, irrelevant and improper, in addition.

30 Mr. Miller—I would like to have the last *Exhibit R 2* and *Exhibit R 3* spread at length on the minutes. I offer it in evidence.

Mr. Starr—I object as above stated.

Mr. Burt—Present offer of exhibit be marked *R3A* as to the letter and *R3B* as to the deed.

Q. Will you produce your minutes for March 3, 1922, Board of Commissioners, City of Millville and read what if anything you have relating to communica-

tions or proceedings of any kind with the Peoples' Water Company of Millville?

A. I find in the minutes under date of March 3, 1922, the following: Mr. McMullen, attorney for the Peoples' Water Company, handed the clerk a deed for their property, accompanied by a communication, which communication was read and filed by the clerk. The deed and the contents of the letter were discussed at some length by the board and Mr. Miller and on motion of Mr. Simmerman the deed and letter were referred to the board as a committee as a whole to consult with the solicitor before taking any definite action by the following vote: Yeas, Simmerman, La Dow, Kate's, Ware and Felmey. 10

Q. Do you find any further minutes with reference to communication of March 3 to the City of Millville by the Peoples' Water Company?

A. No.

Q. Has there been any report of the committee as a whole? 20

A. There has not.

Q. So the matters remain in abeyance since that time of letter marked *Exhibit R 3 A*?

A. Yes.

Q. Did some messenger or some person bring to you at any time after March 3 some United States Internal Revenue Stamps with the request that they be permitted to be put on this deed, and if so, who was he and when was it and state the circumstances at the present time?

A. You want the whole story? 30

Mr. Miller—Yes.

A. My recollection of the affair is that I was notified by telephone that there had been an error made in the number of stamps affixed to the deed as tendered and that Mr. McMullen proposed sending the required shortage to the affixed. In order to avoid any confusion in the absence of any legal knowledge of just what proceedings should be employed and as a matter of courtesy I telephone Mr. McMullen at his Philadelphia office that

he need not go to the trouble of sending anyone down, as I had no authority to relinquish the deed to anyone until the Board of Commissioners so directed. He told me he was sorry for the messenger had already left. The messenger came to City Hall. I was away and Miss Bennett—

Q. Who is Miss Bennett?

A. Miss Bennett is deputy clerk and also serves as my assistant. I instructed Miss Bennett to refuse to
10 deliver the deed to anyone who might call for it. She later telephoned me that the messenger had arrived with the stamps and that he had used the telephone in the City Hall to get instructions from Mr. McMullen. That as a result of all this the stamps were left in our custody and are now in an envelope in the vault.

Q. Will you produce the stamps?

A. The clerk produces two \$30.00 United States Documentary Revenue Stamps, also one \$2.00 United States Revenue Stamp and also one 50c. United States
20 Revenue Stamp.

Mr. Miller—I offer in evidence the stamps and ask that they do not be marked but be considered as *Exhibit R 4*.

Q. Mr. Horton, have you sufficient acquaintance with the city government to state as a fact whether the City of Millville has gone into operation of its water plant under this deed?

A. I think I do.

Mr. Starr—I object to that question as calling for a conclusion.
30

Q. I said did you know as a fact whether it is in physical possession of it?

Mr. Starr—I object to that question as immaterial and irrelevant.

A. It is not.

Q. Then, who is operating the water plant at this time and who has continued to operate it since March 3, since the delivery of the deed?

A. The People's Water Company of Millville, New Jersey.

Q. Are there any other letters or communications from the People's Water Company of Millville, New Jersey, since March 3d, touching this water settlement?

A. No.

Mr. Miller—I do not think it would be necessary to print the case of Wood against Millville and Franklin *vs.* Millville, but I do think that the Adams case should 10
be printed because that has the whole matter.

Mr. Starr—I object to the offer, as in my judgment it is immaterial, irrelevant and improper. Unless the Court requires me to print I do not propose to do so.

Mr. Miller—I now announce that I will print Adams *vs.* Millville, including all of the matters that went before the Court of Errors and Appeals and excluding those matters which were excluded on appeal and which were stricken out by Judge Starr when the case went up on appeal. 20

Mr. Starr—Where is Miss Bennett, the department clerk you mention?

Mr. Horton—She is ill to-day.

Mr. Starr—She lives in Millville, does she?

Mr. Horton—Yes.

Mr. Starr—She is still department clerk?

Mr. Horton—Yes.

I Certify that the foregoing depositions were taken by Frances Rossi, a stenographer selected by me, and 30
by me duly sworn faithfully and truly to take stenographically and reproduce in typewriting the testimony given, and that such depositions were taken in my immediate presence and hearing by said stenographer sworn as above stated, and I believe that they accurately state the said evidence.

HENRY O. BURT,
A Master in Chancery of New Jersey.

STATE OF NEW JERSEY, }
CUMBERLAND COUNTY, } ss.

I, FRANCES ROSSI, do solemnly swear that I will faithfully and truly take stenographically, and reproduce in typewriting the testimony given in a certain cause now depending in the New Jersey Supreme Court wherein S. J. Franklin is prosecutor and John S. Horton, City Clerk of Millville, the City of Millville and the People's Water Company of Millville, New Jersey,
10 are respondents. On *certiorari*. So help me God.

FRANCES ROSSI.

Sworn to and subscribed before me this 20th day of April, 1922.

HENRY O. BURT, M. C.

Louis H. Miller,
Counsellor-at-Law,
Millville, N. J.

20

W. Fred Ware, Esq.,
Director Parks and Public Property,
Millville, N. J.

February
22
1922.

In Re: People's Water Company.

Dear Sir:

I forward you herewith the letter from the People's Water Company of Millville, N. J., dated February 18th, together with copy of my reply which you have already perused. This is a very important communication and I suggest that you either hand it to the City Clerk for safe keeping, or if you wish, I will keep it in my files. Probably, however, you should lodge the letter with the Clerk. I have kept a copy of it.
30

Yours very truly,

LOUIS H. MILLER,
City Solicitor.

(Copy.)

People's Water Company of
Millville, N. J.
112 N. Broad Street,
Phila., Pa.

February
21
1922.

In Re: Contract for Purchase of Millville Water Plant.

Gentlemen:

I duly received, on the seventeenth instant, the letter from your company addressed to me as City Solicitor of Millville, setting forth, among other things a statement of the amount of money you claim to be due on settlement for your plant under the terms of the contract. I delayed in making a formal reply to this letter because I thought that the subject matter required careful consideration which I have given it. I wish to add that I read the letter to W. Fred Ware, Esquire, Director of Parks and Public Property and Wilbert J. Simmerman, Esquire, Director of Revenue and Finance of this City; and I am handing the letter to Director Ware with a copy of this communication. No doubt, unless some modification of your claim shall be submitted to the City, Director Ware will lay your communication of February 17th, before the Board of Commissioners for consideration by the whole Board. As I now understand the attitude of the City of Millville respecting your claim is as follows:

First. I understand that the purchase price of the plant is to be One Hundred Twenty-five Thousand Dollars (\$125,000), the amount stated in the offer contained in your letter addressed to the Board of Commissioners of the City of Millville, New Jersey, dated July 1st, 1920, which was submitted to the legal voters of the City of Millville by Resolution No. 360 of the Board of Commissioners of the City of Millville, and adopted by the voters at the election held November second, 1920.

Second. While it is true that settlement for the purchase price of the plant was to be made on or before

January first, 1921, the delay in the settlement was not occasioned by either of the parties to the contract, but was occasioned by reason of the writ of *certiorari* allowed in Adams *vs.* Millville and the stay accompanying the writ. If the delay in the settlement had been occasioned by your Company clearly no interest would have been chargeable against the City on the purchase price. Nor, in the exigency that did arise, does it seem clear, under the authorities, that the City of Millville is charge-
10 able with such interest under the acts in this case, because your company has remained in possession of the plant and franchises, and has received the rents, revenues and profits of the same.

From a hasty examination of the authorities I find the following principles to be apparently established:

The right to, or accountability for rents and profits is frequently treated as correlative with or dependent upon the liability for or payment of interest on purchase money, the one being ordinarily treated as equivalent
20 to the other, and the cases proceed upon the principle that unless there is some agreement or equitable consideration to the contrary, one party should not have both the property and the purchase money or the proceeds thereof without accountability for either (39 *Cyc.*, page 1630).

In the case of Jersey City *vs.* Flynn, 74 N. J. Equity, page 104, it would seem that, under a parallel case to that now under discussion, "the effect of a popular vote of acceptance and notice to the contractor was not to
30 abrogate the provisions of the contract as to supplying water for the twenty-five year term by the million gallons, to to put the city in the position of one who had merely agreed to purchase, but that the city was required to pay for the water by the million gallons until it actually took title and paid the price, and that this was not changed by the supplemental contract. See the Syllabus, paragraph one, at page 104. This decree was affirmed for the reasons given by the Chancellor except as to one unimportant part concerning the erection of a

fence around the lands occupied by the reservoir. Under the principles laid down in this case, therefore, which is binding upon the City of Millville, it would seem clear that it would not be lawful for the City to pay interest on the purchase price. Unless something is presented to cause me to change my mind I shall deem it my duty to so advise the Board of Commissioners.

Third. Regarding the cost of service pipes authorized to be installed under Resolutions of the City Commissioners Six Thousand Two Hundred Sixty-five Dollars and fifty-five cents (\$6,265.55) it seems by the decision of the Supreme Court rendered last week, the primary resolution providing for these extensions was invalid because the resolution was not laid over for two weeks. In the formal discussion at my office on Friday Mr. Water and Mr. Simmerman both expressed the thought that the City should provide for the taking over of these extensions by proper ordinance or resolution. 10

I do not believe there will be any differences between the City and your Company because of the decision of the Supreme Court, last mentioned. 20

Fourth: The change for cost of operating the plant from January first, 1921, to April first, 1922, estimated to be, approximately, Eighteen Thousand Three Hundred Dollars (\$18,300), must be borne by your Company, if the contention of the city, set forth under the point secondly discussed is sound. But, under *Jersey City vs. Flynn* above stated the City must pay for the water consumed, of course; and in this behalf it will be claimed, no doubt, by the City that it has covered these payments by the remittances amounting to Twelve Thousand Five Hundred Dollars (\$12,500) mentioned in your letter. 30

Fifth: As to supplies on hand December 31, 1920, if the foregoing principles now presented on behalf of the City are sound, this charge must be stricken out. Whether the supplies on hand when the plant is taken over must be paid for is a question I am now inclined to answer in the negative. If the City takes over the

entire plant I have heretofore considered this to mean that the city is to take over the entire plant as a going concern. If this is so it would seem that the supplies on hand ought to go with the plant. However this is a business matter which I have not discussed with any of the Commissioners.

10 Sixth: According to my understanding of the obligation of the City of Millville toward your company, touching the purchase of the plant, the City is to pay only the purchase price of the plant, \$125,000. The value of the water service rendered from November first, 1920, to date of settlement must also be paid for and I deem that entirely a separate transaction, in no wise connected with the purchase, and the city is paying for the water service from time to time with this understanding.

20 I will await further communication from you touching the amount of money claimed after you have consulted your counsel in this matter. It is very important that I know at an early date the amount of money required to be raised on order to make the settlement because Caldwell & Raymond advise that a supplemental ordinance must be passed providing for the raising of the money and the City of Millville wishes to proceed without delay to make settlement with your company.

It is the intention of the City of Millville to proceed as soon as may be toward a consummation of the purchase of the plant of your Company, and of course, you will understand that the City itself must know the purchase price before it can proceed to provide the money.

30

Yours very truly,

City Solicitor of Millville.

P. S. Mr. Ware called my attention to the statement which accompanied your bill paid May 20th, 1921; and he says that he finds from the City Clerk a similar statement accompanied the other bills paid to your water company. He has asked my opinion whether the payment of these bills, which was done by a mere motion to pay the bill, without comment, would raise an im-

plied obligation binding the city by the recitals of fact and of law contained in your statement accompanying the bill. I have told him that in my opinion the recitals he refers to could not affect the city of Millville for three reasons:

First. If the City of Millville was not on May 20th, or the subsequent dates, legally obliged to pay your company interest, there was no consideration moving to the City which would warrant the Commissioners in assuming to pay, on behalf of the City, many thousands 10 of dollars of indebtedness which your company had theretofore incurred.

Second. The only corporate act of the city was merely an order for payment of your bill, without condition. I do not consider that this was impliedly an acquiescence in the reasons alleged by your company in support of the claim as set forth in the statement referred to.

Third. Even if the Commissioners were willing to pay your claim for interest and losses, any tax payer 20 could attack the proceedings for such payment, including the proceedings involved in any implied contract or promise springing out of the act of the Board to pay these bills.

I add this postscript to your letter so that you will fully understand that I have fully considered that phase of the questions touching the present obligation of the City of Millville to the Peoples Water Company.

Very respectfully yours,

PEOPLES WATER COMPANY OF MILLVILLE, N. J.

Philadelphia, Pa. February 16, 1922.

Louis H. Miller, Esq.,
City Solicitor,
Millville, N. J.

Dear Sir:

10 The writer had intended to call on you tomorrow afternoon, the 17th, and discuss with you some of the details in connection with the settlement to be made between the City and this Company for our water plant, etc., but today received word that a conference which we were expecting to hear about had been fixed for the 17th in North Jersey and as men will attend that conference from New York and other places it is not possible to postpone it, therefore, we give you herein the information which we intended to hand you tomorrow:—

20	The settlement for our plant, under the terms of our contract was to have been made as of January 1st, 1921.	
	The purchase price is	\$125,000.00
	Interest at 6% on this amount for say 15 months, to April 1st, 1922, will be	9,375.00
	Cost of service pipes authorized to be installed under resolutions of the City Commissioners	6,265.55
	Cost of operating the plant by April 1st will amount to approximately	18,300.00
30	Supplies on hand December 31st, 1920, which were used in operating the plant	1,341.33
	Amount due by the City for water for the months of November and December 1920	1,666.66
		\$161,948.54

Received on account of the above payments as follows:

May 20th, 1921	\$5,000.00	
July 30th, 1921	2,500.00	
October 31st, 1921,	2,500.00	
February 1st, 1922	2,500.00	12,500.00

Leaving estimated balance due as of April
1st, 1922 \$149,448.54

10

Louis H. Miller, Esq.—No. 2.

We do not know whether it is your intention to issue bonds to cover the entire amount set out above but we thought best to give you these figures so you could determine just how the matter is to be taken care of.

We will, of course, whenever you desire it furnish you with the details covering the above amounts.

We shall be glad to go over these matters with you at your convenience.

20

Yours very truly,
PEOPLES WATER COMPANY OF
MILLVILLE, N. J.
W. H. ROTH,
Vice-President.

WHR'B

Peoples Water Company of
Millville, N. J. 30

Philadelphia, Pa. March 3rd, 1922.

The Board of Commissioners of the
City of Millville, N. J.

Gentlemen:—

The Peoples Water Company of Millville, N. J., herewith tenders to you its deed for its entire plant and property, exclusive of accounts receivable, cash and operating supplies on hand, as of January 1st, 1921.

Pursuant to the agreement of purchase existing between yourselves and us we have dated this deed January 1, 1921, and have named the consideration in the deed at the purchase price agreed to be paid as of that date, \$125,000.00, for which amount we now ask payment.

As we have advised you at various times, we contend that under our agreement for the sale of this plant settlement was to be made as of January 1, 1921, and that
 10 since that date we have been operating the plant in the interest of the City. We, therefore, claim that in addition to the \$125,000.00, the consideration for the plant as of January 1, 1921, you are indebted to us as follows:

Interest on \$125,000.00 from January 1,	
1921, to February 28, 1922,	\$8,750.00
Operating Expenses, January 1, 1921, to	
February 28, 1922 (which includes oper-	
ating supplies on hand January 1, 1921,	
and supplies purchased since that date),...	17,697.44
20 On account of water supplied in November	
and December, 1920,	1,666.66
Cost of installing service pipes at request of	
City,	6,348.66
Total,	\$34,462.76
Less paid on account,	12,500.00

Balance due Company as of Febru-
 ary 28, 1922, \$21,962.76
 30 to which is to be added interest until paid as well as
 interest on the item of laying service pipes which should
 be adjusted, also cost of operating the plant from Feb-
 ruary 28th, 1922, to date of settlement.

In tendering this deed and requesting payment of the consideration therein mentioned, we expressly reserve our claim to receive, from the City the items set forth in the paragraph immediately preceding, and reserve the right to take any proceeding for the collection of the same which we may deem appropriate.

Our reasons for the above claims have been fully explained to you in detail, and our accounts showing how the figures are arrived at are open to your inspection at any time which you may name, and we will be glad to furnish you with any details regarding same which you may wish.

Yours respectfully,

PEOPLE'S WATER COMPANY OF MILLVILLE, N. J.

W. H. ROTH,

WHR'B

Vice-President.

10

THIS INDENTURE made the first day of January, in the year of our Lord one thousand nine hundred and twenty-one,

Between the People's Water Company of Millville, N. J., a corporation of the State of New Jersey, party of the first part, and the City of Millville, a municipal corporation, of Cumberland County, New Jersey, party of the second part:

Witnesseth, That the said party of the first part, for 20
and in consideration of the sum of One Hundred Twenty-five Thousand Dollars, lawful money of the United States of America, to it in hand paid, by the said party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold, aliened, remised, released, conveyed, confirmed, assigned, transferred and set over, and by these presents doth grant, bargain, sell, alien, remise, release, convey, confirm, assign, transfer and set over unto the said party of the 30
second part, and its successors and assigns forever.

All the following described tracts and parcels of land situate in the City of Millville, County of Cumberland and State of New Jersey, bounded as follows:

No. 1. Beginning at a stake in the west line of a lane leading through the late I. B. Mulford's meadow and is the southeast corner of formerly J. P. Brick's now L. R. Corson's meadow, the same being also corner of Lot No. 13, as per the aforesaid late I. B. Mulford's meadow

map made by Samuel M. Sheldon, Surveyor, in 1888, and runs from thence along the line of said I. R. Corson's land north seventy-six degrees and fifty minutes west three chains and thirteen links to a stake corner of the same in the line of the Institute property, thence along the line of said Institute property south seventeen degrees west one chain and twenty-nine links to a stone corner to said Institute property; thence still along the line of same north fifty-two degrees and forty-five minutes west three chains and eighty-six links more or less to low water mark on Maurice River, thence down said river, bounding on said low water mark the several courses and distances thereof in a southerly direction to a corner of "Whitall Tatum Company's" land; thence along the line of said "Whitall Tatum Company's" land south eighty-three degrees and forty-five minutes east to the top of the bank along said Maurice river; thence continuing the same course bounding on said Whitall Tatum Company's land along the middle of a line ditch seventeen chains and thirty-nine links to a stake in the middle of another ditch, corner of Lot No. 1, on the aforesaid I. B. Mulford's meadow map; thence along the middle of said last mentioned ditch and bounding on the line of land formerly owned by Mary H. Channell north five degrees and thirty minutes east two chains and forty links to a stake in said ditch corner of formerly said Channell's land; thence still along the line of same north seventy degrees and fifty minutes east two chains and twenty-seven links to a corner in the west line of Second Street; thence along the west line of Second Street north nineteen degrees and ten minutes west three chains more or less to a corner of William L. Dooling's lot; thence along his line of same south seventy degrees and fifty minutes west two chains and fifty links to a corner of the same; thence along the line of said William L. Dooling's meadow lot south nineteen degrees and ten minutes east thirty-two links more or less in the line of Lot No. 2, as west four chains and thirty-four links to a

corner of said Lot No. 4, in the middle of the Stratton ditch; thence along the middle of said ditch bounding on the line of said Lot No. 4, north three degrees east one chain and twenty-seven links more or less to a corner in the south line of a lane; thence along the south line of said lane north eighty-seven degrees and twenty-five minutes west two chains thirty-two links to a corner in the middle of a ditch along the east side of a lane; thence along the middle of said ditch north four degrees and fifteen minutes east thirty-two links to a corner; 10
thence north eighty-five degrees and forty-five minutes west across said lane twenty links to a stake corner of Lots No. 13 and 14, as per the aforesaid meadow map in the west line of the aforesaid lane leading through the late I. B. Mulford's meadow; thence along the west line of said lane north four degrees and fifteen minutes east four chains and forty-four links to the place of beginning. Containing thirteen acres of land be the same more or less.

No. 2. Beginning at a stake in the west line of 20
Second Street, the same being the northeast corner of Aaron R. Clum's lot which was conveyed to him by Isaac B. Mulford June 11, 1890, and runs from thence along his line same south seventy degrees and fifty minutes west two chains and fifty links to a stake corner of the same in the line of William L. Dooling's land; thence along his line of same north nineteen degrees and ten minutes west sixty-one links more or less to a stake in the Ditch corner to said Dooling's land, and in the line of Lot No. 4, as per the aforesaid map; thence 30
along the middle of said ditch bounding on line of said Lot No. 4, now owned by said Dooling south eighty-five degrees and thirty minutes west three chains and forty-seven links to a stake in the middle of the aforesaid Stratton ditch, and is a corner of said Lot No. 4, in the line of Lot No. 8, as per said map; thence along the middle of said Stratton ditch bounding on line of said Lot No. 8, north three degrees east three chains and twenty-one links to a corner in the south line of a ten

foot alley or lane, thence along the line of said Lot No. 5, south forty degrees and thirty-five minutes east one chain and thirty-eight links to a corner of said Lot No. 5, thence still along the line of same south sixty degrees and fifteen minutes east one chain and thirty-five links to a corner in the line of Lot No. 6, as per said map; thence along the line of said Lot No. 6, south eighty-nine degrees and ten minutes east thirty-three links to a corner in the line of Ida Marts lot; thence along her
10 line of same south nineteen degrees and ten minutes east eighteen links more or less to a corner of said Ida Marts lot; thence still along her line of same north seventy degrees and fifty minutes east fifty-six links more or less to a corner in the division line between Lots Nos. 6 and 12, as per the aforesaid map; thence along said Division line south eighty-nine degrees and ten minutes east one chain and fifteen links more or less to a corner in the west line of Second Street aforesaid; thence
20 thereby south nineteen degrees and ten minutes east one chain and twelve links more or less to the place of beginning. Containing one and twenty-hundredths acres of land be the same more or less. Being Lots Nos. 3, 13, 14, 15, 16, 17, 18 and 19, and a part of Lots Nos. 1, 2, 4, 6 and 7, as per the late Isaac B. Mulford's Meadow Map made by Samuel M. Sheldon, Surveyor, in 1888.

The above tracts, Nos. 1 and 2, are the same lands which were conveyed to the present grantor by James D. Godfrey and wife by deed dated August 1, 1901, and recorded in the Clerk's Office of Cumberland
30 County, in Book 257 of Deeds, page 260, etc.,

No. 3. Beginning at the northeast corner of Third and "H" Streets and runs from thence in a northerly direction along the east line of Third Street forty feet to a corner; thence in an easterly direction and parallel with the north line of "H" Street, one hundred and twelve feet to a corner in the west line of a ten foot alley; thence along said alley in a southerly direction and parallel with Third Street forty feet to a corner in the north line of "H" Street aforesaid; thence thereby

in a westerly direction one hundred and twelve feet to the place of beginning. Containing four thousand four hundred and eighty square feet of land be the same more or less. Being Lot No. 54 on the east side of Third Street as per map of Theodore C. Wheaton's building lots.

The above tract, No. 3, is the same land that was conveyed to the present grantor by deed of Theodore C. Wheaton and wife, dated May 13, 1901, and of record in said Clerk's Office, in Book No. 255 of Deeds, page 10 633, etc.

No. 4. All that right of way which was granted unto the present grantor by agreement of Owen W. Worstall and wife, dated December 17, 1902, and of record in said Clerk's Office in Book 265 of Deeds, page 79, etc., subject to the conditions in said agreement mentioned.

No. 5. All that right of way which was granted unto the present grantor by agreement of Thomas F. Mayhew, dated July 7, 1913, recorded in said Clerk's Office in Book 333 of Deeds, page 405, etc., subject to the conditions in said agreement mentioned. 20

And also all the property and franchises of the said party of the first part, real, personal and mixed, including its lands, pumping station buildings, machinery, pipes, apparatus and equipment, (excepting, however, accounts receivable, cash on hand, supplies on hand and the franchise to be a corporation), situate in the County of Cumberland in the State of New Jersey.

Together with all and singular, the tenements, hereditaments, and appurtenances thereunto belonging, or in any wise appertaining, and the reversions, remainders, rents, issues and profits accruing therefrom. Also all and singular the privileges right and liberties which the said party of the first part now has or can exercise in the City of Millville, Cumberland County, New Jersey. And also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity of the said party of the first part of, 30

in and to the property and franchises above described and each and every part and parcel thereof, with the appurtenances.

To have and to hold all and singular the above granted and described premises, together with the appurtenances, unto the said party of the second part, and its successors and assigns forever.

10 And the said party of the first part, for itself and its successors, covenant, grant and agree to and with the said party of the second part and its successors that they the said party of the first part their successors, all and singular the above described property, franchises, goods and chattels above sold, unto the said party of the second part, and its successors, against all and every person or persons whomsoever lawfully claiming, or to claim, the same, or any part thereof, shall and will, free and clear of all incumbrances, warrant and forever defend.

20 In Witness Whereof, The said party of the first part has caused its common or corporate seal to be hereto affixed attested by its proper officers the day and year first above mentioned.

PEOPLES WATER COMPANY OF MILLVILLE, N. J.
BY ROBERT WETHERILL,
President.

Attest:
H. BAYLAULHIDGE,
Secretary.

Signed, Sealed and Delivered
in the presence of
30 ROBERT E. LONG
H. B. STACKES

STATE OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } ss.

Be it remembered that on this second day of March, in the year of Our Lord one thousand nine hundred and twenty-two, before me the subscriber, a Foreign Commissioner of Deeds for New Jersey, in Pennsylvania,

personally came and appeared H. Bayard Hodge, who being by me duly sworn according to law on his oath says, that he is Secretary of the Peoples Water Company of Millville, N. J., the corporation named in and which caused the above deed or instrument to be executed; that Robt. Wetherhill is President of said corporation grantor; that he, this deponent, knows the common or corporate seal of said corporation grantor and that the seal annexed to the above deed or instrument is such common or corporate seal, that the said deed or instrument was signed by the said President and the seal of said corporation grantor affixed thereto in the presence of this deponent and that the same was signed, sealed and delivered as and for the voluntary act and deed of said corporation grantor for the uses and purposes therein expressed, pursuant to a resolution of the Board of Directors of said corporation grantor; and that at the execution thereof this deponent subscribed his name thereto as witness. 10

H. BAYARD HODGE 20

Sworn and subscribed the day and year aforesaid at the place aforesaid, before me,

ROBERT E. LONG,

A Foreign Commissioner of Deeds for New Jersey.
\$62.50 revenue stamps attached.

Endorsement.

Deed

Peoples Water Company of
Millville, N. J.

To

City of Millville

Referred to Board of Com. of the Whole

3/3/1922

J. S. HORTON
City Clerk. 30

Extracts from the Minutes of the Board of Commissioners of the City of Millville, New Jersey.

Millville, New Jersey, December 31, 1915.

The Board of Commissioners met in regular session with Mayor Geig presiding. Members present, Geig, Corson, Kates, Ware and Whitaker.

* * * * *

10 Ordinance Number 145, providing for the acquisition of the real estate, personal property and works, and all the corporate rights, powers and franchises, and privileges of the Peoples' Water Company of Millville, New Jersey, was taken up in regular order and read in full by the Clerk, after which the Clerk was directed by the Mayor to call the roll on the adoption of the ordinance. The roll was called and Ordinance No. 145 adopted by the following vote: Yeas, Whitaker, Corson, Kates, Ware and Geig.

20

ORDINANCE NUMBER 145.

An ordinance for the acquisition by the City of Millville, of all the real estate, personal property and works and all the corporate rights, powers, franchises and privileges of the Peoples' Water Company of Millville, N. J.

30 Whereas, the Board of Commissioners of the City of Millville deems it proper and of public necessity that the City of Millville acquire all the real estate, personal property and works, and all the corporate rights, powers, franchises and privileges of the Peoples' Water Company of Millville, N. J., a corporation of New Jersey, for the purpose of supplying said city and the inhabitants thereof with water for public and private use and consumption thereof.

The Board of Commissioners of the City of Millville do ordain.

1. It is hereby determined that the City of Millville shall acquire, forthwith, for public use, all the real

estate, personal property and works, and all the corporate rights, powers, franchises and privileges of the Peoples' Water Company of Millville, N. J., a corporate of New Jersey, for the purpose of supplying said city and the inhabitants thereof with water for public and private use and consumption; and the Board of Commissioners, of said city, doth decide, upon full investigation of said matter and doth ordain, determine and declare that the acquisition of all said property and franchises is necessary, convenient and proper for the public use. 10

2. The Mayor and other members of the Board of Commissioners and the majority of them are hereby made, constituted and appointed agents of the City of Millville to negotiate, on the part of the City, an agreement with the owner or owners for the purchase of said real estate, personal property and works and all the corporate rights, powers, franchises and privileges of the said The Peoples' Water Company, Millville, N. J.; and the said agents are required and directed to use all reasonable means and endeavor in good faith to come to an agreement as to the price and terms of the purchase thereof with the owner or owners of said real estate, personal property and works and corporate rights, powers, franchises and privileges aforesaid, and said agents shall proceed in said matter with all convenient diligence and dispatch and shall make report in the premises within thirty days after this ordinance shall become effective, or as soon thereafter as conveniently may be. In case the city can acquire said land and other property by agreement with the owner or owners, the Director of Revenue and Finance and the Treasurer are authorized and directed to pay to said owner or owners the agreed purchase price according to the terms of the agreement, and all further directions and proceedings for the acquisition of said property and franchises shall be by resolution or further or supplementary or amendatory ordinances of the Board of Commissioners. The agents of the city hereinbefore 20 30

appointed shall not enter into any final contract or agreements, on behalf of the city, for acquisition of said property and franchises without making report to, and being duly authorized by resolution or supplemental ordinance of the Board of Commissioners.

10 3. If the city cannot acquire said real estate, personal property and works and all the corporate rights, powers, franchises and privileges of the Peoples' Water Company of Millville, N. J., by agreement with the owner, whether by reason of disagreement as to the price, or the legal incapacity of the owner, or inability in the owner to convey valid title or by any other cause, the said real estate, personal property and works and all the corporate rights, powers, franchises and privileges of the said Water Company shall then be acquired and taken for public use by condemnation pursuant to the provisions of the statute "An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use" (2 C. S. pp. 2182 &c., and the acts supplemental thereto and amendatory thereof and such other statutes of this state as may be applicable to said condemnation proceedings; and the City Solicitor shall institute and prosecute said condemnation proceedings with all convenient speed.

30 4. In order to pay the agreed purchase price of the said property and franchises, if an agreement for the purchase of the same be concluded with the owner, or in order to pay the costs of condemnation proceedings and the award of the commissioners, or assessment by a jury of the value of said property and franchises and the damages sustained, and for the other purposes hereinafter in Section five of this ordinance mentioned, bonds of the City of Millville shall be issued in the sum of one hundred and twenty-six thousand dollars or so much thereof as may be necessary, provided, that the issue of additional bonds in any further sum shall be authorized by a supplemental or other ordinance if required for said purposes in case the agreed purchase

price of said property and franchises, or the award of commissioners in condemnation proceedings or the assessment by a jury of the value of said property and franchises and damages sustained by the taking thereof, and the costs of condemnation proceedings shall exceed one hundred and twenty-six thousand dollars and the city shall stand by any such award or assessment and elect not to abandon said condemnation proceedings as permitted by Section 15 of the statute above recited (3 C. S. pp. 2187, 2188).

5. Said bonds shall be issued under the authority of the act entitled "An Act to enable cities to supply the inhabitants thereof with pure and wholesome water" (1 C. S. 823), and the acts supplemental thereto and amendatory thereof, which act has heretofore been duly adopted in this city pursuant to the provisions and requirements of Section 16 of said act; provided, that said bonds may be issued under the authority and provisions of Chapter 117 of the Laws of the Legislature of New Jersey, Session of 1914, if the Board of Commissioners shall by resolution so direct; the proceeds of the sale of said bonds shall be applied and used for the purpose of defraying all the expenses and the cost of purchase of the aforesaid real estate, works, property, rights, franchises, privileges and appurtenances of the Peoples' Water Company of Millville, N. J., and of maintaining and extending the same, and for the purchase of materials, the laying of mains in and about the city or leading from or connecting it with its source of supply and constructing all works necessary for the accomplishment thereof.

All of said bonds shall bear date December first, nineteen hundred and fifteen, shall be payable thirty years after date; shall bear the seal of the city, be signed by the Mayor and the Director of Revenue and Finance, countersigned by the Treasurer and attested by the Clerk; shall be either coupon bonds or registered bonds at the option of the holder; all coupons shall bear the signature of the Treasurer in facsimile; said bonds

shall bear interest at the rate of five per centum per annum, payable sem-annually and shall be payable both principal and interest at the Millville National Bank; and the property and credit of the city shall be pledged for payment of the same.

10 The Treasurer shall dispose of said bonds at public sale for the best price that can be obtained, but at not less than par and accrued interest. Record of all said bonds shall be kept by the Treasurer and all moneys received therefrom shall be deposited in the Millville
20 National Bank or other bank or banks, designated from time to time by a majority of the Board of Commissioners, and shall be drawn upon by said Treasurer only for the purpose for which the same were issued as hereinbefore declared and specified, and all said moneys, shall be inviolably applied for said purposes only, and for none other, and only when said Treasurer shall be so ordered by proper warrant or warrants issued by the Board of Commissioners of said city. Said bonds shall be in
20 such form as the Board of Commissioners, shall, by resolution, provide.

30 6. A sinking fund for the redemption of said bonds is hereby established. Such portions of the moneys received from the water rents or prices paid for the use of water, and interest on arrears of water rents, as may remain after paying all expenses and costs for purchasing water works or for constructing and maintaining water works and raising and distributing the water, and salaries, wages and incidental expenses and charges, shall be applied by the Board of Commissioners, first, to the payment of the interest upon the debt created for the purchase and construction of the works and next, to the purchase of the bonds issued therefor, if the same can be obtained at reasonable rates; or if that cannot be effected, then to be safely invested by the Commissioners of the sinking fund of this city for the redemption of said bonds when due. There shall be raised annually by taxation the amount of the deficiency, if any, in the

water revenues for the payment (1) of the interest on the debt hereby authorized and created and cost of managing and keeping in repair and operation of the water works with three per centum thereof added to cover losses and deficiencies to be ascertained and certified in the manner provided for by Section 13 of said act (1 C. S. 823) and (2) a sum sufficient, when added to the water revenues applicable for the purpose, to make up an amount equivalent to $2\frac{1}{2}$ per centum of all said bonds issued and at the time outstanding, for the retirement of the bonds at maturity; which taxes shall be levied, assessed and collected in the same manner as other taxes, and the amount thereof assessed and collected for interest shall be paid by the taxing officers to the Treasurer, and the amount thereof assessed for sinking fund shall be paid by said taxing officers to the Sinking Fund Commissioners of the city appointed under the provisions of Ordinance No. 142 to be invested by them and allowed to remain as a sinking fund for the retirement of said bonds at maturity.

10

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7. If the authority of the city to take any of the proceedings or to do any of the acts, matters or things hereinbefore provided for under the authority of those several statutes particularly above recited shall be brought in question it is the intention of the Board of Commissioners to rest their authority not alone upon those several statutes, but upon the city charter, the act P. L. 1895, P. 769 (2 C. S. 2198), and all and every other of the statutes of this state granting power and authority to this municipality in the premises.

30

8. All other proceedings of the Board of Commissioners required to be had, if any, touching the matters in this ordinance contained shall be by further or amendatory or supplemental ordinances or by resolutions of the Board of Commissioners.

9. All resolutions or ordinances or parts of resolutions or ordinances inconsistent herewith are hereby re-

pealed. This ordinance shall take effect ten days after its publication, as provided by law.

Adopted December 31, 1915.

HARRY J. GEIG, *Mayor*,
 THOMAS WHITAKER,
 ROLAND B. CORSON,
 WALTER KATES,
 W. FRED WARE,
Commissioners.

10 Attest: JOHN S. HORTON, *Clerk.*

Millville, August 18, 1916.

The Board of Commissioners met in regular session with Mayor Whitaker presiding. Members present, Whitaker, Corson, Kates, Ware and Kurtz.

* * * * *

20 Ordinance No. 152, a supplement to the ordinance entitled "An Ordinance for the Acquisition by the City of Millville of all the real estate, personal property and works, and all the corporate rights, powers, franchises and privileges of the Peoples' Water Company of Millville, N. J., adopted December 31, 1915, and known as Ordinance No. 145 of the City of Millville, was adopted by the following vote: . Yeas, Corson, Kates, Ware, Kurtz and Whitaker.

ORDINANCE NO. 152.

30 A supplement to the ordinance entitled "An Ordinance for the acquisition by the City of Millville of all the real estate, personal property and works, and all the corporate rights, powers, franchises and privileges of the Peoples' Water Company of Millville, N. J., adopted December 31, 1915, and known as Ordinance Number 145 of the City of Millville.

Whereas, because of the provisions of Chapter 252 of the Laws of 1916 (P. L. 1916, page 525, &c.), authorizing and regulating the issuance of bonds and other obligations and the incurring of indebtedness by cities and other municipalities certain modifications in said

Ordinance Number 145, are required to be made to the end that the terms of said ordinance providing for the issue of bonds by the City shall be in conformity with the said statute of 1916, therefore,

The Board of Commissioners of the City of Millville, do ordain:

1. All of the bonds to be issued under the provisions of the ordinance to which this ordinance is a supplement shall bear date August first, nineteen hundred and sixteen; said bonds shall be for not more than one thousand dollars nor less than one hundred dollars each; shall be payable in not exceeding thirty years from their date in annual installments commencing August first, nineteen hundred and eighteen, and no installment shall be made for more than fifty per centum in excess of the amount of the smallest prior installment. Said installment shall be equal in amount as nearly as may be and in sum multiple of one hundred dollars. The precise amount of each said annual installment of bonds shall be fixed by supplemental ordinance when the total amount of bonds necessary to be issued for the purpose of said Ordinance Number 145 shall have been ascertained.

2. Said bonds shall be sold in the manner provided by Section 6 of Chapter 252 of the Laws of 1916 (P. L. 1916, page 532, etc.).

3. This municipality shall temporarily finance the carrying out of the purpose for which this ordinance and the ordinance to which this is a supplement is authorized to issue bonds by borrowing money and issuing from time to time temporary improvement notes, to an aggregate amount not in excess of the amount for which said bonds may be issued, which improvement notes shall state in general terms the purpose for which they are issued, and shall mature in not exceeding one year from their date, and shall bear interest at the rate of five per centum (5 per cent.) per annum, payable semi-annually. Said improvement notes shall be payable both as to principal and interest at the Millville National Bank; said notes may from time to time be renewed

by the issuance of new notes of the same maturity and rate of interest and shall also be subject to call, but such renewed notes shall not be renewed after six years after the purpose for which they were issued has been carried out. The issuance of such improvement notes shall be authorized by resolution of the Board of Commissioners and shall be executed as in this ordinance and in the ordinance to which this is a supplement is provided for the long term bonds, and said improvement notes and the issuance thereof shall be in all respects in accordance with the provisions of Section 13 of said Chapter 252 of the Laws of 1916. The proceeds of the sale of said bonds shall be used and applied so far as may be necessary for the redemption of any said temporary improvement notes that may have been issued.

4. Said bonds and said improvement notes shall be signed by the Mayor and the Director of Revenue and Finance, attested by the Clerk and countersigned by the Treasurer, and shall bear the seal of the City; and the coupons, if any, shall be signed by the facsimile signature of the Treasurer. Said bonds and said improvement notes shall be payable in lawful money of the United States of America, both as to principal and interest, at the Millville National Bank, and both said bonds and said improvement notes shall be in such form as may be provided by resolution of the Board of Commissioners. Said coupon bonds, if any, may be registered as to principal only or as to both principal and interest. The Treasurer shall be transfer agent and registrar of said bonds.

5. The proceeds of said bonds or improvement notes issued under said Ordinance Number 145 and this supplemental ordinance shall be paid to the Treasurer of the City, who shall in no event disburse of the same except to pay the expense of issuing and selling the same and for the purpose or purposes for which such bonds or improvement notes were issued. If for any reason, any part of such proceeds are not applied to or necessary for such purpose or purposes the Board of Commis-

sioners of this City may reappropriate the proceeds remaining unapplied to pay the principal of any outstanding bonds.

6. Pursuant to the provisions of Section 2 of said Chapter 252 of the Laws of 1916 (P. L. 1916, page 525, etc.) it is hereby certified and declared:

(a) The probable period of usefulness of the improvement or property for which said bonds and said improvement notes are authorized is forty years.

(b) The average assessed valuation of the taxable 10
real property (including improvements) of this municipality computed upon the next preceding three valuations thereof in the manner provided by Section 12 of said act is four millions, seven hundred eighteen thousand, two hundred and ninety-three dollars.

(c) The net debt of this municipality computed in the manner provided in Section 12 of Chapter 252 of the Laws of 1916 is one hundred eight thousand five hundred seven dollars and ten cents.

(d) The statement required by Section 12 of said 20
Chapter 252 of the Laws of 1916 (P. L. 1916, pp. 535, 536, etc.) has been made and was filed with the City Clerk on the fourth day of August, 1916, as required by said act of the Legislature.

7. This ordinance shall be attested by the Clerk and shall be published once in the manner prescribed in Section of Chapter 525 of the Laws of 1916; and the Clerk shall publish with this ordinance a statement in the form provided by sub-division 1 of Section 2 of said act. The bonds authorized by this ordinance and 30
said Ordinance Number 145, to which this ordinance is a supplement, shall not be issued nor delivered until after thirty days shall elapse from and after the date that this ordinance shall be published.

8. Said bonds shall recite that they are issued pursuant to the provisions of Chapter 252 of the Laws of 1916, and in all respects the sale, issuance and delivery of said bonds and said improvement notes shall conform to said act of the Legislature.

9. Such portions of the moneys received from the water rents or prices for the use of water and interest on arrears of water rents, as may remain after paying all expenses and costs for purchasing water works or for constructing and maintaining water works and raising and distributing the water, and salaries, wages and incidental expenses and charges shall be applied by the Board of Commissioners, first for the payment of interest upon the debt created for the purchase and construction of the works, and next to the purchase of
10 bonds issued therefor, if the same can be obtained at reasonable rates, or if that cannot be effected, then to be safely invested by the Commissioners of the Sinking Fund of this City for the redemption of said bonds and improvement notes when due. There shall be raised annually by taxation the amount of the deficiency, if any, in the water revenues for the payment (1) of the interest on the debt authorized and created by said Ordinance Number 145, and this supplemental ordinance and
20 the cost of managing and keeping in repair and operation the water works, with three per centum thereof added to cover losses and deficiencies to be ascertained and certified be in the manner provided in Section 13 of the act entitled, "An Act to enable cities to supply the inhabitants thereof with pure and wholesome water" (1 C. S. 823, etc.), and (2) a sum sufficient, when added to the water revenues applicable for the purpose, to make up an amount equivalent to the installments of said bonds that shall accrue and fall due each year for the retirement of each of such installments of bonds at
30 maturity; which taxes shall be levied, assessed and collected in the manner as other taxes and the amount thereof assessed and collected for interest shall be paid by the taxing officer to the Treasurer, and the amount thereof assessed for the retirement of said bonds shall also be paid by the taxing officers to the Treasurer for the retirement of the installments of said bonds as the same shall fall due. The Sinking Fund Commissioners shall, on the first day of July of each year, pay to the

Treasurer from the moneys which have come into their hands as a sinking fund for that purpose the balance of the moneys required for the retirement of bonds falling due on August first of that year.

10. All ordinances and parts of ordinances inconsistent herewith are hereby repealed; and this ordinance shall take effect immediately upon its publication as provided by law.

Adpted August 18, 1916.

THOMAS WHITAKER, *Mayor*, 10
ROLAND B. CORSON,
LEWIS E. KURTZ,
WALTER S. KATES,
W. FRED WARE,

Attest: *Commissioners.*
JOHN S. HORTON, *Clerk.*

Extract from the Minutes of the Board of Commissioners of the City of Millville, New Jersey.

20

MILLVILLE, New Jersey, December, 3, 1920.

The Board of Commissioners met in regular session with Mayor Felmey presiding. Members present, Felmey, Simmerman, Bennett, Kates and Wheaton.

RESOLUTION NUMBER 261.

A Resolution providing for the purchase by the City of Millville of all the real estate, personal property and works, and all the corporate rights, powers and franchises and privileges of the Peoples' Water Company of Millville, N. J., for the price or sum of one hundred and twenty-five thousand dollars (\$125,000.00) lawful money, and the allowance of certain delinquent taxes assessed against said company and its property in this city prior to the taxing year 1917. 30

Whereas, by section two of ordinance number 145 of the City of Millville, it was ordained as follows:

“2. The Mayor and other members of the Board of Commissioners and the majority of them are hereby made, constituted and appointed agents of the City of Millville to negotiate, on the part of the City, an agreement with the owner or owners for the purchase of said real estate, personal property and works and all the corporate rights, powers, franchises and privileges of the said Peoples’ Water Company of Millville, N. J., and the said agents are required and directed to use
10 all reasonable means and endeavor in good faith to come to an agreement as to the price and terms of the purchase thereof with the owner or owners of said real estate, personal property and works and corporate rights, powers, franchises and privileges aforesaid, and said agents shall proceed in said matter with all convenient diligence and dispatch and shall make report in the premises within thirty days after this ordinance shall become effective, or as soon thereafter as conveniently may be. In case the city can acquire said
20 land and other property by agreement with the owner or owners, the Director of Revenue and Finance and the Treasurer are authorized and directed to pay to said owner or owners the agreed purchase price according to the terms of the agreement; and all further directions and proceedings for the acquisition of said property and franchises shall be by resolution, or further or supplementary or amendatory ordinance of the Board of Commissioners. The agents of the City hereinbefore appointed shall not enter into any final contract or agreement, on behalf of the city, for acquisition
30 of said property and franchises without making report to, and being duly authorized by resolution or supplemental ordinance of the Board of Commissioners.”

And Whereas, afterwards on the thirtieth day of November, 1917, the Mayor and all other members of the Board of Commissioners, constituted and appointed agents of the City of Millville in and by said Section Two of said ordinance Number 145, submitted to the

Peoples' Water Company of Millville, N. J., mentioned in said ordinance Number 145, a conditional proposal in writing for the purchase by the City of Millville, of all the real estate, personal property and works and all the corporate rights, franchises and privileges of said Peoples' Water Company of Millville, N. J., a corporation of New Jersey, which conditional proposal is in the words and figures following, that is to say. "To the Peoples Water Company of Millville, N. J. Gentlemen:

If your Company, by appropriate corporate action, assented to by your bondholders, in consideration of the benefits to your company thereon arising, will grant to the City of Millville, the right, option and privilege hereinafter outlined, the subscribers, Commissioners of the City of Millville, agents of the City in this behalf under the provisions of Section Two of Ordinance Number 145 of said City will by appropriate proceedings make report to the Board of Commissioners of such right, option and privilege with recommendation that said board do submit to the electors of said city, the question of the exercise of said option at a special election to be held for that purpose on or before May first, next, or at some other election if any shall be held within said time where said question may lawfully be submitted to the electors. The right, option and privilege which the subscribers ask your Company to grant to the City of Millville is as follows:

The City of Millville, shall have the right, option and privilege of purchasing from your Company, all of the real estate, personal property and works, and all the corporate rights, powers, franchises and privileges of the Peoples' Water Company of Millville, New Jersey, at any time before September 2nd, next, at the price hereinafter mentioned, provided that the City of Millville, by due corporate action, shall, on or before July 15th, next, by writing, under the seal of the City, notify said Peoples' Water Company, of Millville, New Jersey, that the City has elected to exercise such right, option

and privilege of purchase of the aforesaid real estate, personal property and works, and all the corporate rights, powers, franchises and privileges of said Company. And in case the City shall fail to give such notice of its election to exercise said option, on or before July 15th, next, then said right, option and privilege of purchase is expired; and if within said time, to wit: on or before July 15th, next, the City shall give such notice of its exercise of said option, then the sale shall be
10 consummated, and settlement made on September 1st, next, at (12) o'clock, noon, at the Millville National Bank, Millville, New Jersey; or at an earlier date, or other place in Philadelphia, or New Jersey, at the option of the City, whereof, it shall give notice to the Company.

The price or consideration, at which the City shall have the right, option and privilege of purchasing said plant, as aforesaid, shall be (a) One Hundred Twenty-five Thousand Dollars (\$125,000.00) lawful money of
20 the United States of America, which money shall be paid in cash, or by certified check, or certified City Warrant, to the order of the Peoples' Water Company of Millville, New Jersey.

And (b) the satisfaction and cancellation of record by the City of Millville, of all taxes levied and assessed against said Company in the City of Millville, and remaining in arrears, and unpaid at the time of settlement, providing that the taxes for 1917 shall be paid by the Company, or allowance thereafter, made to the City in
30 settlement. The said option shall provide that the title to the said real estate, personal property and works, and all the corporate rights, powers, franchises and privileges of said Company, shall be free and clear of all incumbrances, excepting the aforesaid taxes, and shall be conveyed by good and sufficient deed or deeds of conveyance, with full covenants of warranty.

Included in said deeds of conveyance, shall be: (1) a surrender of the contract with the City of Millville, existing under the provisions of Ordinance No. 73, and

(2) a general release to the City, against all claims and demands whatsoever, except such claims as shall have arisen at the time of settlement for water service supplied to the City of Millville, by the Company, under contract, from and after November 1st, 1917; settlement for which service shall be made by the City under the terms of the contract, as a transaction entirely separate and apart from the purchase of the plant, property and franchises, as aforesaid, upon an exercise of said option.

10

And whereas, the said Peoples' Water Company of Millville, New Jersey, has accepted said conditional proposals, and thereby has granted to the City of Millville, the option of said conditional proposal mentioned, as appears by a resolution of the Board of Directors of said Corporation, a certified copy of which was transmitted by said Company to the City of Millville, and is now on file with the City Clerk, and which resolution reads as follows, viz :

Resolved, That the right, option and privilege 20
of purchasing the property of this Company is hereby given to the Commissioners of the City of Millville, New Jersey, under the terms outlined by said Commissioners in their communication to this Company, dated November 30th, 1917.

Further resolved, That said communication from the Commissioners of the City of Millville, be filed with, and form a part of the minutes of this meeting.

And whereas, afterward, the Mayor and all other 30
members of the Board of Commissioners, agents of the City, as aforesaid, in that behalf, did make report in writing to the Board of Commissioners of the City of Millville, on the seventh day of December, 1917, to the effect that after numerous interviews and negotiations, the said agents had procured from the Peoples' Water Company of Millville, New Jersey, an option for the purchase of all the real estate, personal property and works, and all the corporate rights, powers, franchises

and privileges of the Peoples' Water Company of Millville, New Jersey, upon the terms stated in the conditional proposal, and acceptance hereinbefore, in this resolution, recited and set forth. And recommending that the Board of Commissioners of the City of Millville, do, by appropriate proceedings, submit to the electors of the City of Millville, on or before May 1st, next, the question whether the City of Millville shall exercise the aforesaid option and privilege of purchase.

- 10 And whereas, the Board of Commissioners of the City of Millville, has made careful investigation, and given due consideration of the matter of the purchase of the aforesaid property, works and franchises upon the terms stated in the said conditional proposal, and acceptance, and the said Board believes that is it for the best interest of the City of Millville, and its inhabitants, and taxpayers, that the City do exercise said right, option and privilege of purchase, and do acquire the said property, works and franchises for the price or consideration
- 20 specified in said option, but the said Board of Commissioners has decided that a question of such importance to the public, ought to be submitted to the qualified electors of the City for their determination.

- Therefore, Resolved by the Board of Commissioners of the City of Millville. (1) That the City of Millville doth elect to exercise and shall exercise its aforesaid right, option and privilege of purchase, of all of the aforesaid real estate, personal property and works, and all of the corporate rights, powers, franchises, and privileges of the Peoples' Water Company, of Millville, New
- 30 Jersey, a corporation of New Jersey, upon the precise terms and conditions and for the price or consideration in said option, set forth and declared. (2) That immediately after the adoption of this resolution by the electors of the City, and on or before July 15th, 1918, the Mayor shall notify the Peoples' Water Company of Millville, New Jersey, by writing, under the seal of the City attested by the Clerk, that the City of Millville has

elected to exercise said option, and shall transmit to said Company, a certified copy of this resolution.

That the bonds of the City of Millville provided for by said Ordinance No. 145, and the ordinances supplemental thereto, and amendatory thereof, shall be issued and sold at public sale according to law, forthwith, after the adoption by the electors of this resolution, in the sum of One Hundred Twenty-five Thousand Dollars (\$125,000.00) or so much thereof, as shall be necessary. And the proceeds of the sale of said bonds shall be applied 10 towards payment of the purchase price of all of the aforesaid real estate, personal property and works, and all the rights, powers, franchises and privileges of said Company.

All other, or further proceedings necessary for the consummation of the purchase of said property and franchises, and the issue of said bonds shall be had by resolution or by ordinances supplemental to said ordinance No. 145.

(3) This resolution shall go into effect immediately, 20 but its provisions, except as to the referendum herein contained, shall remain inoperative until, and unless a majority of the qualified electors voting therein, shall vote in favor thereof, at the special election herein as mentioned; and the question of the adoption of this resolution, shall be, and hereby is submitted by the Board of Commissioners, of its own motion, to the qualified electors of the City of Millville, at a special election which is hereby called, and shall be held in said City on Tuesday, the 30th day of April, next, and notice 30 of said special election shall be given, and said election shall be held and the returns thereof made, canvassed and certified by the proper officers in the manner provided by law.

The expense of said special election shall be paid from the appropriation for special elections heretofore provided in the local budget, and taxing resolution for the current fiscal year.

Adopted by the Board of Commissioners of the City of Millville, the first day of March, 1918.

(Signed),

THOMAS WHITAKER, *Mayor.*

WILBERT J. SIMMERMAN,

SAMUEL D. BENNETT,

WALTER S. KATES,

LEWIS E. KURTZ,

Commissioners.

10 Attest: •

JOHN S. HORTON,

Clerk.

Extract from the Minutes of the Board of Commissioners of the City of Millville, New Jersey.

Millville, New Jersey, August 27, 1920.

The Board of Commissioners met in regular session with Director Simmerman presiding. Members present Simmerman, Bennett, Kates and Wheaton. Absent, Kurtz.

20

* * * * *

Resolution Number 360, referring to a proposal of the Peoples Water Company of Millville, New Jersey, to sell their entire plant to the City for the sum of \$125,000.00 clear of all encumbrance, and offering to waive all claims for water rent claimed to be due if this offer is accepted, provided any balance due the City for taxes at the date of settlement shall be cancelled; and further, proposing to postpone such action as had been contemplated if this Board takes the necessary action to place the matter before the electors of the City, at the next general election, and made settlement on or before January 1, 1921, if the result of the election is favorable to the purchase, and providing that the City does accept the aforesaid offer, contingent upon the approval of the electors, at the general election on November 2, 1920. This resolution also directed the Clerk to certify this resolution to the County Clerk to the end that said officer may cause this measure to be submitted

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and voted upon in the City of Millville in conformity with the statute. This resolution was adopted by the following votes: Yeas, Simmerman, Bennett, Kates and Wheaton.

RESOLUTION NUMBER 360.

Whereas, the Peoples Water Company of Millville, New Jersey, has submitted to the City of Millville, an offer or proposal in writing, in the works and figures 10 following, to wit:—

Philadelphia, Pa., July 31, 1920.

To the Board of Commissioners,
of the City of Millville,
Millville, New Jersey.

Gentlemen:—

We beg to bring to your attention the fact that the conditions under which we are operating our plant in Millville are such that we can no longer continue to operate the plant for the income that we are now receiving. We have been hoping to avoid litigation, which would be expensive to both the City and this company, and it is our desire to close up our affairs in Millville and in an amicable way, we offer to sell our entire plant to the City for the sum of \$125,000., clear of all encumbrance, and if this offer is accepted, we will agree to waive all claims for water rent which we claim to be due in excess of the \$10,000 yearly payment you have been making. The balance which we claim is now due (as of May 1st, 1920,) is \$32,271.09. It would also be understood that any balance due by this Company for taxes at the date of settlement would be cancelled. 20 30

If your Board promptly takes such action as is necessary to place this matter before the electors of the city at the general election to be held on the first Tuesday in November next, and will agree that if said election is favorable to the purchase of our property at the price and upon the terms mentioned, settlement to be made on

or before January 1, 1921, our Company will postpone such action as it had contemplated to correct the unfavorable conditions under which we are now operating.

We would appreciate hearing from you upon the above matter at your earliest convenience.

Yours very truly

PEOPLES WATER COMPANY OF MILLVILLE, N. J.

By W. H. ROTH,

Vice President.

10 As by the said writing, this day ordered filed with the Clerk, reference being thereto, had, will appear:

And whereas this Board is of the opinion that it is advantageous to the City to accept said offer, but deems it proper and fitting that a matter of such importance ought to be submitted to the legal voters for their rejection or approval, and such submission may be had with but small expense, to the City, therefore,

Resolved by the Board of Commissioners of the City of Millville:

20 1. That the City of Millville does accept the aforesaid offer of the Peoples Water Company of Millville, New Jersey, and the Mayor is authorized and directed to sign and deliver to said corporation, forthwith upon this Resolution becoming operative, a writing authenticated by the seal of the City, attested by the Clerk, accompanied by a copy of this Resolution, notifying said corporation that the City accepts its said offer or proposal.

30 2. In order to pay for said plant, bonds shall be issued under and pursuant to the provisions of Ordinance Number 145, entitled "An Ordinance for the Acquisition by the City of Millville of all the real estate, personal property and works and all the corporate rights, powers, franchises and privileges of the Peoples' Water Company of Millville, N. J.," adopted December 31, 1915, and the ordinances supplemental thereto and mandatory thereof.

3. The Board of Commissioners, of its own notion pursuant to the authority granted by Section 17 of the

Walsh Act as amended (Suppl. C. S. 1114,) does hereby submit this resolution to the Electors of the City for adopting or rejection at the next general election to be held November second, 1920. The Clerk is directed to certify to the County Clerk this resolution, to the end that said officer may cause this measure to be submitted with any other Public Question to be voted upon in the City of Millville by printing in proper form to be placed on the ballot as provided by Article XIII of the General Election Law (P. L. 1920, p 682,) 10 and the Board of County Canvassers is requested to certify the result of said election, with respect to the matters aforesaid as provided by Section 8 of Article XX of said Election Law (P. L. 1920, page 732.)

4. For the information of the voters, this resolution shall be published by the City Clerk in one or more newspapers circulating in the City once in each week of October next, provided that the same shall be published therein daily except Sunday from October 25th to November 2d next, inclusive of said dates. 20

5. The provisions of the resolution shall remain inoperative until and unless the electors shall vote to adopt the same at the election to be held as aforesaid, and in case the same shall then be adopted, the provisions thereof shall immediately be of full force and effect; provided, that the provisions of section three and four shall be effective immediately upon the adoption of this resolution by the Board of Commissioners.

Adopted August 27, 1920.

.....Mayor, 30
W. J. SIMMERMAN,
SAMUEL D. BENNETT,
WALTER S. KATES,
W. S. WHEATON,
Commissioners.

Attest:

JOHN S. HORTON, *Clerk.*

A Statement of the Result of an Election held in the City of Millville, Cumberland County, New Jersey, on the second day of November, A. D. 1920, to Elect a Chosen Freeholder for the Fifth Ward, Together with the Public Question Voted Upon, Made by the Board of County Canvassers of Said County (Filed November 12, 1920. John S. Horton, City Clerk).

10 Shall the Resolution of the Board of Commissioners of the City of Millville, known as Resolution Number 360, providing for the purchase by the City of Millville of the entire plant of the Peoples' Water Company of Millville, N. J., be adopted?

	Yes.	No.
First Ward:		
First District,	237	61
Second District,	181	20
Third District,	212	27
Second Ward:		
First District,	306	108
20 Second District,	291	70
Third Ward:		
First District,	190	213
Second District,	194	270
Fourth Ward:		
First District,	120	75
Second District,	308	126
Third District,	203	106
Fifth Ward:		
First District,	292	135
30 Second District,	177	83
Whole number of votes,	2711	1294

We do hereby certify, that the foregoing is a true, full and correct statement of the result of the election above mentioned, as the same is exhibited by the statements produced and laid before the Board of County Canvassers, according to law, that the same exhibits the number of the names in the signature copy registers

and the register of voters, the number of names of the voters in the poll book of the election districts, respectively, and of the ballots rejected, the whole number of the names in the signature copy registers and the register of voters, the whole number of names of the voters in the poll book of the several election districts, the name of each person for whom any vote or votes were cast, the number of votes cast for each person in each election district, and the whole number of votes cast for each person for each office designated, and also specifies each public question voted upon, and the number of votes cast thereupon in each election district respectively and the whole number of votes cast thereupon in the several election districts as they appear by the statements so produced and laid before the said board. 10

In Witness Whereof, we have hereunto set our hands this eighth day of November, A. D. 1920.

JOHN OGDEN,

CHARLES F. HEADLEY,

FERDINAND R. JONES,

E. C. REBER,

20

Board of County Canvassers.

Attest:

(Seal) L. H. HOGATE, *Clerk.*

REASONS FOR REVERSAL.

(Filed April 28, 1922.)

NEW JERSEY SUPREME COURT.

	S. J. FRANKLIN,	} On Certiorari. Reasons for Reversal.
	<i>Prosecutor,</i>	
	vs.	
10	JOHN S. HORTON, City Clerk, THE CITY OF MILL- VILLE a n d PEOPLES' WATER COMPANY OF MILLVILLE, NEW JERSEY, <i>Respondents.</i>	

The prosecutor above named, by Lewis Starr, his attorney, appears and prays that the ordinance adopted by the Board of Commissioners on the 17th day of March, 1922, known as Ordinance 207, be set aside, annulled, and for nothing holden, for the following reasons:

1. The Commissioners of the City of Millville did not, at the time of the adoption of said ordinance, possess any legal right to authorize the issue of bonds especially referred to therein, for the purpose of raising money to carry out and perform any contract for the acquisition of the water works referred to therein, as provided by the terms of Ordinance 145, adopted December 31, 1915.

2. Bonds for the purchase of the plant of the People's Water Company cannot be legally issued, as provided by the terms of said Ordinance 207.

3. Any bonds issued by the City of Millville for the purchase of the plant of the People's Water Company must be bonds of the character authorized by the provisions of Ordinance No. 145 and not serial bonds as provided in Ordinance No. 207.

4. The form, date, amount and maturity of any bonds issued by the City of Millville for the purchase of the plant of the People's Water Company must be issued as prescribed by the terms of Ordinance 145.

5. Chapter 252 of the Laws of 1916, known as the Pierson Act, does not apply to the issue of bonds by the City of Millville for the purchase of the water plant of the People's Water Company.

6. All bonds issued for the purchase of the plant of the People's Water Company must be in accordance with legislative authority as it existed at the time of the passage of Ordinance 145 above referred to. 10

7. Ordinance No. 207 does not make any proper provision for the payment and redemption of the bonds to be issued thereunder by sinking fund or otherwise, as required by law.

8. The said ordinance is illegal, void and passed and adopted without proper legislative or municipal authority.

LEWIS STARR,

Attorney of Prosecutor.

20

IN CHANCERY OF NEW JERSEY.

BETWEEN

THE PEOPLE'S WATER COMPANY
OF MILLVILLE, NEW JERSEY,
Complainant,

AND

THE CITY OF MILLVILLE, A COR-
PORATION,
Defendant.

} On Bill, Etc.

10

ORDER DISMISSING PLEA.

(Filed August 17, 1922.)

20 This cause having been opened to the Court on the sixth day of June, 1922, upon notice given by defendant of the motion to hear and dispose of the plea filed by it, and the Court having heard Louis H. Miller, solicitor for defendant, in support of said motion, and John D. McMullin, solicitor for complainant, in opposition thereto, and having considered the matter,

It is, this thirteenth day of July, 1922, on motion of John D. McMullin, solicitor for complainant, ordered that the plea of defendant filed herein be dismissed.

E. R. WALKER, C.

IN CHANCERY OF NEW JERSEY.

BETWEEN

THE PEOPLE'S WATER COMPANY
OF MILLVILLE, NEW JERSEY,
Complainant,

AND

THE CITY OF MILLVILLE, A COR-
PORATION,

Defendant.

On Bill, &c.

10

AMENDMENT TO DEFENDANT'S ANSWER.

(Filed October 3, 1922.)

Application being made for this purpose by defendant,
in the presence of complainant's counsel, it is on this
.....day of....., 1922, ordered that de-
fendant's answer be, and the same hereby is, amended
in the following particulars:

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After the words "submits to the decision of this hon-
orable court," page five, line twenty-two, add the follow-
ing:

The transactions and business between the par-
ties to this suit are embodied in the printed
states of the case in Adams v. Millville and
Franklin v. Horton, said states of the case being
attached to this answer and made part hereof; and de-
fendant says that all of the facts disclosed and set forth
in said states of the case (as well as those disclosed and
set forth in the state of the case Franklin v. Horton,
case II also hereto attached and made a part hereof) are
true whether referring to the records of proceedings of
the city departments or officials or the records of the
courts, or recited in any documents of the city officials
or appearing by the testimony, all of which facts de-
fendant is ready to maintain and prove as this honorable

30

court may order and direct. Defendant further says that the complainant and defendant entered into a contract for a supply of water, under the provisions of the Water Act of 1888 (3 C. S. 3647 at Sec. 669, P. L. 1888) pursuant to the provisions of Ordinance No. 73 of the City of Millville, a copy of which is set out in the state of the case *Franklin v. Horton*, case II which is hereto annexed and is made part of this answer; and that said contract has been executed by the parties from
 10 the date thereof hitherto except in so far as the same may have been affected by the contract of purchase referred to in the bill of complaint. That the water system contracted to be constructed was installed and water turned on May 1, 1903; and that from thence hitherto the complainant company has, in fact, retained physical possession of the plant and has supplied water through the same to the city, and the municipality has sold said water, so supplied to it, to its consumers throughout the city; that, in lieu of payment by actual measurement of
 20 water sold, the city for a number of years past, has paid \$10,000 for the water service to the water company, in quarterly payments of \$2,500 each, payable May, August, November and February of each year, but the said payments have not been acknowledged by the Water Company to be in full satisfaction of its claims. Said quarterly payments have been continued by the city since January 1, 1921, down to the time of the filing of the bill, by payments as follows:

30	May 21, 1921, \$5,000.00
	August 1, 1921, 2,500.00
	November 1, 1921, 2,500.00
	February 1, 1922, 2,500.00
	\$12,500.00

Each payment was made by a claim and order for payment such as is recited in the state of the case in *Franklin v. Horton* (marked case II) at pages 4, 5, 6, etc.

The proceedings of the Board of Commissioners in relation to the payment of the bill referred to in paragraph ten of the bill are also set out in the said state of the case in Franklin v. Horton, case II, and the facts set forth in said state of the case are true, as this defendant is ready to maintain and prove."

E. R. WALKER, C.

On motion of

LOUIS H. MILLER,

Solicitor of Defendant. 10

IN CHANCERY OF NEW JERSEY.

BETWEEN

THE PEOPLE'S WATER COMPANY
OF MILLVILLE, NEW JERSEY,
Complainant,

AND

THE CITY OF MILLVILLE, A CORPORATION,
Defendant.

On Bill, Etc.

20

ORDER SETTING DOWN CAUSE.

(Filed August 17, 1922.)

Application having been made to the Court on the sixth day of June, 1922, by complainant to set down this cause for final hearing on bill and answer, and counsel for defendant consenting thereto, 30

It is, on this thirteenth day of July, 1922, on motion of John D. McMullin, solicitor for complainant, ordered that this cause be set down for final hearing on bill and answer to be heard before the Chancellor in the State House, Trenton, on Thursday, July 13, 1922, at two o'clock in the afternoon.

E. R. WALKER, C.

IN CHANCERY OF NEW JERSEY.

BETWEEN

THE PEOPLE'S WATER COMPANY
OF MILLVILLE, NEW JERSEY,
Complainant,

AND

THE CITY OF MILLVILLE, A COR-
PORATION,
Defendant.

On Bill, &c.

10

MEMORANDUM.

(Filed Sept. 28, 1922.)

On final hearing on bill and answer.

Mr. John D. McMullin, for complainant.*Mr. Louis H. Miller*, for defendant.

20

WALKER, Chancellor.

The bill is one for specific performance of a contract entered into by the complainant with the defendant for the conveyance to the latter of the complainant's water plant. The regularity and validity of the contract is not questioned in this suit. In *Adams v. Horton*, 116 Atl. 426, the Court of Errors and Appeals affirmed a judgment of the Supreme Court upholding as valid an ordinance of Millville, providing for the acquisition of the complainant company's water property by the City of Millville, under which the contract was submitted to the voters and was approved by them, whereby a contract automatically resulted between the city and the company. Immediately upon the affirmance of that judgment, the defendant took action to raise the money necessary to pay the purchase price of the water plant, by the adoption of an ordinance for the issuance and sale of municipal bonds, which ordinance was certified

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to the Supreme Court in *Franklin v. Millville*, where the same is still pending undetermined, and the defendant avers that the reason it has not complied with the contract to purchase is solely and only because it has been prevented from raising the purchase money by the allowance of the last-mentioned *certiorari*, which stays its hands.

Contracts will not be decreed to be specifically performed by a court of equity where obedience to such decree would be impossible; the jurisdiction in these 10 suits being discretionary, that is, resting in sound judicial discretion. This Court will not command a defendant to specifically perform a contract the means to perform which are involved in a suit in a court of law, which suit acts as a stay of proceedings by the defendant. The remedy by way of specific performance is enforced by proceedings for contempt of court, and surely a court of equity would not adjudge a defendant in contempt of court for not performing a decree, which performance would involve the defendant in contempt of another 20 court, which had commanded the defendant to stand still.

In my opinion the bill in this case is premature and it will be dismissed, unless the complainant elects to retain it pending final disposition of the suit at law on *certiorari*.

IN CHANCERY OF NEW JERSEY.

BETWEEN

THE PEOPLE'S WATER COMPANY
OF MILLVILLE, NEW JERSEY,
Complainant,

AND

THE CITY OF MILLVILLE, A MU-
NICIPAL CORPORATION,
Defendant.

On Bill, Etc.

10

DECRETAL ORDER.

(Filed March 6, 1923.)

This cause being opened to the Court by Louis H. Miller, of counsel with the defendant, in the presence of John D. McMullin, of counsel with complainant, and it being suggested to the Court that the litigation on
20 *certiorari* lately pending in the New Jersey Supreme Court by J. S. Franklin against both parties to this cause, the pendency of which proceeding was set up in defendant's answer herein as a part of its defense has terminated favorably to the parties herein, as will appear from the records of the Supreme Court and of the Court of Errors and Appeals in said *certiorari* proceeding:

And counsel for both parties representing to the Court that the defendant is desirous of taking immediate
30 possession of the plant of complainant referred to in said bill:

And complainant being willing to convey said premises free and clear of all encumbrance upon receipt at this time of \$125,000.00, and both parties being desirous that this transfer of title and possession be made forthwith without prejudice to any of the contentions or claims made by either party heretofore in this cause:

It is, on this sixth day of March, 1923, on motion of Louis H. Miller, counsel for defendant, ordered,

adjudged and decreed, that the complainant shall forthwith, by good and sufficient deed, convey the premises and property agreed to be sold unto the defendant free of encumbrance, upon the defendant's paying to complainant the sum of \$125,000.00:

And it is further ordered, that all the claims and contentions of complainant that it is entitled to have and receive from the defendant beside said sum of one hundred and twenty-five thousand dollars, additional moneys, as follows (less credits for moneys paid by the city to said water company since November 1, 1920):

(a) Interest on said sum of \$125,000.00, according to the charges and prayer of the bill;

(b) The moneys expended by complainant for operating expenses, from January 1, 1921, including operating supplies on hand, according to the charges and prayer of the bill;

(c) For water furnished before January 1, 1921, \$1,666.66, according to the charges and prayer of the bill;

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(d) For cost of installation of service pipes, \$6,265.55, according to the charges and prayer of the bill;

(e) Additional interest and cost of operating the plant to date of settlement, according to the demand contained in the letter *Exhibit "C"* referred to in and a copy of which is attached to the bill of complaint;

be and they hereby are reserved for the further determination and decree of the Court, this decretal order being made without prejudice to any of the said claims and contentions of complainant, and also without prejudice to any of the claims and contentions of the defendant set out in its answer in this cause.

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And it is further ordered, that in the event of the defendant's accepting the deed for the property, works and franchises, referred to in paragraphs 13 and 14 of the bill of complaint, and dated January 1, 1921, the acceptance of that deed under the terms of this decree

shall be without prejudice as against any of the claims of the defendant set up in its answer, except as adjudicated in this decree, and free of the conditions set up in the letter accompanying the tender, dated March 3, 1922, a copy of which, marked *Exhibit "C,"* is attached to the bill of complaint, reserving, however, to the complainant for the determination of this Court in this cause, the claims set up in the bill of complaint and in said letter.

- 10 And it is further ordered that all the issues between the parties, raised by the pleasings and reserved as aforesaid for the further determination of the Court, shall be brought on for final hearing before the Chancellor, according to the practice of the court.

And it is further ordered, that the above cause, and all further proceedings herein, be and the same hereby are referred to Edmund B. Leaming, Esquire, one of the Vice-Chancellors of this court, to hear the same for the Chancellor and advise what further order or

- 20 decree should be made therein.

E. R. WALKER, C.

We consent that the above decree be made.

JNO. D. McMULLIN,

Solicitor for and of Counsel with Complainant.

LOUIS H. MILLER,

Solicitor for and of Counsel with Defendant.

COURT OF CHANCERY OF NEW JERSEY

VICE CHANCELLOR'S CHAMBERS

CAMDEN, N. J., Apr. 26, 1923.

E. B. Leaming,
V. C.Peoples Water Company,
vs.
City of Millville.*Louis H. Miller, Esq.,*
John D. McMullin, Esq.,

GENTLEMEN:

10

At the hearing I understood you to state as an accepted fact that in November, 1901, when the contract was made to supply water to the City for 25 years the Peoples Water Company were owners of the entire water supply system, that is, not only the water supply but also the pipes extending through the streets of the City, and that the contract contemplated that in the future the Water Company should simply supply water to the pipes and that the City thereafter on its own account should sell water to the inhabitants of Millville and collect its own rates. 20

I do not know at this time that this detail is at all material; but I want to be sure that I understand it accurately.

If the above is accurate I would like also to inquire whether during the period of operation under that contract prior to the date contemplated for settlement under the compromise agreement extensions to the pipe lines in the City and repairs were to be made by the City and at the City's expense. 30

I have not searched the pleadings for a copy of that contract; but I assume it is not with the pleadings.

I would like to inquire also whether at the time of the compromise settlement any suit or suits were pending between the Water Company and the City touching matters which were then in dispute.

I am sending this letter in duplicate to each of you.

Very sincerely yours,

E. B. LEAMING.

April 27, 1923.

*Hon. E. B. Leaming, Vice Chancellor, Court House,
Camden, N. J.*

Peoples Water Company *v.* City of Millville.

DEAR VICE CHANCELLOR:

Referring to your letter of April 26, instant, I beg to answer your inquiries as follows:

First. A certified copy of the contract between the
10 Peoples Water Company and the City of Millville will be sent you as soon as I can procure it from the City Clerk. I consent, and no doubt Mr. McMullin will consent, also, that it be used as an exhibit in this case.

Answering now your first query, I beg to say that the contract provided for the construction of the plant by the water company and that, for twenty-five years, the city was to be supplied with water through the pipes and mains, which during that time were to be owned and maintained and kept in repair by the water com-
20 pany; and during the period of the contract the water was to be sold by the City to the consumers and the city received the revenue from the sales. The city was to pay for the service to the company one cent per 100 gallons, beside fire hydrant rentals.

Second. Under the contract, prior to the date contemplated for settlement under the compromise agreement, extensions to the pipe lines and repairs were to be made by the water company, at its expense. Charges for house connections were covered by the first section of
30 the contract (Franklin-Wood case, pages 168-169).

Third. Your third inquiry is, whether at the time of the compromise settlement any suit or suits were pending between the water company and the city touching matters which were then in dispute. Suit was entered in the New Jersey Supreme Court against the city of Millville to recover from the city money claimed to be due in excess of the ten thousand dollars annual payment for water supplied. The action came on to be tried before Judge Carrow at the Cumberland Circuit

but a motion was made for non-suit on the opening by counsel and finally a juror was withdrawn with the understanding that the water company would file an amended claim. Nothing further was done with this suit, and it is still pending in the sense that it has not been discontinued. But if this matter become of importance then I must ask Mr. McMullin to introduce a transcript of the record of the action in the Supreme Court.

I am sending a copy of this letter to Mr. McMullin, 10 together with a letter as per copy attached.

Yours very truly,

LOUIS H. MILLER,

Solicitor of Defendant and City of Millville.

April 27, 1923.

*Vice-Chancellor E. L. Leaming, Court House, Camden,
New Jersey.*

Peoples' Water Company vs. City of Millville. 20

DEAR VICE CHANCELLOR:

Replying to your letter of April 26, I enclose copy of the contract made by ordinance of November 1, 1901, between the Water Co. and the City. The Company owned all the pipes and ferules upon its system and the city was privileged to sell water and charge its own rate, therefore. Under this contract, any necessary extensions or additional connections were to be paid for by the Water Company.

The contract provided in its eighth paragraph that 30 the city might at anytime during twenty-five years, buy the plant at a price to be determined by four commissioners, so that of course any extensions made would under that contract, increase the price to be paid. The contract further provided in paragraph two, five and six for an annual rate to be paid by the city of \$25.00 per hydrant and ten cents per thousand gallon for all the water used by the city and its customers.

About 1912 there was some oral understanding by the then management of the Company and the City, not, I believe, reduced to writing, by which the Company accepted a flat rate of \$10,000.00 from the city in lieu of the payment called for by the contract, but there is no minute on the Company's books of any such arrangement. In 1916 the present management took charge of the Company and from that time until the summer of 1920 when the present offer of sale was made, the Company billed the city in accordance with its written contract and the city paid in accordance with its so called oral contract, the difference between the rates to that time from 1916, aggregating \$32,000.00, for which sum or a large part thereof in 1920 a suit at law by the Company against the City, was pending. Since 1920, the water consumed at the price agreed upon in the ordinance is more than \$20,000.00 in excess of the \$10,000.00 a year for which the city admits its liability.

I enclose the only copy of ordinance which I have and I have no objection, unless Mr. Miller has, to its forming a part of the record.

I wish to make clear however, that it has no bearing upon the present sale nor upon the question of extensions made after Jan. 1st, 1921. The ordinance provided for a sale, the price to be fixed by commissioners. The actual sale was a new bargain between the Company and the City and included waivers of claims by either party. The sale abrogated the contract and was in contradiction to its terms.

You will observe in the offer of sale made by the Company a suggestion of further litigation. The conditions had become unbearable to the Water Company and it was about to apply to the Board of Public Utility Commissioners to fix a fair rate to be paid by the City and had so advised the City.

Since 1916 all water furnished to the city has been measured and the Company can substantiate at any time its figures as to the amount of rentals which were due

in the summer of 1920, the time of settlement, and which would have fallen due from that time until the turn over of the plant to the City in 1923, had the settlement not been made. Such figures will show a greater expense to the City than the payment of actual operating charges as claimed by the Company.

I am sending a copy of this letter to Mr. Miller.

Yours truly,

JNO. D. McMULLIN.

10

Copy of Ordinance Number 73.

Entering into a contract with the Peoples' Water Company of Millville, N. J., for furnishing a supply of water.

The Common Council of the City of Millville do ordain as follows:

Sec. 1. That the following contract be entered into with the Peoples' Water Company of Millville, N. J., to wit:

20

Agreement between the City of Millville and the Peoples' Water Company of Millville, N. J.

This agreement, made this first day of November in the year 1901, between the Peoples' Water Company of Millville, N. J., of the first part, and the Mayor and Common Council of the City of Millville, State of New Jersey, of the second part, Witnesseth:

First. That the said party of the first part, for itself, its successors and assigns, covenants and agrees with the said party of the second part, that it will, at its own expense, lay in and through certain portions of certain streets of the said city of Millville, as shown on the plan hereto annexed, water pipes for conducting water.

30

That it will at its own expense, lay the pipes three feet below the surface grade of the streets. That the said pipes shall be of different dimensions, namely, not less than thirty-five hundred and forty feet of pipe with an inside diameter of sixteen inches; not less than eleven hundred and twenty feet of pipe with an inside

- diameter of twelve inches; not less than fifty-nine hundred feet of pipe with an inside diameter of ten inches; not less than sixty-four hundred and seventy feet of pipe with an inside diameter of eight inches; not less than twenty-three thousand feet of pipe with an inside diameter of six inches. That said party of the first part will, during a period of two years from the date hereof, put in pipes to the curb and all ferrules free of cost to all applicants who desire to take water and have made
- 10 arrangements with the said City of Millville so to do. Said pipes shall be put in and said ferrules furnished, however, only upon the order and direction of the proper authorities of the said city of Millville. The charge of ferrules after the expiration of two years from the date hereof shall not exceed Three Dollars each. Said party of the first part will also furnish proper appliances for turning on and off the water supply to each individual consumer, and shall furnish or cut off the supply to each of said consumers as and when it may be so directed by
- 20 the proper authorities of said City of Millville.

Second. That it, the party of the first part, will place upon the pipes laid as aforesaid, sixty-five anti-freezing fire hydrants, each having a four inch barrel and double hose discharge, at such locations as are shown on the plan hereto annexed; from which fire hydrants the City of Millville shall have the right, for the term of twenty-five years, from the date hereof, to draw water for the extinguishment of fire. The party of the first part further agrees that the city shall have the use of

30 the fire hydrants to be erected in the City of Millville for the flushing of gutters and the sprinkling of streets, it being agreed that such flushing shall be done between the hours of eight A. M. and two P. M. only, and that no more than two hydrants shall be opened at the same time. They shall have the use of water for the flushing of sewers when the City of Millville shall own their own sewerage plant and system, in which the most approved automatic discharge tank shall be used.

The party of the first part hereby further agrees to supply water to the city buildings, school houses, etc., it being understood that three million gallons of water annually shall be furnished free of charge to the above buildings. Should the consumption exceed this amount the charge for the same shall be one cent per hundred gallons.

Third. That said party of the first part, should the party of the second part hereto desire it, and indicate such desire by a majority vote in common council of 10 the City of Millville, will extend the laying of said water pipes along such streets, designated as aforesaid, or along other streets of the City of Millville, upon the express condition that the party of the second part shall secure an additional fire hydrant for every additional five hundred feet of pipe, laid as aforesaid; and for each additional fire hydrant so erected shall pay to the party of the first part, its successors and assigns, as and for compensation for the use of the water therefrom, the sum of thirty (\$30) dollars per year for each 20 year of the term of this contract then unexpired, payable at the same time and in the same manner as is hereinafter provided with regard to the remaining fire hydrants to be erected thereunder. Provided, that whenever three property owners make application for water and said council shall order it an extension of five hundred feet of pipe shall be laid whenever council may direct by the said Peoples' Water Company.

Fourth. That the said party of the first part hereto will erect in the City of Millville a stand-pipe, not less 30 than one hundred and ten feet high, and with an inside diameter of not less than fourteen feet, for the use of said works; said stand-pipe to be built of good material and in a good substantial and workmanlike manner; and that it, the said party of the first part, will also erect in the City of Millville a good and substantial pump-house, large enough for a duplicate set of machinery, in which shall be located the pumps, which shall be operated by steam or other motive power, and capable

of throwing four fire streams at one time to a height of seventy-five feet and furnish the supply of water of sufficient capacity for all ordinary domestic and manufacturing purposes.

- Fifth. That the mayor and common council of the City of Millville, party of the second part hereto, covenant and agree with the said party of the first part, its successors and assigns, in consideration of and as compensation for the water so furnished to the City of
- 10 Millville for its municipal purposes, as specified in the second paragraph of this agreement, to pay it, the party of the first part, annually the sum of twenty-five (\$25) dollars per hydrant for each and every of the sixty-five (65) fire hydrants, of the character specified in the second paragraph hereof, payable in equal quarterly payments; the first payment to be made at the expiration of three months from the completion and successful operation of the works as hereinbefore specified and described; and that the said City of Millville shall provide for payment of said sums by taxation, or from
- 20 moneys realized by the sale of water as provided by law.

- Sixth. In addition to the sums above specified, the City of Millville, in consideration of and as compensation for the supply furnished to the inhabitants of the said City of Millville, and the firms or corporations residing therein, for domestic or manufacturing purposes, from the pipes and mains herein agreed to be laid in and upon the streets covered thereby, will pay the said party of the first part, its successors or assigns, one cent
- 30 for each one hundred gallons so furnished, to be measured at pump station; the total payment to be not less than six thousand dollars (as the minimum sum) for any one year for a period of six years. Each of said yearly payments shall be subdivided into quarterly payments, commencing at the time of the completion of said plant and each quarterly payment shall be for the water furnished for the preceding three months (the last quarterly payment for each year, however, to be sufficient, with the three preceding payments, to make the

total not less than the minimum sum specified for that year).

It is understood and agreed, however, that in case the said City of Millville shall at any time during the continuance of this contract exercise the option contained in the eighth paragraph of this contract, and in accordance therewith purchase the plant to be erected by the said People's Water Company of Millville, N. J., the City of Millville shall be entitled to a credit upon the purchase money for said plant equal to the aggregate 10 of all sums, if any, theretofore paid by the said City of Millville under the above provisions for the payment of the minimum sums herein specified which may be in any year be in excess of the amount which would be otherwise due for the amount of water actually consumed in said year at the rate of one cent per hundred gallons, as above fixed.

Seventh. That the said Peoples' Water Company of Millville, N. J., is to assume and bear the burden and expense of any and all suits brought to test the legality 20 of this agreement or ordinance, or brought to enjoin the prosecution of work hereunder.

Eighth. That the said mayor and common council of the City of Millville may at any time, after the completion of said water plant, and the test having been made, require the entire plant of the said Peoples' Water Company of Millville, N. J., its franchises, rights, privileges, mains, pipes, conduits and appurtenances and attachments, including all sources of water supply and all other property, by purchase, the price to be so paid 30 therefor to be settled and determined by four commissioners or persons, two to be selected by the said City of Millville and the other two by the said water company, its successors or assigns.

In case the said four persons cannot agree as to the price to be paid therefor, they may select a fifth commissioner or person, and the determination and judgment of three of said commissioners or persons shall

be binding and final as to the amount to be paid for said entire plant, property and rights.

Ninth. That said Peoples' Water Company of Millville, N. J., shall place, at its own expense, in the room of the fire department, city hall, a proper guage which shall show at all times the exact pressure of water upon the mains.

Tenth. That the Peoples' Water Company of Millville, N. J., its successors or assigns, shall commence
10 work within thirty days of the acceptance of this ordinance, and shall have completed the waterworks herein named within ten months of the acceptance of the ordinance as aforesaid, or shall forfeit to the City of Millville the sum of Ten Thousand (\$10,000) dollars, to secure the payment of which the said company shall, within thirty days after this ordinance takes effect, file with the city recorder a bond, with security, satisfactory to the finance committee of council and the city solicitor. And in case of litigation of any kind whatsoever, caus-
20 ing delay in the completion of the said water works, the time shall be extended to agree with the time consumed by such litigation.

Eleventh. In default of such acceptance of this ordinance, as hereinabove specified it shall be understood and held that if said Peoples' Water Company of Millville, N. J., decline to accept this ordinance within thirty days after the publication of the same, as required by law, thereupon all rights, powers and privileges granted hereby shall forever cease and be at an end, and this
30 ordinance shall be and become null and void, and in case of litigation of any kind whatsoever, the time shall be extended to agree with the time consumed by such litigation.

Twelfth. The contract now existing between the parties hereto and made and executed under and by virtue of the ordinances approved October 5, 1900, and July 3, 1901, is hereby cancelled and annulled.

Thirteenth. This contract shall continue in force for a period of twenty-five years from the date hereof.

In witness whereof the said parties of this agreement have hereunto interchangeably set their seals, the president and secretary of the Peoples' Water Company of Millville, N. J., party of the first part, having hereunto subscribed their names and caused the common seal of the company to be hereunto affixed, at this office on the 15th day of November, 1901.

GEORGE A. FREY, *President.*

SAMUEL C. SMITH, *Secretary.*

10

And the mayor and common council of the city of Millville, party of the second part, have caused the common seal of the said city to be hereunto affixed at the office of the mayor, on the first day of November, 1901.

Sec. 2. This ordinance shall take effect within twenty days after its publication, as required by the city charter.

Sec. 3. This contract shall be substituted for and takes the place of the contract between the Peoples' Water Company of Millville, N. J., and the City of 20 Millville, under the ordinance approved July 3, 1901.

Passed by common council November 1, 1901.

Approved by the mayor November 1, 1901.

A true copy.

[SEAL.]

JOHN S. HORTON,
City Clerk, July 11, 1922.

IN CHANCERY OF NEW JERSEY.

BETWEEN

THE PEOPLE'S WATER COMPANY
OF MILLVILLE, NEW JERSEY,
Complainant,

AND

THE CITY OF MILLVILLE, A COR-
PORATION,

10

Defendant.

} Final Hearing
on Bill for
Specific Per-
formance.

CONCLUSIONS.

(Filed June 1, 1923.)

John D. McMullin, Esq., for complainant.

Louis H. Miller, Esq., for defendant.

LEAMING, V. C.

20 The only issue here involved is the ascertainment of a basis of accounting between complainant and defendant. No essential facts are in dispute. When the manner of accounting shall have been ascertained, a master can easily state an account between the parties.

In 1901 complainant was the owner of a system of water works which included not only a water supply station, but also the pipes in the streets of defendant municipality, and contracted with defendant to supply it with water for a period of 25 years at specified rates.

30 During that period the municipality was to sell to consumers the water so supplied and was to receive on its own account all revenues from such sales. An option of purchase by the city was also contained in the contract, but that option was not exercised.

During the progress of operations under that contract disputes arose between the water company and the city touching the amounts earned by the company for water supplied under the contract, the municipality claiming that by subsequent arrangements it had

become entitled to water at the flat rate of \$10,000 per annum, and each quarter thereafter the municipality would pay to the water company \$2,500, and each quarter the water company would make claim to a greater amount. In July, 1920, the claims made by the company against the city, in excess of the \$10,000 per year which the city had paid, aggregated \$32,271.09 as of May 20, 1920. The city also had claims against the water company for unpaid taxes.

In this situation, on July 21, 1920, the water com- 10
pany made a written proposition to the city for the sale of the plant to the city and for a compromise of all matters in dispute. This proposition was an offer to sell the plant to the city for \$125,000 clear of all incumbrances and waive all claims against the city for the balance claimed to be due it; the city to also waive its claims for delinquent taxes. The offer further proposed that if the city would accept the offer conditional on a ratification by the electors of the city and submit the proposed settlement to the electors at the succeeding 20
November election, and the election should be favorable to the purchase on the terms proposed, settlement should be made on or before January 1, 1921.

That offer was accepted by the city subject to the approval of the electors, and at the election in the following November the acceptance by the city was approved. The result of the election was duly certified and reported to the water company November 22, 1920.

On January 1, 1921, the day provided for the consummation of the contract, both the water company and 30
the city were ready, willing and desirous of making settlement pursuant to the contract, but were unable to do so by reason of two writs of certiorari which had been issued a day or two before that date. One writ was to review and determine the validity of the contract of the city for the purchase of the water works; the other to review and determine the validity of a bond issue which had been authorized by the city in contemplation of the purchase. Since these writs prevented the city

from consummating the purchase at the time agreed upon, and the necessity to supply water to the inhabitants of the city was paramount, the water company continued to operate the plant as theretofore from the necessities of the situation, that is, the water company continued to operate the pumping station to supply water for the city, and the city continued to supply the inhabitants with water and to collect its water rates from the inhabitants. No negotiation or agreement was had
10 between the water company and the city touching their mutual resultant obligations between the date agreed upon for the settlement and such time as the city should be privileged to make settlement under the contract of sale.

The validity of the contract for the purchase of the plant was subsequently affirmed by the Supreme Court and later by the Court of Errors and Appeals, and the remittitur of the latter court was filed February 15, 1922. The certiorari relating to the bond issue was
20 sustained on motion of the city because the bonds which were authorized were not serial as required by ordinance.

A supplementary ordinance was then adopted by the city authorizing the bonds and providing for their delivery on April 18, 1922. That ordinance was removed to the Supreme Court by certiorari and the certiorari was by that court dismissed November 17, 1922. An appeal from that order of the Supreme Court was dismissed February 28, 1923.

It will be observed that these writs of certiorari relat-
30 ing to the proposed bonds were operative to prevent the city from issuing the bonds it desired to issue until February 28, 1923. The certiorari to review the contract of sale was also operative to prevent the city from accepting a deed of conveyance for the plant until ten days after February 15, 1922, the date on which the remittitur was filed. A few days thereafter the water company tendered a deed of conveyance, which deed the city was unable to accept because of the pending

writ of certiorari to review the proceedings for the issuance of the bonds.

Since this bill was filed and on March 9, 1923, conveyance of the plant was made to the city and the purchase price of \$125,000 was paid by the city to the water company. This was done by stipulation under a court order in this suit, the order providing that the transaction should in no way be operative as a waiver of the claims of either of the parties touching their respective rights or obligations which have arisen since the contract of sale was by its terms to have been consummated. Accordingly the prayer of the bill for specific performance of the contract has been satisfied in all respects except that of an accounting between the parties. 10

It follows that the primary inquiry at this time is the ascertainment of the basis of an accounting between the parties from the date on which the contract of sale should have been consummated until it was consummated, that is, from the beginning of the year 1921 to March 9, 1923. 20

The water company invokes the well-established rule that in contracts for the sale of land, the contract is regarded, for most purposes, as if specifically executed on the day agreed upon; the purchaser then becomes the equitable owner of the lands, and the vendor the equitable owner of the purchase money; each is trustee for the other from that date. This rule, if applied, will charge the city with the cost properly incurred by the water company in the operation of the water station from the agreed date of settlement until the city actually took over the plant, and also will charge the city with interest on the purchase price during the same period, and the city will retain all revenues from consumers during that period. 30

This equitable rule, above referred to, with its applications and exceptions, has been so frequently considered in this State that little appears to remain for inquiry touching it. In *Haughwout v. Murphy*, 22 N. J. Eq. 531, at page 546, Mr. Justice Depue points out

- its general application and effect and collects prior authorities of this State. Later authorities in this State are collected and reviewed by Vice Chancellor Stevens in *Jersey City v. Flynn*, 74 N. J. Eq. 104, at pages 115, 118-121. The accepted rule is that in an accounting between the parties in the absence of stipulations to the contrary the purchaser is to be deemed the owner of the property and the seller the owner of the money from the time fixed for the completion of the contract. *Jersey City v. Flynn*, *supra*, at page 115. But, as pointed out in that case, this rule, equitable in its origin and nature, is subject to exceptions and modifications based upon equitable considerations incident to a given case. Thus in *King v. Ruckman*, 24 N. J. Eq. 556, it is determined that where the delay in consummating the contract is due to the fault of the vendor the rule cannot equitably be enforced for his benefit. In *Jersey City v. Flynn*, *supra*, the accepted equitable rule was held to be overcome by the express stipulations of the parties.
- 20 Neither stipulations of the parties nor equitable considerations appear to exist in this case to remove it from the normal operation of the rule above stated. On the day agreed upon for making title complainant was ready to deliver a deed of conveyance, but the city could not properly then accept a deed of conveyance by reason of the existence of a writ of certiorari which had been issued to review the validity of the contract, and another writ which challenged the validity of the bonds from the proceeds of which bonds the city was to procure
- 30 the money to pay for the plant. The writ directed against the contract in no way questioned the power of the water company to convey; it was based upon want of power of the city to buy. The other writ questioned the validity of the bonds and in no way concerned complainant. Accordingly the nonconsummation of the contract on the day agreed upon was through no fault of the vendor. Its title was perfect and it was ready and anxious to perform on the day. No case has been brought to my attention in which the normal operation

of the rule has been denied to a vendor in the absence of fault on his part. The inability of a vendor to deliver a perfect title on the agreed day by reason of defects in his title is obviously a fault attributable to the vendor. The writ was subsequently determined to have been wrongfully sued out. Conveyance was promptly tendered as soon as that writ was dismissed. Accordingly the lawful contract of the parties and all equitable considerations accompanying it contemplated that on the agreed date of settlement the vendee should become the 10 owner of the plant and the vendor the owner of the purchase price. The contract was, in effect, that on that date the purchaser should assume all the benefits and burdens arising from the operation of the water supply plant and the seller should in like manner enjoy the purchase price. There appears to be no reason why the parties should not be permitted to enjoy their lawful engagements in that respect; no act of either of the parties, save the error of the city touching its bonds, prevented consummation on the due day. No deed was 20 then tendered, but a tender would have been futile, since the city could not accept it. It also may be said that the city was not in fault, except to the extent of creating an invalid bond ordinance; but the contract contemplated a compromise settlement as of that day in which the city should become the owner of the plant from that day and the water company the owner of the money and both parties then desired that settlement carried into effect at that time.

Also it may be noted that the situation which ex- 30 isted on the day for performance appears to render it peculiarly equitable that in an accounting the contract shall be deemed to have been consummated on that day in accordance with the then mutual desire and purpose of the parties. In the contract of sale the water company had irrevocably waived its claim against the city for a large sum of money which it claimed was due to it, and for the recovery of a part of which suits were pending against the city at the time the contract

was made. That waiver of claim was necessarily based upon the assumption that on and after the contract day for performance the water company would be relieved from the burden of further operation of its water supply plant and would enjoy the purchase price. In the meantime the water company had also paid off its mortgage indebtedness in anticipation of the settlement on the agreed day. It cannot reasonably be assumed that the water company would have waived its claim of indebtedness of the city for operations under the contract to settlement day with any notion of thereafter operating under the same contract in any event. A waiver by the water company of what it claimed as contract rates of operation for a longer period would have called for additional consideration for such extended waiver.

When the performance day arrived and settlement could not be made the water company did the only thing it could do. It continued to operate the water supply plant and to furnish water to the city *ex necessitate*. The inherent plan and quality of the contract of settlement was that the old water supply contract should be abrogated at the time set for settlement. The waiver of the rate of compensation claimed up to that time by the water company was not only irrevocable, but was necessarily based upon the expectancy of the plant passing to the city at that time. To extend the contract terms of operation beyond that time unseats the whole basis of settlement. The suggestion that subsequent to that time the old contract, with all the disputes connected with it, should be deemed revived and be made the basis of accounting from that date not only violates the equitable rule touching the transmission of equitable title, but is obviously unjust, since the waiver of the amount claimed up to that time was, as already stated, necessarily based upon the expectancy of cessation of operations under the contract and receiving the purchase price at that time.

This also appears probably to have been the view entertained by the parties in the early part of the operation of the plant after the settlement day, although no definite agreement was made touching the terms of operations subsequent to the date fixed for settlement. At the end of the first quarter after the date for settlement the water company rendered a bill to the city for \$5,000, accompanying the bill with a letter in which it was stated, among other things, that "because of the delay in settlement the water company had been without 10 the use of the purchase price since January 1st, 1921 (contract date for settlement), and in addition has been paying the cost of operation of the plant since said date, the aggregate amount of interest on the purchase price and the operating expenses, exclusive of taxes, since January 1, 1921, amounting to a sum in excess of \$5,000, and whereas said water company, in view of its contract with the city, settlement under which was to have been made on or before January 1, 1921, and settlement as of which date will be made under the terms of the con- 20 tract, if and when the litigation now pending, or any other litigation which may hereafter be instituted, shall result favorably to the city, the said water company is in the position of operating the plant from and after January 1, 1921, in the interest of the city, which is chargeable with interest on the purchase price, and operating expenses since said date; and whereas, if said litigation result in a determination that said contract of purchase is invalid, then there would be due to the People's Water Company from the City of Millville, for 30 water supplied since November 1, 1920, under the terms of the contract entered into under Ordinary No. 73, of the City, a sum in excess of \$5,000. Therefore the People's Water Company respectfully requests the City of Millville to pay to it, on account, the sum of \$5,000 without deduction for delinquent taxes, waiver of which is to be included in the agreed purchase price of the water plant, if the pending litigation be decided in favor of the city."

That bill was paid by the city May 21, 1921, with the following letter accompanying the payment: "Enclosed herewith please find order on the Treasurer of the City of Millville in the sum of \$5,000 which is tendered in accordance with bill presented by your Mr. Roth to the Board of Commissioners of the City of Millville, at their regular meeting on Friday, May 20, 1921, and in conformity with agreement attached to said bill."

- 10 While this \$5,000 would have been the amount due under the old contract at the rate contended for by the city, the bill, as presented, clearly sets forth that the water company was operating from and after January 1, 1921, with the understanding that in the event of the settlement contract being sustained by the courts the cost of operating the plant from January 1, 1921, and interest on the purchase price from that date were to be paid by the city. The answer by the city appears to have accepted that view. Some subsequent payments
- 20 have been made by the city of lesser amounts in response to bills accompanied by letters similar to the one above quoted. Certain extensions of the water mains were also made by the water company after January 1, 1921. Under the old contract such extensions would have been made at the expense of the water company; but these extensions were made under and by reason of a resolution of the city commissioners in which the city promised to pay the cost of the extensions providing the contract of sale should thereafter be sustained by the
- 30 courts in the then pending litigation already referred to. That stipulation clearly negated any notion of the parties that on January 1, 1921, the water company had be relegated to operations under the old contract.

It also is contended on behalf of the city that while the sale of the plant to the city included real estate, it also included the water pipes in the public streets of the city, which pipes, it is urged, are personal property. With this contention the following text of 39 Cyc. 1642 (Title: Vendor and Purchaser), is invoked as an ex-

ception to the equitable rule above stated: "It is also held that the rule does not apply in the case of an entire contract for the sale of both real and personal property." The text above quoted is based on *Clinton v. Hope Insurance Co.*, 45 N. Y. 454, and *Listman v. Hickey*, 19 N. Y. Supp. 880; affirmed in 143 N. Y. 630. Neither of these cited cases can be said to be applicable to the circumstances of this case. In *Clinton v. Hope Insurance Co.*, the question was touching the right of an insurance company to be subrogated to the rights of an insured vendor who had contracted to sell a mill and its machinery, the machinery being in part personalty. A fire had destroyed the mill and the machinery after the date of the contract and before the date for consummation of the contract. The additional and material circumstance was also there present that at the time of the fire the vendee held as a tenant of the vendor at an agreed rental by express stipulation of the parties. The loss was held to be the loss of the vendor. In *Jersey City v. Flynn*, *supra*, at page 115, the rule is defined as follows: "It [the rule as to transmission of the equitable title] is kept within reasonable limits by the perfectly well settled rule that in the absence of express stipulation the purchaser takes the rents and profits and pays interest on the purchase-money only from the time fixed for the completion of the contract; not from the time of its execution. *Fry Spec. Per.*, sec. 891; *King v. Ruckman*, 24 N. J. Eq. 298; *DeVisme v. DeVisme*, 1 McN. & Gor. 336. And, as I shall show hereafter, not always as early as that." (The instances of later dates for the operation of the rule, due to default of the vendor, are pointed out by the learned Vice Chancellor at pages 120-122.) The other case cited in *Cyc.* (*Listman v. Hickey*) also is a case in which the property was destroyed by fire before the date agreed upon for performance, and the vendor was not, in consequence, able to perform at the time contemplated by the contract for performance. In the present case, with the vendor without fault and able and willing to perform on the day

fixed for performance and with no intervening event in any way changing either the nature or value of the property, there seems to be no sound reason for denying to it the application of the equitable rule now contended for by complainant merely because the contract of sale includes, in addition to real estate, water mains which defendant contends are in the nature of personal property and which are admittedly an essential and necessary and integral part of the plant which was sold
10 for a gross amount as a complete and operating plant. In this view it becomes unnecessary to inquire whether water mains of a water company which are located in public streets can be regarded as personal property as between the parties to a contract of this nature; but it may be appropriately noted that even though considered personal property the water mains would clearly fall within that special class of personal property to which all equitable rules touching specific performance and its incidents obtain. See *Pomeroy on Contracts* (Specific
20 Performance), sections 10 and 11.

It is further urged on behalf of defendant that the city could not have lawfully contracted for complainant to operate the plant as its trustee or agent and in consequence cannot be held to liability on any equitable grounds the result of which are not in harmony with the powers of the city by direct action. A sufficient answer to this is that the contract of purchase and its terms were in all respects lawful and within the powers of the city. The liabilities of the city under that contract flow from the contract and are to be considered a
30 part of the contract, and in no sense a new contract by the city. The equitable status of the parties from the day fixed for performance flows from the contract and not from any new agreement or new obligation of the city; the accounting is an accounting wholly based on the rights of the parties lawfully created by the contract. Recognized equitable obligations flowing from the contract are a part of the obligations of the contract to the same extent as similar legal obligations.

My conclusions are that complainant can equitably only be regarded as having operated the plant subsequent to January 1, 1921, for defendant, and in the accounting is entitled to charge defendant with the reasonable cost properly incurred in operating the plant from that date to the date the plant was physically taken over and operated by defendant, and is also entitled to charge defendant six per cent. interest on the agreed purchase price of the plant from January 1st, 1921, to the date the purchase price was paid; and that defendant 10 is entitled to credits for the several payments made on account for water supplied to it during that period, and is entitled to retain all moneys collected by it for water rents from consumers, and no account is to be taken of water used by the city for fire and flushing or other city purposes during that period.

Contention also exists touching the liability of the city to pay the cost of construction of certain extensions made by complainant to water mains during the period the plant was operating subsequent to January 1, 1921. 20 The city desired these extensions made and passed a resolution to the effect that the cost incurred by complainant in making the extensions would be paid by the city in addition to the purchase price of the plant in the event of the contract of sale of the plant being sustained by the courts. A copy of the resolution will be found in *Franklin v. Horton*, 116 At. Rep. 175, at page 176. These extensions were admittedly made by the water company on the faith of that resolution of the city commissioners and no claim is made that the cost 30 was excessive. Subsequently, on certiorari, in the case last cited, the resolution was declared to be contrary to the provisions of the Welsh Act in that it was adopted without remaining on file for two weeks before its final adoption as required by that act. The city has since taken over the plant and is in enjoyment of these extensions. Counsel for the city declares the city's willingness to pay, but doubts its right to do so.

It seems clear that there can be no present recovery of this claim, notwithstanding the fact that it is a just claim and the further fact that the city is now enjoying the extensions which the water company in good faith has supplied in reliance upon the solemn promise of the board of commissioners to pay for the cost of construction. In this class of claims the essential inquiry is touching the power of the municipal corporation. Defendant municipality enjoyed the power to order this work and to agree to pay for it, but the power so enjoyed is a specifically restricted one. By section 6 of the Welsh Act, as amended by P. L. 1912, p. 649, as pointed out in *Franklin v. Horton*, *supra*, that power can be exercised only by ordinance or resolution adopted in the manner there rescribed. The legislative restriction touching the exercise of the power is no less potent than the power affirmatively conferred. No other source of power has been brought to my attention. Obviously the implied promise to pay arising from the acceptance of the work cannot rise above an express promise to pay for the same work, and the express promise has been declared to be unauthorized by law and void because of the statutory restriction touching its exercise. In *Frank v. Board of Education*, 90 N. J. Law, 373, consistently with *Bourgeois v. Freeholders of Atlantic County*, 82 N. J. Law, 82, our court of appeals has clearly defined the effect of ratification and implied liability to be wholly dependent upon and only co-extensive with the power to contract. If defendant municipality desires to respect this admittedly honest obligation there appears to be no obstacle to its doing so at any time by an ordinance or resolution directing payment; it is a just debt. But the power to authorize its payment must be exercised by ordinance or resolution passed in the manner specifically required by the statute.

A question has also been raised touching taxes. Admittedly the taxes prior to January 1, 1923, had been discharged by the settlement agreement. I see no reason why as to subsequent taxes the general rule

should not be followed exempting a vendor from the burden of taxes from the date the equitable title passes to the vendee.

In the briefs it is stated that at the time the plant was turned over to the city certain supplies, such as coal and other material used in operating the plant, was turned over to the city. Defendant contends that these are properly to be considered a part of a going concern and are covered by the purchase price of the plant; and further urges that if not so considered no recovery can 10 be had for such supplies because the Home Rule Act of 1917 as well as the Crimes Act requires all purchases of supplies in excess of \$500 in amount to be by advertising.

I find nothing in either the bill or answer relating to these supplies or their nature and do not think it proper to include a consideration of that controversy in these conclusions.

A reference will be made to a master for an accounting pursuant to these conclusions.

20

Submitted April 23, 1923.

Determined May 9, 1923.

IN CHANCERY OF NEW JERSEY.

BETWEEN

PEOPLE'S WATER COMPANY OF
MILLVILLE, N. J.,*Complainant,*

AND

THE CITY OF MILLVILLE,
Defendant.

} On Bill.

10

ORDER OF REFERENCE.

(Filed June 11, 1923.)

This cause being opened to the Court by John D. McMullin, solicitor for complainant, in the presence of Louis H. Miller, solicitor for defendant, and it appearing that notice of plaintiff's application for this order has been duly served upon defendant;

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It is, on this eleventh day of June, 1923, upon motion of John D. McMullin, solicitor for complainant, ordered, adjudged and decreed that it be referred to Wm. J. Kraft, one of the Masters of this court, to take an account of the dealings and transactions between the complainant and the defendant in reference to the matters set out in the bill of complaint and the answer and in accordance with the opinion of this Court, as filed herein by Vice-Chancellor E. B. Leaming, for the better clearing of which account the parties are to produce

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before said Master upon oath or affirmation as required, and leave with him all books and writings in their custody or power relating thereto, and said Master shall have power to examine the parties and other witnesses in relation to said account and the taking of the same; he is to make to both parties all just allowances and is to report what upon such accounting appears to be due from each party to the other and the balance which upon said accounting shall appear to be due from either party to the other.

And said Master shall make his report with all convenient speed, and if in taking said account any special matter shall arise, he is at liberty to state the same to the Court.

E. R. WALKER, C.

Respectfully advised,

R. H. INGERSOLL, V. C.

IN CHANCERY OF NEW JERSEY.

BETWEEN

PEOPLE'S WATER COMPANY OF
MILLVILLE, N. J.,
Complainant,

AND

THE CITY OF MILLVILLE,
Defendant.

On Bill, &c.
Notice of Appeal
from Order of Ref-
erence, or Order for
Accounting, made
June 11, 1923.

10

NOTICE OF APPEAL.

(Filed June 18, 1923.)

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The defendant hereby appeals from an order made in the above-stated cause bearing date on the eleventh day of June, nineteen hundred and twenty-three, whereby it was ordered, adjudged and decreed that it be referred to William J. Kraft, one of the Special Masters of this court, to take an account of the dealings and transactions between the complainant and the defendant in reference to the matters set out in the bill of complaint and the answer and in accordance with the opinion of this Court as filed herein by Vice-Chancellor E. B. Leaming, and from the whole and every part thereof to the Court of Errors and Appeals in the last resort in all causes.

Dated Millville, N. J., June 13, 1923.

LOUIS H. MILLER,
Solicitor and Counsel with Defendant.

I conceive there is good cause for said appeal in the above-stated cause.

LOUIS H. MILLER,
Of Counsel with Defendant.

NEW JERSEY COURT OF ERRORS AND APPEALS.

BETWEEN

THE PEOPLE'S WATER COMPANY
OF MILLVILLE, N. J.,

10 *Complainant-Respondent,* On Bill, &c.

AND

THE CITY OF MILLVILLE,
Defendant-Appellant.

PETITION OF APPEAL.

To the Honorable Court of Errors and Appeals:

20 The petition of the City of Millville, appellant, in the above-stated cause respectfully shows that your petitioner finds itself aggrieved by a certain order made in the above-stated cause bearing date on the eleventh day of June, 1923, by his Honor, the Chancellor, and filed in the Court of Chancery on that date in this respect, to wit: That his Honor the Chancellor ordered, adjudged and decreed that it be referred to William J. Kraft, one of the Masters of said court, to take an account of the dealings and transactions between the complainant and the defendant in reference to the mat-
30 ters set out in the bill of complaint and the answer in the above-stated cause, and in accordance with the opinion of said Court of Chancery as filed therein by Vice-Chancellor E. B. Leaming; and from the whole and every part of the said decretal order of the Chancellor upon the ground that the same is erroneous for that:

1. The said decretal order directs that an account be taken between the parties upon the principles laid down and declared in the opinion of Vice Chancellor Leaming, holding that there should be awarded to complainant divers sums of money, to be ascertained upon an accounting, for interest on the purchase price of the water plant referred to in the bill; and for losses sustained from the operation of the water plant between January 1, 1921, and March 9, 1923; and for the price of certain supplies delivered with the said plant; whereas the Chancellor should have decreed that the relief allowed to complainant by said decretal order be denied. 10

2. The said decretal order decrees an accounting as set forth in the said opinion of Vice Chancellor Leaming, whereas the application for the relief granted by said decretal order should have been dismissed by the Chancellor.

3. The complainant was not entitled to the relief granted by said decretal order.

4. Complainant was not entitled to said order or decree for accounting, or for any other equitable relief whatsoever against defendant upon the facts found, or produced, or shown, or proved, or admitted in the court below. 20

Your petitioner therefore prays that the said decree of the Chancellor may be, in all things, reversed, set aside and for nothing holden, and that your petitioner may have such relief in the premises as to this equitable court may seem meet.

LOUIS H. MILLER,

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Solicitor for and of Counsel with Appellant.

Endorsed:

"Filed Jun. 16, 1923,

THOMAS F. MARTIN,

Clerk."

STATE OF NEW JERSEY.
DEPARTMENT OF STATE.

I THOMAS F. MARTIN, Secretary of State of the State of New Jersey, and *ex-officio* Clerk of the Court of Errors and Appeals in the last resort in all causes, do hereby Certify that the foregoing is a true copy of
10 Petition of Appeal, between The Peoples Water Company of Millville, N. J., Complainant-Respondent, and The City of Millville, Defendant-Appellant, as the same is taken from and compared with the original filed Jun. 16, 1923, and now remaining on file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal of
[SEAL.] said Court at Trenton, this Sixteenth day of June, A. D. 1923.

T. F. MARTIN,
Secretary of State.

THE PEOPLES WATER COMPANY OF MILLVILLE, NEW JERSEY, <i>Complainant-Respondent,</i> and THE CITY OF MILLVILLE, <i>Defendant-Appellant.</i>	On Bill for Specific Performance and Accounting. On Appeal from Chancery.
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The bill was filed May 13, 1922, and prayed specific performance by the City of its agreement to purchase the company's plant; it further prayed that an account be had and the City directed to pay interest on the agreed purchase price from date fixed for settlement, January 1, 1921, and the actual cost of the operation of the plant by the company after that date, for operating supplies on hand and for extensions to water lines made by company at City's request. Before the hearing and on March 9, 1923, the City accepted a deed for the property from the company, paid \$125,000.00 under stipulation that such action should be without prejudice in this case. Accordingly when the case came before Vice-Chancellor Leaming on final hearing, the ac-

counting prayer of the bill was all that remained for attention. No essential facts were left in dispute by the bill and answer and no testimony was taken. Certain stipulations were made orally by counsel at the hearing which are lost because of the death of the stenographer, but these are not of importance in the case.

After the hearing, at the request of the Court and as testimony in the case, Ordinance 73 of the City was introduced as evidence and this ordinance with the correspondence of counsel is printed as part of the case at pp. 101 to 111. The Vice-Chancellor decided the basis of the accounting, filing written conclusions (Case, 112, etc.) whereby he charged the City with interest on the purchase price and operating expenses of the plant from the date fixed for settlement, disallowed the company's claim for improvements made at the City's request and did not decide the liability for operating supplies because of lack of proof. An order was made referring the case to a special master to state an account in accordance with such conclusions. From this order of reference, the City appeals.

THE FACTS.

No essential facts are in dispute. Their statement by the Vice-Chancellor is so clear and concise, that respondent asks that they be adopted as its statement also (Case, pp. 112 to 115). One correction however is to me made. In the last sentence of page 114, the Court says, "A few days thereafter the water company tendered a deed of conveyance which deed the City was unable to accept because of the pending writ of certiorari to review the proceedings for the issuance of the bonds." This is error,

at the time of tender March 3, 1922, there was no litigation of any kind pending, the certiorari mentioned by the Vice-Chancellor was not granted until April 5, 1922 (see Appellant's Brief, p. 3).

Prior to a discussion of appellant's argument, respondent emphasizes one point in the case, namely:

AS THE CASE NOW STANDS, THE CITY OF MILLVILLE IS PLACED IN THE SAME SITUATION AS IT WOULD HAVE OCCUPIED, HAD NO CERTIORARIS BEEN BROUGHT, AND HAD THE CONTRACT BEEN CONSUMMATED ON JANUARY 1, 1921, AS ORIGINALLY AGREED:

By the decision under review, the City pays interest from January 1, 1921, the date of settlement. Had no certiorari intervened, the City's bonds would then have been issued for the entire purchase price and it would have paid interest thereon.

By the decision, the City pays operating expenses, but only what an accounting shall show to be proper. But for the certiorari, the City would have operated the plant and paid the expense.

By the decision, taxes on the plant cease from the date of the agreed settlement. Had there been no suit in the Supreme Court, the plant would at the time fixed have been municipally owned.

Before January 1, 1921, the City took all of the product from the company and retailed it, receiving all consumers' rents, and has always continued to receive them.

As the decision charges nothing against the City which it would not have had to pay, neither does it give anything to the water company which it would not have received, had the parties been permitted to carry out their contract, on the day fixed. The water company would have had the use of the pur-

chase price, it would have had no operating expense nor taxes to pay.

This most equitable result, the City wishes to set aside and its entire plea is by technicalities to find some means whereby it can, at the expense of the company, reap some profit to itself, by reason of the delays caused by the numerous taxpayers' suits.

The four certioraris did not attack the ability of the company to convey but the power of the City, in the main case to buy the plant; and in the other cases, the means chosen by the City to raise the price.

This is pointed out by the learned Vice-Chancellor (Case 116, line 20, and *seq.*).

APPELLANT'S ARGUMENT.

APPELLANT'S POINTS I, II AND XV. The City admits the general rule to be as stated by the Vice-Chancellor (Case, 115, lines 20 and *seq.*) that in contracts for the sale of land, the contract is regarded for most purposes as if specifically executed on the day agreed upon, but contends that the rule is not applicable here. Why?

Because the company did not perform at the time set! The company was fully prepared to settle, had paid its bonds and perfected its title; then intervened the restraint of the certiorari, restraining both parties. Why, in equity, should this interference by a higher power give one of the two innocent parties a monetary gain at the expense of the other?

The City charges the company with default, although unintentional. There was no default at any time by the company, wilful or otherwise, although after the dismissal by this Court of the certiorari

of the purchase ordinance, and from the demand for settlement of March 3, 1922, there was default on the part of the City whose legal duty it was to have the funds in hand.

The New Jersey cases cited, *King v. Ruckman*, 24 Eq. 298 and *Jersey City v. Flynn*, 74 Eq. 104, neither treat of cases where at the time set for performance both parties were ready and able to perform, but were restrained by a court order.

In *King v. Ruckman*, the vendor for five years wrongfully refused to perform and remained in possession. The Court recognized the general rule (p. 301) and then said (p. 302):

“The general and elementary doctrine is always applied with reference to and for the promotion of the true agreement by the parties and the equities of the case. The vendor and vendee are trustee each for the other and each will be held to execute his trust with fidelity to the other and neither will be permitted so to manage or mismanage his trust as to advance his own interest at the expense of the *cestui que trust*,” etc.

As the application of the rule would have given an advantage to the defaulting vendor the Court refused to apply it.

In *Jersey City v. Flynn*, 74 Eq. 104: The rule was not applied, not because of any default, but because there was in the contract of purchase the provision that until the purchase of the water works by the transfer of the title and the payment of the price, the water rent should be continued to be paid by Jersey City (see that case at bottom of p. 115) counsel's citation does not go far enough.

The appellee has no criticism of the general principles called by counsel from the decisions of sister

states, that the obligation of the vendor to deliver the deed and that of the vendee to pay are mutual and dependent, that a mutual and simultaneous failure to perform saves the default of each, that tender is excused where either party is unable to perform. All of these doctrines have to do with what constitutes a breach of contract to convey, so as to relieve the other party or give him a right to damages. The determination of the present case requires the interpretation of a contract and of the equities arising from it under the particular circumstances.

Cropper v. Brown, 76 Eq. 406, quoted by appellant (Brief, 12) in so far as it has any bearing supports over contention.

APPELLANT'S POINTS III and VIII. These points have to do with "losses." There are no losses to either party flowing from the contract or the respondent's interpretation thereof. Under the original contract between the company and the City under Ordinance of November 1, 1901, the City became the sole customer of the company, agreed to pay a measured rate and the City was privileged to sell and did sell water to consumers, fixing its own rate. Ordinance No. 73 (Case 105). In 1916, when the present management of the company took charge, and from then until the summer of 1920, when the present offer of sale of the plant was made; the company, in accordance with said ordinance, metered the water and rendered to the City bills therefor at ordinance rates. During said period the City refused to abide by its ordinance and paid the company at a flat rate of \$10,000.00 per annum, which was much less than the measured price. A suit was pending in the Supreme Court by the company against the City to recover this dif-

ference between the payments called for by the contract-ordinance and those tendered by the City. This difference as of May 20, 1920, amounted to \$32,271.09 and the surrender of this claim by the company formed part of the sale agreement of that year, 1920. There is nothing in the case to show whether the City at any time made a profit or sustained loss upon its retailing of water. And there is nothing to show whether the company's measured rates would have yielded it a profit. All that appears clearly is that the yearly cost of operation of this plant was more than the \$10,000.00 which the City was willing to pay.

APPELLANT'S POINT IV. Of course the company was left in possession until March 9, 1923, but there is no question of title involved here. The City admits company's title was good from January 1, 1921 on.

APPELLANT'S POINT V. Because personalty is included in the sale, the general rule does not apply. Counsel cites no case in support of this proposition and no reason for the exception suggests itself.

The Vice-Chancellor deals with this point (Case, 121 and 122).

Moreover, the same subject-matter may be real or personal property depending on the circumstances—as between landlord and tenant; for tax purposes; between mortgagor and mortgagee; vendor and vendee. The cases decided under the definitions of our tax laws, which are referred to by counsel are of no aid in determining whether between vendor of this plant and its vendee, the water mains are realty or personalty.

APPELLANT'S POINT VI. Such an arrangement was *ultra vires*. The City so states but gives no reason save that possible losses must be borne by the taxpayers. Here as has been shown there were no losses. But if there had been why should not the taxpayers bear them, they derived the benefits?

The contract of sale with settlement January 1, 1921, this Court has held valid and binding, all that is contended for is what in equity flows from that contract. There is no effort to bind the City by any new or additional contract. When a municipality enters into a valid contract such contract is subject to the same standards as to legal and equitable rules and interpretation as that of a private citizen, and one of these rules is what the respondent invokes.

APPELLANT'S POINTS VII AND X. The tender of deed made March 3, 1922, was not good, and therefore interest did not run thereafter. Respondent's case does not depend upon any default upon the part of the City, though there was default, nor did the Court below so rest its decision. Suppose the company had never made any tender of any deed and the City were applying to chancery for a conveyance it would be decreed upon terms equitable to both parties and such are the terms now imposed upon them. The deed as tendered was later without change accepted. True on March 3, 1922, when this deed was handed to the commissioners of the City then in session, only \$62.50 of United States documentary stamps were affixed, the next day while the deed was in custody of the city clerk, \$62.50 additional stamps were by the company presented to his assistant and deputy at the clerk's office, which deputy had possession of the deed. The

request was then made that the company's agent be permitted to affix the stamps to the deed and cancel them, which request was refused by the City and the stamps left with the clerk.

The construction and application of the Federal Revenue Act is by its terms left to the head of the department and rulings and treasury decisions in great numbers could be quoted, were it not a matter of common knowledge, that the stamps may be affixed and cancelled by any one, at any time, before the conveyance is recorded. There is also a ruling of the department that upon a conveyance to a state or any of its subdivisions no revenue stamps are required.

APPELLANT'S POINT X. It is further objected by appellant that the tender was accompanied by a letter imposing terms and therefore invalid. The letter is Exhibit C attached to the bill (Case, 12). The terms are approved by the decision appealed from. This case is not dependent upon tender.

APPELLANT'S POINT IX. That the conduct of the City after January 1, 1921, can have no bearing on this case. This will be considered hereafter as point one of respondent.

APPELLANT'S POINTS XII AND XIII. That the City is not obliged to pay for the supplies on hand. This question was expressly not decided by the Vice-Chancellor for lack of proof as to what they were. That coal, oil, unused water pipe, form part of a water plant as contended by the City is a novel proposition. But it is not presently before this court. Before an intelligent decision on this point can be reached there must be proof as what is meant

by "supplies" and that can be furnished before the Master on the accounting.

APPELLANT'S POINT XIV. AS TO SERVICE PIPES PAID FOR BY THE COMPANY AT THE REQUEST OF THE CITY: The Court below advised the City as to how this honest debt of the City might be paid, to wit: by the passage, now, of a valid ordinance or resolution, but the City further seeks advice from this Court.

At the request of the City pending the Supreme Court certioraris, and relying upon an invalid resolution, the company spent \$6,265.66 in the installation of new service pipes. The resolution was held invalid because it did not lay over two weeks as required by law. The City claims to be anxious to pay this claim but is seeking more light. Will not this Court approve the learned Vice-Chancellor's advice to the appellant that the way to pay its just debt is open to it?

THE ITEM OF \$1,666.66 FOR WATER FROM NOVEMBER 1, 1920 to JANUARY 1, 1921.

Appellant deals with this on the first paragraph of page 6 of his brief. Under the agreement of sale water furnished the City to January 1, 1921, the date of consummation, was to be paid for by the City at \$2500.00 per quarter. When the certiorari tied up the sale, this item was due. It is charged as part of the moneys due from the City upon this transaction. Counsel says it is not disputed. However, the credits allowed the City in the pleadings, to wit: \$12,500.00 include all moneys paid by it to the filing of the bill, so it makes no difference whether the item of \$1,666.66 is regarded as paid

out of the \$12,500.00 and both sides of the account reduced by \$1,666.66 or whether it remains as a charge and the larger credit \$12,500.00 likewise remains.

Passing now to the respondent's argument; the company's points are:

POINT ONE: The company's claim is in entire accord with the mutual understanding of the parties as shown by their acts after the sale was certioraried.

POINT TWO: In equity, the vendor is considered a trustee for the vendee from the date fixed for consummation of the contract.

POINT THREE: By the decision under review the parties have been placed in the exact position in which they would be had the settlement of January 1, 1921, not been restrained.

POINT ONE: THE COMPANY'S CLAIM IS IN ENTIRE ACCORD WITH THE MUTUAL UNDERSTANDING OF THE PARTIES AS SHOWN BY THEIR ACTS AFTER THE SALE WAS CERTIORARIED. See opinion below (Case 117, *et seq.*).

When the day of performance came and the action of the Supreme Court prevented the delivery of the plant, the public necessity compelled the company to continue to furnish water for the City. Its old contract and the contentions between the parties as to its rates had been abrogated by the contract of sale. At the end of the first quarter the company rendered a bill for \$5000.00 to the City (Exhibit D,

Case 13), to which was attached a statement (Exhibit E, Case 14) which statement was referred to in the bill and which *inter alia* said after reciting the contract of sale, that settlement was to have been made on or before January 1, 1921, and was delayed by the certioraris:

“Whereas, because of said delay the water company has been without the use of the purchase price since January 1, 1921, and in addition has been paying the cost of operation of the plant since said date, the aggregate amount of interest on the purchase price and the operating expenses exclusive of taxes since January 1, 1921, amounting to a sum in excess of five thousand (\$5,000.00) dollars, and

“Whereas, said water company, in view of its contract with the City, settlement under which was to have been made on or before January 1, 1921, and settlement as of which date will be made under the terms of the contract, if and when the litigation now pending or any other litigation which may hereafter be instituted shall result favorably to the City, the said water company is in the position of operating the plant from and after January 1, 1921, in the interest of the City, which is chargeable with interest on the purchase price and operating expenses since said date, and

“Whereas, if said litigation result in a determination that said contract of purchase is invalid, then there would be due to the Peoples Water Company from the City of Millville, for water supplied since November 1, 1920, under the terms of the contract entered into under Ordinance No. 73 of the City, a sum in excess of \$5000.00.”

Therefore, in view of the foregoing, the Peoples Water Company respectfully requests the City of Millville to pay to it, on account, the sum of five thousand dollars without deduction for delinquent taxes, waiver of which is to be included in the agreed purchase price of the water plant, if the pending litigation be decided in favor of the City.

In response to this bill, the City wrote the water company (Exhibit F, Case 16):

“Enclosed herewith please find order on the treasurer of the City of Millville in the sum of five thousand dollars which is tendered in accordance with bill presented by your Mr. Roth to the board of commissioners of the City of Millville at their regular meeting on Friday, May 20, 1921, and in conformity with agreement attached to said bill.”

On three later occasions similar bills for lesser amounts and with similar statements attached were rendered by the company and paid by the City checks, accompanied by letters as above (Bill para. 11, Case 4).

The City does not deny that such was the agreement and they enjoyed its fruits.

Now, they say the contract of sale has a different meaning from what both parties for over a year have given it and the vendor is entitled to \$10,000 per annum. For what? The old disputed contract for the sale of water died January 1, 1921.

POINT TWO. IN EQUITY, THE VENDOR IS CONSIDERED A TRUSTEE FOR THE VENDEE FROM THE DATE FIXED FOR THE CONSUMMATION OF THE CONTRACT.

In *Hall v. Ely*, affirmed by this Court in 91 Eq. 92, it was said of a vendee in possession, "He was the equitable owner of the land and vendor of the purchase money," at 95.

HOUGHWORT v. MURPHY, 22 Eq. 546;
PATTERSON v. LUMBER CO., 92 Eq. 569.

This principal is well established regardless of which is in physical possession. The City's reliance upon *Jersey City v. Flynn* fails for the reason that there was in the contract of purchase the provision that until the purchase of the water works by the transfer of the title and the payment of the price the water rent should be paid by the City. It was because of the terms of the contract that the general rule was not applied. 74 Eq. 104 at bottom of 115.

POINT THREE. BY THE DECISION UNDER REVIEW THE PARTIES HAVE BEEN PLACED IN THE EXACT POSITION IN WHICH THEY WOULD BE, HAD THE SETTLEMENT OF JANUARY 1, 1921, NOT BEEN RESTRAINED.

To attain this result is the aim of equity. Here until March 3, 1922, neither party was in default. Had no certiorari been brought, the City would have paid the \$125,000.00 price in January, 1921, and

must have paid interest thereon from that date. The City would have had the operating costs to pay from that date.

Now view the City's claims: It admits that there has been no default on the part of complainant, that it has received everything which it would have obtained had the payment not been temporarily delayed. By reason of the certioraris it says: The City should profit and the company lose. The City should have its money and its interest too, it should have the use of the plant and the company pay the bills. It should have the supplies, coal and oil, etc., bought by the company for the City's use.

Which party makes the more equitable claim? While the rule given as point two is the general rule and we come directly under it, yet we also come within its purpose, to do equity, and to that end it may be varied. See *Jersey City v. Flynn* at 115 and again on 120 where it is said:

"There are many cases where the question has come up. They show that in dealing with the subject, the Court does that which on the particular facts is equitable, unless it feels itself controlled by some stipulation so clear and positive as to preclude all discretionary action."

In *King v. Ruckman*, 24 Eq. 298. The vendor for five years wrongfully refused to perform his contract and remained in possession. The Court recognized the rule p. 301 and then said (302):

"This general and elementary doctrine is always applied with reference to and for the promotion of the true agreement of the parties and the equities of the case. The vendor and vendee are trustees each for the other and each will be held to execute his trust with fidelity to the other and neither will be permitted to man-

age or mismanage his trust as to advance his own interest at the expense of the *cestui que trust*."

As the application of the rule would have given a premium to the defaulting vendor, the Court refused to apply it.

It is submitted the appeal should be dismissed.

JOHN D. McMULLIN,
*Counsel for Complainant-
Respondent.*

NEW JERSEY

Court of Errors and Appeals

THE PEOPLES WATER COMPANY	} On Bill for Specific Performance and Accounting. On Appeal from Chancery.
OF MILLVILLE, NEW JERSEY,	
<i>Complainant-Respondent,</i>	
AND	
THE CITY OF MILLVILLE,	
<i>Defendant-Appellant.</i>	

Brief for Defendant-Appellant.

The City of Millville entered into a contract with the Peoples Water Company of Millville, New Jersey, for the purchase of the entire plant of the Water Company for the sum of \$125,000, clear of encumbrances, and the waiver of certain claims for water rent; settlement to be made on or before January 1, 1921 (C. 8-9-10-11.)

On December 30, 1920, before the day of consummation of the sale by delivery of the deed or payment of any part of the purchase price, a writ of certiorari was issued out of the Supreme Court, in *Adams v. Horton et al*, bringing before the Supreme Court for review the contract of sale between the parties. The writ of certiorari operated as a stay, restraining the Water Company from executing the contract on its part by delivery of the deed on or before January 1, 1921, as agreed and restraining the City on its part from payment of the purchase price and accepting the deed. At the time of the service of the writ of certiorari the water plant was in the possession of and was being operated and main-

tained by the Water Company and so remained until the property was finally transferred March 9, 1923.

The writ of certiorari in the case referred to, sometimes called the Adams case, was dismissed by the Supreme Court June 15, 1921. An appeal was taken by the prosecutor to the Court of Errors and Appeals, which court in February, 1922, filed its opinion sustaining the contract and dismissing the appeal. The remittitur was filed February 15, 1922, but the record, under Rule 39, was not actually remitted to the court below until after the expiration of ten days, February 28, 1922.

On March 3, 1922, six days after the remittitur was sent down, and at the next meeting of the Board of Commissioners of the City of Millville held after the record was remitted in the Adams case, the Peoples Water Company of Millville, New Jersey, handed to the Board of Commissioners, in open session, the letter dated March 3, 1922, shown at page 57, &c. of the Franklin case. The purport of the letter was to tender the City the deed for the plant and to demand immediate payment of the agreed purchase price of \$125,000, and also payment of the following sums (Franklin case, page 58) :

Interest on \$125,000 from January 1, 1921, to February 28, 1922,	\$8,750 00
Operating expenses, January 1, 1921, to February 28, 1922 (which includes operating supplies on hand January 1, 1921, and supplies purchased since that date),	17,697 44
On account of water supplied in November and December, 1920,	1,666 66
Cost of installing service pipes at request of City,	6,348 66
	\$34,462 76
Less paid on account,	12,500 00
Balance due company as of February 28, 1922,	\$21,962 66

To which is to be added interest until paid as well as interest on the item of laying service pipes which should be adjusted, also cost of operating the plant from February 28, 1922, to date of settlement.

The City took no action touching the tender of the deed or payment of any of the sums demanded or any part thereof, and the deed remained in the custody of the City Clerk until it was finally delivered to the City under the terms of a decree made in this cause, consented to by the parties, shown at (C. 98).

The City, however, at once proceeded to complete necessary proceedings for issuance of its bonds by causing the introduction on March 3, 1922, and the adoption on March 17, 1922, of Ordinance known as No. 207, shown at page 29 &c. of the Franklin case, printed with and forming part of the state of the case in this cause. The purpose of ordinance No. 207 is self explanatory. This Ordinance was adopted March 17, 1922, and published by the Clerk, together with the notice required by the Pierson Act of 1916. Franklin case, 32. But on April 5, 1922, before the bonds could be sold, another writ of certiorari was allowed, in *Franklin v. Horton*, removing Ordinance No. 207 before the Supreme Court. The Peoples Water Company and the City were both parties to this suit, and the writ operated as a further stay pending the litigation in this second certiorari case, which is referred to herein as the Franklin case.

The Supreme Court at the November, 1922, term dismissed the writ in the Franklin case, whereupon the prosecutor appealed to the Court of Errors and Appeals; but afterward, in February, 1923, by consent of counsel for the parties the appeal was dismissed. The dismissal of this appeal left no litigation pending which restrained the Peoples Water Company and the City from carrying out their contract for the purchase by the City of the water plant.

In the meantime, on May 13, 1922, notwithstanding the pendency of the second certiorari suit in the Franklin case, the Water Company filed the bill of complaint in this cause. (C. 1.) The purpose of the bill was to require the City to specifically perform its agreement of purchase with the water plant; and that the City upon an accounting pay the sums of money above referred to, aggregating \$146,962.76 which had been demanded March 3, 1922. (C. 6.)

The City filed an answer, setting up the two writs of certiorari and alleging, in substance, that the reason that the City had not complied with the contract of purchase and paid the purchase money was because of the allowance and consequent restraint of the two writs of certiorari; and the City said that it did recognize the validity of its obligation to purchase the water plant and it had made in good faith attempts to purchase the plant but theretofore had been and then was restrained from doing so by the legal proceedings above referred to in *Adams v. Horton* and *Franklin v. Horton*.

The City filed a further answer by way of plea in bar setting up the legal proceedings; but the Chancellor dismissed the plea on July 13th, 1923 (C. 92). The cause was then set down for a hearing on bill and answer before the Chancellor. (C. 95.) The Chancellor filed a memorandum (C. 96), holding that the bill had been prematurely filed and that it must be dismissed, unless the complainant elected to retain it pending the final disposition of the suit at law in certiorari. This the complainant did elect to do; so the bill stood.

When the second writ of certiorari was finally disposed of in February, 1923, counsel in this case consented to a decretal order (C. 98) whereby it was ordered, adjudged and decreed that the plaintiff should forthwith by good and sufficient deed convey the property free of encumbrances upon the complainants paying the sum of \$125,000. It was further ordered, that in the event the City should accept the identical deed for the water works and franchises which had been tendered March

3, 1922, but was dated January 1, 1921, the acceptance of that deed under the terms of the decree should be without prejudice as against any of the claims of the defendant set up in its answer except as adjudged in the decree, and free of the conditions set up in the letter accompanying the tender. All of the other issues between the parties, presented by the bill of complaint and the amended answer, were expressly reserved for further determination and decree of the court, the decree being made without prejudice as against any claim had by either party against the other at issue by the pleadings.

Accordingly, under the direction and protection of this decree made March 6, 1923, the City on March 9, 1923, paid to the complainant the \$125,000 purchase price for the water plant, and the Water Company on that day March 9th, 1923, affixed to the same deed of conveyance which had been tendered March 3, 1922, \$62.50 of additional Internal Revenue stamps, cancelled all of the \$125 of stamps affixed to the deed, and then delivered the deed to the City on the same day. The deed was recorded March 9, 1923; and the City for the first time took possession of the plant on that date—March 9, 1923.

This cause then went to final hearing on bill and amended answer and the agreed facts recited in the correspondence with Vice Chancellor Leaming and accompanying documents shown at pages 101 to 111 of the case; this final hearing being upon the points expressly reserved by the decretal order entered March 6, 1923. The points at issue so reserved were the following:

1. Is the City chargeable with interest on the \$125,000 the agreed purchase price of the plant from January 1, 1921, to March 9, 1923?

2. Did the Peoples Water Company operate the plant as trustee for the City of Millville from January 1, 1921, to March 9, 1923, and if so is the City chargeable with the losses sustained by the Peoples Water Company

from the operation of the water plant during that period?

There was a claim set up in the bill for \$1,666.66 for water supplied to the City between November 1, 1920, and January 1, 1921; but that claim was paid by the City of Millville in the ordinary course of its business with the Water Company and never has been disputed and is not now in issue.

Another item, amounting to \$6,265.55 is for service pipes laid by the Water Company at the request of the City after the contract to purchase the plant had been entered into. The City with respect to this claim, by its answer (bottom page 19 top page 20) stated that if it is liable to pay for that item, it is willing to comply with such decree in that behalf as the Chancellor may deem equitable and just. The contract for installation of these service pipes has been declared invalid by the Supreme Court (116 At. 175). The City admits all the charges contained in the bill, respecting that claim, to be true.

All of the facts and proceedings set forth in the Franklin case and in the Adams case are in this case by force of the answer of the City of Millville and were used below.

The conclusions of Vice-Chancellor Leaming upon the issues presented to him are found at page 112 of the case. Upon the question of interest and losses from operation of the plant, the learned Vice Chancellor held that, under the rule that the contract of purchase is regarded, for most purposes, as if specifically executed upon the day agreed upon, the purchaser then becomes the equitable owner of the lands and the vendor the equitable owner of the purchase money, each as trustee for the other from that day. He therefore held that the City is liable for the interest on the purchase price of \$125,000 from January 1, 1921, to March 9, 1923, and is also liable for the losses that had been sustained for the operation of the plant by the Company during the period. As to the claim for house con-

nections, the Vice Chancellor held that the City could by proper further proceedings validate and ratify the contract held illegal by the Supreme Court.

Upon these conclusions of the learned Vice Chancellor a decree was entered directing the City to account in the premises. (C. 126.)

From that decree the City had now taken this appeal and in support of this cause raises the following

POINTS.

1. The doctrine of equity which holds the purchaser of lands to be the owner after the making of the contract, and that, pending the delivery of the deed, the vendor is merely a trustee for the purchaser, is not applicable to this case: so that the City is not obliged to pay interest, and the Water Company must bear the losses.

2. The same rule applies to the unintentional default of the complainant as if the default had been willful.

3. The purchaser is not liable for losses where he is not in possession and has no license to enter under the terms of his contract.

4. The vendor must be held to have been left in possession until he showed good title, March 9, 1923.

5. The rule has never been extended to sales of personal property.

6. The rule of equity adopted below cannot be invoked to set up a trust where a private water company must be held to have operated and maintained a water plant as trustee for a municipality of the state, free from all safeguards and restraints surrounding the management of municipal affairs and the public business of a municipal corporation.

7. The tender set up in the bill of complaint was not good, so that interest did not run thereafter.

8. The rule does not contemplate that a purchaser shall stand losses sustained by the vendor in carrying on a going business.

9. It cannot be considered that the water plant was being operated by the Company as a trustee for the City merely because the City paid the quarterly water bills.

10. The tender of the deed was coupled with unlawful conditions.

11. The vendor is not entitled to be reimbursed for losses during the operation of the plant, on principles adopted by the Courts of New Jersey.

12. The City is not obliged to pay for the supplies on hand.

13. It is not lawful for the City to pay for the service pipes but it is willing to do so if a legal method can be found.

14. The City is entitled to the additional taxes that accrued in 1921 and 1922 and for a proportionate part of the taxes for 1923.

I.

The doctrine of equity which holds the purchaser of lands to be the owner after the making of the contract, and that, pending delivery of the deed, the vendor is merely a trustee for the purchaser, is not applicable to this case; so that the city is not obliged to pay interest, and the water company must bear the losses.

(1)

Under the equitable rule adopted by the learned Vice Chancellor, the City must not only stand the losses sustained through the management of the water plant by the Water Company, but must pay interest on the purchase price. But this rule is not applicable in this case for several reasons.

a. The vendor was not in a position to claim the benefit of the rule because the complainant did not perform the contract on its part at the time stipulated. It was restrained by the certiorari proceedings from conveying, and consequently did not convey, the title to the water plant. Yet it invokes the court to apply a maxim of equity although itself it did not do, nor offer to do,

and because of the restraining order could not have done, equity. This was held by the Chancellor in this case (C. 96), for he decided that the bill was prematurely filed.

II.

The same rule applies to the unintentional default of complainant as if the default had been willful.

It is not material whether the default of the vendor be willful. If the default of the vendor be willful, then of course the complainant stands the losses and loses interest; for the equitable rule adopted by the Court below will not apply. But defendant respectfully contends that it is wholly immaterial whether the vendor's default be willful or involuntary.

Chief Justice Beasley speaking for the Court of Errors in *King vs. Ruckman*, 24 N. J. Eq., middle of page 564, said:

“* * * If the non-performance of this contract had been involuntary on the side of the defendant, but had come about through some unforeseen circumstance, no claim for interest could have been listened to. This is the rule as I read the authorities.” 24 E. 564.

And at the bottom of page 562 Chief Justice Beasley said:

“I cannot think that it can rationally be denied, that when the default is on the side of the vendor, no matter how involuntary such default may be, he cannot have any just claim to an allowance of interest.” *Id.* 562 and at the bottom of page 562 and top of page 563:

“And indeed so completely was it the established course to refuse interest to a vendor who failed to convey for whatever cause that when the parties required a different result it was found to be necessary to introduce in their articles of sale a special agreement with that aspect.” *Id.* 562-3.

"Where interest is more in amount than rents or profits and it is clearly made out that the delay was occasioned by the vendor, the court gives the vendor no interest, but leaves him in possession of the interim profits." *Jersey City v. Flynn*, 74 N. J. Eq. at pp. 121-122 citing *King v. Ruckman*, 24 N. J. Eq. where Chief Justice Beasley quotes from Lord St. Leonard:

"It has been intimated that in order to put the rule in force it was necessary that the vendor should not only be in default but that such default should be willful. I think there is not the least foundation for such contention. * * * These illustrations make it demonstrably clear that the point as to the degree of culpability of the vendor has not in the least affected the court of equity." 74 E. 121-122.

In *Jersey City v. Flynn*, near bottom of page 115, Vice Chancellor Stevens said:

"It is true that, speaking generally, equity regards the vendee as the purchaser for whom the vendor holds the legal title in trust, but the doctrine is not carried to an unwarrantable extreme. It is kept within reasonable limits by the perfectly well settled rule that in the absence of express stipulation the purchaser takes the rents and profits and pays interest on the purchase money only from the time fixed for completion of the contract; not from the time of its execution." *Jersey City v. Flynn*, 74 Eq. at page 115. Citing *Fry, Spec. Per.*, par., 891; *King v. Ruckman*, 24 Eq. 298; *DeVisme v. DeVisme*, 1 McN. Gor. 336.

It is a settled principle of law, that the obligation of the vendor to deliver the deed and the obligation of the purchaser to pay the purchase price are mutual and dependent, and are by law to be performed simultaneously. *Watson v. Coast*, 35 W. Va. 463.

Interest on the purchase price does not run until the purchase price is due. *McKenna v. Sterrett*, 6 Watts

(Pa.) 162. Certainly in this case the purchase price was not *due* from the vendee until the water company could, according to its own contract, by a good and sufficient deed, make conveyance of the plant. Without a conveyance it may not be said to have performed its contract to *sell* the plant for \$125,000 *free and clear of all encumbrances* for manifestly the Water Company could not effect a sale without delivery of a deed of conveyance.

A contract for the purchase of lands is held to imply a covenant by the vendor, to sell and convey on payment of the purchase price. *Williams v. Gilbert*, 120 Minn. 299.

A purchaser of lands is the owner of land from the date of the contract when the vendor is prepared to convey a clear title and is not in default; but he is not the owner until the vendor can make a title according to the contract.

Christian v. Cabell, 22 Grat. (Va.) 82.

Where there is a mutual and simultaneous failure to perform a contract for the sale of land, the failure of both parties to tender performance saves the default of each and keeps the contract alive. *Wright v. Swigart*, 172 Iowa 743. Where concurrent acts are to be performed, title does not pass until performance. *Robinson v. Yetter*, 230 Ill. 320.

The principle of equity adopted in the court below requires, in effect, that the City be held for the purchase price, notwithstanding the Water Company was enjoined from selling and conveying the plant.

Another principle may appropriately be referred to. A tender, by the City, of the purchase money would, of course, have been unlawful and futile, yet would have stopped the running of interest. *But tender is excused where either party is unable to perform.* *Mangle v. McCoy*. (N. J.), 115 At. 393. It would not be logical to hold, that (a) a tender of the money would have stopped the running of interest; (b) legal tender was

excused, and yet, tender being excused, interest nevertheless runs on the purchase price for lack of a tender.

It is true that, in *Cropper v. Brown*, 76 N. J. Eq. 406, the Court of Chancery held the vendee at a judicial sale for a loss accruing between the time of the sale and the confirmation of it by the court; but this was based on the principle that, in cases of judicial sales, "the general equitable rule * * * carried the title back by relation to the date of the sale so as to award the purchaser the intermediate rents." 76 Eq., *top p.* 420. That would not be the rule in the case of a sale where the title was to pass at a future day.

It is held that, in order that the loss may fall on the purchaser, the vendor must not only be *willing* but *able* to perform on his part, and if his title is defective and he is unable to convey a good title as required by his contract, the loss will fall on him. 27 R. C. L., pp. 556, 557. Here complainant was not *able* to convey because restrained by the certiorari proceedings.

III.

The purchaser is not liable for losses where he is not in possession and has no license to enter under the terms of his contract.

"No principle is better established or more uniformly recognized than that the fee draws to it not only the right to possession but also the constructive possession of land * * * Hence the mere purchase of land, or a contract for conveyance at a future time, does not authorize the purchaser to enter and occupy without a license from the vendor." 2 *Warvelle on Vendors*, 2d Ed., par 874, pages 1037, 1038, citing *William v. Forbes*, 47 Ill. 148; *Chappell v. Knight*, 108 Ill. 570; *Suffern v. Townsend*, 9 Johns (N. Y.) 35; *Druse v. Wheeler*, 22 Mich. 439.

A contract to sell, with deferred payments, which is silent as to possession, does not give the purchaser right

of possession until full and final payment is made. *Sanders v. Detliffe* (Mich.), 188 N. W. 446.

Said the court in *Smith v. Phoenix Ins. Co.*, 91 Cal. 323, 27 Pac. 728, 13 L. R. A. 475. 25 Am. Rep. 191:

"* * * No case has been cited and we have discovered none in which the vendee has been held bound to pay the purchase price where a valuable part of the property has been destroyed before the day fixed for payment and conveyance, unless he has taken possession under the contract of sale, or has the right to such possession under the contract before the occurrence of the loss."

See also *Wicks v. Bowman*, 4 Daly (N. Y.) 225; *Smith v. McClusky*, 45 Barb. (N. Y.) 610.

In *Grunaur v. West Chester Ins. Co.*, 72 N. J. L. 289, 294, the Court of Errors quotes approvingly from *Ordway v. Chace*, 12 Dick. Ch. Rep. 478, where Vice Chancellor Pitney says:

"The loss would fall directly upon him, as where he is in possession, under a contract of purchase, and has paid the whole or a part of the purchase money and is liable for the remainder."

57 Eq., top p. 482; 72 L. 294.

Continuing, Mr. Justice Vredenberg, speaking for the Court of Errors says:

"Under such a contract and surrender of possession the vendee becomes the beneficial owner, and loss or destruction falls upon him, and many cases decided in other jurisdictions directly hold such contract (either with or without transfer of possession) to be a breach of the condition in question." 72 L. at p. 294.

It is a general rule that the vendee is ordinarily liable to the payment of interest only from the time of taking possession. *Waterman on Specific Performance*, par. 519, citing *Lombard v. Chicago Sinai Congregation*, 75 Ill. 271.

Here the court below, applying a rule of equity, imputes to the city possession by its trustee, the vendor,

where, by the contract and the law the City was not entitled to, and by restraining process of the Supreme Court the City was enjoined from taking possession.

An executory contract usually creates dependent covenants. The vendor must convey, and the vendee must pay the consideration. Each act is a condition precedent to the other. Neither party can require the other to perform, without himself offering to perform; and unless the contract so provides the vendee has no right of possession until he has paid the consideration and so performed the condition precedent. The execution of the contract of sale itself does not give the vendee even a license to enter. 27 R. C. L., Title "*Vendor and Purchaser*," p. 549, par. 285; *Teller v. Schmetz*, 123 App. Div. 883, 108 N. Y. Supp. 325; *Fagan v. Scott*, 14 Hun. 162.

A vendee in possession has physical control of the property and is vested with all the outward indicia of ownership; the full beneficial ownership of the property is his.

With reason, therefore, may the doctrine be asserted that a vendee should bear the loss of that which he controls, possesses and enjoys. But the doctrine does not appeal with equal force where the vendor retains title and control.

Boehm v. Platt, 189 N. Y. Supp. 16, 17, 18.

Although the vendee will be regarded, for many purposes, as the owner, he is not so for all purposes. Under a contract of sale of land, by the terms of which the payment of the purchase money and the delivery of the deed are to be concurrent acts for a future day, the vendee's right to a conveyance is not complete until that day, and he cannot before that day be regarded as the owner. See *Tabor v. Robinson*, 36 Barb. 486; *Smith v. McCluskey*, 45 Barber 612.

The doctrine that the vendee is to be treated in certain cases as the owner is founded on the application of the equitable maxim, that what ought to be done is considered in equity as done. (2 *Crabb's Law of Real*

Property, par 1759, 1760; 2 *Story's Eq. Jur.*, par. 1212); a maxim that does not apply where the contemporaneous acts—the payment of the purchase money and the delivery of the deed—were to take place on a day subsequent. *Wicks v. Bowman*, 5 *Daly* (N. Y.), at page 233.

Where the vendee is let into actual possession, or has by the contract the immediate right to it, there is a reason for his bearing the loss, if the building is subsequently destroyed by fire, as he has entered upon the beneficial enjoyment of the property. (*Aetna F. Ins. Co. v. Tyler*, 16 *Wend.* 396) * * * While, therefore, it may be equitable and just that the vendee should bear the loss where the building is burned down after he enters upon the possession, it is not just nor equitable to impose it upon him whilst the vendor is in possession of the premises. 5 *Daly* at p. 234.

IV.

The vendor must be held to have been left in possession until he showed good title, March 9, 1923.

Where the interest was considerably more than the rents and profits, it was held that the vendor should be left in possession of them *until a good title was shown* and from that time he would be entitled to interest *and the purchaser to reasonable rents and profits, although, in consequence of the destruction of the buildings by fire no rents had been received.* *Waterman Spec. Per* par. 519. Good title is said to be first shown at "the date at which the purchaser comes under an obligation to complete." *Fry on Spec. Per.*, par. 1406.

"Where the bill is filed by the vendor and his title is first made out (that is shown to be good)
* * * the day when the title is made out is the day from which the purchase money begins to draw interest." *Jersey City v. Flinn*, 74 *Eq.* at page 119.

In the instant case the Chancellor denied specific performance because the bill was prematurely filed (.96); so at the time the bill was filed the City was not under obligation to complete the purchase. Hence, it must be *that the complainant did not first show good title at any time prior to the time the bill was filed nor, indeed, at any time whatsoever until final dismissal, in February 1923, of the certiorari proceedings in the Franklin case.* Therefore the vendor must be deemed to have remained in possession, and is not entitled to recover either interest or losses.

V.

The rule has never been extended to sales of personal property.

The rule has never been extended to sales of personalty. 35 Cyc. 343, 345. It has never been applied, except in cases of sales of lands where the rents and interest ordinarily counter-balance, or where, in case of unimproved property, and the vendee refuses to perform, interest on the purchase price is charged against him. Here, however, the rule is extended so that it takes in the operations of a *going water plant*, involving the hiring of labor at an annual cost of thousands of dollars and the purchase of tens of thousands of dollars' worth of coal and other supplies. It is respectfully contended that such an extension of the rule is novel and without precedent to support it.

"It is also held that the rule does not apply in the case of an entire contract for the sale of both real and personal property." 39 Cyc. 1642 and cases cited.

Here the entire plant, except the standpipe and powerhouse lands and their fixtures constitute personal property. *Pipe Line v. Berry*, 53 N. J. L. at p. 216; *People v. Board of Assessors*, 39 N. J. 81; *Newark v. State Board of Taxation*, 67 N. J. L. 246. It is conceded that the case *Newark &c., v. North Arlington*, 65 N. J. L., page 151, and *Newark v. State Board of Taxa-*

tion, 66 N. J. L. at p. 470, appear to be against the contention of the City of Millville in this behalf. But the latter case was reversed on grounds which go to the merits of the point now under discussion, and the reversal in that case in effect overruled Mr. Justice Collins in *Newark &c., v. North Arlington*. It is suggested, also, that Mr. Justice Collins, in writing the opinion in the North Arlington case founded his conclusions that street railway tracks constitute real estate on New York cases which related to steam railroads, where the railroad company owned the soil, or at least an easement therein, while a street railway or a gas or water company have no easement in the soil. *Newark v. Board*, 67 L. 246.

VI.

The rule of equity adopted below cannot be invoked to set up a trust where a private water company must be held to have operated and maintained a water plant as trustee for a municipality of the State, free from all safe-guards and restraints surrounding the management of municipal affairs and the public business of a municipal corporation.

Such an arrangement could not have been entered into voluntarily by the City, because plainly ultra vires. And it is elemental that what a municipality cannot lawfully do directly it cannot do by indirect means. No precedent is pointed out by which it ever has been held that such an arrangement, wholly beyond the power of a municipality, has been imposed upon the public by the indirect means adopted in this case—the assumption by the court of a barren principle of equity which imputes to the City in contemplation of the court, the doing of something it was restrained from doing and was powerless to do.

The authorities of Millville would have been guilty of malfeasance in office if they had voluntarily turned over to a private company the operation of its municipal water plant. Yet the court, applying a maxim of equity, de-

crees that the City actually has done so and that the losses sustained by its trustees must be borne by the taxpayers of the City. Such an application of the equitable rule is dangerous and without precedent.

The court, for relief of a private suitor, ought not create, by mere contemplation of law, a situation that involves the City in a contractual relation wholly ultra vires the City and likely to be detrimental to the public interest.

VII.

The tender set up in the bill of complaint was not good; so that interest did not run thereafter.

The general rule is, that after the settlement day has been postponed to an indefinite day, reasonable notice demanding settlement must be given.

The settlement day agreed upon had been postponed by force of the writ in the Adams case. When the time fixed in a contract of sale of real estate has passed, with no offer to perform by either party, though time is of the essence, the time of performance becomes indefinite, though remaining mutual and dependent, and neither party may put the other in default without an offer to perform. *Ready v. Sound Inv. Co.*, 64 Wash. 422.

But, in such case, where the settlement day has been postponed, it has been held that the other party is entitled to *reasonable time after demand made, to perform*. *More v. Smedley*, 8 Paige (N. Y.) 600. That was a case where the vendee made demand, but the principle is equally applicable where the vendor makes tender.

"The law is that a day fixed in a contract for closing title, without more, is merely formal, but if it is stipulated that time is of the essence, or the circumstances are persuasive that that is the case, prompt performance is essential; and it is also the law that, where the time fixed is regarded as a formality only, and the period has gone by, or where time is of the essence, and there is a waiver, time may be made of the essence by

formal demand that the title be closed by a given day, but the time given must be reasonable." V. C. Backes, in *Orange Soc. &c. v. Konsky*, 121 At. 448, 450. In that case it was held *demand for performance in seven days was unreasonable.*

In the Konsky case it was held demand for performance in seven days was unreasonable; yet in this case demand was made of the defendant municipal corporation for instant payment of the purchase price in a transaction where the vendor knew the vendee was obliged to issue bonds to raise the \$125,000 of purchase. See Sec. 2 of Resolution 360, Adams case, page 9, accepting the proposal to sell. To issue even temporary bonds requires considerable time. Therefore, demand for immediate performance was unreasonable, and the tender of the deed was wholly nugatory. The City, however, proceeded forthwith after the tender was made to attempt to issue its bonds, when the proceedings for that purpose were stayed by the second certiorari proceedings, the Franklin case.

After the settlement day had been postponed to an indefinite day, reasonable notice demanding settlement was required to be given; and since the settlement, which it was agreed was to be on or before January 1, 1921, had been indefinitely postponed by force of the Adams writ, it was incumbent upon complainant, in order that it put the City in default, to fix a new day for settlement on reasonable notice. Such reasonable notice, under the circumstances, should have allowed sufficient time to the City to raise the money by issuance of temporary bonds, at least. The Water Company knew the City proposed to issue bonds to raise the purchase money to pay for the plant. See Resolution 360, C. 8. Hence the peremptory demand for performance, coupled with tender of the deed, was nugatory.

In New York and Mississippi the rule is that payment must be demanded, *a reasonable length of time allowed to elapse and then another demand made.* But if a refusal be made on the first demand a second demand

is not necessary. 29 *Am. & Eng. Enc. of L.* (2d Ed.) title "Vendor and Purchaser," page 699, and cases in notes 4 and 5.

In principle, after the settlement day had gone by, performance was required to be on demand. But, where by the terms of the contract, performance by one party is to take place upon performance by the other, or upon demand, there should be allowed a reasonable time after such performance or demand. 29 *Am. & Eng. Enc. of L.*, 2d Ed., p. 699, 4, and numerous cases in note 14. And see *Stickler v. Dunbar*, 45 *Iowa* 34, where it was held that if a condition in a deed makes interest on the purchase price payable annually "If required or demanded" a reasonable time should be allowed after demand in which to make payment.

2. The tender of the deed was not good because the deed was not duly stamped, nor were the stamps affixed thereto, nor the stamps afterwards forwarded to the clerk, cancelled, as required by the U. S. Revenue Law. The Revenue Act approved November 23, 1921, provides:

Sec. 1100. That on and after January 1, 1922, there shall be * * * collected and paid, for and in respect of the * * * documents &c., mentioned in Schedule A, &c. the several taxes mentioned in such schedule.

Sec. 1102. That whoever * * * makes or accepts, any instrument, document &c., without the full amount of tax thereon being duly paid * * * is guilty of a misdemeanor &c.

Sec. 1104. That whenever an adhesive stamp is used for denoting any tax imposed by this title, except as hereinafter provided, the person using or affixing the same shall write on stamps or cause to be written or stamped thereon the initials of his or its name and the date upon which the same is attached or used so that the same may not again be used; provided, that the Commissioner may provide such other method

for the cancellation of such stamps as he may deem expedient.

Schedule A.—Stamp Taxes.

6. Conveyances: Deed, instrument or writing whereby any lands, tenements or other realty sold shall be granted, when the consideration &c. exceeds \$100, and does not exceed \$500 fifty cents for each additional \$500 or fractional part thereof, fifty cents.

The testimony in the Franklin case, made part of this case, at page 47, shows that only \$62.50 of stamps were affixed to the deed. None of these was cancelled. An additional \$62.50 of stamps was sent to the clerk, and held by him as stated in the testimony of Mr. Horton, p. 48. The deed was delivered and accepted March 9, 1923, when the additional \$62.50 of stamps were attached to the deed, and the whole \$125 of them cancelled that day as will appear by the deed itself, which will be shown to the court.

The City, therefore, respectfully asserts that the deed, when tendered, was void and the so-called tender a nullity, because the conveyance was not good and sufficient in the law, and the acceptance of it would have made the City officials guilty of a misdemeanor.

VIII.

The rule does not contemplate that a purchaser shall stand losses sustained by the vendor in carrying on a going business.

Even if the court shall hold that the rule is applicable in cases of sales of pipes and mains of a water plant, on the authority of Pomeroy cited by the Vice-Chancellor, yet this authority does not intimate nor does any other authority hold, that the rule could be applied in such manner as to constitute a public utility corporation trustee for a municipality, so that the public must stand the burden of losses sustained through operation of a utility plant by such a trustee. Losses resulting from destruction of the property to be conveyed, as in case of

fire, are not of the same character as losses sustained from operation of the plant, and in determining the liability for such losses different principles ought to govern.

IX.

It cannot be considered that the water plant was being operated by the company as a trustee for the City merely because the City paid the quarterly water bills.

The Water Company continued in possession of the plant after the certiorari was served in the Adams case. From the time the plant was built about twenty years ago the Water Company had supplied the City with water under the terms of the contract provided for by Ordinance 73. (C. 105.) Payments of \$2,500 each had been made quarterly on May 1, August 1, November 1, and February 1, of each year, for many years prior to 1921 for the water supplied under the terms of the contract. See the amendment to the answer, C. 93, 94 and 95.

On February 1, 1921, no quarterly bill was presented by the company for the water service rendered for the quarter beginning November 1, 1920, and ending February 1, 1921; but on May 19, 1921, the Water Company put in a claim for payment of \$5,000 on the theory that that sum, at least, was due either (a) on account of the purchase price of the plant or (b) for water service for the preceding two quarter years. The sworn claim in that behalf is shown at pages 14, 15 and 16. The \$5,000 was ordered paid May 20, 1921, and the warrant forwarded by the Clerk with the letter *Exhibit F*, shown at pp. 16-17. Correspondence between the Water Company and the City Solicitor regarding the effect of paying these bills is shown in the Franklin case at pages 51, 52, 53, 54, the pertinent part being at page 54.

The City for years had paid for water service \$2,500 per quarter; and it continued to make such quarterly payments to that amount after the service of the writ in the Adams case, except that there were two quarters paid

for in May, 1921. The City was obliged to make those payments whether or not the sale was valid, from the viewpoint of the Water Company; and that was so. The Company might have been justified in ceasing to render the water service unless the payments were made. Under such conditions, therefore, it was but prudent on the part of the City to make the payments.

It is true the Clerk recited, in his letter, that the order for \$5,000 was tendered in accordance with the bill presented by Mr. Roth, "and in accordance with the *agreement* attached to said bill." There is, of course, no agreement attached to the bill; but, giving the letter the construction most adverse to the City, the Clerk may have meant that the warrant was forwarded in conformity with the explanation of the Water Company annexed to the bill.

The City, in its answer, sets up (p. 20):

* * * That the attitude of the City regarding the payment by the City of the moneys demanded in paragraph fifteen (of the Bill, C. 6) is set forth in the letter of its City Solicitor to Peoples Water Company of Millville, New Jersey, a copy of which is set forth in the State of the case hereinafter referred to Sir John Franklin, prosecutor, v. John S. Horton, City Clerk of Millville et al., respondents, at page 40 (In the reprint in this case, Franklin case, at page 51, 54, 55.)

Turning to this letter it will be there found recited (p. 54, line 36, &c.) that the municipal proceeding for payment of the bill was by mere motion to pay the bill, without comment. However, assuming that the recitals in the company's bill were read, understood and debated, the City yet maintains that the mere assent, expressed or implied, of the Board of Commissioners on May 20, 1921, could not bind the City to transfer the legal title of the Water Company into an equitable title in the City so that, not only from thenceforward until the litigation was settled, but from a date long prior thereto, the City assumed and became liable for thousands of dollars for

interest and for losses sustained in operating the water plant. The succinct statement of the City's position, stated at page 55 of the Franklin case, is founded on principles of justice and fair dealing with the public.

If the City was not, on May 20, 1921, legally obliged to pay interest, and the losses that had been sustained, there was no consideration moving to the City which could warrant the Commissioners in assuming to pay, on behalf of the City, the interest that had accrued, and would accrue, on the purchase price, and the several thousands of dollars of losses which already had been sustained, and were then accumulating and would thereafter accrue.

The Company put in their request that the \$5,000 bill and the subsequent quarterly bills of \$2,500 each be paid on the theory, that, in the alternative, those sums were due either (a) as water rental or (b) for losses sustained by its operation of the plant "in the interest of the City." But there was still another theory under which these sums were due, viz, that the plant was yet being operated by the Company under the original water contract, contained in Ordinance 73 and would continue so to be until the settlement day, which had been postponed, actually arrived. The \$5,000 paid May 20, 1921, and the quarterly payments made thereafter must be deemed to have been paid by the City on the last theory whatever the recitals of the Water Company expressed in their statements were, whatever their belief may have been, and whatever the belief of the Commissioners may have been; for it is only on that ground the payments may be justified.

The legal situation of the parties was established (1) by the solemn agreement made by the people, at the election, when they ratified the resolution of purchase (C. 85) and (2) by the operation of legal principles which became effective touching that contract when the writ of certiorari was allowed. And neither the company by its recitals, nor the City Commissioners, could alter those relations then existing between the parties.

But, if it was within the power of the Commissioners to modify the relations then legally existent, on May 20, 1920, by Ordinance, assuredly they could not do so by mere motion to pay a bill.

X.

The tender of the deed was coupled with unlawful conditions.

It is respectfully submitted that interest ought not run from the date of the alleged tender of the deed because the tender was not conditioned on mere payment of the purchase price, only, but was coupled in an effective way with demand for payments of other sums of money not connected with, or arising out of, or due under the contract of purchase. This appears from the letter accompanying the tender of the deed printed in the Franklin case at page 57 &c.

Defendant was not required to accept the deed under the conditions imposed, and the tender therefore was void.

XI.

The vendor is not entitled to be reimbursed for losses during the operation of the plant, on principles adopted by the courts of New Jersey.

1. In *Jersey City v. Flinn* the City was operating under a contract made with Flinn under the act of 1888 for supplying water to Jersey City. The City voted to buy the water plant during the operation of the contract, and questions similar to if not identical with, those presented in this case were before the Court.

Vice Chancellor Stevenson, in *Jersey City v. Flinn*, 74 N. J. Eq. at page 115, said:

"It is true that, speaking generally, equity regards the vendee as a purchaser from whom the vendor holds the legal title in trust, but the doctrine is not carried to an unwarrantable extreme. It is kept within reasonable limits by

the perfectly well-settled rule that in the absence of express stipulation the purchaser takes the rents and profits and pays interest on the purchase money only from the time fixed for the completion of the contract; not from the time of its execution. *Fry Spec. Perf.* 891; *King v. Ruckman*, 24 N. J. Eq. (9 C. E. Gr.) 298; *DeVisme v. DeVisme, v McN. & Gor.* 336, and, as I shall show hereafter, not always as early as that. And again the court never applies the doctrine in such a way as to override the express stipulation of the parties. I have already shown that this requires the water to be paid for by the million gallons until the time of the completion of the purchase by the transfer of the title and payment of the price. And so the express stipulation is in conformity with the rule of equity which would prevail in the absence of express stipulation on the subject."

"Looking, therefore, at the original agreement alone, it is quite plain that the City was required to pay for the water by the million gallons at the schedule rates, until it actually took the title and paid the price."

The principles laid down in the Jersey City case seem to be applicable to the case at bar. Here, as in that case, it must be "*held* that under the original contract, the effect of a popular vote of acceptance and notice to the contractor was not to abrogate provisions of the contract as to supplying water for twenty-five years by the million gallons, and to put the City in the position of one who had merely agreed to purchase, but that the City was required to pay for the water by the million gallons until it actually took title and paid the price." *Jersey City v. Flinn*, 74 N. J. Eq., page 105. Syllabus, paragraph one.

The general principles laid down in the authorities are in accordance with the rules laid down in *Jersey City v. Flinn*.

"The right to or accountability for rents and profits is frequently treated as correlative with or dependent upon the liability for or payment of interest on purchase money, the one being ordinarily treated as equivalent to the other, and the cases proceeding upon the principle that unless there is some agreement or equitable consideration to the contrary, one party should not have both the property and the purchase money or the proceeds thereof without accountability for either." 39 Cyc. 1630 e.

Therefore, in this case, the City of Millville is entitled to the benefit of the interest on the purchase price and the vendor has the rents, issues and profits of the same, as was the municipality in the Jersey City case. If the profits of the water plant were large during the period in question then the Water Company is benefited thereby. On the other hand if the profits were small or the plant was actually operated at a loss, the principle still applies, as in the Jersey City case.

"But if the contractual obligation to pay for the water by the million gallons did not terminate when the City notified the company of the popular vote, and if it did not terminate upon the filing of the bill, when did it terminate? There are two, and only two, possible periods. Either the last day named for test and acceptance (October 1st, 1905) or the date of the decree." Vice-Chancellor Stevenson in the Jersey City case, 74 E, at page 119.

Similarly in this case there were only two possible dates when the obligation to pay for the water by contract could be held to terminate, viz., either on January first, 1921, or at the date of the decree entered March 6, 1923. The contract of purchase could not have become effective January first, 1921, because of the stay growing out of the Supreme Court. Since that day is not a possible one at which the contract for the supply of water by the million gallons terminated, then the only

other possible date when the old contract did terminate and the contract of purchase did become effective is the date fixed in the case by decree of the court, to wit, March 6, 1923.

2. In *King v. Ruckman*, *Court of Errors*, 24 N. J. Eq., page 556, it was held that when a vendor refuses to convey real estate according to his agreement and keeps the vendee out of possession, and the rents and profits are less than the interest on the purchase money, the vendor will not be allowed such interest. Under such circumstances the vendor will take the interim rents and profits and the vendee will not be required to pay interest on the purchase money. Said Chief Justice Beasley in that case:

"That the vendee, if kept out of possession by the vendor, would not be charged with interest, was referred to, as a settled rule, by Lord Hardwicke, in the case of *Blount v. Blount*, 3 Atk. 636, and from that time to the present, this rule can be traced in constant use through a long line of decisions. * * * I consider, then, the rule to be indisputable; then why is it not applicable to this suit?

"This rule, as I conceive the subject is put in force in every case in which these three qualities enter; first, the rents and profits must fall below the interest; second, the delay must be the fault of the vendor; and, third, the vendee must be out of possession. I do not find, that in any case in which these three elements exist, interest has been exacted." 24 N. J. Eq., at page 561.

It is respectfully submitted that this rule is put in force in this case because the three qualities referred to by Chief Justice Beasley entered. First, the rents and profits fall below the interest. Second, the delay is the fault of the vendor, in a legal sense (although whether or not the default of the vendor was voluntary or involuntary is immaterial), because at the time stipulated he did not tender title and possession; for there is no

reason why the complainant could not have tendered title and possession *prior* to the allowance of the writ of certiorari which was issued on December thirtieth, 1920, since settlement was to be made *on or before* January first, 1921. Third, the vendee is (or was) out of possession.

The rule laid down by Chief Justice Beasley in the Ruckman case is followed in the textbooks. 29 *Am. & Eng. Enc. of L.*, at page 710, and cases cited in note 9.

XII.

The City is not obliged to pay for the supplies on hand.

1. The theory on which this claim is based, is that the vendor became a trustee for the purchaser, respecting these supplies, on January first, 1921, and thereafter operated the plant and held, or acquired, the supplies as trustees for the benefit of the City.

Defendant claims that under the municipal law of New Jersey, it could not authorize the purchase of supplies, by contract express or implied, except in the manner provided by the Statute, and through its own officers. Under the provisions of the Home Rule Act of 1917 as well as under the Crimes Act it is provided that all purchases of supplies must be made by advertising where the value of the same is in excess of \$500; and if the supplies referred to are something additional to those which are necessarily incidental to the operation of the plant and went with the plant as a going concern then the City could not lawfully have purchased such supplies, save in accordance with the provisions of the statute.

XIII.

The coal and other supplies necessary to the operation of the plant, delivered with the plant to the City on March 9th, 1923, were, by the terms of the contract, intended to be included as a part of the property sold, to wit, the "entire plant" of the Water Company.

The offer was (Adams case, page 8,) to sell the "entire plant" to the City for the sum of \$125,000 clear of all encumbrances. Ordinarily the language used in the deed which was tendered March 3, 1922, and was accepted by the City on March 9, 1923, would conclude the City of Millville touching the demand now made that the City pay the value of the supplies on hand, in addition to the purchase price of \$125,000; for, contained in the deed, is this language:

"Also all the property and franchises of the said party of the first part real, personal and mixed, including its lands, pumping station, buildings, machinery, pipes, apparatus and equipment (excepting, however, accounts receivable, cash on hand and in banks, *supplies on hand* and the franchise to be a corporation) situated in the County of Cumberland and State of New Jersey."

The deed, however, was accepted by the City because its equities touching the points now under discussion were especially reserved by the decree of March 6, 1923.

Under the terms of the contract of sale entered into between the Water Company and the City the ordinary supplies on hand must have been intended to go with the plant, which by plain implication was intended to be sold and conveyed as a going concern, as a whole, as a plant.

It must be conceded that the City was to take a going concern, fully equipped, and in a condition to continue the delivery of a supply of water to the inhabitants of the City of Millville, for public and private uses. The term "plant" is defined as "the fixtures, machinery, tools, apparatus, appliances, etc., necessary to *carry on* any trade

or mechanical business." 17 *Am. and Eng. (2d Ed.)*, 834.

The City respectfully maintains that all of the ordinary supplies on hand which were used, necessarily, in the operation or maintenance of the plant, went with it and were included in the property sold, because the supplies formed part of the entire plant. To paraphrase the language of Vice-Chancellor Backes, in dealing with a subject somewhat similar (*Chancellor v. Cruse*, 83 *N. J. L.*, at page 234), the supplies had become and "*were integral parts of a common plant*" and with the pumping station and water system "*formed a unit for the prosecution of a common purpose.*" No doubt the conveyance of a property "*as a whole, as a plant,*" by the general understanding of the bar, carries the entire property, real, personal and mixed, of a going concern, including all tools, appliances, supplies, and other things necessarily incident to the carrying on and continuance of the business and the maintenance of the property.

For these reasons defendant claims that the supplies on hand, which were delivered to the City March 9, 1923, when the rest of the property was turned over, were an integral part of the water plant and formed a unit for the prosecution of the common purpose of supplying water to the domestic consumers and public of the City of Millville.

XIV.

It is not lawful for the City to pay for the service pipes but it is willing to do so if a legal method can be found.

These service pipes were put in under the Resolution (C. 17) referred to in *Franklin v. Horton*, 116 *Atlantic*, page 175. The Resolution itself is found at the top of page 176 of the reported case and reads as follows:

Resolved, that if any extensions of water mains or other improvements to the plant of the Peoples Water Company are installed by the Water Company, at the request or approval of

the Board of Commissioners, the costs of said extensions or improvements shall be added to the purchase price of the plant, and paid for by the City at the time of settlement for the plant, under the agreement of purchase, if the contract of purchase be adjudged valid, and if the contract of purchase be adjudged invalid, then the expense of such extensions and improvements shall be borne by the Water Company.

The City of Millville admits that pursuant to the terms of this Resolution, and at the request and with the approval of the Board of Commissioners, the water extensions were installed.

Nevertheless the Resolution was held unlawful because it was not laid over for two weeks. 116 *Atlantic*, 175.

The attitude of the City was expressed in the letter written by the City Solicitor to the Peoples Water Company which is printed in the Franklin case at page 37. He wrote—

“Third. Regarding the cost of service pipes authorized to be installed under resolutions of the City Commissioners, \$6,265.66, it seems by the decision of the Supreme Court rendered last week that the extensions were not lawful because the resolution was not laid over for two weeks. At an informal discussion at my office on Friday Mr. Ware (misprinted Mr. Water) and Mr. Simmerman both expressed the thought that the City should provide for the taking over of these extensions. I do not believe that there will be any differences between the City and your Company because of the decision of the Supreme Court last mentioned.”

Counsel repeats here what was said below, that if the court shall indicate some method of lawfully paying the costs of these extensions the City of Millville will not object to it, and, if proper, will consent to it. If the Court of Errors adheres to the view of the Vice Chancellor regarding these extensions, then the counsel for the

City will advise the Board of Commissioners to adopt a proper Ordinance or Resolution which will provide for the payment of the extensions.

XIV.

The City is entitled to the additional taxes that accrued in 1921, 1922 and for a proportionate part of the taxes of 1923.

"Generally in the absence of express agreement the vendor must pay all taxes which are a lien at the time of the contract, and except where the purchaser is in possession the taxes accruing between the date of the contract and the time for its completion. If the vendor retains the possession and use of the property he must pay the taxes accruing while he is in possession, and must continue to do so even after the time for the completion of the contract if he is the party responsible for the delay." 39 Cyc. 1643-45.

"The purchaser must pay the taxes and assessments for which he is liable under the provisions of the contract, or of the deed, and except in so far as the rule may be varied by agreement or by a retention of possession by the vendor, will ordinarily be liable for all taxes accruing after the execution of the contract where it is of such a character as to constitute the purchaser the equitable owner of the property, and for taxes which become a lien after the conveyance." *Ibid.*, page 1635-1636.

Under these principles it would seem that the Water Company should pay the taxes for the years 1921 and 1922. These taxes were assessed by the local Board of Assessors against the Peoples Water Company and no appeal was taken therefrom. On settlement the amount of the taxes and the costs should be ascertained by a master, or by the court, and allowed in the decree.

Taxes for 1923 should be apportioned under the statute.
(P. L. 1919, p. 118, 119.

Respectfully submitted,
LOUIS H. MILLER,

Of Counsel with the City of Millville.

October 25th, 1923.

