INDEX.

	PAGE.
Writ,	1
Return,	6
Answer,	6
Petition to Move Boardwalk,	12
Demurrer,	13
Notice to Strike Return,	14
Opinion,	15
Notice of Appeal,	18
Judgment,	19

MacCrellish & Quigley Co., Printers, Trenton, N. J.

New Jersey Supreme Court.

RICHARD MCALLISTER ET AL.
Relators,
vs.
ATLANTIC CITY,
Respondents.
} On Mandamus.

WRIT.

(*Returnable August 11, 1916.*)

NEW JERSEY, *ss.*—The State of New Jersey to Atlantic City, GREETING:
[SEAL.]

Whereas, on the eighth day of April, 1907, Richard McAllister, Henry C. Schmidt, and Edward C. Schmidt, were jointly owners of a tract of land in Atlantic City, New Jersey, situate in the west line of Rhode Island Avenue one hundred ninety feet south of the south line of Oriental Avenue, and running thence (1) westwardly and parallel with Oriental Avenue eighty feet, and thence (2) southwardly between parallel lines of the width of eighty feet to the exterior line established by the Commissioners appointed under the authority of an act entitled "An Act to ascertain the rights of the State and of riparian owners in lands lying under the waters of the Bay of New York and elsewhere in this State."

And whereas, by deed dated the eighth day of April, 1907, and recorded in the Clerk's Office of the County of Atlantic, at Mays Landing, in Book 380 of Deeds, page 237, &c., said parties "For and in consideration of the premises and the sum of one dollar, lawful money of the United States of America, well and truly paid by the said party of the second part (Atlantic City), the said parties of the first part, at and before the ensealing and delivery of these presents, the receipt of which is hereby acknowledged, and in consideration of the benefit and advantage to be derived by the parties of the first part by the laying out of the said park within the boundaries aforesaid, and building said walk, and in consideration also that the lands of the said parties of the first part will not be condemned, as is provided by the act of the Legislature and ordinance above referred to," granted and conveyed to Atlantic City, its successors and assigns, all their and each of their right, title and interest in and to all their land above described, beginning in the interior line of the public park of Atlantic City and running southwardly to said exterior line; and whereas, said City resolved to open and lay out along its beach or ocean front a public park or place for public resort and recreation, and to devote the lands within the limits of such park or place of resort to such uses exclusively, under and by virtue of an act of the Legislature of the State of New Jersey, entitled "An Act to enable cities in this State located on or near the ocean, and embracing within their limits or jurisdiction any beach or ocean front, to open and lay out a public park or place for public resort or recreation on and along the beach or ocean front of such City, and to purchase or condemn lands, property and rights therefor, and to preserve the same from obstruction and encroachment," approved April 26, 1894; and whereas, the City Council of the said City for this purpose did, on the ninth day of October,

1899, duly pass an ordinance of the said City to lay out and open such park and to establish the interior or inland lines therefor, and said City Council did, in pursuance of the powers and authority given by said act, and in pursuance of its provisions, establish the inland line of said park and suitably marked the same upon the ground, and did cause a description of the same to be filed in the office of the City Clerk of said City, in pursuance of and in conformity with the provisions and directions of the said act, all of which is recited in full in said deed;

And whereas, it is recited in said deed among other things as follows: "Now for the purpose of enabling the said City to use the land lying oceanward of the inland line (referring to said park) so established and so to be established, and within the boundaries above designated, as a public park and place of resort and recreation, in pursuance of the provisions of the said act," and further "To have and to hold said premises with all and singular the appurtenances, unto the said party of the second part, and its successors, for, and only for, use as a public park or place of resort and recreation, giving to said party of the second part, and to its successors, however, the right to construct, reconstruct, repair, complete and maintain upon the land so conveyed along the interior or inland line of said park or place for public resort as established as aforesaid, an elevated public boardwalk, in accordance with the provisions of the said act, but subject to the following conditions and restrictions: * * * Fourth, that the lands hereby granted and dedicated to public use shall forever be and remain open, so that the view oceanward from the elevated public walk erected, and to be erected as above mentioned, shall be free, open and unobstructed, and that no use shall be made of the said land by the grantee, its successors or assigns, in-

consistent with its use as a public park or place for public resort and recreation."

And whereas, no consideration passed to said parties for the grant so made to Atlantic City except the consideration of advantage not to have their lands condemned under and in pursuance of the said recited act and the enjoyment of the existence and maintenance of said public park with its accruing advantage to the remaining land of said grantors.

And, whereas, at the time of the execution and delivery of said deed by said parties to Atlantic City, there existed a certain pier built of wood, iron and steel, and commonly known as Heinz Pier, and which is connected with the public boardwalk in said City, is approximately forty feet in width, and extends into the ocean in a diagonal course for about five hundred feet, on which are two enclosed pavilions, the outer or larger one being oceanward of the exterior line aforesaid and not within the lines of the said public park, and the smaller one being inland of said exterior line and within the line of said park, but neither of which buildings are on the land which said parties granted and conveyed to said Atlantic City, but about one hundred feet of the said pier, between the two pavilions, crosses one corner of the land which the parties conveyed to said City for park purposes; and whereas, said City is the owner by grant or condemnation of all the land within the line of said public park with the exception of properties known as the Heinz Pier rights in Wootton tract, the Heinz Pier rights in petitioners' tract, Garden Pier, Steel Pier, Steeplechase Pier, the Old Young's Pier, and the Lindley tract, which represent a small fraction in area of the entire public park tract; and whereas, said parties have petitioned the Board of Commissioners of Atlantic City to purchase or condemn said Heinz Pier, and remove so much of the same as is within the limits of said public park in order to complete and perfect said park within the meaning and intent of said

act of 1894, and the ordinances and deeds pursuant thereto, and they have refused to act, as by their complaint we have understood.

We, therefore, being willing that due and speedy justice should be done in this behalf, demand and strictly enjoin you that you procure title to all the land within the limits of said public park upon which said Heinz Pier is located, and the title and ownership of said pier by purchase, condemnation or otherwise, and cause so much of the said pier as is within the limits of said park to be wholly removed therefrom, and that you proceed without delay in whatever may be legally necessary to accomplish the removal of said pier to the extent named in order that said public park "shall forever be and remain open, so that the view oceanward from the said elevated public walk, erected and to be erected as above mentioned, shall be free, open and unobstructed, and that no use shall be made of the said land by the grantee, its successors or assigns, inconsistent with its use as a public park or place for public resort and recreation," or cause to us to the contrary signify, lest in your default complaint should come to us to be repeated; and how you should execute this command, certify to our Justices of our Supreme Court of Judicature, at Trenton, on the eleventh day of August next, together with this our writ, and this in nowise omit on your peril.

Witness William S. Gummere, Esquire Chief Justice of our said Supreme Court, at Trenton, on the 22d day of July, 1916.

WM. C. GEBHARDT,
Clerk.

C. L. COLE,
Attorney.

NEW JERSEY SUPREME COURT.
February Term, 1916.

RICHARD MCALLISTER ET AL.
vs.
ATLANTIC CITY.
} Mandamus.

RETURN.

(Filed August 25, 1916.)

To the Honorable Justices of the Supreme Court of New Jersey:

The City of Atlantic City, to whom the said writ is directed, does herewith make return thereto to your Honors, and asserts and certifies that all the statements set forth in said writ are not true; that it admits as true the several recitals set forth in the writ heretofore issued in this cause, except such allegations as are hereinafter expressly denied; but answers that it should not be compelled to carry out the mandate of said writ for the following reasons:

1. That the necessity or expediency of procuring title by the City of Atlantic City of the land within its ocean park upon which said Heinz Pier is located, and the title and ownership of such pier, is not a judicial question; but is vested in Atlantic City.

2. That the statutes authorizing the City to acquire lands on its ocean front for public park purposes contained no provisions fixing and determining the time in which all lands constituting a part of said ocean-front park should be acquired, and such taking is a matter within the judgment of the governing body of the City, and not of the relator, nor of this court.

3. That the relators are not proper parties to receive the relief sought, because at the time when the relators conveyed said land to said City for public park purposes, the Heinz Pier was upon the premises conveyed, and its

presence was acknowledged by and assented to by the relators, who, during the years from 1907 to 1913, both inclusive, demanded and received from the owners of the pier, large sums of money annually, as a rental of the pier, which sums were not paid to Atlantic City, the relators grantee under said deed of April 22, 1907: but were retained by the relators, and no demand for removal of said pier was ever made until the owner of the pier refused to pay an increase of $1,500 in rent when in 1914, $2,500 was demanded instead of $1,000 demanded and paid for the year 1913, and this court will not permit its process in this cause sought, to issue for the purpose of enforcing the payment of rent.

4. That said pier was on said premises by virtue of the following circumstances:

The Atlantic City Ocean Pier Company was incorporated May 2d, 1885.

The City of Atlantic City passed an ordinance on May 11th, 1885, authorizing the construction of an iron pier at the foot of Massachusetts Avenue out into the Atlantic Ocean in Atlantic City, N. J.

Pursuant to the authority and permission conferred by said order and said charter, the said Company erected said pier, and that pier is the pier now known as Heinz Pier, which said pier, by sundry mesne conveyances, all duly recorded, passed from the said Company into H. J. Heinz Company, the present owners.

On December 31st, 1902, when the plaintiffs became the registered owner of the land described in their petition, the pier was actually existing on the ground conveyed by them to the defendant.

5. That prior to April 22d, 1907, the date of the deed of the relator to said City, said lands, or adjoining lands, were subject to an agreement dedicating for public street purpose, a 60 feet wide street known as the Boardwalk, across the lands owned by the relator, upon which a public boardwalk had been erected and was then in use. Said Boardwalk agreement contained

the following provision: "And that wherever, because of the formation of land by accretion, the high-water line shall not be less than three hundred feet oceanward from the present location, the City Council shall, upon the written request of the grantors hereto, owning not less than three contiguous squares of land, who shall give the right of way for such purpose, cause the same to be moved oceanward said three hundred feet or any less distance that said owners and City Council may agree upon."

Prior to said April 22d, 1907, the land oceanward of the Boardwalk lying between Connecticut and Maine Avenues (a distance of five contiguous blocks), had moved oceanward so that the high-water line of the Atlantic Ocean was more than three hundred feet oceanward of the said sixty feet wide street known as the Boardwalk, and the relator and others, owners of more than three of said contiguous blocks, petitioned City Council of said City to move said Boardwalk oceanward, as shown by one petition, copy hereto annexed. Said City Council did offer to move said Boardwalk oceanward provided the owners within said five blocks conveyed the lands oceanward of the line of the Boardwalk to be newly located, for ocean park purposes. In consideration, therefore, of the great amount of land available for building and other purposes, which the relators could enjoy by reason of the relocation of the Boardwalk, land worth more than $30,000, they did sign the deed of April 22d, 1907, conveying land upon which said Heinz Pier extended for a short distance, to the City for park purposes, and said Boardwalk was relocated and newly constructed along the inner line of the park as delineated in said deed.

6. That in order to comply with the request of property owners, including the relators, who petitioned said City Council to move said Boardwalk oceanward, it was necessary to destroy or make valueless approximately 300 feet of said Heinz Pier, and build a new entrance

to said pier, and said City Council thereupon did negotiate with the owners of said pier, and did secure from them consent to go through said pier with its new Boardwalk, and was freed from any claim or damages occasioned by destruction of the portion of the pier inland of the newly-located Boardwalk, and to that end did pass the following resolution: "Resolution Relative to Consent from H. J. Heinz Company for the Relocation of a Boardwalk 40 ft. wide along the Interior Line of Beach Front Park.

"*Be It Resolved* by the City Council of the City of Atlantic City, that for and in consideration of a consent in writing, approved by the Streets, Walks and Drives Committee of City Council, from H. J. Heinz and Company of Pittsburgh, for the relocation of a boardwalk forty feet wide along the interior line of the Beach Front Park, located by ordinance of April 10, 1907, said location cutting through at that width the iron pier located at the ocean end of Massachusetts Avenue; that the City of Atlantic City will not interfere with or disturb the present occupancy or possession of said company with said pier, as now erected on lands owned, or hereafter acquired by the City, within the limits of said Beach Front Park, unless such interference or disturbance shall be by condemnation proceedings instituted against all piers on the ocean front carrying out a scheme for the acquirement by the City of all lands within said Beach Front Park; that the Mayor and City Clerk be hereby authorized to sign such agreement."

The agreement aforesaid was entered into and actually completed by both of the parties therein mentioned, according to its terms. That the relators knew of this resolution, profited by it because it allowed the Boardwalk to be promptly moved, and said resolution thereby made effective the true consideration of the deed to April 22, 1907, viz: the acquisition of lands inside of a newly-located Boardwalk in return for a grant to

the City for ocean-park purposes, wherefore the relators should not be heard, to force the City to violate its solemn agreement and promise as contained in said resolution made to the owners of said pier, and which enured to the benefit of the relators.

7. That the City should not be placed in a position whereby a grantor of said lands to the City, by an order of this court, may compel it to condemn, at a time or times solely at the discretion of such grantor, *all* piers on said beach front, and defendant submits that all land, excepting a few parcels of land on its beach front, has been secured for park purposes, and that on five of these parcels, there are respectively Heinz Pier, Garden Pier, Steel Pier, Young's Old Pier and Million Dollar Pier, which piers, and the land on which they stand, have a value exceeding 3,000,000 of dollars, and are a public necessity in Atlantic City, furnishing rest, entertainment and comfort to hundreds of thousands of residents and visitors, public policy forbidding the elimination of these necessary adjuncts to the beach front of Atlantic City, and which adjuncts are properly a part of a beach front public park.

8. That it would be impossible for the City of Atlantic City to carry out at this time its intention to acquire the few remaining tracts of land not now deeded to it for park purposes, and on which piers are erected, because of its inability to sell or dispose of its bonds or securities to be issued therefor, as its limit of bonded indebtedness, which determines the market ability of such bonds, will be reached upon the issue of additional bonds in the amount of $1,050,000, whereas it would require a fund of over $3,000,000 to acquire such tracts. Such action, also, would so add to the bonded indebtedness of the City that it would be impossible to sell any bonds which said City may require to be issued for its usual improvements and other lawful purposes, the cost of which must be met by bond issues.

9. That the mandate of the Court, if executed, would fail to benefit the relators, and no good would result to them, because it would remove but approximately 100 feet of said pier, that portion only being upon the land formerly owned by the relators, other portions of said pier being on lands over which the City has, and can have, no jurisdiction, to wit: lands lying outside of the Exterior Riparian line as established by the Riparian Commission of New Jersey, and on which lands the largest portion of said pier extends, cutting off the view of the sea from the relators' land to a far greater extent than that portion of the said pier sought to be removed. The mandate, if confined to the land formerly of the relators, would not accomplish the purpose sought, and should not be extended to removal of the pier from other lands of which the relator was not a grantor, for the reasons above stated.

Wherefore, the defendant prays that the matter of the removal, through purchase or condemnation, of a portion or all of the Heinz Pier, and of any piers, be left to the discretion and judgment of the governing body, where it lawfully belongs, to carry out at such times and under such circumstances as it deems best for the interest of its grantors under said park deed, as public policy dictates, with regard to public necessity, and as its ability to provide the funds necessary therefor will permit, and to that end this defendant humbly prays that said writ may be dismissed, and that it be relieved from obeying the commands therein given.

Dated August 10th, 1916.

CITY OF ATLANTIC CITY,
By HARRY WOOTTON,
Attorney.

To the President and Members of City Council:

GENTLEMEN—The petition of the undersigned respectfully shows that they are the owners of all the land on the ocean front at a point between New Jersey

and Connecticut Avenues, and Maine Avenue, in Atlantic City, New Jersey, and that by reason of the formation of land by accretion, the high-water line, as it now exists, is not less than three hundred feet oceanward from the present location of the sixty-feet-wide street upon which is erected the public Boardwalk, and not less than three hundred feet oceanward from the location of high-water line and said public street and Boardwalk, at the time of the execution and delivery by us, or our predecessors in title, of a certain deed to Atlantic City, familiarly known as the easement deed, as made and delivered pursuant to an act entitled "An Act to authorize cities in this State, located on or near the ocean, etc.," approved April 6, 1889, and the ordinances of Atlantic City passed by virtue of said act, and its supplements and amendments.

Petitioners further show that the land owned by them as stated, comprises more than three contiguous squares, and they hereby petition your Honorable Body to move said Boardwalk oceanward, between the points herein named, from its present location to a point three hundred feet oceanward or such greater or less distance as the rights of your petitioners under said easement deed and the public interest may require; such distance and location to be agreed upon by your petitioners.

And your petitioners as in duty bound, will ever pray, etc.

Walter Walls, 110 ft. frontage Cor. Dewey and Maine Ave.

H. E. Kelley, 100 ft. bet. Maine and N. H.

States Ave. Land Co., by James A. Cathcart, Pres., 190 ft. New Hampshire Ave., Easterly.

H. E. Stevens, Jr., 175 ft. Westerly from New Hampshire Ave.

Walter B. Dick, owner of record.

H. E. Stevens, Jr., owner by contract, 175 ft. Vermont Ave., Easterly.

Edgar Lehman, 175 ft. bet. Vermont and middle line of Victoria Ave.

New Amsterdam Realty Co.
H. E. Stevens, Jr., Treas.
H. G. Harris, Sec'y. } 175 ft. Rhode Island Ave. to middle line Victoria Ave.

Richard McAllister—150 ft. Metropolitan Ave. to Rhode Island.

Mass. Ave. to Metropolitan, 160 ft.

350 ft. Mass. Ave. to Conn.

Allen B. Endicott and Oxford Hotel Company, by Joseph Thompson, Pres., 125 ft. West side of Conn. 350 feet between Conn. and Mass. Avenues.

[SEAL.]

I consent to the filing of the within Answer out of time.

C. L. COLE,
Atty. for Relator.

NEW JERSEY SUPREME COURT.

RICHARD MCALLISTER ET AL., *Relators,*
vs.
ATLANTIC CITY, *Respondent.* } On Mandamus.

DEMURRER TO PLEA.

(*Filed September 5, 1916.*)

The relators say in reply to the return made by the respondent in this cause that none of the matters and things set forth in said return justify a refusal of

the respondent to take proceedings ultimating in the removal of the Heinz Pier structure within the limits of the public park, nor to deny to the relators a pre-emptory writ of mandamus to be addressed to the respondent to accomplish that end, and that the matters and things set forth are not sufficient in law to require them to plead thereto, therefore, and because of the insufficiency of the matters and things set forth, they pray judgment that said answer and return be stricken, set aside, and for nothing holden, and that a pre-emptory writ of mandamus do issue in accordance with the prayer of the alternative writ in this cause.

C. L. COLE,
Attorney of Relators.

NEW JERSEY SUPREME COURT.

RICHARD MCALLISTER ET AL., *Relators,*
vs.
ATLANTIC CITY, *Respondent.*
} On Mandamus.

NOTICE TO STRIKE RETURN.

(Filed September 5, 1916.)

To Harry Wootton, Esquire, Attorney of Respondent:

Notice that on the first Tuesday of November next, at the hour of eleven o'clock in the forenoon, or so soon as the matter can be heard, I shall move the Court to strike the return filed in this cause and for a pre-emptory writ of mandamus for the reason that none of the facts or matters set forth in said return are sufficient answer in the law to the alternative writ or to deny to the relators the right to a pre-emptory writ,

nor do any of such facts and matters set forth a legal excuse on the part of the respondent for its refusal to take steps looking to the removal of the Heinz Pier structure from off the public park.

C. L. Cole,
Attorney of Relators.

Due and legal service acknowledged this 5th day of September, 1916, by

Harry Wootton,
Attorney of Respondent.

New Jersey Supreme Court.

McAllister et al.,
Relators,
vs.
Atlantic City,
Respondent.
On Mandamus.

OPINION.

Nov. Term, 1916.

Bergen, *J.*

The relators hold an alternative writ of mandamus enjoining respondent to procure the title to all the land within the limit of a public park upon which a pier, known as "Heinz Pier," is located, by condemnation or otherwise, and to cause so much of the pier as is within the limits of the park to be wholly removed therefrom. The writ recites that in 1907 relators were the owners of a strip of land 80 feet wide, adjoining Rhode Island Avenue, and extending southerly at that width to the exterior line established by the riparian commissioners; that April 8, 1907, they conveyed to

Atlantic City all their interest in said land, beginning in the interior line of the public park of the city and running southerly to the said exterior line; that, as authorized by statute, the respondent, by ordinance adopted October 9, 1899, did establish the inland line of a park along the ocean front; that the aforesaid conveyance granted the interest conveyed, for and only for, use as a public park except that the city might maintain along the interior line an elevated public boardwalk; that the grantee covenanted that the lands granted and dedicated to public use should forever be and remain open, so that the view oceanward from the elevated public walk should be free, open and unobstructed, and that no use should be made of the land inconsistent with its use as a public park; that when the deed was delivered there existed a pier known as "Heinz Pier," connected with the boardwalk and extending into the ocean about 500 feet on which are two inclosed pavilions, one within and the other without the park limits, but neither on the land granted to the city by the relators, but that about 100 feet of the pier crosses a corner of said land; that the city is the owner of all the land within the park limits except the Heinz and three other like piers, and what is called the Lindley tract, and that relators have requested respondents to acquire and remove so much of the Heinz Pier as is within the limits of the park, which request has not been complied with. The City filed a plea, setting up that the determination of the question of the necessity of procuring title to land for a park is vested in the City and not subject to mandamus; that the statute fixes no time for acquiring the land; that when relators conveyed that portion of the structure they now seek to remove was on the land; that relators have, since giving the deed, consented to the continuance of the platform, and have collected rent for the use of it by the Pier Company; that in 1885 the City authorized the construction of the pier and

it was in existence when relators conveyed, subject to an agreement dedicating a strip 60 feet wide for the boardwalk; that the boardwalk was moved oceanward, owing to accretions, which required the destruction of 300 feet of the pier, and the City agreed with the Pier Company that it would not interfere with so much of the pier as was within the park limits, unless all other piers within the limits of the park were acquired by condemnation; that the City is not financially able to take over all the piers, as it would require a bond issue beyond legal limit, and that to condemn so much as is within relators' conveyance would not accomplish the purpose relators seek. To this plea relators demur, and argue that the presence of the pier within the boundaries of the park is an obstruction in violation of the terms of the deed. This may be granted, and yet the question remains whether the City can be required by mandamus to condemn land for park purposes, because it has acquired a part, or because of a covenant in a deed for some of the land. We do not think it is.

(1) In the first place, the law (P. L. 1894, p. 146) does not require the City to acquire—it has the legal right, but is not compellable—and mandamus will only issue when the City refuses to perform an express legal duty, and there is in this case no such duty imposed.

(2) In the second place the deed does not aid the relators, for the writ is never rested on a contractual obligation, in such cases the private party has his action for damages. *Mabon* v. *Halsted*, 39 *N. J. Law*, 640. Again it will never compel what cannot lawfully be done, and in this plea it appears that the City has no funds to pay any award and cannot raise it by a bond issue, as it would require a sum in excess of legal limit.

(3) A notice to strike out the plea was given, as well as demurrer thereto, and the question was raised as to

which was proper. We are of opinion that, this being a proceeding resting on a prerogative writ, the Practice Act of 1912 does not apply, and that the objection should be raised by demurrer and not by motion to strike out.

The demurrer will be overruled.

NEW JERSEY SUPREME COURT.

RICHARD MCALLISTER ET AL.,
Relators-Appellants,
vs.
ATLANTIC CITY,
Respondent-Respondent.

NOTICE OF APPEAL.

(*Filed October 4, 1917.*)

To Harry Wootton, Esquire, Attorney of Respondent:

Take notice that the appellant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The Supreme Court overruled the demurrer of the appellants when it should have sustained it.

2. The Supreme Court refused to award a peremptory writ of mandamus to the relators-appellants when it should have awarded such a writ.

3. The Supreme Court held that the relators-appellants were seeking to enforce a covenant when it should have held that they were relying upon a legal duty cast upon the respondent.

4. The Supreme Court held that the plea of the respondent showed that it was without funds with which to carry out the park scheme when there was no such averment in the plea.

5. The Supreme Court refused to grant relief to the relators-appellants when it should have granted all the relief for which they prayed.

C. L. Cole,
Sept. 29, 1917. *Attorney of Appellants.*

Due and legal service of copy of the within notice of appeal acknowledged this 29th day of September, 1917.

Harry Wootton,
Joseph B. Perski, 10
Attorneys of Respondent.

JUDGMENT.

(*Filed October 23, 1917.*)

This case was heard before our Supreme Court at the November Term, 1916, on the demurrer of the relators to the return of the respondents to the Alternative Writ of Mandamus, and the Court rendered judgment in favor of the respondent and against the relators on the demurrer to the return to the Alternative Writ of Mandamus. 20

Whereupon it is adjudged that the said return to the said Alternative Writ of Mandamus is sufficient in law and that said demurrer thereto is overruled, and that said Alternative Writ of Mandamus be dismissed; it is further adjudged that the said respondent, Atlantic City, do recover of the said relators, Richard McAllister, Henry C. Schmidt and Edward A. Schmidt, the sum of costs.

Judgment entered October 4, 1917.

Wm. S. Gummere, 30
C. J.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above stated cause as the same remains on file and of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this
[L. S.] tenth day of October, A. D. nineteen hundred and seventeen.

WM. C. GEBHARDT,
Clerk.

I. F. Huntzinger Co., Appellate Printers, Camden, N. J.

New Jersey Court of Errors and Appeals

Richard McAllister,
Relator-Appellant,
vs.
Atlantic City,
Respondent-Defendant.

On Demurrer to the Return to Alternative Writ of Mandamus.

BRIEF FOR RESPONDENT

The return to the alternative writ of mandamus furnishes its own argument. We rely thereon in all its parts, but call particular attention to the following points:

I.

Under the act (P. L. 1894, p. 146) authorizing a park along the beach or ocean front, such as has been laid out by Atlantic City and partially acquired, the time and manner of acquisition of land within the boundaries of such park is entirely at the discretion of the municipality and for the benefit of the whole public. The courts cannot interfere and consider whether a necessity for such acquisition exists, or whether the same is expedient. *McQuillan Mun.*

Corp., Vol. 4, p. 3092, 3, and cases cited. Suppose no land within the park boundaries had been acquired, surely a citizen and taxpayer or an abutting owner could not invoke mandamus to compel such acquisition either in whole or in part, nor can a land owner who has sold or conveyed his land for a park compel the city to acquire the residue of the land therefor. In a project so extensive as the ocean park in Atlantic City many considerations must enter into the municipal action, and the legislature alone can compel complete accomplishment. So far the only legislation applicable is permissive, not mandatory. If the argument of relators is sound, then as soon as one parcel of land was acquired any person directly interested could compel the purchase or condemnation of the entire park irrespective of available resources. It happens that the city has acquired by condemnation the greater part of the lands within the park boundaries, but there is considerable land yet to be acquired, including several piers of great value, which may better for the present be left as they are.

Relators say (brief, page 8), that "all relators are asking is that the Heinz pier be removed from off the land which they conveyed to the city. The alternative writ is not so limited, and it is apparent that to remove that much of the pier would altogether destroy its utility as a pier, and the whole structure would have to be condemned and paid for. Furthermore, if relators succeed it is inevitable that other relators similarly situated may compel the acquisition of the other piers. Mandamus is discretionary even where there is a legal duty. The public interest only will be considered, unless the duty is one directly owing to the relator, which is not the present case.

II.

The right of the relators is altogether contractual, and in such a case mandamus will not lie. *Spelling on Extraordinary Remedies,* Sec. 1379. Relators' remedy, if they have one, is in action for damages or to compel a reconveyance of their property because performance of conditions has been unreasonably delayed or refused. See *Mabon vs. Halstead,* 39 N. J. L. 640.

III.

When the relators conveyed to the city, the Heinz pier existed in its present location, partly on the lands conveyed, under a resolution of the city council providing that it should be undisturbed until there should be a general condemnation of all piers on the ocean front. The conveyance by the relators was with knowledge of this resolution and they cannot ask that the pier be now purchased or condemned. The consent of the Heinz Company to the removal oceanward of the Boardwalk was a consideration for the agreement entered into by such resolution, and inured greatly to the benefit of the relators. They are estopped from taking a proceeding that would work a breach of the agreement.

IV.

The city is not compellable to alter the physical condition of the land conveyed by relators. The condition of the grant was (Case, p. 3, l. 30):

> "Fourth, that the lands hereby granted and dedicated to the public use shall forever be and remain open, so that the view oceanward from the elevated public walk shall be free, open and unobstructed, and that no use shall be made of

> the said land by the grantee, its successors or assigns, inconsistent with its use as a public park or place for public resort and recreation."

This is negative in character. It does not mean that the city must remove obstructions, but only that the lands granted shall "remain" open. The view oceanward that existed at the time the grant was made has not been obstructed by the city. The Heinz pier is probably a purpresture upon the park. The only right of the Heinz Company was under an ordinance authorizing the construction of a pier at the foot of Massachusetts Avenue (Case, p. 7). The pier instead of being constructed in continuation of the avenue ran diagonally across lands of the relators or their predecessors in title. Either this was under a grant from the land owner or was altogether illegal. If the former, then the grant by the relators to the city was subject to the right of the pier owners, and the relators did not convey it, or the pier was on the lands without authority, in which case it is a public nuisance and can be removed either by proceedings taken by the Attorney General or by indictment. The relators are only concerned as members of the public. They have no right to compel by mandamus the purchase or condemnation of the pier or any part of it.

A writ of mandamus will never compel what cannot lawfully be done, and in the plea of the respondent it appears that the city has no funds to pay any award, and cannot be raised by a bond issue, as it would require a sum in excess of its legal limit.

The judgment of the Supreme Court should be affirmed with costs.

HARRY WOOTTON,
City Solicitor.
JOSEPH B. PERSKIE,
Assistant City Solicitor.

I. F. Huntzinger Co., Appellate Printers, Camden, N. J.

New Jersey Court of Errors and Appeals

Richard McAllister,
Relator-Appellant,
vs.
Atlantic City,
Respondent-Defendant.

On Demurrer to the Return to Alternative Writ of Mandamus.

BRIEF FOR RESPONDENT

The return to the alternative writ of mandamus furnishes its own argument. We rely thereon in all its parts, but call particular attention to the following points:

I.

Under the act (P. L. 1894, p. 146) authorizing a park along the beach or ocean front, such as has been laid out by Atlantic City and partially acquired, the time and manner of acquisition of land within the boundaries of such park is entirely at the discretion of the municipality and for the benefit of the whole public. The courts cannot interfere and consider whether a necessity for such acquisition exists, or whether the same is expedient. *McQuillan Mun.*

Corp., Vol. 4, p. 3092, 3, and cases cited. Suppose no land within the park boundaries had been acquired, surely a citizen and taxpayer or an abutting owner could not invoke mandamus to compel such acquisition either in whole or in part, nor can a land owner who has sold or conveyed his land for a park compel the city to acquire the residue of the land therefor. In a project so extensive as the ocean park in Atlantic City many considerations must enter into the municipal action, and the legislature alone can compel complete accomplishment. So far the only legislation applicable is permissive, not mandatory. If the argument of relators is sound, then as soon as one parcel of land was acquired any person directly interested could compel the purchase or condemnation of the entire park irrespective of available resources. It happens that the city has acquired by condemnation the greater part of the lands within the park boundaries, but there is considerable land yet to be acquired, including several piers of great value, which may better for the present be left as they are.

Relators say (brief, page 8), that "all relators are asking is that the Heinz pier be removed from off the land which they conveyed to the city. The alternative writ is not so limited, and it is apparent that to remove that much of the pier would altogether destroy its utility as a pier, and the whole structure would have to be condemned and paid for. Furthermore, if relators succeed it is inevitable that other relators similarly situated may compel the acquisition of the other piers. Mandamus is discretionary even where there is a legal duty. The public interest only will be considered, unless the duty is one directly owing to the relator, which is not the present case.

II.

The right of the relators is altogether contractual, and in such a case mandamus will not lie. *Spelling on Extraordinary Remedies,* Sec. 1379. Relators' remedy, if they have one, is in action for damages or to compel a reconveyance of their property because performance of conditions has been unreasonably delayed or refused. See *Mabon vs. Halstead,* 39 N. J. L. 640.

III.

When the relators conveyed to the city, the Heinz pier existed in its present location, partly on the lands conveyed, under a resolution of the city council providing that it should be undisturbed until there should be a general condemnation of all piers on the ocean front. The conveyance by the relators was with knowledge of this resolution and they cannot ask that the pier be now purchased or condemned. The consent of the Heinz Company to the removal oceanward of the Boardwalk was a consideration for the agreement entered into by such resolution, and inured greatly to the benefit of the relators. They are estopped from taking a proceeding that would work a breach of the agreement.

IV.

The city is not compellable to alter the physical condition of the land conveyed by relators. The condition of the grant was (Case, p. 3, l. 30):

> "Fourth, that the lands hereby granted and dedicated to the public use shall forever be and remain open, so that the view oceanward from the elevated public walk shall be free, open and unobstructed, and that no use shall be made of

> the said land by the grantee, its successors or assigns, inconsistent with its use as a public park or place for public resort and recreation."

This is negative in character. It does not mean that the city must remove obstructions, but only that the lands granted shall "remain" open. The view oceanward that existed at the time the grant was made has not been obstructed by the city. The Heinz pier is probably a purpresture upon the park. The only right of the Heinz Company was under an ordinance authorizing the construction of a pier at the foot of Massachusetts Avenue (Case, p. 7). The pier instead of being constructed in continuation of the avenue ran diagonally across lands of the relators or their predecessors in title. Either this was under a grant from the land owner or was altogether illegal. If the former, then the grant by the relators to the city was subject to the right of the pier owners, and the relators did not convey it, or the pier was on the lands without authority, in which case it is a public nuisance and can be removed either by proceedings taken by the Attorney General or by indictment. The relators are only concerned as members of the public. They have no right to compel by mandamus the purchase or condemnation of the pier or any part of it.

A writ of mandamus will never compel what cannot lawfully be done, and in the plea of the respondent it appears that the city has no funds to pay any award, and cannot be raised by a bond issue, as it would require a sum in excess of its legal limit.

The judgment of the Supreme Court should be affirmed with costs.

HARRY WOOTTON,
City Solicitor.
JOSEPH B. PERSKIE,
Assistant City Solicitor.

I. F. Huntzinger Co., Appellate Printers, Camden, N. J.

New Jersey Court of Errors and Appeals

Richard McAllister,
Relator-Appellant,
vs.
Atlantic City,
Respondent-Defendant.

On Demurrer to the Return to Alternative Writ of Mandamus.

BRIEF FOR RESPONDENT

The return to the alternative writ of mandamus furnishes its own argument. We rely thereon in all its parts, but call particular attention to the following points:

I.

Under the act (P. L. 1894, p. 146) authorizing a park along the beach or ocean front, such as has been laid out by Atlantic City and partially acquired, the time and manner of acquisition of land within the boundaries of such park is entirely at the discretion of the municipality and for the benefit of the whole public. The courts cannot interfere and consider whether a necessity for such acquisition exists, or whether the same is expedient. *McQuillan Mun.*

Corp., Vol. 4, p. 3092, 3, and cases cited. Suppose no land within the park boundaries had been acquired, surely a citizen and taxpayer or an abutting owner could not invoke mandamus to compel such acquisition either in whole or in part, nor can a land owner who has sold or conveyed his land for a park compel the city to acquire the residue of the land therefor. In a project so extensive as the ocean park in Atlantic City many considerations must enter into the municipal action, and the legislature alone can compel complete accomplishment. So far the only legislation applicable is permissive, not mandatory. If the argument of relators is sound, then as soon as one parcel of land was acquired any person directly interested could compel the purchase or condemnation of the entire park irrespective of available resources. It happens that the city has acquired by condemnation the greater part of the lands within the park boundaries, but there is considerable land yet to be acquired, including several piers of great value, which may better for the present be left as they are.

Relators say (brief, page 8), that "all relators are asking is that the Heinz pier be removed from off the land which they conveyed to the city. The alternative writ is not so limited, and it is apparent that to remove that much of the pier would altogether destroy its utility as a pier, and the whole structure would have to be condemned and paid for. Furthermore, if relators succeed it is inevitable that other relators similarly situated may compel the acquisition of the other piers. Mandamus is discretionary even where there is a legal duty. The public interest only will be considered, unless the duty is one directly owing to the relator, which is not the present case.

II.

The right of the relators is altogether contractual, and in such a case mandamus will not lie. *Spelling on Extraordinary Remedies,* Sec. 1379. Relators' remedy, if they have one, is in action for damages or to compel a reconveyance of their property because performance of conditions has been unreasonably delayed or refused. See *Mabon vs. Halstead,* 39 N. J. L. 640.

III.

When the relators conveyed to the city, the Heinz pier existed in its present location, partly on the lands conveyed, under a resolution of the city council providing that it should be undisturbed until there should be a general condemnation of all piers on the ocean front. The conveyance by the relators was with knowledge of this resolution and they cannot ask that the pier be now purchased or condemned. The consent of the Heinz Company to the removal oceanward of the Boardwalk was a consideration for the agreement entered into by such resolution, and inured greatly to the benefit of the relators. They are estopped from taking a proceeding that would work a breach of the agreement.

IV.

The city is not compellable to alter the physical condition of the land conveyed by relators. The condition of the grant was (Case, p. 3, l. 30):

> "Fourth, that the lands hereby granted and dedicated to the public use shall forever be and remain open, so that the view oceanward from the elevated public walk shall be free, open and unobstructed, and that no use shall be made of

> the said land by the grantee, its successors or assigns, inconsistent with its use as a public park or place for public resort and recreation."

This is negative in character. It does not mean that the city must remove obstructions, but only that the lands granted shall "remain" open. The view oceanward that existed at the time the grant was made has not been obstructed by the city. The Heinz pier is probably a purpresture upon the park. The only right of the Heinz Company was under an ordinance authorizing the construction of a pier at the foot of Massachusetts Avenue (Case, p. 7). The pier instead of being constructed in continuation of the avenue ran diagonally across lands of the relators or their predecessors in title. Either this was under a grant from the land owner or was altogether illegal. If the former, then the grant by the relators to the city was subject to the right of the pier owners, and the relators did not convey it, or the pier was on the lands without authority, in which case it is a public nuisance and can be removed either by proceedings taken by the Attorney General or by indictment. The relators are only concerned as members of the public. They have no right to compel by mandamus the purchase or condemnation of the pier or any part of it.

A writ of mandamus will never compel what cannot lawfully be done, and in the plea of the respondent it appears that the city has no funds to pay any award, and cannot be raised by a bond issue, as it would require a sum in excess of its legal limit.

The judgment of the Supreme Court should be affirmed with costs.

HARRY WOOTTON,
City Solicitor.
JOSEPH B. PERSKIE,
Assistant City Solicitor.

MacCrellish & Quigley Co., Printers, Trenton, N. J.

NEW JERSEY
Court of Errors and Appeals

RICHARD MCALLISTER AND OTHERS,
Relators-Appellants,
vs.
ATLANTIC CITY,
Respondent-Respondent.

} On Mandamus. Appeal from Supreme Court.

Brief of Appellants.

FACTS.

Atlantic City adopted the provisions of Chapter 93 of the Laws of 1894, page 146.

The title of the act is "An Act to enable cities in this State, located on or near the ocean, and embracing within their limits or jurisdiction any beach or ocean front, to open and lay out a public park or place for public resort and recreation on and along the beach or ocean front of such city, and to purchase or condemn lands, property and rights therefor, and to preserve the same from obstruction or encroachment."

Pursuant to the powers vested in said act the council of Atlantic City adopted an ordinance defining the

boundaries of a public park on the ocean front, and thereafter the lines were actually staked on the ground. Subsequently the city proceeded to acquire title to the land within the boundaries of the park and has acquired title to all such, with the exception of properties named in the return (page 10).

The relators were owners of all the land between Massachusetts and Oriental avenues facing the ocean, and by deed dated April eighth, nineteen hundred and seven (1907), granted and conveyed to the city all their right, title and interest in and to the land so owned by them and within the boundaries of the park as laid out and staked. For the fee thus conveyed to the city they received no money consideration and no valuable consideration save such as might accrue by the city's completing the park project, by acquiring title to all the land within the boundaries of the park and removing all encroachments and obstructions therefrom. At the time of the grant there was a structure commonly known as Heinz Pier, which runs in a diagonal course from Massachusetts avenue and the boardwalk oceanward, and a portion of which was on land owned by the relators and described in the deed to the city. Since the making of the deed the relators have called upon the Commissioners of Atlantic City to carry out the park project by causing the removal of Heinz Pier by condemnation or otherwise. The language of the writ, page 4, line 34, is: "And whereas said parties have petitioned the Board of Commissioners of Atlantic City to purchase or condemn said Heinz Pier and remove so much of the same as is within the limits of said public park in order to complete and perfect said park within the meaning and intent of said Act of 1894, and the ordinances and deeds pursuant thereto, and they have refused to act as by their complaint we have understood." This averment is not denied.

This pier is a very substantial structure and is a

plain obstruction and encroachment within the meaning of the title and body of the act, and within the meaning of the deed.

The deed recites, among other things (page 10, line 30), "Whereas the City of Atlantic City is one of the cities of the State of New Jersey located on or near the Atlantic Ocean and embracing within its limits or jurisdiction certain beach or lands fronting upon the ocean, and whereas, the City Council of Atlantic City, being the governing body of said city, having resolved to open and lay out along such beach or ocean front a public park or place for public resort and recreation and to devote the lands within the limits of such park or place of resort to such uses exclusively, under and by virtue of an Act of the Legislature of the State of New Jersey, entitled, etc., * * * ." And further, at line 12, page 3, "Now for the purpose of enabling the said city to use the lands lying oceanward from the inland line so established and so to be established and within the boundaries above designated as a public park and place of resort and recreation, in pursuance of the provisions of the said act. This indenture, witnesseth, etc." A number of covenants and conditions follows, among which is the fourth, page 3, line 30, "Fourth, that the lands hereby granted and dedicated to public use shall forever be and remain open, so that the view oceanward from the said elevated public walk erected and to be erected as above mentioned shall be free, open and unobstructed, and that no use shall be made of the said land by the grantee, its successors or assigns, inconsistent with its use as a public park or place for public resort and recreation."

The relators ask a mandamus to compel the city to remove, or cause to be removed, the pier off the land granted by relators and to complete the park scheme. Mandamus was denied and relators appeal.

LAW.

The presence of the pier on the land, within the boundaries of the park, is both an encroachment and an obstruction, and is a plain violation of the letter and the spirit of the act, and the deed which provides for a park oceanward of the interior line of the boardwalk, which is to be free from structures of every character, save the elevated boardwalk, which is expressly excepted. The city has refused to move toward a removal of the structure and if that refusal is persisted in the relators are robbed of the only consideration which they received for the grant made to the city. It, therefore, becomes the plain legal duty of the city to take steps for the purchase or condemnation of the pier and cause its removal. It has refused to take either step and it offers no legal excuse for its refusal. The only effectual remedy open to the relators is mandamus, and as their legal right is clear, the city stands defenseless. A writ of mandamus should go compelling the city to discharge its duty to the relators by exercising the powers conferred by the act and secure title to the pier and then cause its removal.

See *Evans* vs. *New Auditorium Pier Company, 67 Equity, page* 318, where the Vice Chancellor, in dealing with the act and deeds in question, says:

> "The attending covenants, securing light, air and view, were obtained for a like consideration. It was a general scheme of public improvement, in which all participated. Its form was a covenant with Atlantic City, but in fact it was a gift by the co-grantors to the public and to each other. Atlantic City paid nothing to the grantors, but it spent large sums in building the boardwalk."
>
> "All the values were given by the grantors. No one grantor, nor anyone claiming under him, having accepted the benefits of the

> others' gifts, can be permitted to destroy its value in an essential particular, as the defendant company now seeks to do."
>
> "Its Auditorium Pier is built immediately contiguous to the boardwalk, using it for access to its Auditorium building."
>
> "Any co-grantor who joined in the gift of the easement has a status to enforce the general scheme arranged and perfected by it."
>
> "The defendant contends that there is no proof of a general plan, no meetings of owners, no conference or association for any general object."
>
> "It seems to me that it is impossible to read the boardwalk covenant deed and follow the course of its lines for the several miles of its length over dozens of ownerships at the ocean edge without perceiving on the face of those covenants, every indication of a common purpose on the part of the various owners to contribute to the creation of a public promenade at the beach front with free light, air and ocean view."

The Act of 1894 plainly provides a public park scheme. This is obvious from the title and the body of the act. The title says among other things, "and to purchase or condemn lands, property and rights therefor and to preserve the same from obstruction or encroachment." Section 3 says: "And to devote the same exclusively for public use as a public park or place for public resort and recreation and to keep the same forever open and unobstructed for such public use." Section 4 permits the construction and maintenance of an elevated public walk. Section 5 permits the city to accept a dedication for park purposes. By the plainest language the act and the deeds given thereunder provide for a public park on the ocean front which shall be free from obstruction of every

character save the public boardwalk, for which an express provision is made. Every owner whose land was condemned under the act, and every owner who sold or dedicated under the act, did so in legal contemplation of the city perfecting the scheme, otherwise there was a failure of consideration. The city did condemn in a number of instances and assessed benefits against the owners upon land lying landward of the public park and commissioners allowed benefits upon the theory that there was an enhancement of the remaining property by reason of the existence of the public park which was to be free and unobstructed. The city could not take the owners' property without the obligation of establishing and maintaining such a park as is contemplated by the act. The obligation on the part of the city to complete the park and perfect the scheme was impliedly written into every condemnation, purchase and dedication. By its answer the city assumes that it has a discretion in the matter. The acceptance of the provisions of the act was a discretion, but after that acceptance and its proceeding thereunder to provide the park, it was legally bound to perfect. The city does not claim that it has abandoned the public park, but if it had the right to do so it would be conditioned upon its restoring the land to such owners as dedicated their land without consideration for park purposes. The attitude of the city seems to be that it had a right to purchase and condemn such lands as it sees fit, accept deeds and dedications where owners are willing to give them, and still leave the park encumbered and obstructed by physical structures in plain violation of the letter and spirit of the act. This right we deny. We insist that the moment the city proceeded under the act it was obliged to complete the park, having in mind, of course, that it had a reasonable time in which to do it. The relators having dedicated their land, they have a legal right to insist that they secure from the city the benefit of a

public park which was the consideration of their deed, and with this legal right there is a legal duty imposed upon the city to complete the park. Since a legal duty is imposed upon the city and relators have no other adequate remedy except by mandamus, there should be an allowance of a peremptory writ.

In its legal aspect this case is identical with *Barnert* v. *Paterson, 69 Law, page* 122. In that case an ordinance had been adopted to open a street and the relator's land was taken and he paid his assessment with interest. The proposed street crossed the railroad of the New York, Susequehanna and Western Railroad, but the city did not open the street through its property. The Board of Aldermen having refused to take the necessary steps to open the street across the railroad, application was made for a mandamus, and the Court said: "These facts we think show *prima facie* a clear right in the relator to have the street opened to the extent intended by the ordinance of March 5, 1894. So much seems necessary to give him the benefit for which his land and money were taken." An alternative writ was allowed. See also *Barber* v. *The Township, 76 Law* 371; also *Sheaff* v. *People, 87 Illinois,* 189, 29 *A. M. Rep.* 49.

It will not escape the attention of the court that one of the considerations for the grant by the relators was the laying out and maintenance of said park. Page 2, line 4, the consideration is expressed as follows:

> "For and in consideration of the premises and the sum of one dollar, lawful money of the United States of America, well and truly paid by the said party of the second part, the said parties of the first part, at and before the ensealing and delivery of these presents, the receipt of which is hereby acknowledged, *and in consideration* of the benefit and advantage to be derived by the parties of the first part by the laying out of the said park within the

boundaries aforesaid, and building said walk, and in consideration also that the lands of the said parties of the first part will not be condemned, as is provided by the Act of the Legislature and ordinance above referred to," &c.

If then the park is not laid out and maintained the valuable consideration which was supposed to have moved to the grantors has been lost.

We cannot agree with the Supreme Court that the Act of 1894 does not require the city to acquire the land necessary to complete the park after it has taken by condemnation, purchase, or otherwise, some land for that purpose. We concede that the city was not obliged to accept the provisions of the act; whether or not it accepted was a matter of discretion. But when it did accept the provisions of the act and compelled owners by any of the methods provided in the act to surrender up their land, it no longer had the discretion to say that it would take the land of some owners and not that of others. Nor do we think the Supreme Court was right in saying that the case was one resting upon contract. The relators who gave their land to the city under and in pursuance of the provisions of the act which permitted the city to condemn or purchase for park purposes stand in the same position as though their land had been condemned. The execution of the deed was merely for the purpose of saving the city the expense of condemnation. Had their land been condemned for park purposes, do you suppose it would not be seriously contended that there was a legal duty cast upon the city to complete the park scheme. That the city believed it was bound by all the provisions of the act is made manifest by a reading of the deed which incorporates so much of the act into the same. Our contention is that in determining the rights and duties as between the relators and the city the court must read the provisions of the statute into the deed.

Again we think the Supreme Court was clearly in error in assuming that the city is not in a position financially to perfect the scheme. The demurrer to the plea or answer admits only such facts as are properly pleaded.

Paragraph 8 of the return (page 10) is the paragraph which the Supreme Court thought justified its conclusion. It will be noted that the city does not say that it is not in a position financially to purchase or condemn, or in some way acquire the Heinz Pier, but that it is not in a position to purchase all the piers. It makes no statement as to what, if anything, it will cost to acquire the Heinz Pier in question, or what amount of money it has on hand or can procure for that purpose. It is no answer to the relators to say that the city cannot acquire other properties yet necessary to complete the park scheme. It may be that no one will move the city so to do and by the time they do the city may be in a position to raise the necessary funds. Certainly the relators ought not to be defeated of their right to have the pier removed off the very property that they conveyed to the city, because perchance later the city may not be able to purchase or condemn other land. It will be noted that the alternative writ avers that the city simply refused to act, and assigned no reason for its refusal.

"Mandamus lies only where there exists a specific legal right, for the enforcement of which there is no other adequate legal remedy. *State* v. *Nicholson Pavement Company*, 35 *Law* 396.

Relators have no other adequate remedy. An action in damages would not be adequate because, first, it would be difficult to determine the measure, and, secondly, the substantial consideration for the grant would have been lost. Specific purpose is not adequate for substantially the same reason. If it be true, although as we urge it does not sufficiently appear by the answer, that the city is not in a position financially to

buy the Heinz Pier, then a decree in specific performance would avail nothing. It was said in this Court in *Jones Company* v. *Guttenberg,* 66 *Law* 669, "It is the mere inadequacy, and not the mere absence, of all other legal remedies, and the danger of the failure of justice without it, that must usually determine the propriety of this writ. Where none but specific relief will do justice, specific relief should be granted, if practical, and when a right is single and specific, it usually is practicable. To supersede the remedy by mandamus a party must not only have a specific, adequate, legal remedy, but one competent to afford relief upon the very subject of his application; hence an action for damages against an officer for neglect of duty is not equally convenient, beneficial and effective as the proceeding by mandate, since it would not compel him to do the specific act."

The relators cannot bring ejectment because they have parted with their title for the land within the bounds of the public park. It may well be doubted if they can apply to the Court of Chancery to have the deed set aside, or the city compelled to reconvey, because that court would probably answer that they had an adequate remedy at law by mandamus to compel the city to discharge its plain legal obligation. More than a reasonable time has elapsed during which the city could have completed the park. The city accepted the provisions of the Act of 1894 and as early as 1899 passed an ordinance to establish the interior line of the park, as as early as 1907 received the grant from relators. According to the language of the writ as quoted above the Commissioners of the city have flatly refused to complete the park and have assigned no reason to the relators for their action. Nothing in the plea or answer suggests a legal reason for their refusal to act. They are not interested in any possible controversy between the city and H. J. Heinz Company. If the city made a contract with it which must be violated in order that relators may have their legal

rights, then the city must respond in damages for a breach of that contract as would any other individual. The relators were not parties to the contract and did not have notice of it. Moreover, their deed antedated the agreement with that company, but if this were not so relators had a right to assume the city would make its own arrangements with the Heinz Company, nor is it necessary for the city to challenge the motive of the relators by saying that they now move only because the Heinz Company refuses to longer pay them rent. The courts are not interested in the motives of litigants. By paragraph of section 7 of the plea or answer the city is saying in effect, if not in words, that it does not intend ever to complete the park scheme because of the existence of certain piers, which it says are a necessity in Atlantic City, and which would cost the citty three million dollars to condemn. We do not see how the relators are interested in these suggestions. The Legislature authorized Atlantic City to condemn, purchase and accept a dedication of lands for a public park which were to be free and unobstructed and the deed from relators to the city says that it is given upon this express condition. It is a plain evidence of bad faith on the part of the city now to say that "you have been tricked." The allegations in paragraph or section 8 of the plea or answer are mere conclusions. Moreover, it will be borne in mind that all relators are asking is that the Heinz Pier be removed from off the land which they conveyed to the city. It is a bald assumption that anyone will ask for the removal of any other pier and it will not be overlooked that even if that should occur that the benefits accruing to the owners of the properties landward of the boardwalk may equal the cost to the city in condemning. Again, while it will make no difference from a legal point of view as touching the rights of the relators, it may make a difference in a moral sense if the city should own, control and manage piers as part of the park scheme and as a part of its public

policy, rather than have them owned, controlled and managed by private individuals. In view of the averments in sections 7 and 8 of the plea or answer that these piers are adjuncts properly a part of a beach front public park, we repeat the language of the act: "And to devote the same exclusively to public use as a public park or place for public resort and recreation and to keep the same forever open and unobstructed for such public use." If these piers can be permitted to remain within the line of the park and be said not to obstruct the same for public use, then they should be devoted exclusively for use as a public park and not for private property. Nor are the relators interested in the suggestion in paragraph 9 of the plea that no benefit will accrue to relators by the removal of the offending structure. Either the relators secured some right by their gratuitous grant, or they did not. If they received a right it was such as the park act and their deed gave them. This court will not balance advantages or disadvantages.

Our submission is that we gave the grant to the respondent conditioned upon its completing a public park and perfecting a scheme permitted and prescribed by the Act of 1894; that the city has flatly refused to carry out that scheme or further proceed in the premises; that in consequence a legal duty is imposed upon it for the benefit of relators and they have no adequate remedy save by mandamus.

The judgment of the Supreme Court should be reversed and a peremptory writ allowed.

If this court should conclude that the only thing which stands in the way of a peremptory writ is the inability of the city to provide the necessary funds at this time, then we urge that the writ be allowed, to be operative when the city is in funds, or is in a position to raise them and wish so to do.

Respectfully submitted,

C. L. COLE,
Attorney for Appellants.

INDEX.

	PAGE.
Writ,	1
Return,	6
Answer,	6
Petition to Move Boardwalk,	12
Demurrer,	13
Notice to Strike Return,	14
Opinion,	15
Notice of Appeal,	18
Judgment,	19

MacCrellish & Quigley Co., Printers, Trenton, N. J.

New Jersey Supreme Court.

RICHARD MCALLISTER ET AL.
Relators,
vs.
ATLANTIC CITY,
Respondents.
} On Mandamus.

WRIT.

(*Returnable August 11, 1916.*)

NEW JERSEY, *ss.*—The State of New Jersey to Atlantic City, GREETING:
[SEAL.]

Whereas, on the eighth day of April, 1907, Richard McAllister, Henry C. Schmidt, and Edward C. Schmidt, were jointly owners of a tract of land in Atlantic City, New Jersey, situate in the west line of Rhode Island Avenue one hundred ninety feet south of the south line of Oriental Avenue, and running thence (1) westwardly and parallel with Oriental Avenue eighty feet, and thence (2) southwardly between parallel lines of the width of eighty feet to the exterior line established by the Commissioners appointed under the authority of an act entitled "An Act to ascertain the rights of the State and of riparian owners in lands lying under the waters of the Bay of New York and elsewhere in this State."

And whereas, by deed dated the eighth day of April, 1907, and recorded in the Clerk's Office of the County of Atlantic, at Mays Landing, in Book 380 of Deeds, page 237, &c., said parties "For and in consideration of the premises and the sum of one dollar, lawful money of the United States of America, well and truly paid by the said party of the second part (Atlantic City), the said parties of the first part, at and before the ensealing and delivery of these presents, the receipt of which is hereby acknowledged, and in consideration of the benefit and advantage to be derived by the parties of the first part by the laying out of the said park within the boundaries aforesaid, and building said walk, and in consideration also that the lands of the said parties of the first part will not be condemned, as is provided by the act of the Legislature and ordinance above referred to," granted and conveyed to Atlantic City, its successors and assigns, all their and each of their right, title and interest in and to all their land above described, beginning in the interior line of the public park of Atlantic City and running southwardly to said exterior line; and whereas, said City resolved to open and lay out along its beach or ocean front a public park or place for public resort and recreation, and to devote the lands within the limits of such park or place of resort to such uses exclusively, under and by virtue of an act of the Legislature of the State of New Jersey, entitled "An Act to enable cities in this State located on or near the ocean, and embracing within their limits or jurisdiction any beach or ocean front, to open and lay out a public park or place for public resort or recreation on and along the beach or ocean front of such City, and to purchase or condemn lands, property and rights therefor, and to preserve the same from obstruction and encroachment," approved April 26, 1894; and whereas, the City Council of the said City for this purpose did, on the ninth day of October,

1899, duly pass an ordinance of the said City to lay out and open such park and to establish the interior or inland lines therefor, and said City Council did, in pursuance of the powers and authority given by said act, and in pursuance of its provisions, establish the inland line of said park and suitably marked the same upon the ground, and did cause a description of the same to be filed in the office of the City Clerk of said City, in pursuance of and in conformity with the provisions and directions of the said act, all of which is recited in full in said deed;

And whereas, it is recited in said deed among other things as follows: "Now for the purpose of enabling the said City to use the land lying oceanward of the inland line (referring to said park) so established and so to be established, and within the boundaries above designated, as a public park and place of resort and recreation, in pursuance of the provisions of the said act," and further "To have and to hold said premises with all and singular the appurtenances, unto the said party of the second part, and its successors, for, and only for, use as a public park or place of resort and recreation, giving to said party of the second part, and to its successors, however, the right to construct, reconstruct, repair, complete and maintain upon the land so conveyed along the interior or inland line of said park or place for public resort as established as aforesaid, an elevated public boardwalk, in accordance with the provisions of the said act, but subject to the following conditions and restrictions: * * * Fourth, that the lands hereby granted and dedicated to public use shall forever be and remain open, so that the view oceanward from the elevated public walk erected, and to be erected as above mentioned, shall be free, open and unobstructed, and that no use shall be made of the said land by the grantee, its successors or assigns, in-

consistent with its use as a public park or place for public resort and recreation."

And whereas, no consideration passed to said parties for the grant so made to Atlantic City except the consideration of advantage not to have their lands condemned under and in pursuance of the said recited act and the enjoyment of the existence and maintenance of said public park with its accruing advantage to the remaining land of said grantors.

And, whereas, at the time of the execution and delivery of said deed by said parties to Atlantic City, there existed a certain pier built of wood, iron and steel, and commonly known as Heinz Pier, and which is connected with the public boardwalk in said City, is approximately forty feet in width, and extends into the ocean in a diagonal course for about five hundred feet, on which are two enclosed pavilions, the outer or larger one being oceanward of the exterior line aforesaid and not within the lines of the said public park, and the smaller one being inland of said exterior line and within the line of said park, but neither of which buildings are on the land which said parties granted and conveyed to said Atlantic City, but about one hundred feet of the said pier, between the two pavilions, crosses one corner of the land which the parties conveyed to said City for park purposes; and whereas, said City is the owner by grant or condemnation of all the land within the line of said public park with the exception of properties known as the Heinz Pier rights in Wootton tract, the Heinz Pier rights in petitioners' tract, Garden Pier, Steel Pier, Steeplechase Pier, the Old Young's Pier, and the Lindley tract, which represent a small fraction in area of the entire public park tract; and whereas, said parties have petitioned the Board of Commissioners of Atlantic City to purchase or condemn said Heinz Pier, and remove so much of the same as is within the limits of said public park in order to complete and perfect said park within the meaning and intent of said

act of 1894, and the ordinances and deeds pursuant thereto, and they have refused to act, as by their complaint we have understood.

We, therefore, being willing that due and speedy justice should be done in this behalf, demand and strictly enjoin you that you procure title to all the land within the limits of said public park upon which said Heinz Pier is located, and the title and ownership of said pier by purchase, condemnation or otherwise, and cause so much of the said pier as is within the limits of said park to be wholly removed therefrom, and that you proceed without delay in whatever may be legally necessary to accomplish the removal of said pier to the extent named in order that said public park "shall forever be and remain open, so that the view oceanward from the said elevated public walk, erected and to be erected as above mentioned, shall be free, open and unobstructed, and that no use shall be made of the said land by the grantee, its successors or assigns, inconsistent with its use as a public park or place for public resort and recreation," or cause to us to the contrary signify, lest in your default complaint should come to us to be repeated; and how you should execute this command, certify to our Justices of our Supreme Court of Judicature, at Trenton, on the eleventh day of August next, together with this our writ, and this in nowise omit on your peril.

Witness William S. Gummere, Esquire Chief Justice of our said Supreme Court, at Trenton, on the 22d day of July, 1916.

WM. C. GEBHARDT,
Clerk.

C. L. COLE,
Attorney.

NEW JERSEY SUPREME COURT.
February Term, 1916.

RICHARD MCALLISTER ET AL.
vs.
ATLANTIC CITY.
} Mandamus.

RETURN.

(Filed August 25, 1916.)

To the Honorable Justices of the Supreme Court of New Jersey:

The City of Atlantic City, to whom the said writ is directed, does herewith make return thereto to your Honors, and asserts and certifies that all the statements set forth in said writ are not true; that it admits as true the several recitals set forth in the writ heretofore issued in this cause, except such allegations as are hereinafter expressly denied; but answers that it should not be compelled to carry out the mandate of said writ for the following reasons:

1. That the necessity or expediency of procuring title by the City of Atlantic City of the land within its ocean park upon which said Heinz Pier is located, and the title and ownership of such pier, is not a judicial question; but is vested in Atlantic City.

2. That the statutes authorizing the City to acquire lands on its ocean front for public park purposes contained no provisions fixing and determining the time in which all lands constituting a part of said ocean-front park should be acquired, and such taking is a matter within the judgment of the governing body of the City, and not of the relator, nor of this court.

3. That the relators are not proper parties to receive the relief sought, because at the time when the relators conveyed said land to said City for public park purposes, the Heinz Pier was upon the premises conveyed, and its

presence was acknowledged by and assented to by the relators, who, during the years from 1907 to 1913, both inclusive, demanded and received from the owners of the pier, large sums of money annually, as a rental of the pier, which sums were not paid to Atlantic City, the relators grantee under said deed of April 22, 1907: but were retained by the relators, and no demand for removal of said pier was ever made until the owner of the pier refused to pay an increase of $1,500 in rent when in 1914, $2,500 was demanded instead of $1,000 demanded and paid for the year 1913, and this court will not permit its process in this cause sought, to issue for the purpose of enforcing the payment of rent.

4. That said pier was on said premises by virtue of the following circumstances:

The Atlantic City Ocean Pier Company was incorporated May 2d, 1885.

The City of Atlantic City passed an ordinance on May 11th, 1885, authorizing the construction of an iron pier at the foot of Massachusetts Avenue out into the Atlantic Ocean in Atlantic City, N. J.

Pursuant to the authority and permission conferred by said order and said charter, the said Company erected said pier, and that pier is the pier now known as Heinz Pier, which said pier, by sundry mesne conveyances, all duly recorded, passed from the said Company into H. J. Heinz Company, the present owners.

On December 31st, 1902, when the plaintiffs became the registered owner of the land described in their petition, the pier was actually existing on the ground conveyed by them to the defendant.

5. That prior to April 22d, 1907, the date of the deed of the relator to said City, said lands, or adjoining lands, were subject to an agreement dedicating for public street purpose, a 60 feet wide street known as the Boardwalk, across the lands owned by the relator, upon which a public boardwalk had been erected and was then in use. Said Boardwalk agreement contained

the following provision: "And that wherever, because of the formation of land by accretion, the high-water line shall not be less than three hundred feet oceanward from the present location, the City Council shall, upon the written request of the grantors hereto, owning not less than three contiguous squares of land, who shall give the right of way for such purpose, cause the same to be moved oceanward said three hundred feet or any less distance that said owners and City Council may agree upon."

Prior to said April 22d, 1907, the land oceanward of the Boardwalk lying between Connecticut and Maine Avenues (a distance of five contiguous blocks), had moved oceanward so that the high-water line of the Atlantic Ocean was more than three hundred feet oceanward of the said sixty feet wide street known as the Boardwalk, and the relator and others, owners of more than three of said contiguous blocks, petitioned City Council of said City to move said Boardwalk oceanward, as shown by one petition, copy hereto annexed. Said City Council did offer to move said Boardwalk oceanward provided the owners within said five blocks conveyed the lands oceanward of the line of the Boardwalk to be newly located, for ocean park purposes. In consideration, therefore, of the great amount of land available for building and other purposes, which the relators could enjoy by reason of the relocation of the Boardwalk, land worth more than $30,000, they did sign the deed of April 22d, 1907, conveying land upon which said Heinz Pier extended for a short distance, to the City for park purposes, and said Boardwalk was relocated and newly constructed along the inner line of the park as delineated in said deed.

6. That in order to comply with the request of property owners, including the relators, who petitioned said City Council to move said Boardwalk oceanward, it was necessary to destroy or make valueless approximately 300 feet of said Heinz Pier, and build a new entrance

to said pier, and said City Council thereupon did negotiate with the owners of said pier, and did secure from them consent to go through said pier with its new Boardwalk, and was freed from any claim or damages occasioned by destruction of the portion of the pier inland of the newly-located Boardwalk, and to that end did pass the following resolution: "Resolution Relative to Consent from H. J. Heinz Company for the Relocation of a Boardwalk 40 ft. wide along the Interior Line of Beach Front Park.

"*Be It Resolved* by the City Council of the City of Atlantic City, that for and in consideration of a consent in writing, approved by the Streets, Walks and Drives Committee of City Council, from H. J. Heinz and Company of Pittsburgh, for the relocation of a boardwalk forty feet wide along the interior line of the Beach Front Park, located by ordinance of April 10, 1907, said location cutting through at that width the iron pier located at the ocean end of Massachusetts Avenue; that the City of Atlantic City will not interfere with or disturb the present occupancy or possession of said company with said pier, as now erected on lands owned, or hereafter acquired by the City, within the limits of said Beach Front Park, unless such interference or disturbance shall be by condemnation proceedings instituted against all piers on the ocean front carrying out a scheme for the acquirement by the City of all lands within said Beach Front Park; that the Mayor and City Clerk be hereby authorized to sign such agreement."

The agreement aforesaid was entered into and actually completed by both of the parties therein mentioned, according to its terms. That the relators knew of this resolution, profited by it because it allowed the Boardwalk to be promptly moved, and said resolution thereby made effective the true consideration of the deed to April 22, 1907, viz: the acquisition of lands inside of a newly-located Boardwalk in return for a grant to

the City for ocean-park purposes, wherefore the relators should not be heard, to force the City to violate its solemn agreement and promise as contained in said resolution made to the owners of said pier, and which enured to the benefit of the relators.

7. That the City should not be placed in a position whereby a grantor of said lands to the City, by an order of this court, may compel it to condemn, at a time or times solely at the discretion of such grantor, *all* piers on said beach front, and defendant submits that all land, excepting a few parcels of land on its beach front, has been secured for park purposes, and that on five of these parcels, there are respectively Heinz Pier, Garden Pier, Steel Pier, Young's Old Pier and Million Dollar Pier, which piers, and the land on which they stand, have a value exceeding 3,000,000 of dollars, and are a public necessity in Atlantic City, furnishing rest, entertainment and comfort to hundreds of thousands of residents and visitors, public policy forbidding the elimination of these necessary adjuncts to the beach front of Atlantic City, and which adjuncts are properly a part of a beach front public park.

8. That it would be impossible for the City of Atlantic City to carry out at this time its intention to acquire the few remaining tracts of land not now deeded to it for park purposes, and on which piers are erected, because of its inability to sell or dispose of its bonds or securities to be issued therefor, as its limit of bonded indebtedness, which determines the market ability of such bonds, will be reached upon the issue of additional bonds in the amount of $1,050,000, whereas it would require a fund of over $3,000,000 to acquire such tracts. Such action, also, would so add to the bonded indebtedness of the City that it would be impossible to sell any bonds which said City may require to be issued for its usual improvements and other lawful purposes, the cost of which must be met by bond issues.

9. That the mandate of the Court, if executed, would fail to benefit the relators, and no good would result to them, because it would remove but approximately 100 feet of said pier, that portion only being upon the land formerly owned by the relators, other portions of said pier being on lands over which the City has, and can have, no jurisdiction, to wit: lands lying outside of the Exterior Riparian line as established by the Riparian Commission of New Jersey, and on which lands the largest portion of said pier extends, cutting off the view of the sea from the relators' land to a far greater extent than that portion of the said pier sought to be removed. The mandate, if confined to the land formerly of the relators, would not accomplish the purpose sought, and should not be extended to removal of the pier from other lands of which the relator was not a grantor, for the reasons above stated.

Wherefore, the defendant prays that the matter of the removal, through purchase or condemnation, of a portion or all of the Heinz Pier, and of any piers, be left to the discretion and judgment of the governing body, where it lawfully belongs, to carry out at such times and under such circumstances as it deems best for the interest of its grantors under said park deed, as public policy dictates, with regard to public necessity, and as its ability to provide the funds necessary therefor will permit, and to that end this defendant humbly prays that said writ may be dismissed, and that it be relieved from obeying the commands therein given.

Dated August 10th, 1916.

CITY OF ATLANTIC CITY,
By HARRY WOOTTON,
Attorney.

To the President and Members of City Council:

GENTLEMEN—The petition of the undersigned respectfully shows that they are the owners of all the land on the ocean front at a point between New Jersey

and Connecticut Avenues, and Maine Avenue, in Atlantic City, New Jersey, and that by reason of the formation of land by accretion, the high-water line, as it now exists, is not less than three hundred feet oceanward from the present location of the sixty-feet-wide street upon which is erected the public Boardwalk, and not less than three hundred feet oceanward from the location of high-water line and said public street and Boardwalk, at the time of the execution and delivery by us, or our predecessors in title, of a certain deed to Atlantic City, familiarly known as the easement deed, as made and delivered pursuant to an act entitled "An Act to authorize cities in this State, located on or near the ocean, etc.," approved April 6, 1889, and the ordinances of Atlantic City passed by virtue of said act, and its supplements and amendments.

Petitioners further show that the land owned by them as stated, comprises more than three contiguous squares, and they hereby petition your Honorable Body to move said Boardwalk oceanward, between the points herein named, from its present location to a point three hundred feet oceanward or such greater or less distance as the rights of your petitioners under said easement deed and the public interest may require; such distance and location to be agreed upon by your petitioners.

And your petitioners as in duty bound, will ever pray, etc.

Walter Walls, 110 ft. frontage Cor. Dewey and Maine Ave.

H. E. Kelley, 100 ft. bet. Maine and N. H.

States Ave. Land Co., by James A. Cathcart, Pres., 190 ft. New Hampshire Ave., Easterly.

H. E. Stevens, Jr., 175 ft. Westerly from New Hampshire Ave.

Walter B. Dick, owner of record.

H. E. Stevens, Jr., owner by contract, 175 ft. Vermont Ave., Easterly.

Edgar Lehman, 175 ft. bet. Vermont and middle line of Victoria Ave.

New Amsterdam Realty Co. / H. E. Stevens, Jr., Treas. / H. G. Harris, Sec'y. — 175 ft. Rhode Island Ave. to middle line Victoria Ave.

Richard McAllister—150 ft. Metropolitan Ave. to Rhode Island.

Mass. Ave. to Metropolitan, 160 ft.

350 ft. Mass. Ave. to Conn.

Allen B. Endicott and Oxford Hotel Company, by Joseph Thompson, Pres., — 125 ft. West side of Conn. / 350 feet between Conn. and Mass. Avenues.

[SEAL.]

I consent to the filing of the within Answer out of time.

C. L. COLE,
Atty. for Relator.

NEW JERSEY SUPREME COURT.

RICHARD MCALLISTER ET AL., *Relators,*
vs.
ATLANTIC CITY, *Respondent.*
On Mandamus.

DEMURRER TO PLEA.

(*Filed September 5, 1916.*)

The relators say in reply to the return made by the respondent in this cause that none of the matters and things set forth in said return justify a refusal of

the respondent to take proceedings ultimating in the removal of the Heinz Pier structure within the limits of the public park, nor to deny to the relators a pre-emptory writ of mandamus to be addressed to the respondent to accomplish that end, and that the matters and things set forth are not sufficient in law to require them to plead thereto, therefore, and because of the insufficiency of the matters and things set forth, they pray judgment that said answer and return be stricken, set aside, and for nothing holden, and that a pre-emptory writ of mandamus do issue in accordance with the prayer of the alternative writ in this cause.

C. L. COLE,
Attorney of Relators.

NEW JERSEY SUPREME COURT.

RICHARD MCALLISTER ET AL.,
Relators,
vs.
ATLANTIC CITY,
Respondent.
} On Mandamus.

NOTICE TO STRIKE RETURN.

(*Filed September 5, 1916.*)

To Harry Wootton, Esquire, Attorney of Respondent:

Notice that on the first Tuesday of November next, at the hour of eleven o'clock in the forenoon, or so soon as the matter can be heard, I shall move the Court to strike the return filed in this cause and for a pre-emptory writ of mandamus for the reason that none of the facts or matters set forth in said return are sufficient answer in the law to the alternative writ or to deny to the relators the right to a pre-emptory writ,

nor do any of such facts and matters set forth a legal excuse on the part of the respondent for its refusal to take steps looking to the removal of the Heinz Pier structure from off the public park.

C. L. Cole,
Attorney of Relators.

Due and legal service acknowledged this 5th day of September, 1916, by

Harry Wootton,
Attorney of Respondent.

New Jersey Supreme Court.

McAllister et al.,
Relators,
vs.
Atlantic City,
Respondent.
} On Mandamus.

OPINION.

Nov. Term, 1916.

Bergen, *J.*

The relators hold an alternative writ of mandamus enjoining respondent to procure the title to all the land within the limit of a public park upon which a pier, known as "Heinz Pier," is located, by condemnation or otherwise, and to cause so much of the pier as is within the limits of the park to be wholly removed therefrom. The writ recites that in 1907 relators were the owners of a strip of land 80 feet wide, adjoining Rhode Island Avenue, and extending southerly at that width to the exterior line established by the riparian commissioners; that April 8, 1907, they conveyed to

Atlantic City all their interest in said land, beginning in the interior line of the public park of the city and running southerly to the said exterior line; that, as authorized by statute, the respondent, by ordinance adopted October 9, 1899, did establish the inland line of a park along the ocean front; that the aforesaid conveyance granted the interest conveyed, for and only for, use as a public park except that the city might maintain along the interior line an elevated public boardwalk; that the grantee covenanted that the lands granted and dedicated to public use should forever be and remain open, so that the view oceanward from the elevated public walk should be free, open and unobstructed, and that no use should be made of the land inconsistent with its use as a public park; that when the deed was delivered there existed a pier known as "Heinz Pier," connected with the boardwalk and extending into the ocean about 500 feet on which are two inclosed pavilions, one within and the other without the park limits, but neither on the land granted to the city by the relators, but that about 100 feet of the pier crosses a corner of said land; that the city is the owner of all the land within the park limits except the Heinz and three other like piers, and what is called the Lindley tract, and that relators have requested respondents to acquire and remove so much of the Heinz Pier as is within the limits of the park, which request has not been complied with. The City filed a plea, setting up that the determination of the question of the necessity of procuring title to land for a park is vested in the City and not subject to mandamus; that the statute fixes no time for acquiring the land; that when relators conveyed that portion of the structure they now seek to remove was on the land; that relators have, since giving the deed, consented to the continuance of the platform, and have collected rent for the use of it by the Pier Company; that in 1885 the City authorized the construction of the pier and

it was in existence when relators conveyed, subject to an agreement dedicating a strip 60 feet wide for the boardwalk; that the boardwalk was moved oceanward, owing to accretions, which required the destruction of 300 feet of the pier, and the City agreed with the Pier Company that it would not interfere with so much of the pier as was within the park limits, unless all other piers within the limits of the park were acquired by condemnation; that the City is not financially able to take over all the piers, as it would require a bond issue beyond legal limit, and that to condemn so much as is within relators' conveyance would not accomplish the purpose relators seek. To this plea relators demur, and argue that the presence of the pier within the boundaries of the park is an obstruction in violation of the terms of the deed. This may be granted, and yet the question remains whether the City can be required by mandamus to condemn land for park purposes, because it has acquired a part, or because of a covenant in a deed for some of the land. We do not think it is.

(1) In the first place, the law (P. L. 1894, p. 146) does not require the City to acquire—it has the legal right, but is not compellable—and mandamus will only issue when the City refuses to perform an express legal duty, and there is in this case no such duty imposed.

(2) In the second place the deed does not aid the relators, for the writ is never rested on a contractual obligation, in such cases the private party has his action for damages. *Mabon* v. *Halsted*, 39 *N. J. Law*, 640. Again it will never compel what cannot lawfully be done, and in this plea it appears that the City has no funds to pay any award and cannot raise it by a bond issue, as it would require a sum in excess of legal limit.

(3) A notice to strike out the plea was given, as well as demurrer thereto, and the question was raised as to

which was proper. We are of opinion that, this being a proceeding resting on a prerogative writ, the Practice Act of 1912 does not apply, and that the objection should be raised by demurrer and not by motion to strike out.

The demurrer will be overruled.

NEW JERSEY SUPREME COURT.

RICHARD MCALLISTER ET AL.,
Relators-Appellants,
vs.
ATLANTIC CITY,
Respondent-Respondent.

NOTICE OF APPEAL.

(*Filed October 4, 1917.*)

To Harry Wootton, Esquire, Attorney of Respondent:

Take notice that the appellant appeals to the Court of Errors and Appeals from the whole of the judgment entered in this cause on the following grounds:

1. The Supreme Court overruled the demurrer of the appellants when it should have sustained it.

2. The Supreme Court refused to award a peremptory writ of mandamus to the relators-appellants when it should have awarded such a writ.

3. The Supreme Court held that the relators-appellants were seeking to enforce a covenant when it should have held that they were relying upon a legal duty cast upon the respondent.

4. The Supreme Court held that the plea of the respondent showed that it was without funds with which to carry out the park scheme when there was no such averment in the plea.

5. The Supreme Court refused to grant relief to the relators-appellants when it should have granted all the relief for which they prayed.

C. L. Cole,
Sept. 29, 1917. *Attorney of Appellants.*

Due and legal service of copy of the within notice of appeal acknowledged this 29th day of September, 1917.

Harry Wootton,
Joseph B. Perski,
Attorneys of Respondent.

JUDGMENT.

(*Filed October 23, 1917.*)

This case was heard before our Supreme Court at the November Term, 1916, on the demurrer of the relators to the return of the respondents to the Alternative Writ of Mandamus, and the Court rendered judgment in favor of the respondent and against the relators on the demurrer to the return to the Alternative Writ of Mandamus.

Whereupon it is adjudged that the said return to the said Alternative Writ of Mandamus is sufficient in law and that said demurrer thereto is overruled, and that said Alternative Writ of Mandamus be dismissed; it is further adjudged that the said respondent, Atlantic City, do recover of the said relators, Richard McAllister, Henry C. Schmidt and Edward A. Schmidt, the sum of costs.

Judgment entered October 4, 1917.

Wm. S. Gummere,
C. J.

I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above stated cause as the same remains on file and of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this
[L. S.] tenth day of October, A. D. nineteen hundred and seventeen.

WM. C. GEBHARDT,
Clerk.