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BILL OF COMPLAINT.

(Filed December 18, 1924.)

IN CHANCERY OF NEW JERSEY.

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

Complainant, Richard McAllister, residing in Atlantic City, New Jersey, respectfully shows, that:

1. On December 15, 1902, by deed bearing that date, Albion Real Estate Company, being then the owner thereof, conveyed to complainant and one William H. Burkard, a certain tract of land and premises situate in the City of Atlantic City, County of Atlantic and State of New Jersey, described as follows:

BEGINNING in the Westerly line of Rhode Island Avenue 190 feet Southwardly of the Southerly line of Oriental Avenue, and extending thence (1) Westwardly parallel with Oriental Avenue eighty feet; thence (2) Southwardly parallel with Rhode Island Avenue seventy- feet; thence (3) Westwardly parallel with Oriental Avenue seventy feet to the Easterly line of Metropolitan Avenue; thence (4) Southwardly by same 940 feet more or less to the exterior line established by Commissioners; thence (5) Eastwardly along said exterior line 150 feet more or less to a point in line with the Westerly line of Rhode Island Avenue extended Southwardly to said exterior line; thence (6) Northwardly along the Westerly line of Rhode Island Avenue 1010 feet more or less to beginning.

Said deed of conveyance is of record in the office of the clerk of Atlantic County, New Jersey, in Book 283 of Deeds, page 7 etc. Said conveyance operated to vest in complainant and said Burkard, each an undivided one-half part or interest in said land as tenants in common, in fee simple.

2. Complainant is still the owner in fee simple of an undivided one-half interest in all of that portion of said lands contained within the boundaries of said exterior line, Rhode Island and Metropolitan Avenues extended and a line drawn parallel with Rhode Island Avenue, approximately 150 feet northwardly from the inside or landward line of the City Park hereinafter mentioned and the public Boardwalk as now located.

3. At the time complainant acquired his title to said tract of land, there had been theretofore erected and then existed partly thereon, a structure known as "Heinz Pier" extending in a southeasterly direction into the Atlantic Ocean from the Boardwalk a distance of approximately 900 feet crossing said tract of land. At the time of said conveyance the said structure known as "Heinz Pier" was in the possession of H. J. Heinz Co., a corporation, but said corporation possessed no legal title to the land of complainant whereon said structure stood, nor any right to the possession thereof, and as to the complainant and said Burkard, the owners thereof, was a mere trespasser thereon.

4. By ordinance passed October 9, 1899, and approved October 13, 1899, the then governing body of the City of Atlantic City, determined to lay out and open a public park or place for public resort

and recreation along the beach or ocean front of said City under the authority and pursuant to the provisions of an Act of the Legislature of New Jersey, approved April 26, 1894, 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 or encroachment," and in and by said ordinance established the interior or inland line of such park or place of public resort or recreation and the limits and boundaries thereof. Said interior or inland line so established crosses and the limits and boundaries therein set forth includes the land of complainant hereinabove described.

5. By deed of grant bearing date April 8, 1907, and recorded in said clerk's office May 5, 1908, in Book 380 of Deeds, page 237, etc., in consideration of one dollar, as is therein recited, complainant and the other owner of said tract of land above described, joining therein with the owners of other lands along said ocean front, granted and conveyed to the City of Atlantic City, a determinable and conditional fee or estate in so much of said tract of land as lay Southwardly of the interior or inland line of said public park as then relocated and established.

6. By the terms of said grant the said tract of land was conveyed and was to be held subject to the conditions, restrictions, limitations and conven-

ants therein expressed and contained, that is to say: the said grant was made to the grantee

"To have and to hold the said premises*** for and only for use as a public park or place of public resort and recreation, giving to party of the second part, the right to construct, reconstruct, repair, complete and maintain upon the land so conveyed along interior or inland line of said park as established as aforesaid, an elevated boardwalk***"

Covenants are therein expressed and contained on the part of the City of Atlantic City, the said grantee, to be observed and kept as follows:

"That whenever a formation of land by accretion shall occur within the bounds of the land hereby conveyed to such an extent that the high water line of the ocean shall not be less than 300 feet Oceanward from the inland line so established, the grantee and its successors, shall upon the written request of the grantors, their heirs, and assigns, owning not less than three contiguous City blocks of the land hereby conveyed upon which such accretion may have formed cause the elevated boardwalk erected thereon to be moved oceanward 300 feet or any less distance that such owners and party of the second part may agree upon;

And whenever the said elevated boardwalk shall be moved oceanward by virtue of this provision, the inland line of said park shall be moved oceanward to correspond therewith, and all the land hereby conveyed lying inland from the line so re-established shall be released from the dedication hereby made and revert to the owners thereof, their heirs or assigns."

"(4) 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 lands by the grantee, its successors and assigns, inconsistent with its use as a public park or place for public resort and recreation."

7. Said H. J. Heinz Co., now in possession of said pier structure, is not the owner of any part of the land whereon the same is erected and stands, a part of said land being owned by the complainant and having by him been granted to the City of Atlantic City, as aforesaid. The landward end of said pier or structure where it is connected with the Boardwalk and also the outer or oceanward end thereof are occupied by enclosed pavilions and the whole of said pier has always been used by said H. J. Heinz Co., solely for commercial purposes to exhibit the products of its business and to advertise the "57 Varieties" thereof, and holds such possession and devotes said pier to said use without any title or right of possession of said structure.

8. At or about the date of the grant and conveyance above mentioned the inland line of said public park was relocated as therein recited and the elevated boardwalk was moved oceanward in consequence of which said pier was shortened by the removal of about 300 feet from the interior or inland end thereof to make the junction thereof with said boardwalk conform to such relocation, so that the present length of said pier is about 600 feet. In the month of August, 1924, a portion of said pier

structure was destroyed as the result of a collision occasioned by a vessel or float being driven against the same by means of which collision a portion of said structure about 136 feet in extent, and a large portion of which is landward of said exterior line, is within the limits of said public park and on the lands granted by the complainant to the City of Atlantic City, as aforesaid, was broken down and destroyed in consequence of which the use of said pier in the business aforesaid, was of necessity interrupted and discontinued.

9. Complainant is informed and believes that said H. J. Heinz Co. designs and intends to repair the damage occasioned as aforesaid and restore said pier to its original condition and to continue said use thereof and has already contracted for said work with one Edward L. Bader, or the Bader Construction Company, a corporation, for said work of repairs and restoration; that said work is now going forward on the part of the contractor; that the City of Atlantic City notwithstanding the covenants contained in said grant is willing that the said pier or structure should be restored and so used and has already issued a permit authorizing said work which permit falsely and deceptively purports to authorize the installation of storm doors, whereas the official having the authority to issue such permits and who actually issued the same knew and knows that the work intended to be done under color of said permit is more extensive than is therein described and was and is fully informed of the nature and extent of the work to be done and that the work to be done is that of repairing said damage and fully restoring said structure.

10. Complainant immediately upon learning that it was proposed to restore said pier, conferred with one of the officials of the City of Atlantic City, viz., with Joseph B. Perskie, Esquire, assistant city solicitor, and objected to any restoration thereof, and threatened to take legal means to make such objection effective by restraining such work and was informed by said official that restoration of said pier would not be permitted and that no action on the part of complainant would be necessary to prevent the same; that later complainant was informed by Edward L. Bader, Mayor of said City, upon whom he called to protest against any such work being permitted, that said work would be done and that he, said Bader, had contracted to perform said work, whereupon on or about December 10, 1924, complainant caused to be given to said Mayor and the Commissioners of said city, notice of his said objection, a copy of which notice marked Exhibit "A" is hereto annexed and made a part hereof. Complainant also, on or about December 16, 1924, caused to be served on said Edward L. Bader personally, and on Axel Olsen, foreman in charge of said work at said pier, on December 17, 1924, and also mailed to H. J. Heinz Co., at Pittsburgh, Pennsylvania, its home or principal office, and also mailed to Colonel J. S. Foster, agent or manager of said pier for said H. J. Heinz Co., addressed Pittsburgh, State of Pennsylvania, in care of H. J. Heinz Co., on December 15, 1924, each a notice, a copy of which marked Exhibit "B" is hereto annexed and made a part hereof. The service of said notice upon the said H. J. Heinz Company and on said Foster was made on December15, 1924, by registered letter addressed to them as aforesaid.

11. Complainant avers that the said tract of land so as aforesaid granted by complainant to the City of Atlantic City, has not been and is not open so that the view oceanward from said elevated public walk erected thereon is not nor since the making of said grant has ever been free, open and unobstructed; that the existence of said pier or structure on said land has been and continues to be an obstruction to the view oceanward from the said elevated walk; that the use of said pier or structure for the commercial purpose aforesaid is and has always been inconsistent with its use as a public park or place for public resort and recreation; that the proposed repairs and restoration thereof is intended to continue said structure as an obstruction of the view oceanward from said walk and for use for said commercial purpose, and complainant expressly charges that the City of Atlantic City is without right, power or authority under said Act of the Legislature, or otherwise to authorize or permit said pier or structure to be repaired or restored to be used for any purpose whatever, commercial or otherwise, not for municipal purposes, or to exist, and that any authority or permission on the part of said city for the reparation or restoration of said pier or structure or for the use thereof for commercial purposes or for any purpose other than municipal purposes not inconsistent with its use as a public park or for its continued existence, is contrary to the provisions, tenor and effect of said Act of the Legislature and contrary to the covenants hereinabove set forth contained in said grant and violative thereof.

Complainant is without adequate remedy in the courts of law and therefore prays:

1. That H. J. Heinz Co., Edward L. Bader, Bader Construction Company and the City of Atlantic City, who are the defendants to this suit, may answer this bill of complaint, without oath, and each statement herein contained.

2. That the City of Atlantic City be enjoined from authorizing, consenting to or permitting the reparation or restoration of said pier or structure and from issuing its permit therefor.

3. That H. J. Heinz Co., its contractors, officers, servants, agents and workmen be enjoined from performing, continuing or further proceeding with any work looking to the reparation or restoration of said pier or structure and that said defendants be decreed to take down, destroy or undo any such work already done or performed.

4. That the continued existence of said pier or structure and the use thereof for commercial purposes be decreed to be inconsistent with the use of said land as a public park or place for public resort and recreation within the meaning of said Act of the Legislature and a violation of the covenants contained in said grant and the defendant, H. J. Heinz Co., enjoin from using the same for commercial purposes and the defendant, City of Atlantic City, be enjoined from authorizing or permitting said structure to be so used.

5. That a writ or writs of subpoena may issue commanding said defendants to answer this bill of complaint and abide by such decree as the Court may make in the premises.

6. That complainant have such further or other relief in the premises as shall be equitable and just.

BABCOCK & CHAMPION,
Solicitors for and of Counsel with Complainant.

EXHIBIT "A."

December 10, 1924.

To the Hon. Mayor
and Commissioners of
Atlantic City, N. J.
Gentlemen:

Mr. Richard McAllister, who owns a large tract of beachfront property between Rhode Island and Metropolitan Avenues, informs me he has reason to believe that it is the intention on the part of the owner of the Heinz Pier structure to restore the portion of the pier which was destroyed by a recent storm.

Mr. McAllister claims that the said pier structure is a trespass upon his property and he not only objects to any restoration, but requires that so much of the remaining portion of the pier which is on or in front of his property be immediately removed.

The further claim is made by Mr. McAllister that the said pier constitutes a violation of the Park Act and that any building or reconstruction by way of restoration will be a direct violation of said act.

It is unnecessary to point out the seriousness of any permission of acquiescence on the part of the City respecting violation of the above mentioned act. Mr. McAllister desires to give notice that he will consider any violation on the part of the City

respecting said act as the equivalent of a release by the City of any rights under the Easement deed, executed by him, and that he will resort to the Courts to prevent the pier from being rebuilt and to have the portion of the pier now remaining removed.

Very respectfully yours,
B/ER Chas. C. Babcock.

EXHIBIT "B."

December 15, 1924.

TO WHOM IT MAY CONCERN:

TAKE NOTICE that Richard McAllister, one of the owners of Beachfront property, between Rhode Island and Metropolitan Avenues, in Atlantic City, New Jersey, on which property there is a structure known as "Heinz Pier," objects to the portion of the Pier which was washed away or destroyed about the month of August 1924, being restored or reconstructed in any manner whatsoever, and objects to the presence of the remaining portions of the Pier upon or in front of his property, and hereby gives further notice that it is his intention to make immediate application to the Court of Chancery of New Jersey, for an injunction preventing any such restoration or re-construction, and for any other relief to which he is entitled and to take such other action necessary to protect his rights.

This notice is in addition to similar notice previously given.

Chas. C. Babccok
Attorney for Richard McAllister

STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } *ss.*

RICHARD MCALLISTER, of full age, being sworn according to law, deposes and says:

1. I am the complainant in the above stated cause and have been made acquainted with the contents of the annexed bill of complaint and all of the matters and things set forth in said bill of complaint as far as they relate to my own acts are true and as far as they relate to the acts of others, I verily believe them to be true. Particularly is it true that:

2. On December 15, 1902, by deed bearing that date, Albion Real Estate Company, being then the owner thereof, conveyed to one William H. Burkard and me, a certain tract of land situate in the City of Atlantic City, County of Atlantic and State of New Jersey, described as follows:

BEGINNING in the Westerly line of Rhode Island Avenue 190 feet Southwardly of the Southerly line of Oriental Avenue and extending thence (1) Westwardly, parallel with Oriental Avenue, eighty feet; thence (2) Southwardly, parallel with Rhode Island Avenue, seventy feet; thence (3) Westwardly, parallel with Oriental Avenue seventy feet to the Easterly line of Metropolitan Avenue; thence (4) Southwardly, by same 940 feet more or less to the exterior line established by Commissioners; thence (5) Eastwardly, along said exterior line, 150 feet more or less to a point in line with the Westerly line of Rhode Island Avenue, extended Southwardly to said exterior line; thence (6) Northwardly, along the Westerly line of Rhode Island Avenue, 1010 feet more or less to beginning.

Said deed of conveyance is of record in the office of the clerk of Atlantic County, New Jersey, in Book 283 of deeds, page 7, etc. Said conveyance operated to vest in said Burkard and me each an undivided one-half part or interest in said land as tenants in common, in fee simple.

2. I am still the owner in fee simple of an undivided one-half interest in all of that portion of said lands contained within the boundaries of said exterior line, Rhode Island and Metropolitan Avenues extended and a line drawn parallel with Rhode Island Avenue, approximately feet northwardly from the inside or landward line of the City park hereinafter mentioned and the public boardwalk as now located.

3. At the time I acquired my title to said tract of land there had been theretofore erected and then existed partly thereon a structure known as "Heinz Pier" extending in a southeasterly direction from the Boardwalk into the Atlantic Ocean a distance of approximately 900 feet crossing my said land. At the time of said conveyance the said structure was known as "Heinz Pier," was in the possession of H. J. Heinz Co., a corporation, but said corporation possessed no legal title to the lands of mine whereon said structure stood, nor any right to the possession thereof, and as to the said Burkard and me, the owners thereof, was a mere trespasser thereon.

5. By ordinance passed October 9, 1899, and approved October 13, 1899, the then governing body of the City of Atlantic City determined to lay out and open a public park or place for public resort and recreation along the beach or ocean front of

said city under the authority and pursuant to the provisions of an Act of the Legislature of New Jersey, approved April 26, 1894, 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 or encroachment," and in and by said ordinance established the interior or inland line of such park or place of public resort or recreation and the limits and boundaries thereof. Said interior or inland line so established crosses and the limits and boundaries therein set forth includes the land of mine hereinabove described.

6. By deed of grant bearing date April 8, 1907, and recorded in said clerk's office May 5, 1908, in Book 380 of Deeds, page 237, etc., in consideration of one dollar as therein recited, I and the other owners of said tract of land above described, joining therein with the owners of other lands along said ocean front, granted and conveyed to the City of Atlantic City, a determinable and conditional fee or estate in so much of said tract of land as lay southwardly of the interior or inland line of said public park as then relocated and established.

7. By the terms of said grant the said tract of land was conveyed and was to be held subject to the conditions, restrictions, limitations and covenants therein expressed and contained, that is to say: the said grant was made to the grantee:

"To have and to hold the said premises * * * for and only for use as a public park or place

of public resort and recreation, giving to party of second part, the right to construct, re-construct, repair, complete and maintain upon the land so conveyed along the interior or inland line of said park as established as aforesaid, an elevated boardwalk * * *."

Covenants are therein expressed and contained on the part of the City of Atlantic City, the said grantee, to be observed and kept as follows:

"That whenever a formation of land by accretion shall occur within the bounds of the land hereby conveyed to such an extent that the high water line of the ocean shall not be less than 300 feet oceanward from the inland line so established, the grantee and its successors, shall upon the written request of the grantors, their heirs and assigns, owning not less than three contiguous city blocks of the land hereby conveyed upon which such accretion may have formed cause the elevated boardwalk erected thereon to be moved oceanward 300 feet or any less distance that such owners and party of second part may agree upon.

And whenever the said elevated boardwalk shall be moved oceanward by virtue of this provision the inland line of said park shall be moved oceanward to correspond therewith, and all the land hereby conveyed lying inland from the line so re-established shall be released from the dedication hereby made and revert to the owners thereof, their heirs or assigns."

"(4) 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 and assigns, inconsistent with its use as a public park or place for public resort and recreation."

8. Said H. J. Heinz Co. now in possession of said pier structure is not the owner of any part of the land whereon the same is erected and stands, a part of said land being owned by me and having by me been granted to the City of Atlantic City as aforesaid. The landward end of said pier or structure where it is connected with the boardwalk and also the outer or oceanward end thereof are occupied by enclosed pavilions and the whole of said pier has always been used by said H. J. Heinz Co., solely for commercial purposes to exhibit the products of its business and to advertise the "57 Varieties" thereof and holds such possession and devotes such pier to such use without any title or right of possession of said structure.

9. At or about the date of the grant and conveyance above mentioned the inland line of said public park was relocated as therein recited and the elevated boardwalk was moved oceanward in consequence of which said pier was shortened by the removal of about 300 feet from the interior or inland end thereof to make the junction thereof with said boardwalk conform to such relocation, so that the present length of said pier is about 600 feet. In the month of August, 1924, a portion of said pier structure was destroyed as the result of a collision occasioned by a vessel or float being driven against the same by means of which collision a portion of said structure about 136 feet in extent, and a large portion of which pier landward of said exterior line, is within the limits of said public park and on the lands granted by me to the City of Atlantic City, as aforesaid, was broken down and destroyed in consequence of which the use of said pier in the business aforesaid was of necessity interrupted and discontinued.

10. I am informed and believe that said H. J. Heinz Co., designs and intends to repair the damage occasioned as aforesaid and restore said pier to its original condition and to continue said use thereof and has already contracted for said work with one Edward L. Bader, or the Bader Construction Company, a corporation, for said work of repairs and restoration; that said work is now going forward on the part of the contractor; that the City of Atlantic City, notwithstanding the covenants contained in said grant, appears to be willing that said pier or structure should be restored and so used and on or about October 3, 1924, issued at the request of said H. J. Heinz Co., a permit for the installation of storm doors and the work which is being done is apparently being done under that permit which I believe was issued in that form for the purposes of deception,

11. Immediately upon learning that it was proposed to restore said pier I conferred with Joseph B. Perskie, Esquire, assistant city solicitor of Atlantic City, and objected to any restoration thereof and threatened to take legal means to make such objection effective by restraining such work and was informed by said official that restoration of said pier would not be permitted and that no action on my part would be necessary to prevent the same; that later I was informed by Edward L. Bader,

mayor of said city, upon whom I called to protest against any such work being permitted; that said work would be done, and that he, Bader, had contracted to perform said work, whereupon on December 10, 1924, I caused to be given to said mayor and the commissioners of said city notice of my objection, copy of which notice is annexed to the bill and marked Exhibit "A." On December 15, 1924, I mailed to H. J. Heinz Co., at Pittsburgh, Pennsylvania, its home or principal office, and also to J. S. Foster, agent or manager of said pier for said H. J. Heinz Co., addressed to him at Pittsburgh, State of Pennsylvania, in care of said company, each a notice of my objection, copy of which notice is annexed to the bill and marked Exhibit "B." Said mail was by registered letter. Said notice, Exhibit "B" was also served personally on Edward L. Bader on December 16, 1924, and on Axel Olsen, foreman in charge of said work on said pier, on December 17, 1924.

12. I have been advised that the City of Atlantic City has not complied with and performed the covenants and conditions of said grant. The said tract of land granted as aforesaid by me to the City of Atlantic City has not been and is not open so that the view oceanward from said public walk erected thereon is not nor since the making of said grant has ever been free, open and unobstructed and I have been advised that the existence of said pier on said land has been and continues to be an obstruction to the view oceanward from said elevated walk; that the use of said pier for commercial purposes is and always has been inconsistent with its use as a public park or place for public resort and recreation; that the proposed repairs and restoration thereof is intended to continue said structure as an

obstruction of the view oceanward from said walk and for use for said commercial purpose and I am advised and charge that Atlantic City is without right, power or authority under said Act of the Legislature or otherwise to authorize or permit said pier or structure to be repaired or restored to be used for any purpose whatever, commercial or otherwise, not for municipal purposes, or to exist, and that any authority or permission on the part of said city for the reparation or restoration of said pier, or for the use thereof for commercial purposes, or for any purpose other than municipal purposes, not inconsistent with its use as a public park or for its continued existence is contrary to the provision and effect of said act and contrary to the covenants of said grant and is violative thereof.

RICHARD MCALLISTER.

Sworn and subscribed to before me this 18th day of December, 1924.

JAMES N. BUTLER,
M. C. C. of N. J.

[ENDORSED]

We hereby certify that the within bill of complaint is a true copy of the bill of complaint and affidavits filed in this cause.

Babcock & Champion,
Solicitors.

ORDER TO SHOW CAUSE.

(Filed December 18, 1924.)

IN CHANCERY OF NEW JERSEY.

Between RICHARD MCALLISTER, *Complainant,* and H. J. HEINZ Co., a corporation, *et al.*, *Defendants.*	On Bill for Injunction. Rule to Show Cause.

Upon reading the bill of complaint in this cause and the affidavit thereto annexed, and on motion of Babcock and Champion, of counsel with the complainant:

It is on this 18th day of December, 1924, ordered that the defendants show cause before the Chancellar, at Chancery Chambers, in Atlantic City, on the twenty-third day of December, 1924, at ten o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an injunction should not issue restraining them and each of them, their agents, servants and employes from making any reparation or restoration of the pier or structure known as "Heinz Pier" or doing any work in connection therewith, and such further relief be granted as may be just.

It is further ordered that a copy of said bill, affidavit and of this order certified by the solicitors for the complainant be served on the said defendants respectively within two days from the date hereof and that said defendants, their agents, workmen, employees and servants desist and refrain from doing any work in connection with such reparation or restoration of such pier structure until the further order of this Court.

It is further ordered that the complainant have leave to present additional affidavit upon the hearing of this rule provided a copy thereof be served upon the defendants two days prior to the hearing.

E. R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL,
V. C.

ADDITIONAL AFFIDAVITS.

(Filed Jan. 6, 1925.)

IN CHANCERY OF NEW JERSEY.

Between

RICHARD MCALLISTER, *Complainant,* and H. J. HEINZ CO., a corporation, *et al.*, *Defendants.*	On Bill for Injunction. Affidavit.

STATE OF NEW JERSEY, } *ss.*
COUNTY OF ATLANTIC, }

E. D. RIGHTMIRE, of full age, being duly sworn according to law, deposes and says:

1. I am a civil engineer and practice my profession in Atlantic City, New Jersey. The map, of which the annexed blue print is a copy, was made of Heinz Pier, in Atlantic City, New Jersey, as result of actual measurements made by me and under my supervision upon the ground.

2. The said map with the exception of the tide lines shows the physical conditions as they existed in August of 1924 and as those conditions continued and existed down to and including December 15, 1924, with the exception that on the last mentioned date there appears to be three or four pilings which had been placed in the break in the pier.

3. The tide lines show the location of high and low water as they existed on December 15, 1924, and the exterior line shown on the map was determined by definite calculation.

E. D. RIGHTMIRE.

Sworn and subscribed to before me this 19th day of December, 1924.

MORRIS M. GORSON,
M. C. C. of N. J.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

Between
RICHARD MCALLISTER,
Complainant,
and
H. J. HEINZ Co., a corporation, *et al.*,
Defendants.

On Bill for Injunction.
Affidavit.

STATE OF NEW JERSEY, COUNTY OF ATLANTIC, *ss.*

RICHARD MCALLISTER, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the complainant in the above stated cause. I caused photographs to be taken on Sunday, December 14, 1924, of Heinz Pier. Annexed hereto and made a part hereof is photograph marked No. 4038-C which was taken by the Atlantic Foto Service, on that date. Said picture was taken with the camera on the Boardwalk about 100 yards east of the pier and looking down the beach and across the pier.

2. Annexed hereto and made a part hereof is another photograph made on said date marked No.

4038-D. Said picture was made with the camera on Boardwalk about 125 yards west of said pier and pointing in an easterly direction.

RICHARD MCALLISTER.

Sworn and subscribed to before me this 19th day of December, 1924.

MORRIS M. GORSON,
M. C. C. of N. J.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

Between
RICHARD MCALLISTER,
Complainant,
and
H. J. HEINZ Co., a corporation, *et al.*,
Defendants.

On Bill for Injunction.
Affidavit.

STATE OF NEW JERSEY, COUNTY OF ATLANTIC, *ss.*

E. D. RIGHTMIRE, of full age, being duly sworn according to law, deposes and says:

1. I am a civil engineer and practice my profession in Atlantic City, New Jersey. The map, of which the annexed blue print is a copy, was made

of Heinz Pier, in Atlantic City, New Jersey, as result of actual measurements made by me and under my supervision upon the ground.

2. The said map with the exception of the tide lines shows the physical conditions as they existed in August of 1924 and as those conditions continued and existed down to and including December 15, 1924, with the exception that on the last mentioned date there appears to be three or four pilings which had been placed in the break in the pier.

3. The tide lines show the location of high and low water as they existed on December 15, 1924, and the exterior line shown on the map was determined by definite calculation.

E. D. Rightmire.

Sworn and subscribed to before me this 19th day of December, 1924.

Morris M. Gorson,
M. C. C. of N. J.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

Between Richard McAllister, *Complainant,* and H. J. Heinz Co., a corporation, *et al.,* *Defendants.*	On Bill for Injunction. Affidavit.

State of New Jersey, }
County of Atlantic, } *ss.*

Richard McAllister, of full age, being duly sworn according to law, upon his oath deposes and says:

1. I am the complainant in the above stated cause. I caused photographs to be taken on Sunday, December 14, 1924, of Heinz Pier. Annexed hereto and made a part hereof is photograph marked No. 4038-C which was taken by the Atlantic Foto Service, on that date. Said picture was taken with the camera on the Boardwalk about 100 yards east of the pier and looking down the beach and across the pier.

2. Annexed hereto and made a part hereof is another photograph made on said date marked No. 4038-D. Said picture was made with the camera on Boardwalk about 125 yards west of said pier and pointing in an easterly direction.

RICHARD MCALLISTER.

Sworn and subscribed to before me this 19th day of December, 1924.

MORRIS M. GORSON,
M. C. C. of N. J.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

Between
RICHARD MCALLISTER,
Complainant,
and
H. J. HEINZ CO., a corporation, *et al.*,
Defendants.

On Bill for Injunction.
Affidavit.

STATE OF NEW JERSEY, } *ss.*
COUNTY OF ATLANTIC, }

F. MARQUEZ TOPPIN, of full age, being duly sworn according to law, deposes and says:

1. I am employed by Richard McAllister, the complainant in the above stated cause. At the request of the complainant and of Babcock and Champion, solicitors for the complainant, I served a copy of the order to show cause and restraining order allowed in this cause on December 18, 1924, together with a copy of the bill of complaint and the affidavit annexed, both certified by the solicitors of the complainant, upon the defendants and persons at the times and in the manner as follows:

Upon Edward L. Bader and Bader Construction Company by delivering to said Edward L. Bader personally a copy of said order and of said bill and affidavit on December 18, 1924, about 6.15 P. M.

Upon H. J. Heinz Co., by mailing to them postage prepaid and by registered mail addressed to said company at Pittsburgh, State of Pennsylvania, a copy of said order and of said bill and affidavits on December 18, 1924.

On December 19, 1924, about 8.15 A. M., upon Axel Olson, foreman in charge of work at Heinz Pier, by reading and explaining said order to him and offering him a copy thereof, together with a copy of the bill of complaint and affidavit. Said Olson refused to take the papers but I made known the contents to him.

I served the map and additional affidavits by Mr. McAllister and Mr. Rightmire and also the two photographs on Edward L. Bader and Bader Construction Company, by delivering a copy of the same to Edward L. Bader personally on December 20, 1924.

F. MARQUEZ TOPPIN.

Sworn and subscribed to before me this 6th day of January, 1925.

ALBERT C. STEPHANY,
Notary Public of N. J.

AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

Between RICHARD MCALLISTER, *Complainant,* and H. J. HEINZ CO., a corporation, *et al.*, *Defendants.*	On Bill for Injunction. Affidavit.

STATE OF NEW JERSEY, COUNTY OF ATLANTIC, } *ss.*

CHARLES C. BABCOCK, of full age, being duly sworn according to law, deposes and says:

1. I am a member of the law firm of Babcock and Champion, solicitors for the complainant.

2. On December 19, 1924, I served a copy of the rule to show cause and restraining order allowed in this cause on December 18, 1924, together with a

copy of the bill of complaint and affidavits thereto annexed, both certified by the solicitors of the complainant, and also copy of map and additional affidavits, upon the City of Atlantic City by delivering the same to Miss Delaney, assistant city clerk of Atlantic City. Mailed additional affidavits and exhibits to Heinz Co., by registered mail addressed to it at Pittsburgh, Pa., December 18, 1924.

CHAS. C. BABCOCK.

Sworn and subscribed to before me this 6th day of January, 1925.

ALBERT C. STEPHANY,
Notary Public of N. J.

ANSWERING AFFIDAVITS.

(Filed Jan. 6, 1925.)

IN CHANCERY OF NEW JERSEY.

Between RICHARD MCALLISTER, *Complainant,* and H. J. HEINZ CO., a corporation, *et al.*, *Defendants.*	On Bill, &c. Answering Affidavits.

STATE OF NEW JERSEY, } *ss.*
COUNTY OF ESSEX, }

ERNEST D. MCCAFFERTY, being duly sworn upon his oath says: I am the secretary of H. J. Heinz Company, and have been connected with that company and its allied interests for a period of 28 years. It has been necessary for me, during my long service with the company, to become familiar with the facts in connection with the company's pier at Atlantic City, the subject of the controversy in this case.

The pier was erected in the year 1885, pursuant to an ordinance of the City of Atlantic City, passed on the 4th and 11th of May, 1885, authorizing and directing the building of the pier by the Atlantic

City Ocean Pier Company. Immediately after the passage of this ordinance, the pier as it present exists, less the part occupied on the land end by the present boardwalk, was erected with the outer pavilion. Later, and about 1900, the inner pavilion was erected, and from that time to the present, the pier has existed down to the time of the accident causing this litigation.

The original length of the pier has been shortened on two occasions to accommodate the two boardwalks that have been erected, and with which it is and always has been connected. The pier has always been used as a free place of recreation and enjoyment by the public. We have exhibited from time to time our own goods there, and have made the place attractive by introducing at intervals, exhibits of various kinds. For example, at the time of the accident to the pier in the month of August, 1924, the outer pavilion contained a very valuable Government exhibit of Indian figures, pottery and basket work, loaned to us by the Government for the purpose of exhibition therein. When we obtained this exhibit, we obligated ourselves to return it to the Government on or before the first of October last. The accident has prevented our conforming with this obligation, and we are in correspondence with the Government explaining our failure to return the exhibit, because of the fact that the accident has rendered it absolutely impossible to do so. In addition to the Government exhibit, the outer pavilion contains an exhibit of paintings from a New York Art Association. This is of great value, and both of them are at present marooned in this outer pavilion, as is shown by the photographs annexed hereto and made part of this affidavit. The pavilion also contains chairs and other means of

rest for the public, who are permitted, free of charge, to go upon and enjoy the breezes and other advantages of the pier. The same pavilion also contains a large collection of art objects that the company itself owns. My belief is that these exhibits, taken as a whole, are worth not less than $70,000. They have at present no caretaker, and are, as I believe, in great jeopardy.

Insofar as the goods and merchandise of the company are advertised by the signs and exhibits on the pier, we are doing business there, but the statement in the bill of complaint and supporting affidavit that the pier is used solely for commercial purposes, is untrue. It is my contention and belief that the pier, with its two pavilions, is no obstruction to the view. Certainly the fact that it has existed, with the two pavilions thereon, for so long a time, would indicate that the public at large takes the same view.

In the month of August, 1924, a large steel barge drifted against the pier between the two pavilions, and completely broke the pier in two, as shown by the photographs annexed hereto. It was of the greatest importance, both for the preservation of the pier itself, and for the care and protection of the outer end, and the valuable exhibits therein contained, that the pier should be repaired, so on the 30th of August, 1924, an application was presented to the building department of Atlantic City, for a permit to make such repairs, and on the 8th of November following, a permit was obtained, copies of which are hereto annexed. Immediately thereafter a contract was made with Edward L. Bader for the repair of the pier. He promptly entered upon the performance of his contract, and at the time that his work was interrupted by the restraining order

herein, he had progressed to the extent shown by the affidavit of Estel D. Rightmire hereto annexed.

It is of the utmost importance to us that this pier be repaired. In addition to the fact that these exhibits are marooned in the manner above described, the present condition of the pier itself is in a critical condition. The outer part, being stranded without the support of the continuous pier, is in momentary danger of being injured by the sea, particularly in stormy weather. Under the end of the pier are submerged piles and other timber, which make it practically impossible, and very dangerous to get to the outer portion in boats, and the company is therefore deprived by the present situation, of any opportunity to repair the damage that has already occurred to the outer end of the pier.

After the construction of the pier, pursuant to the ordinance above mentioned, the title thereto passed, through sundry persons and corporations, to the H. J. Heinz Company, and the said H. J. Heinz Company, its grantors, licensors and lessors have been in the possession and full ownership of the said pier from 1885 to the present time. As appears by the bill of complaint herein, by deed dated the 8th of April, 1907, but not recorded, and as I believe, not delivered until May 16, 1908, Richard McAllister joined in a so-called park deed to the City of Atlantic City, of property therein described, including the *locus in quo* involved in this suit. I have a copy of this deed in my possession, and our counsel will present it to the Court.

On the 22nd of April, 1907, the governing body of the City of Atlantic City, passed a resolution, of which the following is a copy, and found on page 121 of Minute Book for 1907:

"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 to be 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; and that the Mayor and City Clerk be hereby authorized to sign such agreement."

The land which Richard McAllister and his co-owners conveyed to Atlantic City for park purposes by the deed of April 8, 1907, covered all of the land in front of the property owned by them, between the high water line of the Atlantic Ocean and the exterior line established by the Riparian Commission of the State of New Jersey in 1876, and which said line runs through the middle part of the pier of H. J. Heinz Company, and does not reach as far as the outer pavilion. The true location of this exterior line is shown upon the blue print attached to the affidavits filed with the complainant's bill.

On the 18th of February, 1924, the defendant obtained from the State of New Jersey, through its Board of Commerce and Navigation, a lease for fifteen years, the original of which is in my possession and will be produced at the hearing by counsel, granting unto the H. J. Heinz Company, all of that part of land under water upon which the said pier is erected, extending oceanward to the exterior line established by the riparian commission of the State of New Jersey in 1876.

Neither the defendant, nor any of its predecessors in title or interest in said pier, have ever been parties to any of the park deeds that have been made along the shore front at Atlantic City, and as I am advised, are in no way subject to or bound by the terms of such deeds, not being privy thereto.

ERNEST D. MCCAFFERTY.

Sworn to and subscribed before me this 31st day of December, 1924.

LOUISE T. GRUHNERT,
(Seal) *Notary Public for N. J.*

To be Valid this Permit must be countersigned by the Comptroller
THIS PERMIT MUST BE KEPT AT THE PLACE OF WORK
BUILDING PERMIT

No. 943 Atlantic City, N. J. 11-8-1924

Permission is hereby granted to H. J. Heinz Co. ..... Contractor and H. J. Heinz Co. .....Onwer, for Construction .....

Moving .....
Raising .....
Altering .....
Addition .....
Repairing Damage.....
Installation of Heating Plant.....
.....building .....class, for.....
purposes .....stories in height, dimensions..x..
roof of..... Location.....
..... Heinz Pier .....
.....avenue, 1st ward.

This permit is issued in accordance with an ordinance relating to buildings in Atlantic City, passed at a regular meeting of City Commissioners, April 17, 1924, and shall remain in force for the period of 1 m, but shall be rescinded and considered void as to the continuation of work or the further erection of said buildings by the violation of the terms of the Ordinances of Atlantic City relating to buildings.

Residence of Contractor Heinz Pier.....avenue.
Fee 10.00

Cost $5000

Rooms.....

O. K.
John W. Conway
Supt. of Buildings.

Countersigned by
B. M. Townsend Comptroller. L

STREET STORAGE

Section 490. It shall be unlawful to place or maintain any building material, boxes or debris of any kind upon the street without first obtaining a permit for such purpose from the Bureau of Buildings. Such permit shall state the location of the building, the amount of space to be occupied, which space shall in no case exceed the width of the property and

not exceed one-third the width of the driveway, and in no case shall any material be placed within four feet of any railroad track or within ten feet of any fire plug or street crossing, and the gutter shall in all cases be left open and clear of any obstruction for a width of fifteen inches from the curb. The height of the pile of materials shall in no case exceed twelve feet; provided, that a sufficient passage or cartway shall at all times be left unencumbered between said building materials and opposite curbstone on all street for the passage of vehicles. The person or persons or corporations who shall cause or allow any obstruction to be placed in any of the public streets, avenues or alleys of Atlantic City shall place red lights or cause the same to be placed upon or above such obstruction at night, and shall keep said lights burning from sunset to sunrise each and every night while such obstruction shall continue; such lights shall, in each case, be sufficient in number and of such brilliancy and power and shall be placed in such location or position that such obstruction can be plainly seen by drivers of conveyances and by pedestrians in approaching obstruction by any direction. Upon written notice from the Superintendent of Buildings all surplus building material and rubbish must be removed within twenty-four hours, and if not removed within twenty-four hours the Superintendent of Buildings shall have same removed and the expense of said removal shall be collected as provided by Article 32.

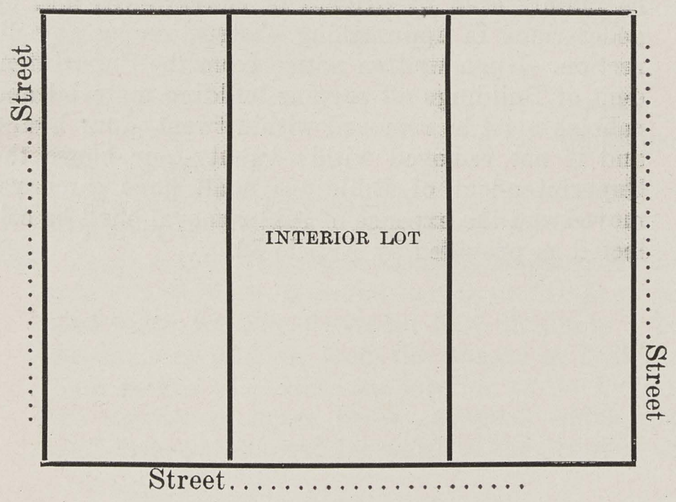
DEPARTMENT OF PUBLIC AFFAIRS
APPLICATION TO THE BUILDING DEPARTMENT
FOR A PERMIT

Filed.....
Permit No..... Atlantic City, N. J., Aug. 30 1924

This Certifies that on the above date I made application to the Building Department Office for a Permit, to do the following work on the premises situated at No. Heinz Ocean Pier

To erect .....
To repair Damage Done by U. S. Government Sand Barge, Reconstruct walk between Sun Parlor & End Pavilion Annex 7 Bays
To move .....
To raise .....
To demolish .....
To install Heat Plant.....

in accordance with the specifications and plans filed with the Building Department, and I agree to comply with all the provisions of the Building Code.



Signed Ray A. Clark Bldg Supt
Owner Heinz Co. Address Heinz Ocean Pier
Contractor ..... Address.....
Cost 4 to 5 thousand
REMARKS

STATE OF NEW JERSEY } ss.
COUNTY OF ATLANTIC }

.....being duly sworn on his oath says that the sum of $..... mentioned in the above application is the total cost of the work contemplated to be done under this application, including labor, material and other expenses

Sign Here

.....

Sworn to and subscribed before me this
..... day of
.....A. D. 192...

INSPECTED BY .....
..... SUPERINTENDENT

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

ESTEL D. RIGHTMIRE, of full age, being duly sworn according to law, upon his oath says:

1. I am a civil engineer and surveyor by profession.

2. I practice my profession in Atlantic City, Atlantic County, New Jersey.

3. At various times during the last few years I have made surveys and maps showing the location

of what is known as Heinz Pier, in the vicinity of Massachusetts Avenue and the Inlet or ocean front, Atlantic City, Atlantic County, New Jersey.

4. On Friday, December 26th, 1924, I measured the said pier to the point at which it is presently constructed, and found that all of the necessary piling for the reconstruction work extends to a point 49 feet oceanward of the riparian line established by the State of New Jersey in 1876; that the joists upon which the decking is to be placed have been laid upon said piling for the same distance; that the point of break in the said pier landward of the said exterior line commences 41.78 feet landward of said exterior line, and that while all of the piling between the said point of break and the said exterior line are in and the joists laid thereupon, the decking has not been placed thereon, nor has the railing been erected as yet.

ESTEL D. RIGHTMIRE.

Sworn and subscribed this 26th day of December, A. D. 1924.

WM. M. CLEVENGER,
M. C. C.

ANSWERING AFFIDAVIT.

IN CHANCERY OF NEW JERSEY.

Between
RICHARD MCALLISTER,
Complainant,
and
H. J. HEINZ CO., a corporation, *et al.*,
Defendants.

On Bill, etc.
Answering Affidavit.

STATE OF NEW JERSEY, } *ss.*
COUNTY OF ESSEX, }

JESSE S. FOSTER, being duly sworn upon his oath says:

I am and have, for over forty years, been connected with the H. J. Heinz Company and its affiliated interests, and I am thoroughly familiar with the pier at Atlantic City, owned and operated by it. I have heard the affidavit of Mr. McCafferty read and will not here repeat what he there says, except to confirm its accuracy.

The general character of the pier is illustrated by the accompanying postal card. It consists generally of a pier that is about 600 feet in length oceanward from the boardwalk, the floor of which slopes three or four feet to the inner pavilion, or

sun parlor, after which it is practically level out to the end of the pier. The inner pavilion, or sun parlor, is about 30 feet by 60 feet, and in height is 16 feet to the slope of the ceiling. Its inner side is about 150 feet from the Boardwalk. The other pavilion on the end of the pier is about 90 feet by 90 feet, the same height as the sun parlor, and its inner end is about 510 feet from the Boardwalk. The outer pavilion has been there since the pier was erected, and the inner one, or sun parlor, has been there since 1890. In my judgment, neither of them is the slightest obstruction to the view, and, of course, the main floor and body of the pier is not and cannot be.

The pier is and always has been used mainly for recreation purposes for the public without charge. During the season, as many as from eight to ten thousand people will go upon the pier a day. The sun parlor, or inner pavilion, is supplied with comfortable chairs, writing material and other things for the free comfort and enjoyment of the people. Moving pictures are there presented free, as well as lectures, and seats are provided for those who desire to listen or see.

Mr. McCafferty has correctly described the nature of the present exhibit in the outer pavilion. I want to accent the hazard and danger to which that valuable exhibit is being subjected by reason of the break in the pier, and to add that we are advised that it is impossible to take care of or remove these exhibits from the outer pavilion except by having the pier restored to its old condition. Our contract with Mr. Bader provides simply for a restoration, so that if completed the situation will be exactly the same as it was before the accident.

Our object in having these exhibits is for the edu-

cation of the people. Previous to the present Government exhibit, we had, from Washington, a complete set of models of the ships of the Navy, and prior to that, we had a collection of oil paintings of prominent American citizens. All of these were from the National Museum. They are, of course, very valuable, as is the present exhibit. The Government is quite excited about the present situation and is pressing us to return the exhibit in accordance with our contract. In my judgment, Mr. McCafferty is too modest about the value of the present Government exhibit, some of which is pottery so old and curious that the Government could not and would not place a value upon it, as it is impossible of replacement.

During the season, we ordinarily have about eight employes upon the pier and study to please the people and make it comfortable for them. In the summer months when it is hot, we provide benches and seats upon the pier and crowds flock there, using the benches and seats to enjoy the cool breezes.

I deem it of the very utmost importance that this pier be immediately restored. A glance at the photographs will convince one that the outer structure, separated as it is from the support of the balance of the pier, is in danger of destruction. No one can get to it at present, and certainly, until the rights of the complainant, if he has any, are determined, this repair should be permitted and the great risk and hazard to which the pier itself, as well as the exhibits contained in the outer pavilion are at present subjected to, can be removed.

There is no method of heating this outer pavilion and we have, in addition to these artistic exhibits to which I have alluded, on exhibition there samples of our own goods, worth at least $1,500 to $2,000. We

always remove them during the winter because they are subject to frost and I believe that unless this pier is repaired at once, so that we can get there and remove these articles, they will be ruined. Among these articles are large bottles of olive oil, worth a great deal of money, which, if they get too cold, will crack and the valuable olive oil will be ruined.

I am informed, that had the contractor not been restrained by the order of the Court in this cause, he could have progressed with his work sufficiently to have enabled us to reach the outer pavilion and take out the exhibits inside of three or four days.

JESSE S. FOSTER.

Sworn to and subscribed before me this 2nd day of January, 1925.

LOUISE T. GRUHNERT,
(Seal) *Notary Public for New Jersey.*

ANSWERING AFFIDAVITS.

(Filed Jan. 6, 1925.)

IN CHANCERY OF NEW JERSEY.

Between RICHARD MCALLISTER, *Complainant,* and H. J. HEINZ CO., a corporation, *et al.*, *Defendants.*	On Bill for Injunction. Answering Affidavits.

STATE OF NEW JERSEY, } *ss.*
COUNTY OF ATLANTIC, }

JOSEPH B. PERSKIE, of full age, being first duly sworn according to law, upon his oath deposes and says that he is the assistant city solicitor of the City of Atlantic City, and the person referred to in the bill; that this deponent denies that he informed complainant, Richard McAllister "that the restoration of the said pier, would not be permitted, and that no action on the part of the complainant would be necessary to prevent the same;" deponent alleges the truth to be that the complainant, Richard McAllister did call deponent on the phone and made an appointment with him for a conference; that in

pursuance to the appointment the complainant did call at the private offices of the deponent located in the Guarantee Trust Building, Atlantic City, New Jersey; that the said McAllister did discuss with deponent the situation with reference to the proposed alterations to the pier, but that the deponent denies that the complainant really objected to the repair, or threatened to take legal means to restrain said repair, but that the said McAllister did in substance state that he felt it would be unfair to permit the Heinz Company to proceed to repair its pier unless it had made some satisfactory arrangement with the complainant; that the complainant proposed to deponent to retain him for the purpose of protecting his alleged interest in the premises; deponent was rather at a loss to understand such a proposal, for he had represented the City of Atlantic City, N. J., in two (2) major law suits heretofore instituted by McAllister and others against the City, which suits involved the Heinz Pier; one suit being in the nature of a writ of mandamus, and taken to the Court of Errors and Appeals, and the other suit in Chancery; both law suits having been decided adversely to the complainant; that this deponent informed the complainant that under no circumstances could he or would he undertake the representation of the complainant in the matter; that deponent did tell complainant that if, as a result of action taken by the City it chanced to benefit complainant, deponent was being paid by the City, and there was no occasion for him to be paid by complainant, and that if, on the other hand, the course taken by the City did not chance to favor complainant, certainly deponent could not represent him; complainant, at the same and only conference, then proposed to deponent that deponent should work through other

counsel and still represent the complainant; this, likewise, deponent absolutely refused to do; that complainant then urged deponent to suggest to him the name of an attorney that he should employ to look after his interest; deponent informed complainant that he (complainant) knew the lawyers of Atlantic City just as well as he (the deponent) did; certainly some of them for a much longer period than did the deponent; and that complainant did not seek deponent's advice in other litigation against the City as to whom he should employ, and deponent saw no reason why he should advise him in this instance; that thereafter deponent met complainant, Richard McAllister, in the office of Edward L. Bader, mayor of Atlantic City, and, in substance, repeated and confronted him with the facts set forth in this affidavit; that complainant did not deny said facts other than to state that it was his impression of the talk with deponent that he was to be told before the permit would be granted to the Heinz Company to make the repairs.

JOSEPH B. PERSKIE.

Sworn and subscribed to before me this 6th day of January, A. D. 1925.

RITA KERTLAND,
Notary Public of N. J.

(Seal)

CONCLUSIONS (Oral).

(Filed February 24, 1925.)

IN CHANCERY OF NEW JERSEY.

Between RICHARD MCALLISTER, *Complainant.* and H. J. HEINZ COMPANY, a corporation, *et al.*, *Defendants.*	On Bill, &c. On Order to Show Cause. Conclusions (Oral).

These conclusions are not to be published in the official or unofficial reports.

On bill for injunction.

For complainant, MESSRS. BABCOCK & CHAMPION.
For defendants, MR. ROBERT H. MCCARTER.

INGERSOLL, V. C.:

I think I am prepared to state my finding in this matter now. It is unnecessary to repeat the facts set out in the affidavits. There is comparatively little controverted testimony. The restraining order, in so far as it refers to land oceanward of the exterior line as fixed by the Commissioners must, of course, be vacated. I take it that it is agreed by all, that this Court has no jurisdiction, as the matter is presently before it at least, concerning the building of structures oceanward of that line.

It is not necessary, it seems to me, in this case even to decide in its general order whether or not this restraining order should remain. The effect desired by both parties can be readily gained by the order which I feel it is my duty to make. That is, of course, as I said, striking out therefrom reference to the land or water oceanward of the exterior line. As the testimony has developed, it seems to me that the only thing that the Court of Chancery could do in this case is, because of the fact that the structure is completed upon the land oceanward of this exterior line with the exception of the decking, make an order permitting sufficient decking or flooring to be placed upon this structure for a passageway across this structure, which has already been built. That reserves in its entirety, of course, to the complainant all his rights. It gives to the defendant all the opportunities they feel are so essential. It gives them an opportunity, if they see fit, to build the remaining section over which the Court has no jurisdiction, to remove all of their exhibits and to have a passageway across that particular par of the structure which has already been built until the final hearing in the matter.

It might be said that, I should follow the rule "to doubt is to deny," but under the circumstances, rather than to hold the matter under examination and to determine whether or not the restraint should go, if counsel for the defense is willing to accept

such an order, I will make an order permitting a twelve-foot passageway to be properly completed across this structure.

Mr. McCarter: We will accept that, your Honor.

The Court: The restraint to remain otherwise, with those two exceptions. That permits me to bring the issue to a conclusion without examining the records and the reports, which I will have to do on final hearing, if it comes to me, and I will say, gentlemen, if this matter is referred to me, I will give a very short day for a hearing. I will make a special day for a hearing. I can not do it now until an order of reference is made.

Mr. Babcock: I will waive all notice.

Mr. McCarter: So will I.

Heard and determined: January 6th, 1925.

A true copy.

THOMAS BARBER,
Clerk.

ORDER.

(Filed January 6, 1925.)

IN CHANCERY OF NEW JERSEY.

Between RICHARD MCALLISTER, *Complainant,* and H. J. HEINZ CO., a corporation, *et al.*, *Defendants.*	On Bill for Injunction. Order.

This matter coming on to be heard upon return of rule to show cause allowed in the above stated cause on December 18, 1924, and the Court having read and considered the bill of complaint filed in this cause, the affidavit thereto annexed and the additional affidavits of the complainant, and having read and considered the answering affidavits of the defendant, H. J. Heinz Co., and the argument of the respective counsel and it appearing that the restraint set forth and allowed in said order should be modified as provided in this order:

It is on this sixth day of January, 1925, ordered, adjudged and decreed that the restraint allowed by and provided for in said order as far as the same may relate to lands oceanward of the exterior line of the riparian commissioners of the State of New

Jersey as said exterior line is shown and located on the map made by E. D. Rightmire, and attached to complainant's affidavit, be and the same is hereby dismissed.

It is further ordered, adjudged and decreed that the said restraint as to the land and all work and construction landward of said exterior line shall, in all respects, and as provided in said order to show cause and restraint, remain and be continued until the further order of this Court except that a single strip of decking not more than twelve feet in width may be laid upon building construction which has been actually done up to this time.

E. R. WALKER,
C.

Respectfully advised,
R. H. INGERSOLL,
V. C.

ANSWER OF BADER CONSTRUCTION COMPANY.

(Filed April 30, 1925.)

IN CHANCERY OF NEW JERSEY.

Between RICHARD MCALLISTER, *Complainant,* and H. J. HEINZ COMPANY, a corporation, *et al.*, *Defendants.*	On Bill. Answer of the Bader Construction Company.

The Bader Construction Company, a corporation of the State of New Jersey, answering the bill of complaint, says:

That it did not do the repair work referred to in the bill of complaint; and has no interest in the entire subject matter set forth in the bill; and is without knowledge as to any of the facts therein contained, and leaves the complainant to such proof thereof as he may be advised to be necessary.

Defendant prays that the bill be dismissed, with reasonable costs sustained.

W. FRANK SOOY,
JOS. B. PERSKIE,
Counsellors-at-law for the Bader Construction Co.

ANSWER OF EDWARD L. BADER.

(Filed April 30, 1925.)

IN CHANCERY OF NEW JERSEY.

Between RICHARD MCALLISTER, *Complainant,* and H. J. HEINZ Co., a corporation, *et al.*, *Defendants.*	On Bill. Answer of Edward L. Bader.

Edward L. Bader, of the City of Atlantic City, County of Atlantic and State of New Jersey, answering the bill of complaint, says:

That he did the repair work for the H. J. Heinz Company referred to in the bill and received the notices referred and attached to the bill, marked "Exhibit B;" but is without information as to any of the other facts set forth in the entire bill; and leaves the plaintiff to such proof thereof as he may be advised to be necessary.

Defendant prays that the bill may be dismissed, with reasonable costs sustained.

W. FRANK SOOY,
JOS. B. PERSKIE,
Counsellors-at-law for Edward L. Bader.

ANSWER OF ATLANTIC CITY.

(Filed April 30, 1925.)

IN CHANCERY OF NEW JERSEY.

Between RICHARD MCALLISTER, *Complainant,* and H. J. HEINZ Co., a corporation, *et al.*, *Defendants.*	On Bill. Answer of City of Atlantic City.

The City of Atlantic City, a municipal corporation of the State of New Jersey, answering the bill in the above entitled cause, says:

1. It is without information as to the facts set forth in paragraph one (1); and leaves the complainant to such proof thereof as he may be advised to be necessary.

2. It is without information as to the facts set forth in paragraph two (2); and leaves the complainant to such proof thereof as he may be advised to be necessary.

3. It is without information as to the facts set forth in paragraph three (3); and leaves the com-

plainant to such proof thereof as he may be advised to be necessary.

4. Defendant admits all of paragraph four (4), with the exception of the following: "Said interior or inland line so established crosses and the limits and boundaries therein set forth includes the land of complainant hereinabove described. Defendant is without information as to the quoted portion of paragraph four (4) above set forth, and leaves complainant to such proof thereof as he may be advised to be necessary.

5. Defendant admits the conveyance set forth in paragraph five (5); but denies the legal conclusion stated in the said paragraph, as a result of said conveyance.

6. Paragraph six (6) is admitted.

7. Paragraph seven (7) is denied.

8. Paragraph eight (8) is admitted.

9. Defendant admits that the H. J. Heinz Company not only designs and intends to repair the damage occasioned, as set forth in paragraph eight (8); but did, as a matter of fact, proceed to restore the pier to its original condition; and that Edward L. Bader was the contractor doing said repair work.

(a) Defendant further answering paragraph nine (9) denies each and every other allegation therein contained.

10. Defendant denies each and every allegation in paragraph ten (10), with the exception of so much

of said paragraph which relates to the serving of notices; which service of notices as therein described, in so far as it relates to defendant, is admitted.

11. Paragraph eleven (11) is denied.

FIRST AND SEPARATE DEFENCE TO THE ENTIRE BILL:

Defendant will raise the point of law that the Court has no jurisdiction, in so far as the entire subject matter may relate to lands oceanward of the exterior line as established by the riparian commissioners of the State of New Jersey.

SECOND AND SEPARATE DEFENCE TO THE ENTIRE BILL:

Defendant will raise the point of law that the complainant has a complete and adequate remedy at law.

THIRD AND SEPARATE DEFENCE TO THE ENTIRE BILL:

Defendant will raise the point of law that the facts set forth in the bill show no grounds for equitable relief.

Defendant prays that the bill may be dismissed with reasonable costs sustained.

W. Frank Sooy,
Jos. B. Perskie,
Counsellors-at-law for the City of Atlantic City.

ANSWER OF H. J. HEINZ CO.

(Filed May 4, 1925.)

IN CHANCERY OF NEW JERSEY.

Between
RICHARD MCALLISTER,
Complainant,
and
H. J. HEINZ COMPANY, a corporation, *et al.*,
Defendants.

On Bill, &c.
Answer of Defendant H. J. Heinz Company.

The defendant, H. J. Heinz Company, a corporation, answering the bill of complaint of Richard McAllister says:

1. It denies paragraph 1 of the bill of complaint.

2. It denies paragraph 2 of the bill of complaint.

3. Answering paragraph 3 of the bill of complaint, it says that in the year 1885, there was erected in its present position, the pier or structure known as the Heinz Pier, extending into the ocean in the direction and for the distance stated in paragraph 3 of the bill of complaint. The pier was erected pursuant to an ordinance of the City of Atlantic City, passed on the 4th and 11th of May, 1885, authorizing and directing the building of the pier by the Atlantic City Ocean Pier Company. Immediately after the passage of this ordinance, the pier as it now exists, less the part occupied on the land end by the present boardwalk, was erected with the outer pavilion. Later, and about the year 1900, another pavilion was erected, and from that time to the present, the pier has existed substantially unchanged, down to the time of the accident in the summer of 1924 referred to in the bill of complaint. Except as in this paragraph specifically admitted, this defendant denies paragraph 3 of the bill of complaint.

4. It admits the passage of an ordinance substantially as alleged in paragraph 4 of the bill of complaint, but for greater certainty, refers to the original thereof, and to that end denies paragraph 4 of the bill of complaint.

5. It admits the execution of a deed substantially as alleged in paragraphs 5 and 6 of the bill of complaint, but for greater certainty requires the production of the original deed, and to that end denies paragraphs 5 and 6 of the bill of complaint.

6. It denies paragraph 7 of the bill of complaint and says that as to so much of the land occupied by the pier as is oceanward of the line established by the Riparian Commission of the State of New Jersey in 1876, defendant on February 18, 1924, obtained from the State of New Jersey, through its Board of Commerce and Navigation, a lease of the same for fifteen years, reference to which original lease in the possession of this defendant is hereby made.

7. The pier has always been used as a free place of recreation and enjoyment by the public. The defendant has from time to time exhibited its own goods there, and has made the place attractive by introducing at intervals, exhibits of various kinds, other than the goods of the defendant, included among such exhibits have been valuable works of art and pottery, Indian figures and basket work lent by the Government of the United States, as well as a large collection of art objects owned by the defendant. The pavilion at the end of the pier contains chairs and other means of rest for the public, who are permitted, free of charge, to go upon and enjoy the breezes and other advantages of the pier. Except insofar as the goods and merchandise of this defendant are advertised by signs and exhibits on the pier, this defendant is doing no business on the pier, and is not using it for commercial business whatsoever. Neither the pier nor either of the pavilions constructed on it, obstruct the view oceanward from the Boardwalk, and neither the existence of the pier nor of the pavilions prevents the view oceanward from the Boardwalk from being free, open and unobstructed, nor is any use made of the pier inconsistent with the use of the Boardwalk by the public, as a public park or place for public resort and recreation.

8. Defendant admits that in the month of August, 1924, a portion of the pier structure was destroyed as a result of a collision occasioned by a vessel being driven against the same, by means of which collision a portion of the structure was broken down and destroyed. Except as thus admitted, it denies paragraph 8 of the bill of complaint.

9. This defendant admits that except as restrained by this Court, it intends to repair the damage occasioned as aforesaid, and restore the pier to its original condition, and continue the use thereof. It was of the greatest importance, both for the preservation of the pier itself, and for the care and protection of the outer end and the valuable exhibits therein contained, that the pier should be repaired, so that on the 30th of August, 1924, an application was presented to the building department of Atlantic City for a permit to make such repairs and on the 8th of November following, a permit was obtained, true copies of which permit are annexed to the affidavits filed in behalf of this defendant in this cause, reference to which true copies is hereby made. Immediately thereafter, a contract was made with Edward L. Bader for the repair of the pier. He promptly entered upon the performance of his contract, and was actually performing same when his work was interrupted by the restraining order made in this cause. The outer part of the pier is of no use whatsoever without a connection with the main land, and while disconnected and without the support of the continuous pier, is in momentary danger of being injured by the sea, and the valuable exhibits are in danger of being lost, and the pier is of slight, if any, use or value to the public. Except as hereinabove specifically admitted, it denies paragraph 9 of the bill of complaint.

10. It denies paragraph 10 of the bill of complaint.

11. It denies paragraph 11 of the bill of complaint.

12. After the construction of the pier, pursuant to the ordinance above mentioned, the title thereto passed, through sundry persons and corporations to this defendant, and this defendant, its grantors, licensors and lessors have been in open, notorious possession and full ownership of the said pier continuously from 1885 to the present time.

13. By deed dated the 8th of April, 1907, but not recorded and not delivered until May 16, 1908, the complainant joined in a so-called park deed to the City of Atlantic City of property therein described, including the *locus in quo* involved in this suit. On the 22nd day of April, 1907, the governing body of the City of Atlantic City passed a resolution, of which the following is a copy and found on page 121 of Minute Book for 1907:

"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 to be 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; and that the Mayor and City Clerk be hereby authorized to sign such agreement."

The land which Richard McAllister and his co-owners conveyed to Atlantic City for park purposes by the deed aforesaid, covered all of the land in front of the property owned by them, between the high water line of the Atlantic Ocean and the exterior line established by the Riparian Commission of State of New Jersey in 1876, and which said line rus through the middle part of this defendant's said pier, and does not reach as far as the outer pavilion. The true location of this exterior line is shown on the blue print attached to the affidavits filed with the complainant's bill. Neither the defendant, nor any of its predecessors in title or interest in the said pier have ever been parties to any of the park deeds that have been made along the shore front at Atlantic City, and this defendant contends that it is in no way subject to or bound by the terms of such deeds, not being privy thereto.

Wherefore this defendant prays to be hence dismissed with its reasonable costs and charges in this behalf most wrongfully sustained.

McCarter & English,
Solicitors for Defendant,
H. J. Heinz Company.

REPLICATION.

(Filed May 9, 1925.)

IN CHANCERY OF NEW JERSEY.

Between RICHARD MCALLISTER, *Complainant,* and H. J. HEINZ COMPANY, a corporation, *et al.*, *Defendants.*	On Bill, etc. Replication.

The complainant joins issue on the answer of the defendant, Bader Construction Company, a corporation.

BABCOCK & CHAMPION,
Solicitors of Complainant.

REPLICATION.

(Filed May 9, 1925.)

IN CHANCERY OF NEW JERSEY.

Between RICHARD MCALLISTER, *Complainant,* and H. J. HEINZ COMPANY, a corporation, *et al.*, *Defendants.*	On Bill, etc. Replication.

The complainant joins issue on the answer of the defendant, Edward L. Bader.

BABCOCK & CHAMPION,
Solicitors of Complainant.

REPLICATION.

(Filed May 9, 1925.)

IN CHANCERY OF NEW JERSEY.

Between
RICHARD MCALLISTER,
Complainant,
and
H. J. HEINZ COMPANY, a corporation, *et al.*,
Defendants.

On Bill, etc.
Replication.

The complainant joins issue on the answer of the defendant, City of Atlantic City, a municipal corporation.

BABCOCK & CHAMPION,
Solicitors of Complainant.

REPLICATION.

(Filed May 9, 1925.)

IN CHANCERY OF NEW JERSEY.

Between
RICHARD MCALLISTER,
Complainant,
and
H. J. HEINZ COMPANY, a corporation, *et al.*,
Defendants.

On Bill, etc.
Replication.

The complainant joins issue on the answer of the defendant, H. J. Heinz Company, a corporation.

BABCOCK & CHAMPION,
Solicitors of Complainant.

ORDER OF REFERENCE.

(Filed May 23, 1925.)

IN CHANCERY OF NEW JERSEY.

Between
RICHARD MCALLISTER,
Complainant,
and
H. J. HEINZ COMPANY, a corporation, *et al.*,
Defendants.

Order of Reference.
On Bill, etc.

It is on this 22nd day of May, nineteen hundred and twenty-five, on motion of Babcock & Champion, of counsel with the complainant, ordered that the above cause be referred to Honorable R. H. Ingersoll, one of the Vice-Chancellors of this court to hear the same for the Chancellor and to report thereon to him and advise what order or decree should be made thereunder.

E. R. WALKER,
C.

We consent to the above order of reference.

MCCARTER & ENGLISH,
Solicitors for H. J. Heinz Co.
W. FRANK SOOY,
JOS. B. PERSKIE,
Solicitors for City of Atlantic City.
W. FRANK SOOY,
JOS. B. PERSKIE,
Solicitors for Edward L. Bader and Bader Construction Company.

A true copy.
THOMAS BARBER,
Clerk.

DESIGNATION.

(Filed June 26, 1925.)

IN CHANCERY OF NEW JERSEY.

Between
RICHARD MCALLISTER,
Complainant,
and
H. J. HEINZ COMPANY, et *al.*,
Defendants.

On Bill, etc.
On Order of Reference.
Designation.

Application having been made by Babcock & Champion, solicitors for the complainant, to fix a time and place for the hearing of the above stated cause:

It is on motion of Babcock & Champion, solicitors, ordered that the twenty-sixth day of June, nineteen hundred and twenty-five, at ten o'clock in the forenoon, Daylight Saving Time, at the Chancery Chambers, in Atlantic City, be and the same is hereby designated as the time and place for the hearing of said cause.

Dated June 20, 1925.

R. H. INGERSOLL,
V. C.

We consent to the above designation.

MCCARTER & ENGLISH,
Solicitors for H. J. Heinz Co.
W. FRANK SOOY,
JOS. B. PERSKIE,
Solicitors for City of Atlantic City.
W. FRANK SOOY,
JOS. B. PERSKIE,
Solicitors for Edward L. Bader and Bader Construction Company.

TESTIMONY.

IN CHANCERY OF NEW JERSEY.

Between
RICHARD MCALLISTER,
Complainant,
and
H. J. HEINZ COMPANY,
et al.,
Defendants.

On Bill, &c.
Final Hearing.

Atlantic City, N. J., June 26, 1925.

TESTIMONY

Before HON. R. H. INGERSOLL, Vice-Chancellor.

APPEARANCES:
For complainant, MESSRS. BABCOCK & CHAMPION and U. G. STYRON, ESQ.
For defendants, MESSRS. MCCARTER & ENGLISH and JOSEPH B. PERSKIE, ESQ.

Mr. Babcock: Your Honor, it may be helpful to the Court to note that the statute authorizing the park is in Compiled Statutes, volume 1, page 1076, and the important sections are 5 and 6.

I would like to introduce in evidence the ordinance passed by the City Council of Atlantic City under the legislative act referred to, the ordinance appearing on page 203 of the compilation of ordinances of Atlantic City.

The Court: The compilation of what date?

Mr. Babcock: That part seems to be removed from the cover. The title of the ordinance is "to lay out and open a public park or place for public resort and recreation along the beach or ocean front of Atlantic City, establishing the interior or inland line of such park or place of public resort or recreation, and the lines and boundaries thereof, and providing for the issuing and sale of bonds to defray the costs, damages and expenses incurred in the opening and laying out of such tract and acquiring the lands, property and rights necessary therefor and for the assessment of the property benefited thereby." The ordinance passed October 9, 1899, and approved October 13, 1899.

(Copy of ordinance admitted and marked Exhibit C1.)

I will also offer in evidence an ordinance appearing in the same compilation entitled: "An Ordinance Granting the Atlantic City Ocean Pier Company the right of way to the ocean end of Massachusetts Avenue from a point at the present boardwalk into the ocean," the ordinance was passed May 11, 1885, and appears on page 60.

(Copy of ordinance admitted and marked Exhibit C2.)

CLARK S. BARRETT, sworn for the complainant.

Direct examination.

By Mr. Babcock:

Q. Mr. Barrett, you connected with the South Jersey Title and Finance Company?

A. I am.

Q. Do you have record of the various conveyances in Atlantic City in your office?

A. We do.

Q. Have you with you a copy of deed to Richard McAllister and William H. Burkard for beach front property at Rhode Island Avenue?

A. I have abstract copies.

Q. Will you produce it, please.

(Abstract produced.)

Mr. Babcock: I want to offer in evidence the abstract copy of deed Albion Real Estate Company, a corporation of New Jersey, to William H. Burkard and Richard McAllister, bearing date December 15, 1902, and recorded in book 283 of deeds page 7, &c., the property beginning in the west line of Rhode Island Avenue 190 feet south of Oriental Avenue, west parallel with Oriental Avenue eighty feet, south parallel with Rhode Island Avenue seventy feet, west parallel with Oriental Avenue seventy feet, to the east line of Metropolitan Avenue, fourth by same

nine hundred and forty feet, more or less, to the exterior line established by the commissioners, east along said exterior line one hundred and fifty feet, more or less, to a point in line with the west line of Rhode Island Avenue, if extended south to said exterior line, sixth north along the west line of Rhode Island Avenue extended 1010 feet more or less to beginning.

(Abstract admitted and marked Exhibit C3.)

Q. Have you with you a copy of deed made by Mr. McAllister and others to Atlantic City in 1907?

A. That is one thing that in my hurry I omitted bringing.

Q. I show you a copy of that deed and ask if that was made under your supervision?

A. It was.

Mr. Babcock: Any objection to that?

Mr. Perskie: What is the date of it?

A. April eighth, 1907, recorded May fifth.

Q. Who are some of the others?

A. Walter Walls, and Amanda, his wife, Richard McAllister, Josephine, his wife, Henry C. Schmidt, Louisa, his wife.

Mr. Perskie: That is all right.

Mr. McCarter: I would like to have the date of the acknowledgment by the city.

Mr. Babcock: I will offer the whole thing.

Q. This paper which you refer to is a complete copy, is it not, Mr. Barrett?

A. This doesn't show the acknowledgments, Mr. Babcock.

Mr. McCarter: I have a certified copy, I think if we are going to offer it at all.

Mr. Babcock: Let's offer that.

(Offer in evidence certified copy of the deed Richard McAllister and others to Atlantic City, dated April eighth, 1907, recorded May sixteenth, 1908, book 383, page 124.)

(Certified copy admitted and marked Exhibit C4.)

Cross-examination.

By Mr. McCarter:

Q. Mr. Barrett, the deed that you produced an abstract of or rather the certified copy of conveys, does it not, to Atlantic City, by the grantors named, all of the land oceanward of the Boardwalk that was included in the deed from the Albion Real Estate Company to Burkard and McAllister?

Mr. Babcock: One moment, if it is merely for the purpose of identifying the deed, we have no objection to that question, but if it is for the purpose of showing what the deed really conveys then we object because the deed speaks for itself.

Mr. McCarter: The deed, of course, speaks for itself, but there are included descriptions that are difficult to understand.

The Court: I will permit the question.

A. I would first have to read that description carefully. (Witness reads description in deed.) This purports to be a deed granting the land oceanward of the interior or inland line of the public park as there established, subject to the conditions and reservations named in the deed.

Q. It goes how far oceanward?

A. Goes oceanward to the riparian commissioners exterior line.

Q. That is all.

RICHARD MCALLISTER, sworn for complainant.

Direct examination.

By Mr. Babcock:

Q. Mr. McAllister, you are the complainant in this suit, are you not?

A. Yes, sir.

Q. In 1902 the deed which has been offered in evidence shows that you were one of the purchasers of property on the ocean front between Rhode Island Avenue and Metropolitan Avenue in this city?

A. Yes, sir.

Q. Are you still a part owner of the ocean front?

A. Yes, sir.

Q. The deed bears date 1902; was the Heinz pier in existence at that time?

A. Yes, sir.

Q. Was the location of it then the same as it is now?

A. No, sir.

Q. What, if anything, caused a difference in the location of the pier?

A. Moving out of the Boardwalk.

Q. Did the pier extend out into the ocean in a straight or diagonal line as compared with the Boardwalk?

A. Diagonal line.

Q. And when they moved out the Boardwalk did that result in the front of the pier being removed?

A. Well, they removed that part of it; I don't know just how far but I think there was about four hundred feet, if I am not mistaken, moved out. Now how much is taken off of that part of the pier on the inside where it adjoins the Boardwalk, I can't say.

Q. As the pier existed when you purchased the property did any of it extend in or across Massachusetts Avenue?

A. Yes, the entrance did and, if I mistake not at the end, that part of it on Massachusetts Avenue. I don't know that but I know it did at the time.

Q. Now after they moved out the pier—I mean moved out the Boardwalk did any portion of it then extend in or across Massachusetts Avenue?

A. Well, I have merely taken the view of it. I would think so, but I am not sure of it.

Q. The Court of Errors and Appeals, in the case of Burkard and others against Heinz Pier, reported in 71 Law, page 562, deals with an ejectment suit against the pier company. Were you one of the plaintiffs in that suit?

A. Yes, sir.

Q. The reports also show a mandamus suit against the Pier Company in which Richard McAllister appears as a complainant, one of the opinions appearing in 90 Law, 92, and the affirmance appearing in 90 Law, page 701; were you the Richard McAllister, complainant in those cases?

A. Yes, sir.

Q. The reports also show a specific performance case between the same parties reported in 107 Atlantic, page 48; were you the Richard McAllister in that suit?

A. Yes, sir.

Q. During the month of August of last year did anything happen to the pier?

A. Yes.

Q. What was it?

A. The dredger out there dredging the channels had a scow which carried the sand out to sea and dumped it, I understood, afterwards looking into the matter found it was true, where it had broke loose through a storm and cut through the pier.

Q. Do you know to about what extent the damage was?

A. Well, it cut a space through there I would say of over a hundred feet so far as I could judge by the eye; I might have been wrong; it might have been more than that.

Q. After the portion of the pier was destroyed in August of last year did you register an objection anywhere to the restoration of it by the pier Company?

A. Yes, sir; the first objection I made was to the assistant city solicitor, Mr. Perskie.

Q. When was that, approximately, with respect to the storm?

A. Why that occurred a short time—I wouldn't say how long because I am not sure—it might be three or four days after, it might be a little longer, that I went to Mr. Perskie's office knowing that I

would have to make some objection to the repairing of the pier, I told him that I objected and he in turn told me that would be attended, in fact, he proposed to stop anything in the way of any repairs and adding to that he said "I think the matter is that they will have to take down the remaining portion."

Q. After that did you receive any information or see anything indicating that the pier intended to restore the broken portion?

A. Yes, sir.

Q. What was it that you heard or saw?

A. A short time after that I had occasion to go up the Boardwalk in a rolling chair with the Mrs., that is my wife, and I observed that they had a boiler and track on the inside part of the pier as if they were going to do some repairing.

Q. Had anything been done at that time by way of restoration?

A. Not to my knowledge, no, sir.

Q. Now, as the result of that, what did you do?

A. I immediately went and saw Mr. Bader, laid the matter before him.

Q. Who was Mr. Bader?

A. Mayor. Laid the matter before him and stated that I could see by the physical appearance that they intended to do some repairing and I objected. After a short conversation he turned to me and said "Well, I don't know what to do; I have got the contract." "Well, I am not interested in that, but I am asking what you people are going to do?" Well, he turned to me "The only thing I see you can do is get an injunction." I thanked him and got up and walked out, went up to your office and employed you immediately, took it up with the commissioners in the shape of a letter of protest.

Q. And did you cause a letter to be sent to the commissioners?

A. Yes, sir.

Mr. Babcock: Have you that letter, Mr. Perskie? You admit it in your answer. Mr. McCarter denies it. I have a carbon copy of it.

Mr. McCarter: No objection to using a copy.

Mr. Babcock: I will offer in evidence carbon copy of the letter addressed to the Mayor and Commissioners of Atlantic City under date of December tenth, 1924, which letter was delivered to the commissioners on that date.

(Copy admitted and marked Exhibit C5.)

Q. Did you have photographs made of the pier at about the time this letter was sent?

A. Right after that, a day or two afterwards.

Mr. Babcock: I had the understanding with Mr. McCarter these pictures might be offered without producing the photographer.

Q. Mr. McAllister, I show you several photographs of the Heinz Pier which by the notation on them appear to have been taken on December 14, 1924. Were you present when these photographs were taken?

A. Well, I was with some of them, but I can't exactly say which ones.

Q. Did you have them taken?

A. Yes, sir.

Q. Do you know whether the dates which appear on them are the dates when they were taken?

A. I presume so. I am not sure of that.
Q. Did we deal with these photographs immediatly upon their being taken?
A. Yes, sir.

Mr. Babcock: I offer in evidence these photographs separately. Exhibit 6 shows the broken portion of the pier with the camera looking down the beach.

(Photograph marked C6.)

C7 shows the break in the pier with the camera pointing up the beach, but oceanwardly.

(Photograph marked Exhibit C7.)

Exhibit 8 is the entrance to the pier on the Boardwalk.

(Photograph marked Exhibit C8.)

Exhibit 9 is the picture of the pier taken from the Boardwalk with the camera pointing diagonally across the pier and in a southwesterly direction.

(Photograph marked Exhibit C9.)

A. That was taken, your Honor, merely to show the slant of the pier as it ran out compared with the Boardwalk.
Q. When you caused the letter to be written to the commissioners had any work been done that could be, that you were able to observe?
A. Not as I could see.
Q. Did you make an inspection of the pier?

A. Went down on the sand on the beach and looked it over but I couldn't see where there was anything done.
Q. Any of the piling been sunk at that time?
A. Not that I could see.
Q. Did you also cause notices to be sent to the Heinz Pier people?
A. Yes, sir.
Q. And to be served on the workmen at the pier?
A. Yes, sir.
Q. Who attended to that for you?
A. My representative, Mr. Toppin, my secretary, served those notices.

Cross-examination.

By Mr. McCarter:

Q. Mr. McAllister, you and Mr. Burkard became joint owners of this beach front property in the year 1902?
A. I believe so; I believe that was the date.
Q. At that time the pier, so far as the two pavilions and everything else on it, except the inshore end, was exactly as it is today, wasn't it?
A. No change at all.
Q. How long had you known the pier with the two pavilions and its other features?
A. Well, I presume I knew it for possibly a few years previous to us buying the ground.
Q. You had lived in Atlantic City how long a time?
A. About forty-five years.
Q. Do you remember when the pier was built?
A. Well, I don't exactly remember the building of it but I have an idea that when they were taking up

a permit to build it but I wasn't interested in that end of the town, I didn't bother much about it.

Q. It was early in 1885 or 6, wasn't it?

A. About that.

Q. It has been there as it is now except the other end that has been cut off due to extending the Boardwalk from that time to the present time?

A. Yes, sir.

Q. Mr. Burkard still is a co-owner with you of as much of the land as you still retain?

A. No, sir; he has nothing to do with it. Mr. Burkard was with me. but he is now out in business for himself. At the time that he sold out he sold to Edward A. Schmidt and Henry C. Schmidt, since deceased his interest. That is, I presume, I don't know the exact time but I imagine it is close on to eighteen years.

Q. Who is the additional owner of this property besides yourself?

A. Just who I stated, Mr. Edward A. Schmidt and the heirs of Henry C. Schmidt, since deceased.

Q. They own the interest that Burkard formerly had?

A. Exactly.

Q. Now is that half interest?

A. Half interest. That is each have a quarter.

Q. Now there has been put in evidence—you spoke of the litigation in the Court of Errors and Appeals in which you sued the Heinz Pier Company, you brought that suit?

A. Yes.

Q. That suit was commenced before you and your associate owners had made the deed to the city, wasn't it?

A. Yes.

Q. What?

A. That is——

Q. Won't you answer my question?

A. Won't you repeat it again?

(Question repeated.)

A. What do you mean by associate owners? There was two, Burkard and some of the others.

Q. Do you understand the English language?

A. Yes, sir, plainly.

Q. Somebody was associated with you as owner of that property?

A. At the time of that suit there was Burkard.

Q. Now I say that was commenced and finished before you made your deed to the city?

A. Yes, sir.

Q. Now after that suit was commenced, litigated and finished, you joined in this deed to the city which has been marked Exhibit C4, did you not?

A. Are you speaking of the Park Act or the moving of the Boardwalk? At this time Burkard was interested with me.

Q. We don't want any dissertation; we want an answer to the question.

A. I am not going to give you—simply take a little time and give me a chance.

Q. All the time you want.

A. You are speaking of this time that the Boardwalk was moved out when we signed this Park deed and Park Act?

Q. (Question repeated.)

A. That is what I am trying to get at. I haven't followed it closely, it means at the time ——

Q. Mr. McAllister, you are a man of intelligence?

A. I am.

Q. I have been speaking of the suit that you have yourself referred to?

A. Yes.

Q. The ejectment suit against the Heinz Pier Company?

A. Yes.

Q. You brought that suit?

A. We had two suits, one time I went in the Court of Errors and Appeals, now this is the next one, I presume.

Q. Now I am speaking of that suit.

A. Yes, sir, I joined in that, yes, sir.

Q. I say, after that suit was finished you joined in a deed for a portion of this property to the city which deed is marked in this case, didn't you?

A. I presume so.

Q. Don't you know?

A. Well, I suppose if it is there I did.

Q. Did you make a park deed to the city?

A. I made a park deed to the city. Burkard at that time was handling this matter and I presume that is what he did with my sanction.

Q. You signed it, didn't you?

A. I presume so.

Q. Is there any doubt about it? And the certified copy—that is your name, isn't it?

A. That signature isn't there, I couldn't tell you without I saw that signature but I presume so.

Q. What?

A. I presume so.

Q. Don't you know whether you signed this park deed to the city?

A. I did sign it at the time of the last case, that was the time that we signed the last deed.

Q. Now before you signed that deed you joined

in a petition to the city, didn't you, to have the Boardwalk moved oceanward?

A. Yes, sir.

Q. There had been some accretion there, had there not?

A. Yes, sir; there was accretion.

Q. And your upland had increased in extent by virtue of that accretion?

A. Yes, sir.

Q. And you were anxious to have the Boardwalk removed so that you could enjoy more upland?

A. Yes, sir.

Q. And so you presented, you joined in a petition to the city with the States Avenue Land Company, Henry E. Stevens, the Marine Realty Company, New Amsterdam Realty Company and Edward A. and Henry C. Schmidt and Newlin Haines, didn't you?

A. Yes, sir.

Q. I show you what purports to be a certified copy of that petition; see if you recognize it?

A. Yes, sir.

(Copy of petition admitted in evidence and marked Exhibit D1.)

Q. Of course at that time the pier was there, the outer pavilion was there and the inner pavilion was there?

A. Yes.

Q. And the layout of the pier was exactly as it has ever since been except, of course, shortening of the landward end?

A. Yes, sir.

Q. Now pursuant to that petition in which you joined with your associate owners the resolution of April twenty-second, 1907, was passed, wasn't it, a copy of which I show you?

A. Yes, sir.

Mr. Babcock: I don't know how he should know about that. I think this resolution is incompetent and immaterial as evidence in this case. It is not a resolution which has to do with the petition and the Boardwalk that the witness had anything to do with.

The Court: He may have knowledge of it. That is the only question.

The Witness: He says pursuant to that petition that was passed.

Mr. McCarter: I offer that in evidence, certified copy.

Mr. Babcock: We object, if your Honor please. It has not been identified. I don't care about producing the minute books, anything of that kind, but I do not understand the witness says that resolution was passed by City Counsel.

The Court: It is a certified copy, certified by the clerk.

Mr. Babcock: We don't object to it as to form of proof, but we say it is immaterial and incompetent.

The Court: I will admit it.

(Copy admitted and marked Exhibit D2.)

Q. Now after that resolution was passed and after the, of course, the petition which has already been

offered in evidence was signed and presented to the city, resulting in this resolution, the Boardwalk was in fact moved, wasn't it?

A. Yes, sir.

Q. And you and your co-owner, Mr. Schmidt, or Messrs. Schmidt, have enjoyed from that time down to the present time the upland landward of the Boardwalk that was formerly covered by the Boardwalk?

A. Yes, sir.

Q. You have spoken of the specific performance suit, that was the suit in which you sued the city of Atlantic City, seeking to compel them to carry out the resolution or rather the covenant in the deed, or, in default thereof, to have the deed declared void, was it not?

A. Yes, sir.

Q. Did you ever see the decree in that case?

A. No, sir.

Q. Who was your counsel?

A. Mr. Cole.

Q. You wouldn't recognize the decree, if you saw it?

A. No, sir.

Q. Now after the judgment in the ejectment suit, which went to the Court of Errors and Appeals, you consented, did you not, to the occupancy by the Heinz Pier Company of the pier as it then existed?

A. You are speaking now of the first case that we had in regard to the Court of Errors and Appeals?

(Question repeated.)

A. With the understanding that they would pay rent.

Q. Beg pardon.

A. With the understanding that they would pay rent.

Q. And they did down to a certain time?

A. Yes, sir.

Q. Paid you rent and you received the rent and let them enjoy the pier just as you now complain about?

A. Yes, sir; they enjoyed the benefit of the pier up to the time ——

Q. Beg pardon?

A. They enjoyed the benefit of the pier up to the time of the case where it was transferred over and then they told me very plainly "We don't owe it to you and don't owe it to the city and we won't pay you."

Q. And you made no objection whatever?

A. I certainly did, I moved ——

Q. One moment, please, when you answered then you answered very quickly, let me finish the question, at least.

A. Go ahead.

Q. I say during the time that they paid you rent you made no objection whatever, did you, to the fact that there were pavilions on the pier or that they were using it just as they are using it today, did you?

A. No, sir.

Q. And they were using the pier just as they are today, weren't they?

A. Yes, sir.

Q. There was no difference whatever in their treatment of the pier today from what is was during the period when you did so consent?

A. No.

Q. And this lease or that relation that existed by virtue of the arrangement that you made commenced immediatly after the judgment in the ejectment suit was affirmed, didn't they?

A. I just can't get that.

(Question repeated.)

A. I believe right after that. I am not sure.

Q. And don't you know too, that when the pier company learned that you had made the deed to the city which I have shown you, they stopped paying you rent?

A. Yes, sir.

Q. The deed that you made to the city, as you know, includes the land whereon that portion of the pier which originally stood on your property is erected, doesn't it?

A. Yes, sir.

Q. What?

A. Yes, sir.

Q. But, except as you may have some right by virtue of the deed that you made to the city which has been offered in evidence, either of reverter or a right to insist npon the performance by the city of its covenants in that deed, you have no interest in the land whereon the pier is erected, have you?

Mr. Babcock: We object to that, if your Honor please ——

A. Sure.

Mr. Babcock: That is purely a legal question, what he has, Mr. McCarter, notwithstanding the execution of this deed.

Mr. McCarter: I, of course, don't want to commit Mr. McAllister to a construction of that deed. That has been considered pretty well, I think, by Vice-Chancellor Leaming. What I have in mind is this,

your Honor, and we might as well meet the issue right away: Mr. Babcock, in opening the case, stated that Mr. McAllister was the owner of the land, had been adjudicated to be the owner, whereon this pier is erected or part of it. Now, he was adjudicated to be the owner as against the pier company at the date of the judgment, which was while he owned way out to the exterior line. Since then he has made a deed from the inner line to the exterior line, including the locus in quo, and I don't want any doubt to exist. Now, if you will carefully listen to the question, it reserves all legal rights except as they are reserved by that deed. He has lost the title to that property. I want that to appear.

Mr. Babcock: The deed, if your Honor please, speaks what it conveys, describes the land.

Mr. McCarter: Identifies the situation.

The Court: For the purpose of identifying it, I will permit it.

(Question repeated.)

A. Sure I have.

Mr. Babcock: If your Honor please, that clearly calls for his opinion of the effect of this deed and it is not done to identify anything.

A. Wish to deny me the right there?

Mr. McCarter: No question.

The Court: Do I understand that the land formerly owned by you, upon which the pier is situated, is included in the deed which you made to Atlantic City?

A. In other words, Judge, you mean that that is not a deed ——

The Court: Did the deed that you signed to Atlantic City cover all the land which you owned upon which the pier is now situated?

A. Yes, sir.

Mr. McCarter: I withdraw my question because that covers it exactly.

Q. You don't think that the pier now goes to Massachusetts Avenue, do you, Mr. McAllister?

A. I am not sure of that, sir. I couldn't answer to be put on my oath.

By Mr. Babcock:

Q. Mr. McAllister, Mr. McCarter has read a resolution passed by the City Council of Atlantic City in 1907 to the effect that the pier will not be disturbed unless there was a condemnation, and so forth, of all the piers; did you have anything to do with that resolution?

A. No knowledge of it until it was read here just now.

Q. Mr. McAllister, since you have lived in Atlantic City have you seen the pier frequently?

A. How is that?

Q. Since you have lived in Atlantic City all the years you have mentioned have you seen the pier frequently?

A. Quite frequently, yes, sir.

Q. For what purpose has the pier been used and is it now being used?

A. It has been used for advertising purposes and displaying of samples, also for the use of the public.

Q. What samples did they display, samples of what?

A. Samples of what they manufacture.

Q. Who manufactures?

A. Heinz Company.

Q. In a general way what do they manufacture?

A. Pickles and one thing another, and different things, beans.

Q. 57 varieties?

A. 57 they have on their sign out on the end of the pier, advertise 57 varieties.

Q. Have there been signs on the buildings advertising their products?

A. Yes, sir; they had signs out there for years advertising, flashing at night, 57 varieties.

By Mr. McCarter:

Q. Now, Mr. McAllister, did you pay any attention to your specific performance suit that has been referred to that Judge Cole had for you?

A. Did I?

Q. Pay any attention to that suit?

A. Well, yes, sure I did, when it was entered.

Q. Did you not appear as a witness in it?

A. I don't know whether Judge called me at that time or not.

Q. Were you present at the hearing?

A. I won't be able to tell you that. I don't remember.

Q. Don't you know that this resolution that I have read, that you say you never heard of until

now, was introduced and offered in evidence in that case?

A. No, sir; I do not. I will tell you, the first time I heard it was just when you read it.

Q. Did you pay any attention to the mandamus proceedings which were brought in which Judge Bergen wrote the opinion?

A. Nothing more than what I left to the Judge. He may have been there.

Q. And did you not hear of this resolution in that case?

A. No, sir; I did not.

Q. Did you lose all interest in the petition that you had signed?

A. No, I did not. I left that to my attorney.

Q. The petition?

A. Yes, sir.

Q. I am not speaking of the bill now, the petition you presented?

A. Left it to the attorney.

Q. Who was your attorney in that matter?

A. In regard to the petition signed moving the Boardwalk?

Q. Yes, sir.

A. I signed that at council, unfortunately, among a lot of people there in the council room, but I just done it, what Mr. Wootton done with us, which I should have done, nevertheless, leaving that aside, I signed the petition.

Q. Who looked after your interest in the matter when you signed it?

A. It was signed, went right down to council after we were at the board there and I signed a petition put before me by Godfrey, that was all.

Q. Do you mean to say that you did not hear of any condition that the Heinz people required or

exacted from the city before the resolution to move the Boardwalk was passed?

A. Nothing more than they notified me Heinz refused to let it go through and I notified Heinz I would tear his pier down if he didn't, and he agreed, because we had the right to do it.

Q. Go out with a broom and tear the thing down?

A. No, I didn't; I went there to tell him where he got off.

Q. You were interested in having that Boardwalk removed, weren't you?

A. I certainly was.

Q. How much land did you acquire by virtue of the removal of that Boardwalk?

A. I think we acquired, about, well, I wouldn't say positive, but I would say about three hundred feet from where the Boardwalk originally stood, maybe a little more.

Q. And a width of how much?

A. Well, 150 feet between Rhode Island and Metropolitan.

Q. That is worth a good deal of money, isn't it?

A. Yes, sir.

Q. How much?

A. Don't know at that time. Council wouldn't agree to put it out unless they put out a hundred feet and wanted to know what we thought it was worth and I said it was worth a hundred dollars a foot.

Q. How much?

A. A hundred dollars, at that time, a foot on the back.

Q. How much is it worth today?

A. Well, it is worth today, I presume on the back, none of it sold, all sold off the side of the frontage, the back I sold for two hundred and seventy-five a foot.

Q. What is the front worth?

A. The front is worth two hundred thousand dollars.

Q. You knew that City Council took some action on your petition and the Boardwalk was in fact moved, didn't you?

A. Yes, sir.

Q. But what you meant to say by your answer to Mr. Babcock is that the exact phraseology of the resolution you never distinctly heard until I read it to you here today?

A. No, sir; absolutely.

Mr. Babcock: Object to that, if your Honor please. That misstates my question, "phraseology of the resolution." This is not a resolution moving the Boardwalk. It is a resolution pertaining to the Heinz Pier Company. It is an unfair question.

(Question repeated.)

The Court: I will permit it.

A. Yes, sir.

Q. Did you pay any attention, Mr. McAllister, to the mandamus proceedings that were commended on your behalf against the city by Judge Cole?

A. Certainly did.

Q. Sir?

A. Yes, sir.

Q. Did you ever see the state of the case or the briefs?

A. No, I never did.

Q. Are you not aware that the eighth stipulation of facts contained in that state of the case signed by your attorney, Judge Cole, quotes this very resolution that I have referred you to?

A. Never saw it, sir.
Q. Never saw it?
A. No, sir.
Q. Never heard of it?
A. I have repeated that several times. I heard it when it was read here for the first time. Don't go any further than that.
Q. Have you ever noticed great crowds of people on the pier?
A. I have never noticed great crowds.
Q. Well, your land is right near the end of it, isn't it?
A. Yes, sir.
Q. Have you ever been down there Sunday and seen thousands of people on that pier?
A. No, I never saw thousands; I wouldn't say, I don't think.
Q. Have you any idea how many people go on that pier in a season?
A. I would say there is a couple of hundred people there in the summer time.
Q. Couple of hundred people?
A. Yes, sir.
Q. I guess you must have been at church at that time, Mr. McAllister?
A. Sir?
Q. I guess you must have been at church and not at the pier?
A. That is a question I don't have to answer; that is personal.
Q. Are you aware that they have seats provided free for the people on the pier?
A. Very few I believe.
Q. What?
A. Very few; there are a few near the entrance, as you go in, they have got a lot of curios stuck in

the middle, they have got some in the house outside, outside of that I don't think there is any seating capacity. At least I never saw it.
Q. How many other piers were there in existence at the time that you got your property outside of Heinz Pier?
A. Well, the Steel Pier was there.
Q. That is one?
A. Now I think the old Ocean Pier, that we called the Ocean Pier, belonged to John Young, was in existence; beyond that I can't go.
Q. And they had buildings, erections on them?
A. They had buildings on the Ocean Pier, yes, and they had some on the Steel Pier.
Q. They are still there?
A. What?
Q. Are they still in existence?
A. The Ocean Pier is demolished, practically; they have got some on the front, but the Steel Pier has the same buildings, I think.

By Mr. Babcock:

Q. Mr. McAllister, is Heinz Pier open on Sunday?
A. No, sir.
Q. Mr. McAllister, Mr. McCarter, speaking of the petition to move out the Boardwalk and the action of city council in respect to it, then referred to his question to this resolution of council pertaining to the Heinz Pier and suggested that you might have known about it but didn't know the exact phraseology; do you know anything about the exact wording or otherwise?
A. No, sir. Like a good many more things pass in council, never heard it.
Q. That is all.

ESTEL D. RIGHTMIRE, sworn for complainant.

Direct examination.

By Mr. Babcock:

Q. Mr. Rightmire, are you a civil engineer?
A. Yes, sir.
Q. How long have you been operating?
A. About thirty years in Atlantic City.
Q. Have you made surveys in the neighborhood of Heinz Pier?
A. Yes, sir.
Q. Did you make the survey in that location for the state in the establishment of the recent exterior line?
A. I made it for the pier company which was submitted to the state.
Q. In connection with that?
A. Yes.
Q. I show you a blue print of a map and ask if you made that map?
A. Yes, sir.
Q. And when?
A. Made December fifteenth, 1924.
Q. You knew about the commencement of this suit, I presume?
A. I heard of it, yes.
Q. And was it in connection with the commencement of this suit that you made the survey?
A. Yes, sir.
Q. How long have you known the Heinz Pier?
A. Thirty years.
Q. Do you know that, as it first existed, it was partly in Massachusetts Avenue?

A. About at the entrance of Massachusetts Avenue.
Q. What we might call the foot of the pier?
A. Yes.
Q. That is the intersection with the Boardwalk as it then existed?
A. Right.
Q. Is any portion of the pier now in Massachusetts Avenue?
A. No, sir.
Q. Why not?
A. By reason of the fact the Boardwalk was moved out about 1909 or 1910, I think.
Q. Did that take off the foot of the pier?
A. It did.
Q. Was that, Mr. Rightmire, because the pier runs diagonally with the Boardwalk?
A. Yes, sir.

Mr. Babcock: I would like to offer this map in evidence.

(Map admitted and marked Exhibit C10.)

Q. Have you a map showing the exterior line as it now exists, Mr. Rightmire?
A. Copy of the map from the Riparian Commissioners, State Board.

Mr. Babcock: I offer in evidence map No. 170 showing the exterior line in the neighborhood of the pier as adopted in January 21st, 1924.

(Map admitted and marked Exhibit C11.)

Q. Does this map which you made show the exterior line as it previously existed?

A. Yes, sir.

Q. And the other map which has been offered in evidence, marked C11, shows the exterior line just touching the outer corner of the most oceanward pavilion of the pier, does it not?

A. That is the new line?

Q. Yes.

A. Yes.

Q. So that all of the pier is inside of the new exterior line as shown on this map, Exhibit C11?

A. Yes, sir.

Q. Do you remember the storm that we had last August in which a portion of the pier was destroyed?

A. Yes, sir.

Q. Did you see the pier shortly after that occurrence?

A. I made a survey shortly after the occurrence.

Q. The map which you made shows a line marked "low water line December 15, 1924;" was that line actually obtained by you as the result of measurements of that date?

A. Yes, sir.

Q. The Riparian Commissioners' exterior line is also shown on the map; is that determined by measurement, theoretical measurement?

A. Yes, sir.

Q. How much of the break in the pier was inside of the old exterior line as shown on your map?

A. About fifty feet.

Mr. McCarter: How much?

A. About fifty feet.

Q. About how much of the break was oceanward of that exterior line as shown on your map?

A. Would be about seventy-four feet.

Q. That is about 134 feet all told?

A. 126.

Q. On one side 126?

A. Yes.

Q. Is the exterior line shown on your map the exterior line shown on the other map marked "New Jersey, June 18, 1876"?

A. Yes, sir.

Q. When you made the survey and measurements on December 15th had any work then been started toward the restoration of the pier?

A. My recollection it was not excepting the travelling track I think was on there and perhaps some preparatory work done on top of the pier.

Q. But the actual restoration of the pier had not been undertaken so far as you observed?

A. Not so far as my recollection goes.

Q. I think that is all.

Cross-examination.

By Mr. McCarter:

Q. Mr. Rightmire, I want to call your attention to an affidavit that you made in the preliminary stages of this case to refresh your recollection as to how far the work of repair had progressed at the time that you made the affidavit, and I will let you look at a copy of the affidavit. Read the whole thing if you want to and then I will ask you the facts. On December 26th, 1924, did you go out to the pier and make some measurements?

A. Yes, sir.

Q. You may refer to your affidavit if you need it?

A. I think I remember.

Q. How far had the work progressed, the work of restoration at that time?

A. My recollection is it was 109 feet from the inland park oceanward, that is the piling were set.

Q. How far had the piling been set oceanward of the riparian line at that time?

A. About 40 feet.

Q. The affidavit said 49?

A. Yes.

Q. Had the joists been placed?

A. They had not been fastened, they had been laid on top of the stringers, cross braces.

Q. Where did the break occur with reference—commence rather, with reference to the exterior line?

A. About 50 feet landward.

Q. Now I wonder if you are familiar enough with the property—I show you a map that seems to have been made by Mr. Hackney, not by you, but it is the same thing—to be able to sketch, by pencil, what part of the pier lay within the McAllister property as it originally existed before the deed to the city? Here is the line, as I understand it. I don't know whether you are familiar enough with it to be able to?

A. I am very familiar with it.

Q. Yes, I think you are. Can you indicate by hatching on that map or on your own map, I don't care which, what part of the pier lay within the boundaries of the McAllister tract before the deed was made by him and his associate owners to the city?

(Witness complies.)

Q. You have hatched with black pencil on this map made by Mr. Hackney, which you know to be an accurate map of the site of the territory that I have described, have you?

A. Yes, sir.

(Map offered and admitted in evidence, marked Exhibit D3.)

Q. How long, to your knowledge, Mr. Rightmire, had the pier stood as it stood at the time of the accident, with the two pavilions, and the other features and characteristics?

A. So far as I recall, ever since I was in Atlantic City, about thirty years, excepting the inland end.

Q. Yes, of course, that was removed when the pier was made short?

A. Yes.

Q. About 300 feet?

A. Well, I don't know just how much shorter it is made but approximately that.

Q. Have you seen the pier since the modification of the restraining order was made in this case?

A. I haven't been on the pier since December 26th, 1924.

By Mr. Babcock:

Q. Mr. Rightmire, is there any difference in the locations as shown on the Hackney map and as shown on your map?

A. I see none excepting the lines are extended from Metropolitan Avenue.

The Court: The location of the pier is the same?

A. The pier is the same, yes.

Q. And the extended maps show the pier on Mr. McAllister's property, they are both the same?

A. Same location, yes.

Q. Will you please indicate by marking in lead pencil, if you please, the portion of the pier which

is within the extended lines, that is the extened lines of Rhode Island and Metropolitan Avenue, that is the easterly line of Metropolitan and the westerly line of Rhode Island Avenue and the exterior line as shown on your map?

(Witness complies.)

Q. Will you please indicate in a like manner, in lead pencil, the portion of the pier that is in front of the McAllister property, considering the exterior line as established in January 21, 1924, as shown on the state map offered in evidence?

(Witness complies.)

Q. Mr. Rightmire, is it a fact that, measuring out to the new exterior line, that all of the outward portion of the pier is in front of the McAllister property with the exception of the outward pavilion?

A. Yes, sir.

Q. That is all.

By Mr. McCarter:

Q. When was the change in the exterior line, do you remember, Mr. Rightmire?

A. The map is endorsed January 21, 1924.

Mr. McCarter: We will concede that the notices that are alleged to have been served were served.

Mr. Babcock: As set forth in the bill?

Mr. McCarter: Yes, only to save time, if I can.

Mr. Babcock: I will offer in evidence notice under date of December 15th, which is admitted, was served upon the persons at the time and in the manner alleged in the bill and in the affidavits attached.

(Notice admitted and marked Exhibit C12.)

COMPLAINTANT RESTS.

DEFENDANTS' TESTIMONY.

JOSEPH B. PERSKIE, sworn for defendant.

Direct examination.

By Mr. McCarter:

Q. Are you the—what position do you hold in the law department of the City of Atlantic City?

A. Assistant City Solicitor.

Q. Mr. McAllister has given some testimony as to an interview he had with you touching the break in the pier in controversy in this suit; do you remember that interview?

A. Yes, sir.

Q. Just tell us what occurred?

A. To the best of my recollection I received a telephone call stating that Mr. McAllister wanted to come up to see me at my private office at the Guarantee Trust Building, Atlantic City.

Q. He didn't come to the City Hall office, law department?

A. No, sir.

Q. Go on.

A. Made the appointment. Mr. McAllister came to see me. He talked about the Heinz Pier and wanted to know whether I wouldn't consent to represent him to look after his interests. I told him that there was no occasion for it, that if perchance what the city did was in his favor, I was being paid and there was no reason for him to pay me or hire me and if perchance what the city did was not in his favor I certainly could not under any circumstances represent him. I told him I was rather surprised at his wanting me to represent him, that he had two other cases with the city involving the Heinz Pier Company matter and that he didn't come to consult me or who to hire then. He then wanted to know whether I wouldn't work to represent his interest under the cloak of another attorney, I told him I wouldn't do that. He then wanted me to recommend the names of other attorneys to whom he might go with reference to this matter. I told him I felt he knew the names of attorneys as well as I did, lived in Atlantic City much longer than I did, and I couldn't understand the reason for it, and I refused to do it. To the best of my recollection I didn't want to enter into a controversy with Mr. McAllister about the matter, but my recollection of the interview was that he felt that he had been put to a great deal of annoyance and expense about the matter and thought the time had come when it would be unfair to permit the city to allow the Heinz Pier Company to make its repairs without them making some satisfactory arrangements with him for the use of, and compensation for the use of his land. That was the end of the interview. Then subsequently, I forget whether it came to my attention what Mr. McAllister had said about the matter and I immediately went to the Mayor and reported it to him and I insisted

that the Mayor call Mr. McAllister to come to face the Mayor in my presence. He did come and when I repeated in substance what I am saying here now, in his presence, he said that it was his impression the result of the conversation which he had with me, that before the city would grant a permit to the Heinz Company to make the repairs that he receive notice, and that was the end of that interview.

Q. Now, did anything else occur at the interview between him and you in your private office or anywhere else where you talked with him in which he sought to get your assistance professionally than you have described?

A. I think, the best of my recollection, I have given a full answer to the question.

Cross-examination.

By Mr. Babcock:

Q. Mr. Perskie, you understand that he was objecting to the restoration of the pier, did you not?

A. Do you want me to tell you what I really understood?

Q. I asked you if you understood that he was objecting to the reconstruction?

A. No, I didn't understand that. I understood that he was objecting to their use of his property without paying him rent and that he, if he could hold them up in any way so that they couldn't make their repairs, as the result of which they would be driven to him to make arrangement for a lease, that would be perfectly satisfactory to him.

Q. You understood then he was objecting unless they made some satisfactory arrangements with him, is that it?

A. You might put it that way, yes.

Q. Is that the way you understood it?

A. I have told you just what my understanding of his conversation with me was.

Q. Then it is a fact he was there objecting unless satisfactory arrangements were made with him, isn't that true?

A. No, he put it, as I told you he said he thought it would be unfair, in view of the litigation and trouble he has had with these people for the city to permit them at this time to repair the pier unless they came to him and made satisfactory arrangements for their occupying his land, as he said.

Q. Did you understand that to mean then he was objecting to the city doing anything unless they did make some satisfactory arrangements?

A. I gave you what he said and that is all I can give you.

Q. You are very willing to draw your conclusion in direct examination but not on cross-examination?

A. No, I am just as willing to do it now. My impression of his proposition to me was that he was not primarily there to object because Heinz Pier wanted to improve but he was there to object that they should be given the permit for reconstruction unless they had assumed the relations of landlord and tenant between themselves.

Q. What was his idea of hiring you unless it was to prevent the pier making the repair destroyed through the storm?

A. I don't know what his idea was in wanting to employ me.

Q. And you have no thought about it at all?

A. Yes, I think I have a thought about the matter.

Q. I guess he has too. That is all.

ERNEST D. MCCAFFERTY, sworn for defendant.

Direct examination.

By Mr. McCarter:

Q. You live in Pittsburgh, Mr. McCafferty?

A. I do.

Q. And what position do you hold in the Heinz Pier Company?

A. Secretary.

Q. How long have you been connected with that company and its allied interests in any capacity?

A. 28 years.

Q. How long have you been familiar with their pier at Atlantic City?

A. Ever since they have had anything to do with it.

Q. And what has been the character of the pier since your acquaintance with it first commenced?

A. It has been used for the exhibition——

Q. Character of the pier first, pier itself physically?

A. Oh, just as is is today, except the land end has been taken off by the removal of the Boardwalk oceanward.

Q. The pavilion that is on the ocean end of the pier was there from the beginning, was it not?

A. About 1890, I think or 1900, I mean.

Q. I am talking about the pier, the ocean end.

A. Oh, that has been there since the beginning.

Q. Just pay attention to the question.

A. Since the beginning.

Q. Do you know when the pavilion on the land end of the pier, toward the land end, was built?

A. I do.

Q. When was that?

A. 1900.

Q. What use is made of the pier by the company, what do they permit the public to do and what does the public do in fact there?

A. They permit the public to come on the pier, occupy——

Q. Free of charge?

A. Free of charge, (occupy the seats and the benches there, examine the exhibits which are kept there, use the writing tables where paper is supplied for their correspondence, read anything that they may find on the reading table there, do whatever they please along those lines.

Q. How many people are employed by the pier company during the season on that pier?

A. I would say about eight.

Q. Is there any charge made for any use of the pier by the public?

A. None whatever.

Q. What have you had in the past in the way of exhibits, amusements or instructions to the public who want to use the pier?

A. There have been exhibits of art objects of various kinds, exhibits of antiques, there have been some educational exhibits borrowed from the government at Washington.

Q. Do you have your own goods exhibited there?

A. We do.

Q. Where did the break actually occur in the physical structure of the pier, if you know?

A. Well, I only know in a general way that it was between the two pavilions; I haven't any distances or dimensions.

Q. If the pier had the flooring widened to the full

width as it existed previous to the accident and the railing were restored at either side would the condition of the pier be the same or different from what it had been for years?

A. It would be the same.

Q. In other words the purpose of the restoration was to restore exactly as it had existed?

A. That is right.

Mr. McCarter: I would just like to offer some records while this witness is on the stand. I offer in evidence the deed from Joseph F. Fralinger, and wife to the Ocean Front Iron Pier Company, dated the 10th of April, 1893, recorded in the county clerk's office in book 174 of deeds, page 354.

(Deed admitted and marked Exhibit D4.)

I offer in evidence deed Mary A. Wootton to the City of Atlantic City, dated December 28, 1898, recorded in book 248 of deeds, page 215.

(Deed admitted and marked Exhibit D5.)

Mr. Babcock: We understand from counsel that those deeds do not affect the land claimed by Mr. McAllister, but are adjoining lands.

Mr. McCarter: That is the land covering the other part of the pier. I offer in evidence from Mary A. Wootton, to H. J. Heinz Company of Pittsburgh, dated the 20th of February, 1900, acknowledged before Harry Wootton on the 26th of February, 1900.

Mr. Babcock: Is that a lease for the portion of the pier in front of her land?

Mr. McCarter: Yes. Recorded book 35 of deeds, page 57. That lease has expired, but it was a continuation for a length of time.

(Lease admitted and marked Exhibit D6.)

Deed from Mary A. Wootton to Atlantic City, dated the 8th of April, 1907, and recorded in book 381, page 286.

(Deed admitted and marked Exhibit D7.)

Deed from the State of New Jersey to the City of Atlantic City, dated the 13th of February, 1907, recorded in book 354, page 359.

(Deed admitted and marked Exhibit D8.)

Grant or lease from the State of New Jersey to H. J. Heinz Company, dated February 18, 1924, recorded deed book 378, page 251.

(Lease admitted and marked Exhibit D9.)

Q. Mr. McCafferty, we have traced a title to this pier by these documents that have been offered in evidence down to the Ocean Front Iron Pier Company; have you in your possession a copy of a lease that was made by that company to the Heinz Pier Company?

A. I have.

Q. You haven't been able to find the original?

A. I have not.

Mr. McCarter: I offer that in evidence.

(Copy admitted and marked Exhibit D10.)

Q. Heinz Company is in possession under this lease yet?

A. They are.

Q. It appears in the case, Mr. McCafferty, that after the affirmance by the Court of Errors and Appeals of the ejectment suit commenced by Mr. McAllister and his associates, the relation of landlord and tenant was occupied and rent paid for some time by the company to Mr. McAllister and his associate?

A. That is correct.

Q. Do you remember what information came to your attention or that of the company which resulted in the cessation of the payment of rent and the cessation of the relation of landlord and tenant?

A. The company was informed that Mr. McAllister had executed a deed in which he had conveyed to the City of Atlantic City his land which the pier occupied and that under those conditions we were advised by our counsel that there was no liability to pay rent.

Q. As soon as that information came to your attention why you then ceased paying rent?

A. Yes, sir.

Q. During the period that you were paying rent was the pier used, maintained and operated in exactly the same way that it has been since?

A. It was.

Q. Pavilions were there?

A. Yes.

Q. No change whatever in the use or physical condition of the pier, was there?

A. No change whatever. It has been just the same.

Cross-examination.

By Mr. Babcock:

Q. Have you had the actual charge of the conduct of the pier?

A. Not in Atlantic City.

Q. How have you been associated in fact with this pier?

A. I have had charge of all of the correspondence with relation to it from our home office and kept in touch with it.

Q. And your home office is where?

A. Pittsburgh.

Q. How often have you seen the pier?

A. On an average a couple of times a year.

Q. So that your management has consisted of having charge of the transactions in Pittsburgh?

A. That is correct.

Q. And the actual charge of the conduct of the pier is delegated to some of your representatives, I assume?

A. That is correct.

Q. However, you know from a history of the conduct of the pier, I suppose, what has gone on there?

A. Yes.

Q. And that is how you have been testifying in this case?

A. That is correct. I know the company's policies in regard to it.

Q. You have been exhibitng your products there for how long?

A. Ever since we have had the pier.

Q. And the Heinz Company in this case is the well known Heinz Company that manufactures and

sells all kinds of pickles and articles of food products?

A. It is.

Q. And you have advertised your product on that pier during the whole time of your connection with it of about 28 years, have you not?

A. That is correct.

Q. To what extent have you had your products on the pier as exhibits?

A. Well, we have had samples of all of the varieties which we make; I don't know just what you have in mind by your question, to what extent?

Q. The quantity and extent of it, probably say run into the hundreds?

A. There will be, I judge, two or three hundred dozen of all products on different parts of the pier.

Q. Various sizes, put up in various forms?

A. Just as packed for the trade, except no bulk goods was exhibited there, just bottled goods and canned goods.

Q. In connection with that exhibit there from time to time ran in other exhibits that might be attractive to the public such as art in the way of paintings, probably antiques and some educational exhibits, I think you said?

A. Yes, sir.

Q. As far as you know were orders ever taken for your goods on the pier?

A. Yes.

Q. You had some one there to look after that, did you?

A. Yes.

Q. And as these orders were taken on the pier, they would be filled from your supplying plants in Pittsburgh or elsewhere?

A. That is correct.

Q. Did you sell directly on the pier?
A. We did not.
Q. Only by order?
A. Only by order.
Q. Was the pier open every day as far as you know?
A. So far as I know it was open every day except Sunday until last year when for several months prior to this wreck up there it was open on Sundays.
Q. However, you reserved yourself, I suppose, the right to open it and close it, as you saw fit?
A. Oh, yes.
Q. You were running it, in other words, as a private enterprise?

Mr. McCarter: I object.

Mr. Babcock: He stated they were.

The Court: I will admit that.

A. Yes.
Q. Now, Mr. McCafferty, I show you pictures, Exhibit C7, 8 and 9. Painted on the middle pavilion shown on the picture are the words "Permanent Exhibit Heinz Ocean Pier" that is on the end next to the Boardwalk and on the side down town "Pure Food Products, Sun Parlor, Open all the year, Heinz Ocean Pier." You observe that on this photograph?
A. Observe that.
Q. Has it been your custom to have that advertisement or similar advertisements on the pier?
A. It has.
Q. On the most oceanward pavilion shown on this picture appears to be a large steel sign on the roof

at the bottom being the words "Heinz" and on the frame work in very large figures "57"?
A. That is right.
Q. Is that an illuminated sign, electric sign?
A. It was illuminated up until the time of the break.
Q. I mean one of those ordinary electric signs?
A. It is an electric sign.
Q. You have been operating that or a similar sign for some time, have you?
A. That is correct.
Q. On C8 appears "Entrance to the Pier"?
A. That is the entrance in there, on the entrance.
Q. On this picture is shown, by way of advertisement, the announcement "H. J. Heinz Company" in the middle and on one side "57 varieties" on the other side "Food Products" and different announcements of your different things. Have you had that advertisement or a similar advertisement through these years that you have had charge of the pier?
A. There has been some advertising on the entrance.
Q. Exhibit 9 shows the central pavilion from a different angle, the picture being taken with the camera uptown looking down town and on that appears some advertisement as you observe?
A. I observe it.
Q. Has it been advertised that way?
A. It has.

By Mr. McCarter:

Q. How long has the advertising been on the pier?
A. There has been advertising of that character ever since we have had the pier.

JESSE S. FOSTER, sworn for defendant.

Direct examination.

By Mr. McCarter:

Q. Colonel, how long have you been connected with the Heinz Pier Company?
A. With H. J. Heinz Company 45 years.
Q. How long have you been familiar with the pier at Atlantic City?
A. About 27 years.
Q. You spend a good part of your time here?
A. Most of the time, yes, sir.
Q. I show you a postal card, is that prepared and used by the Pier Company as illustrating the pier?
A. Yes, sir.
Q. Is it a fairly good illustration of the way the pier is?
A. It is a very good one.

(Postal admitted in evidence and marked Exhibit D11.)

Q. What use is made of these cards?
A. We give them to visitors, give them free. We have them on writing desks. There are fifteen desks there, supply them with cards every morning and they are used up.
Q. Generally the pier is of what length?
A. About 600 feet.
Q. What two pavilions are on the pier?
A. One we call the sun parlor, about 70 feet from the Boardwalk and the large pavilion at the other end, the ocean end.

Q. The sun parlor you say is about 70 feet from the Boardwalk?
A. About 70 feet from the Boardwalk, yes, sir.
Q. That is the near Boardwalk end 70 feet?
A. From the edge of the Boardwalk to the corner of the sun parlor about 70 feet.
Q. What is the size of that?
A. Thirty by sixty.
Q. What is the height of the ceiling?
A. About 16 feet.
Q. What is the size of the outer pavilion?
A. 90 by 90, 90 feet square.
Q. And its height?
A. About the same up to the eaves, about 16 feet.
Q. The outer pavilion has been there how long?
A. Ever since the pier was built.
Q. When was the inner pavilion built?
A. In 1890, I think.
Q. 1900?
A. 1900, yes.
Q. Is it your judgment that these pavilions in any way obstruct the view of people on the Boardwalk?
A. No, they don't seem to.
Q. What use is made of the pier?
A. Well, we have really a museum there, educational museum. We have lectures there every half hour during the summer. In the back end building we have a seating capacity for 200, in the lecture room, showing pictures of our manufactures, articles and various industries we have. In the other building is the same way, we have pretty large pyramids built up with the goods on, various products we put up, showing the different kinds.
Q. What else do you have in the way of amusements?
A. We have exhibits there of curios, all kinds of

arrangements. Last year we had an exhibit there from the government, national government, two large kegs, we had about 400 pieces of pottery there and we had some very valuable oil paintings there, all taken away since.

Q. I show you three sort of catalogues, look at them, and I show you this one first, what is that?

A. That is a catalogue of curios we have on the pier, paintings, &c., there is an interior view.

Q. They give these visitors the catalogues?

A. Yes, we give those catalogues to visitors.

Q. When did you have that exhibit?

A. This is permanent; this is there all the time. This is permanent. That is there today.

(Catalogue offered and admitted in evidence, marked Exhibit D12.)

Q. I show you another catalogue.

A. That was an exhibit we had from the government, Navy Department in 1922, we had models of all the boats.

Q. From the Navy?

A. From the Navy, yes.

Q. Loaned to the company by the government?

A. By the government.

Q. Exhibited there to the public?

A. Free to the public.

Q. Is the other exhibit which you say is a permanent one free to the public?

A. All free, no charges on the pier, never has been.

Q. Are there any moving pictures?

A. Yes, sir.

Q. Exhibits?

A. Yes, sir.

Q. Free to the public?

A. Free to the public. We have schools there every day come from all parts of this country.

Mr. McCarter: I offer this catalogue in evidence.

(Catalogue admitted and marked Exhibit D13.)

Q. In a season how many people will come on that pier?

A. In July or August we run from six to eight or ten thousand a day, July and August; through the winter time, of course, we don't have so many, probably two or three hundred a day; we have 110 benches on the pier proper.

Q. 110?

A. 110 at the present; we had more than that, but there was some got lost in the wreck. We have over 300 seats inside the two buildings.

Q. Now, assuming that the proposed restoration after this break were made complete, not only partially as authorized by the court, how would the physical situation and condition of the pier compare with its physical situation and condition anterior to the accident?

A. It would be just the same exactly.

Q. The break occurred in the piling and the platform?

A. Yes, about the center of the pier.

Q. Didn't affect either of the pavilions?

A. No, sir.

Q. Except to leave one marooned out there?

A. That is all.

Q. What exhibit was in the outer pavilion at the time of the break?

A. Why an exhibit from the government National

Museum and one from Sargent, paintings, we had from a party in New York, about two carloads of stuff there, and our own goods.

Q. Is there any heat in the inner pavilion, artificial heat?

A. In the sun parlor in winter time, yes, sir.

Q. That is provided free to the people that come there?

A. Yes, sir, all free.

Cross-examination.

By Mr. Babcock:

Q. Colonel, do you have charge of the pier here?

A. Yes, sir.

Q. I think you said that you had had charge for about 27 years?

A. Yes, sir.

Q. So you are familiar with the operations of the pier during all that time?

A. Yes, sir.

By Mr. McCarter:

Q. Testimony has been given by Mr. McCafferty that you have exhibited your own wares, own articles of merchandise; they are exhibited there as well, aren't they?

A. Yes, sir.

Q. Do you know what use is made now and has been for several years or for some time of the strand or Boardwalk in the way of business?

A. You mean the Boardwalk?

Q. No, the strand or beach?

A. Or the pier? The beach? I don't know. I see they have these sun chairs down there.

Q. What?

A. What they call the sun chairs.

Q. Which they rent?

A. Which they rent to visitors to sit in, and horses down below, ponies on the beach.

Q. Going up and down?

A. Yes, I guess that is about all.

Q. Is there any—ever see any men design images?

A. Yes, sand man down below the Steel Pier there; see him occasionally.

Q. How many piers have been, besides the Heinz Pier, in use for a number of years?

A. Well, I think there is four.

Q. And they are which ones?

A. Million Dollar Pier, and the Standard Pier, it is Young's old pier, I don't know what they call it now, Steeplechase Pier, Steel Pier, the Garden Pier, that would make five.

Q. What construction or pavilions are on those piers?

A. On the Steeplechase Pier they have it is a frame building in front, pier is practically closed, stores, glass front. I think copper all around. Same way down at the other pier below. I believe the Steel Pier is all frame, so far as I know, front part of it is.

Cross-examination.

By Mr. Babcock:

Q. The ponies and the sand artist and other things you have mentioned are down the beach from you?

A. The ponies are down the beach, sand artist down here, but these chairs are up above the pier there; they charge you 40 cents for an hour sitting on one.

Q. They are up above you some place?

A. Right above us, between all these piers.

Q. Do you know that some of the piers that you have mentioned are not affected by the so-called easement deed?

A. I don't know anything about that.

Q. Now, coming back to your management of the pier, was the use which was being made of the pier at the time when the accident took place last August practically the same as the use made of it during all the time you have been there?

A. Yes, sir; it has always been used for the same purpose.

Q. But you have always had a large exhibit there of your own products on the pier to show the persons who come on the pier?

A. Yes, sir; that is what we have.

Q. I think you said you had a picture exhibit there?

A. Yes, we have a lecturer there.

Q. Is that a modern picture?

A. Educational lecture. We are using lantern slides all together now.

Q. Lantern slides?

A. Yes.

Q. Are those pictures pictures of the provisions for producing your goods?

A. Yes, sir.

Q. And showing the finished product?

A. Showing the finished product, showing our farms, &c.

Q. Do you have a lecturer that points out——

A. Yes, sir.

Q. I suppose he explains how attractive they are?

A. Yes, sir.

Q. In other words advertise your goods?

A. We show the interior of the factory, show how the girls are labelling bottles, putting pickles in bottles, everything just the same as you would in your own kitchen.

Q. Is that in your order department where you have the exhibit?

A. In the sun parlor.

Q. No, in the order department where you take orders for goods, is that not where you exhibit the pictures?

A. Same place, yes, sir.

Q. In connection with your own advertising plan you have other exhibits, such as of curios and educationals objects, do you?

A. Yes, we do.

Q. Is the pier under the exclusive management of the Heinz Company?

A. Yes, sir.

Q. In your plan of taking orders and advertising you hand out to the public without charge these picture post cards such as have been offered in evidence?

A. Yes, sir; we have desks there for them to write on.

Q. I say you hand out these post cards such as have been offered in evidence and these pamphlets giving account of your articles, merchandise?

A. The exhibits are numbered; they can check them on there and look around and see them, they are numbered there.

Q. I say these pamphlets give your goods also?

A. Yes, sir.

Q. Do you have a pamphlet giving the list of your goods?

A. We had another kind of a pamphlet.

Q. You didn't offer that this morning?

A. No, I haven't got that here.
Q. Do you have a pamphlet here?
A. No, sir.
Q. You do have a pamphlet under label and price?
A. We do not, no, no price at all.
Q. Simply gives the various articles of merchandise?
A. Simply the standard prices, we don't give any prices, don't need any prices.
Q. This stationery, does that have——
A. Some of it has Heinz Pier on the top.
Q. ——Heinz Pier or some form on top?
A. Yes.
Q. Same as the picture there?
A. No, we don't have any with a picture on it.
Q. That is confined to the post cards, is it?
A. Yes, sir.
Q. You have stated that pier offers no obstruction to the view of the ocean from the Boardwalk. Is the decking of the pier as high as the Boardwalk?
A. Yes, a little higher.
Q. Higher, isn't it?
A. A little higher, yes.
Q. How much higher would you think?
A. I think about 3 feet.
Q. The inland pavilion is approximately how near the Boardwalk?
A. 70 feet, I think.
Q. The outside dimensions in a general way are what, on top of this decking of the pier, are what?
A. 30 by 60.
Q. 30 feet wide by 60 feet long?
A. Yes.
Q. What height?
A. 16 feet inside.
Q. And there is still another pavilion out at the end or building?

A. Yes.
Q. Right at the outer end of the Boardwalk you have some form of a gate or entrance?
A. Gate, yes, sir.
Q. That is how high?
A. I suppose 15 feet, 12 or 15 feet.
Q. Extending along the Boardwalk how much?
A. About 30 feet.
Q. 30 feet?
A. Probably 30 feet. It has gates on it.
Q. You think those pavilions and that archway to the pier offer no obstruction to sea at all?
A. I never heard any in 37 years I have been, never heard any.
Q. Not whether you heard, but is it your opinion that those things offer no obstruction to the view of the ocean from the Boardwalk?
A. No, sir; not a bit.
Q. You can see right through the pavilion, can you?
A. You don't need to see through them, you can see between them.
Q. Is this something the picture of the pavilion, you can see that?
A. Yes, you can see right between the pavilions, three or four hundred feet there.
Q. What do you do when the objects that you are viewing when the pavilion is between you and the object?
A. People don't generally look that way, do they?
Q. How do you see them?
A. Go to one side or the other. You don't stand still to look out in the ocean.
Q. In other words these obstructions offer no view if you have some particular place from which to view? In other words they offer no obstruction at all?

A. Not at all. They haven't for this last 27 years anyway.

By Mr. McCarter:

Q. Mr. Foster, was the condition of things that existed after this break safe or dangerous?

A. Why it was dangerous until we got them fit there.

Q. What effect did the break have upon the physical integrity of the pier itself?

A. Why it weakened all the under piling under the platform as tore down and the sides of it, you see the fact is this, if it was torn down beneath the bracing.

Q. How about the pavilions and the other parts, deck—I am not as familiar with these piers as you are—take any one of the three or four piers that you mention and describe what there is or are on them in the way of pavilions or buildings above the level of the floor, how extensive they are, how near the Boardwalk?

A. I don't know, the Steel Pier has got three or four very long pavilions on, there is on their pier.

Q. How close to the Boardwalk is the first one?

A. Comes right to the Boardwalk.

Q. What?

A. Right up to the Boardwalk.

Q. Right up to the Boardwalk?

A. Yes.

Q. How wide is it compared with the width of the pier?

A. I guess must be a 100 feet that first building.

Q. Is it the whole width of the pier?

A. Yes.

Q. That is on the deck, goes right across?

A. Yes.

Q. This pavilion of ours which is 60 or 70 feet out, how wide is that compared with the width of the pier?

A. It is 30 feet, stands to one side of the pier.

Q. The main width of the pier is what?

A. Thirty feet.

Q. The main width of the pier is what?

A. Thirty feet wide, main platform, and this stands to one side of that.

Q. How wide, what part of the width of the pier?

A. Which, the inner pavilion take up?

Q. Is it as wide as the pier?

A. It don't take any of the platform at all.

Q. Doesn't?

A. It is thirty foot to one side.

Q. Laid to one side?

A. Yes, sir.

Q. What other pavilions are there on other piers right closs to the Boardwalk beside the one you have just alluded to?

A. This pier opposite the Alamac Hotel down here has all stores in there.

Q. What is that pier called?

A. I don't know whether called the Standard Pier or not, that used to be Young's old pier.

The Court: It is now called the Central, Young's old pier.

Q. You say that is what physically?

A. That has stores in it. There is a big alcove goes in, and stores to each side of it, glass, a great many windows in there.

By Mr. Babcock:

Q. How far is the Steel Pier from you?
A. I should say about five squares.
Q. Westward?
A. This way, yes.
Q. All these others piers are still further westward?
A. Yes, all but the Garden Pier.
Q. The Garden Pier?
A. Yes.
Q. How far is that from you?
A. Two squares.
Q. The Central Pier is how many squares?
A. That is about six squares, I expect, Knickerbocker Hotel.
Q. South Carolina Avenue?
A. Yes.
Q. Six or eight squares away from you?
A. You can see, figure up, I don't know, count—only about six squares, yes.
Q. And the Million Dollar Pier is still further down?
A. About a mile down, yes.
Q. About a mile down?
A. I think so.

Mr. McCarter: It is conceded that in the mandamus proceedings brought by Richard McAllister and another against the city of Atlantic City, to which allusion has been made in the evidence, a stipulation was used, signed by Clarence L. Cole, Attorney for Mr. McAllister, and Theodore Schimpf, City Solicitor, the eighth feature of which was as follows:

"8. On April 22, 1907 Atlantic City passed the following resolution:

'Resolution relative to consent from H. G. Heinz Company for the relocation of a boardwalk forty feet wide along the interior line of beach front park.' "

Said resolution is the one I have already offered in evidence and the stipulation in the ninth paragraph also included the following: "After agreement aforesaid was entered into and actually completed by both of the parties therein mentioned according to its terms."

Mr. Babcock: If your Honor please, we will concede that the stipulation, for the purpose of mandamus case, be as Mr. McCarter has read but we do not concede that Mr. McAllister ever had any notice or knowledge of the resolution referred to and that, so far as this case is concerned, never was any agreement executed in conformity with or as authorized by that resolution. I may say to your Honor that I made a personal effort to find out yesterday whether there was any such contract but the city clerk could not find any and had no knowledge of it.

Mr. McCarter: I now offer in evidence a copy, uncertified, direct from the files of the law department of the city of the final decree in the Chancery suit between Richard McAllister, Henry A. Schmidt and Edward A. Schmidt, complainants, City of Atlantic City, defendant, which decree is dated the twenty-ninth of June, 1920, and advised by Vice-Chancellor Leaming, and, if necessary, we offer, in addition, the bill and answer, which we haven't here, but wish to make the offer complete.

Mr. Babcock: I think, if your Honor please, if going to offer any part of the record, ought to offer all.

Mr. McCarter: I have offered the bill and answer.

The Court: The file in that case of McAllister and others against Atlantic City, Docket 45, page 692.

(Decree marked Exhibit D14.)

Mr. McCarter: I don't know that it is of any particular moment in this case, but your Honor, if you are familiar with the other cases, the mandamus, also the case before Vice-Chancellor Leaming, will recall that in those cases it appeared that the city had already so nearly exhausted its taxation for debt that in order to carry out the agreement about condemnation of all the piers it would make them exceed the debt limit. I have here figures that are furnished by the comptroller of the city with reference to the assessed value of the other piers and this one and also a statement with reference to the extent of the debt and how near the limit is reached. I am not sure that the matter is material in this controversy, because there is no effort there to get the city to condemn these piers, but, at the same time, to make the record complete, we would like to offer these figures.

Mr. Babcock: We don't object, of course, to the form of the offer but we object to the substance of it as immaterial, irrelevant and incompetent in this case.

The Court: I will permit it.

Mr. McCarter: Then I will say that the assessed value of the different piers, Heinz, Garden, Steel,

Steeplechase, Young's Old and the Million Dollar, according to the figures, $2,422, 350, that is the assessed value; that the net debt of Atlantic City, computed according to the statutes of our own State, on the 25th of June, 1925, is 5-1/10%, giving a leeway of 1-9/10% and that the leeway amounts in dollars and cents to $3,462,487, and that is about a little less than a million dollars in excess of the assessed value of the piers, and that their assessed value is not their actual value, such as would be claimed in the event of condemnation; that the only market Atlantic City has today for its bonds is in the City of New York, whose method of computing the limitation of debt reduces the leeway to $864,740. We rest.

TESTIMONY CLOSED.

EXHIBIT C1.

AN ORDINANCE.

To lay out and open a public park or place for public resort and recreation along the beach or ocean front of Atlantic City, establishing the interior or inland line of such park or place of public resort and recreation, and the limits and boundaries thereof, and providing for the issuing and sale of bonds to defray the costs, damages and expenses incurred in the opening and laying out of such park and acquiring the lands, property and rights necessary therefor, and for the assessment of property benefited thereby.

Section 1. Be it Ordained by the City Council of Atlantic City, That in pursuance of the power and authority conferred upon the City Council of Atlantic City by an act of the Legislature of this State, approved April twenty-sixth, eighteen hundred and ninety-four, 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 or encroachment," constituting chapter ninety-three of the session laws of eighteen hundred and ninety-four, the City Council of Atlantic City does hereby determine to open and lay out a park or place of public resort and recreation along the beach or ocean front of said city within the limits and jurisdiction of said City, and does hereby determine, fix and establish

the interior or inland line of the same, as required by the said act, as follows:

Beginning in the south line of Caspian avenue at a point distant three hundred and sixteen (316) feet eastwardly from the west line of Maine Avenue, thence (1) southwardly to the south line of Pacific avenue at a point distant two and thirty-six hundredths (2 36-100) feet westwardly from the west line of Maine avenue; (2) southwestwardly to the middle line of New Hampshire avenue to a point distant four hundred (400) feet southwardly from the south line of Pacific avenue; (3) southwestwardly to the middle line of Massachusetts avenue to a point distant one thousand and seventy-three (1,073) feet southwardly from the south line of Pacific avenue; (4) southwestwardly to the middle line of Connecticut avenue at a point distant thirteen hundred and thirty-five (1,335) feet southwardly from the south line of Pacific avenue; thence (5) westwardly to the middle line of St. Charles Place at a point distant one thousand, four hundred and thirty (1,430) feet southwardly from the south line of Pacific avenue; (6) westwardly to a point distant twenty-five (25) feet westwardly from the east line of Maryland avenue and one thousand, four hundred and sixty (1,460) feet southwardly from the south line of Pacific avenue; (7) westwardly parallel with Pacific avenue to the middle line of North Carolina avenue; (8) westwardly to a point distant one thousand, three hundred and eighty-five (1,385) feet southwardly from the south line of Pacific avenue and one hundred and twenty-five (125) feet westwardly from the middle line of Tennessee avenue; (9) westwardly to a point distant two hundred and five (205) feet westwardly from the middle line of New York avenue and twelve hundred and

forty-four (1,244) feet southwardly from the south line of Pacific avenue; (10) westwardly to a point distant ninety-five (95) feet eastwardly from the middle line of Illinois avenue and one thousand, one hundred and fifty-three (1,153) feet southwardly from the south line of Pacific avenue; (11) westwardly to a point in Park Place distant nine hundred and seventy-one (971) feet southwardly from the south line of Pacific avenue and two hundred feet eastwardly from the middle line of Ohio avenue; (12) westwardly to the middle line of Arkansas avenue at a point distant seven hundred and seventy-three (773) feet southwardly from the south line of Pacific avenue; (13) westwardly to the middle line of Mississippi avenue at a point distant six hundred and eighty (680) feet southwardly from the south line of Pacific avenue; (14) westwardly to the middle line of Iowa avenue at a point distant five hundred and ten (510) feet southwardly from the south line of Pacific avenue; (15) westwardly to the east line of Albany avenue at a point distant three hundred forty-one (341) feet southwardly from the southeast corner of Albany and Pacific avenues; (16) westwardly parallel with Atlantic avenue to the middle line of Jackson avenue;

Provided that the inland line of said park joining the two points fifty feet on either side of the above corners shall be the arc of a circle tangent at said points and not the broken line above described.

Sec. 2. And be it Ordained, That the limits and boundaries of said park or place for public resort and recreation be and the same are hereby fixed, established and described as follows:

Beginning in the south line of Caspian avenue at a point distant three hundred and sixteen (316) feet eastwardly from the west line of Main avenue,

thence (1) southwardly and westwardly along the interior or inland line of said park or place for public resort and recreation, as above described, to the middle line of Jackson avenue; (2) southwardly along the middle line of Jackson avenue to the exterior line established by the commissioners appointed under authority of the act entitled "An act to ascertain the rights of the State and Riparian owners in lands lying under the waters of the Bay of New York and elsewhere in this State," approved April eleventh, eighteen hundred and sixty-four and the supplements thereto; (3) eastwardly and northwardly along the said exterior line the several courses and distances thereof to the south line of Caspian avenue extended; (4) westwardly along said line of Caspian avenue to the place of beginning.

Sec. 3. And be it Ordained, That all the lands lying oceanward from the interior line so established from the boundaries above defined, be and the same are hereby devoted to public use as a public park or place for public resort and recreation exclusively, and for such use shall be kept open and unobstructed forever, in the manner and to the extent as in any of the said act is directed and prescribed.

Sec. 4. And be it Ordained, That the City Surveyor be and he is hereby directed to make a survey and description of the said line so fixed and established, and cause the same to be suitably marked upon the ground by substantial posts or piling sunk in the soil, and prepare a map showing and indicating the said line and giving a description thereof, and it is hereby directed to file the said map and description in the office of the City Clerk of Atlantic City, where the same shall remain on record.

Sec. 5. And be it Ordained, That the City Soli-

citor be and is hereby empowered, in the name and on behalf of the said city, to cause to be condemned for the purposes of said public park any and all lands, property and rights within the limits of the said park, as hereby established, which shall not be dedicated to such use by the owners thereof and accepted by the city, as provided in the said act, or shall not be purchased by said city for such purpose.

Sec. 6. And be it Ordained, That for the purpose of providing the money to pay the costs, damages and expenses incurred in the opening and laying out of the said park and acquiring the lands, property and rights therefor, bonds of the City of Atlantic City to an amount not exceeding one hundred thousand dollars shall be issued and deposited of and the proceeds thereof used exclusively for the purposes above stated. All such bonds so issued shall be denominated Atlantic City Park Bonds, and shall run from the date of their issue for a term of thirty years and shall bear interest at the rate of four and one half per cent per annum. Such bonds shall be in the denomination of one thousand dollars each and be in the following form:

UNITED STATES OF AMERICA

No. $1,000

The City of Atlantic City, in the State of New Jersey, Atlantic City Park Bond.

KNOW ALL MEN BY THESE PRESENTS, That the City of Atlantic City, in the State of New Jersey, for value received, is indebted to the bearer hereof in the sum of One Thousand dollars which the said City of Atlantic City promises to pay to the bearer on the First Day of July, in the year of our Lord, one thousand nine hundred and twenty-nine, with interest thereon, at the rate of four and one-half per cent. per annum, payable semi-annually, on the first days of January and July in each year upon the presentation and surrender of the coupons hereto annexed as they severally become due, both principal and interest payable in lawful gold coin of the United States of America, at the Union National Bank of Atlantic City.

This bond is one of a series of one hundred bonds, numbered from 1 to 100, inclusive, each of like date and amount, aggregating the principal sum of one hundred thousand ($100,000) dollars all of which bonds, including this bond, shall become due and payable on the first day of July, 1929, and are issued under and pursuant to the provisions of an act of the Legislature of the State of New Jersey, entitled "An act to authorize cities in this State to issue bonds in certain cases," approved March 22, 1895, and it is hereby certified and recited that all acts, conditions and things precedent to and in the issuance of the said bonds have been duly done, happened and performed, in regular due form, as required by law, and that said issue of bonds, together with the other indebtedness of the said city do not exceed any limitation prescribed by the statutes or Constitution of the said State; and that the faith, credit and property of the said city are inviolably pledged for the payment of all of said bonds. This bond shall pass by delivery or it may be registered by its owner in the books of the City Treasurer of Atlantic City. After registration of ownership certified hereon by the Treasurer no transfer except upon the books of the treasurer shall be valid unless the last transfer shall have been to bearer and the transferability thereof by delivery thus subject to successive registration and transfer to bearer as aforesaid, at the option of the holder.

The transferability of the coupons by delivery shall not be affected by the registry of the bonds.

IN WITNESS WHEREOF, The City of Atlantic City has caused its corporate seal to be hereto affixed and attested by its Clerk and this bond to be signed by its Mayor and countersigned by its Treasurer and has also caused the coupons hereto annexed, to be signed with the engraved or lithographed signature of its Treasurer, as of the first day of July in the year of our Lord, One thousand eight hundred and ninety-nine.

Attest: Mayor of Atlantic City

Clerk

Countersigned:

Treasurer.

With coupons in the following form attached to said bonds for the payment of the semi-annual interest:

No..... $22.50

The City of Atlantic City in the State of New Jersey will pay to the bearer on the first of..... ....., 19...., Twenty-two dollars and fifty cents in lawful gold coin of the United States, at the Union National Bank of Atlantic City, being six months' interest then due on Atlantic City Park Bond No..... Dated July 1, 1899.

The principal and interest of such bonds to be payable at the Union National Bank of Atlantic City. The principal of said bonds to be paid at said bank when they fall due, and the semi-annual interest thereon on the first days of January and July in each year, and such bonds may be registered at the option of the holder in the office of the City Treasurer.

Sec. 7. And be it Ordained, That when the costs, damages and expenses incident to the opening and laying out of the said park and the acquiring of the lands, property and rights necessary therefor have been ascertained by the City Solicitor of said City, on behalf of said city, is hereby authorized and directed to proceed in the manner prescribed by law to cause an assessment to be made on all the properties situated within the limits of the said city benefited by the opening and laying out of the said park to the extent of the special and peculiar benefits conferred upon the owner or owners of such property thereby in proportion to the benefit each shall be deemed to acquire.

Sec. 8. And be it Ordained, That all benefit assessments thus made, when collected, shall be paid to the Commissioner of the Sinking Fund of the said City and held and invested by him, and the same with the proceeds thereof shall be applied exclusively to the payment of the principal and interest of the bonds issued under the authority of this ordinance; and the balance required for the payment of such principal and interest, if any, shall be raised by taxation as required by law.

Passed at a Regular Meeting of City Council, October, 9, 1899.

Approved October 13, 1899.

EXHIBIT C2.

AN ORDINANCE.

Granting the Atlantic City Ocean Pier Company the right of way to the ocean end of Massachusetts avenue from a point at the present Boardwalk into the ocean.

Section 1. That a right of way to the ocean end of Massachusetts avenue is hereby granted to John Heinz, J. A. Reid, P. W. Wiltbank, and their associates forming said Atlantic Ocean Pier Company, or such company as they may form under the laws of the State of New Jersey, for the purpose of erecting and extending an iron pier, from a point at the present Boardwalk to extend thence about one thousand feet into the ocean.

Sec. 2. That the conditions of this ordinance are: First, that the pillows of said pier shall be erected so as not to obstruct the drive and travel along the ocean front; second, that said pier shall be fully erected on or before the first day of July, 1886, otherwise all the rights, and privileges granted by this ordinance shall cease, terminate and become void.

Sec. 3. That this ordinance shall take effect immediately.

Passed May 11, 1885.

EXHIBIT C4.
6/26/25 L.

Walter Walls, et ux, et al
to
Atlantic City.
} Deed.

This Indenture, made the Eight day of April in the year of our Lord one thousand nine hundred and seven Between Walter Walls, of the City and County of Philadelphia and State of Pennsylvania and Amanda M., his wife, James A. Cathcart, widower of the City of Atlantic City, County of Atlantic and State of New Jersey Richard McAllister of the City of Atlantic City, County of Atlantic and State of New Jersey, Josephine, his wife, Henry C. Schmidt of the City and County of Philadelphia and State of Pennsylvania, Louisa M., his wife, Edward A. Schmidt of the City and County of Philadelphia, and State of Pennsylvania, Emma B., his wife, Mary A. Wootton, widow, of the City of Atlantic City, County of Atlantic and State of New Jersey, Oxford Hotel Company, a corporation under and by virtue of the laws of the State of New Jersey, Newlin Haines, of the City of Atlantic City, County of Atlantic and State of New Jersey and Eva B., his wife, Henry E. Stevens, Jr. of the City, County and State of New York and Ida S., his wife, Dewey Land Company a corporation under and by virtue of the laws of the State of New Jersey, parties of the first part, and Atlantic City, a municipal corporation of New Jersey, party of the second part, 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 "An Act to enable cities in this State, located on or near the Ocean and embracing within their limits or jurisdicton 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 or encroachment," approved April twenty-sixth, eighteen hundred and ninety-four and whereas, the said City Council of the city for this purpose did, on the ninth day of October, eighteen hundred and ninety-nine duly pass an ordinance of the said City to lay out, and open such park and to establish the interior or inland lines thereof. And Whereas, the said City Council has relocated or is about to relocate said interior or inland line between the middle line of Connecticut Avenue and a point in the west line of Maine Avenue twenty-five and two-tenths feet northwardly of the south line of Pacific Avenue, so that the interior or inland line of said park shall be as follows: Beginning the South line of Caspian Avenue at a point distant three hundred and sixteen (316) feet Eastwardly from the West line of Maine Avenue, thence (1) Southwardly to a point in the West line of Maine Avenue, distant twenty-

five and two-tenths (25.2) feet Northwardly, from the South line of Pacific Avenue thence (2) Southwardly along said line of Maine Avenue four hundred and eighty-five and two-tenths (485.2) feet to the South line of Oriental avenue (3) Southwestwardly to the middle line of New Hampshire avenue at a point distant nine hundred and ten (910) feet Southwardly from the South line of Pacific Avenue; (4) Southwestwardly to the middle line of Vermont Avenue, at a point distant twelve hundred and ten (1210) feet Southwardly from the South line of Pacific Avenue (5) Southwestwardly to the middle line of Rhode Island avenue to a point distant thirteen hundred and thirty-five (1335) feet Southwardly from the South line of Pacific avenue; (6) Westwardly parallel with Pacific avenue to the middle line of Connecticut Avenue; (7) Westwardly to the middle line of St. Charles Place at a point distant one thousand four hundred and thirty (1430) feet Southwardly from the south line of Pacific Avenue; (8) Westward to a point distant twenty-five feet Westwardly from the East line of Maryland avenue and one thousand four hundred and sixty (1460) feet Southwardly from the South line of Pacific avenue; (9) Westwardly parallel with Pacific avenue to the middle line of North Carolina avenue; (10) Westwardly to a point distant one thousand three hundred and eighty-five (1385) feet Southwardly from the South line of Pacific avenue and one hundred and twenty-five (125) feet Westwardly from the middle line of Tennessee avenue; (11) Westwardly to a point distant Two hundred and five (205) feet Westwardly from the middle line of New York avenue and twelve hundred and forty-four (1244) feet Southwardly from the South line of Pacific avenue; (12) Westwardly to a point distant

ninety-five (95) feet Eastwardly from the middle line of Illinois avenue and one thousand one hundred and fifty-three (1153) feet Southwardly, from the South line of Pacific avenue, (13) Westwardly to a point in Park Place distant nine hundred and seventy-one (971) Southwardly feet from the South line Pacific avenue and Two hundred (200) feet Eastwardly from the middle line of Ohio avenue; (14) Westwardly to the middle line of Arkansas avenue at a point distant seven hundred and seventy-three (773) feet Southwardly from the South line of Pacific Avenue; (15) Westwardly to the middle line of Mississippi avenue, at a point distant six hundred and eighty (680) feet Southwardly from the South line of Pacific avenue; (16) Westwardly to the middle line of Iowa avenue, at a point distant Five hundred and ten (510) feet Southwardly from the South line of Pacific avenue; (17) Westwardly to the East line of Albany Avenue at a point distant three hundred and forty-one (341) feet Southwardly from the Southeast corner of Albany and Pacific avenues, (18) Westwardly parallel with Atlantic avenue, to the middle line of Jackson avenue. Provided that the inland line of said park joining the two points fifty feet on either side of the above corners shall be the arc of a circle tangent at said points and not the broken line above described. Said ordinances fixing and establishing the limits and said boundaries of said park or place for public resort and recreation, as follows: Beginning in the South line of Caspian avenue at a point distant three hundred and sixteen (316) feet eastwardly from the west line of Maine avenue; thence (1) southwardly and westwardly along the interior or inland line of said park or place for public resort and recreation, as above described to the middle

line of Jackson avenue; (2) southwardly along the middle line of Jackson avenue to the exterior line established by the Commissioners, appointed under authority of the 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," approved April eleventh, eighteen hundred and sixty-four, and the supplements thereto, (3) eastwardly and northwardly along said exterior line of the several courses and distances thereof to the south line of Caspian avenue extended, (4) westwardly along said line of Caspian avenue to the place of beginning. And Whereas, the said City Council in pursuance of the power and authority, given by said act and in pursuance of its provisions has caused the inland line of the said part to be established and suitably marked upon the ground, and has caused a description of the same to be filed, in the office of the city Clerk of the said City in pursuance of and in conformity with the provisions and directions of the said act. And Whereas, the said City has heretofore constructed and is about to reconstruct within the limits of the said park for a considerable distance along and near to the inland line so established, an elevated boardwalk and proposes hereafter to continue such construction along the entire line. 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 provision of the said act. This Indenture Witnesseth, That the parties of the first part, for and in consideration of the premises and of 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, to the said parties of the first part, at and before the sealing and delivery of these presents—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 or ordinance above referred to, have and by these presents do, for themselves and each of them, their heirs, successors and assigns, give, grant, bargain, sell, and convey to the said party of the second part and its successors, all their and each of their right, title and interest in and to the above described tract of land and every part and parcel thereof, including such parts and parcels thereof as are, or may be covered by water, to have and to hold the 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: That no railroad, nor street railway shall ever be constructed, operated, or maintained over, upon or across any portion of the premises hereby granted and conveyed, and that said land shall never be used for any railroad purposes or

whatever. And the said party of the second part hereby covenants, and agrees to and with the said grantors, parties of the first part, and to and with each and every one of them, and to and with their and each of their assigns, as follows: First, To maintain the said elevated boardwalk as now constructed or hereafter constructed or extending, along the inland line of the land hereby conveyed as an open public walk, and to reconstruct and maintain said walk between the point of the line relocated as aforesaid; Second, To permit the owners of property contiguous thereto lying inland from the line so established and marked to connect their and each of their lands and properties with such elevated boardwalk by building and maintaining proper approaches for this purpose on the inland side thereof. Third, whenever a formation of land by accretion shall occur within the bounds of the land hereby conveyed to such an extent that the high water line of the ocean shall not be less than three hundred feet oceanward, from the inland line so established, the grantee and its successors shall upon the written request of the grantors, their heirs and assigns, owning not less than three contiguous city blocks of the land hereby conveyed upon which such accretion may have formed, cause, the elevated boardwalk, erected thereon, to be moved oceanward three hundred feet or any less distance that such owners and the party of the second part may agree upon; and whenever the said elevated boardwalk shall be moved, oceanward by virtue of this provision, the inland line of the said park shall be moved oceanward to correspond therewith, and all the land hereby conveyed, lying, inland from the line so re-established shall be released from the dedication hereby made and revert to the owners thereof, their heirs

or assigns. 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, *opean* and unobstructed, and that no such 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. In Witness Whereof, the said parties of the first part have hereunto set their hands and seals and the said party of the second part has caused its corporate seal to be

hereunto affixed, an d attested by its proper officers, the day and year first above written.

Signed, sealed and delivered, in the presence of
J. H. Hayes, Jr.

Atlantic City by
Franklin P. Stoy
Mayor
(corporate seal)

Attest:
Edward R. Donnelly
City Clerk.

Dewey Land Co.
by James A. Cathcart.
Vice President.
(corporate seal)

Attest:
R. H. Ingersoll
Secretary

Walter Walls (seal)
Amanda M. Walls, (seal)
James A. Cathcart, (seal)
Richard McAllister (seal)
Josephine McAllister (seal)
Henry C. Schmidt (seal)
Louisa M. Schmidt (seal)
Edward A. Schmidt (seal)
By Henry C. Schmidt,
Attorney.
Emma B. Schmidt (seal)
By Henry C. Schmidt,
Attorney.
Newlin Haines (seal)
Eva B. Haines (seal)
Henry E. Stevens, Jr. (seal)
Ida S. Stevens (seal)

EXHIBIT D1.
6/26/25 L.

Regular meeting of City Council held on January 28, 1907.

President Leeds Presiding.

Councilmen present: Messrs. Buzby, Donnelly, Gale, Johnson, Kessler, Lingerman, Moore, Murtland, Parker, Phoebus, Reilly, Riddle, Roberts, Westcott, White and Leeds (16). Absent, Mr. Bacharach (1).

PETITION ASKING THAT THE BOARDWALK BE MOVED OCEANWARD FROM CONNECTICUT TO MAINE AVENUES.

A petition was read which stated that it was signed by the owners of all the land on the ocean front from Connecticut Avenue to 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, 1899, and the ordinances of Atlantic City passed in 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.

Along Me. Ave. Pac. to Dewey P.
Walter B. Dick (L. S.)

110′ S. W. Cor. Maine and Dewey Pl.
Walter Walls (L. S.)

190 ft. East Maine
H. E. Kelley (L. S.)

190 East New Hamp. So. of Dewey Pl.
States Ave. Land Co. (L. S.)
(Seal)
by James A. Cathcart, Pres.

175 West New Hamp. Ave.
Henry E. Stevens Jr. (L. S.)

175 E. Vermont Ave.
Marine Realty Co.
Wilbur Zimmerman (L. S.)
President.

150′ W. Vermont Ave.
Herbert J. Cuthbert, Secy.
Edgar Lehman (L. S.)

150′ E. Rhode Island Ave.
New Amsterdam Realty Co. (L. S.)
(Seal)
by H. E. Stevens, Jr. Treas.
H. G. Harris, Secy. (L. S.)

150 Westerly R. I. Ave. to Metropolitan
Richard McAllister (L. S.)
Edw. A. Schmidt (L. S.)

350′ bet. Mass. & Conn. Ave.

Henry C. Schmidt (L. S.)
Newlin Haines (L. S.)
Owner by contract.

I, Mary A. Wotton, owner of frontage beginning, Easterly line of Massachusetts Avenue and extending Eastwardly One hundred and sixty feet, join in above petition, my signature however not to authorize interference with possession of strip over my said lands, leased by H. J. Heinz Co., for pier purposes.

..... Mary A. Wotton (Seal)

Oxford Hotel Company
by Joseph Thompson
Prest.

Land between Conn. & Mass. Aves.

CITY OF ATLANTIC CITY
DEPARTMENT OF PUBLIC AFFAIRS
City of Atlantic City, N. J.

I, DAVID H. PORTER, JR., ASSISTANT City Clerk of the City of Atlantic City, in the County of Atlantic, State of New Jersey, Do Hereby Certify, that the foregoing is a true copy of a portion of the minutes of a regular meeting of City Council held on January 28, 1907, as taken from the original on file in the office of the City Clerk.....

In Testimony Whereof, I have hereunto set my hand and affixed the official seal of the City of Atlantic City, this 28th day of November 1919.

David H. Porter, Jr.,
(Seal) Ass't City Clerk.

EXHIBIT D2.
6/26/25 L.

Atlantic City, N. J., April 22, 1907.

A Regular Meeting of City Council was held this evening at City Hall at 8:00 o'clock, President Leeds presiding.

Councilmen present: Messrs, Bacharach, Buzby, Donnelly, Gale, Johnson, Kessler, Lingerman, Moore, Murtland, Parker, Phoebus, Reilly, Riddle, Roberts, Westcott, White and Leeds (17). Absent, (0).

RESOLUTION RELATIVE TO CONSENT FROM H. J. HEINZ COMPANY FOR THE RELOCATION OF A BOARDWALK FORTY FEET WIDE ALONG THE INTERIOR LINE OF THE BEACH FRONT PARK.

Resolution by Mr. Riddle:

Be it resolved by the City Council of Atlantic City that for and in consideration of a consent in writing, to be approved by the City Solicitor from H. J. Heinz Company, of Pittsburg, for the relocation of a boardwalk forty feet wide along the interior line of the Beach Front Park, located by ordinance of April 10th, 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 to be hereafter acquired by the city within the limits of said Beach Front Park unless such interference or disturbance shall be by condemnation proceedings in-

immunities and franchises which are possessed or enjoyed by the said Atlantic City Ocean Pier Company under the laws of the State of New Jersey, And under their Certificate of Incorporation or Charter filed in accordance therewith. (Being the same premises which Albert H. O'Brien and wife by indenture bearing date the thirtieth day of June A. D. 1893 and to be forthwith recorded in the Clerk's Office of Atlantic County at May's Landing, N. J. granted and conveyed unto Joseph F. Fralinger in fee, as by reference to the said deed being had will more fully and at large appear. Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, And also, all the estate, right, title, interest, property claim and demand whatsoever as well in law as in equity of the said party of the first part, of, in and to the above described premises and every part and parcel thereof, with the appurtenances. To have and to hold, all and singular the above mentioned and described premises together with the appurtenances unto the said party of the second part, its successors and assigns forever. And the said Joseph F. Fralinger doth for himself, his heirs, executors and administrators covenant and grant to and with the said party of the second part, its successors and assigns that he the said Joseph F. Fralinger hath not done, caused, suffered or procured to be done any act, matter or thing whereby the title of the said party of the second part, of, in and to the above granted, bargained and described lands and premises or any part thereof can or may be changed, charged, altered or defeated in any way whatsoever. In Witness whereof the said party of

the first part have hereunto set their hands and seals the day and year first above written.

Signed, sealed and delivered, in the presence of C. L. Cole — Jos. F. Fralinger (seal) — Nettie Fralinger (seal)

State of New Jersey, } ss.
County of Atlantic. }

BE IT REMEMBERED, that on this Tenth day of July in the year one thousand eight hundred and ninety three before me, a Master in the Court of Chancery of the State of New Jersey, personally appeared Joseph F. Fralinger and Nettie his wife, who I am satisfied are the grantors in the within deed of conveyance named, and who executed the same; and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed; And the said Nettie being by me privately examined separate and apart from her said husband did further acknowledge that she signed, sealed and delivered the same as her voluntary act and deed, freely, without any fear, threats or compulsion of her said husband.

C. L. Cole,
M. C. C. of N. J.

Recd. & recorded Judy 18" A. D. 1893,
Lewis Evans, Clk.

STATE OF NEW JERSEY
COUNTY OF ATLANTIC

I, Edwin A. Parker, Clerk of the County of Atlantic, and also Clerk of the COMMON PLEAS Court, holden therein, said court being a court of record, having a common seal, do hereby Certify, That the foregoing is a true copy OF A certain

Deed made by Joseph F. Fralinger, et ux., to The Ocean Front Iron Pier Co. as the same is recorded in my said office in Deed Book #174 page 354 &c., Stamp EAP 12-17-15

In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal at May's Landing, N. J., this Seventeenth day of December A. D. 1915.

Edwin A. Parker

(Seal) Clerk

By .....

Deputy Clerk

[Endorsed]
CERTIFIED COPY
OF
DEED
JOSEPH F. FRALINGER, ET UX.,
TO
THE OCEAN FRONT IRON PIER CO.
RECEIVED
DEC 18 1915
B. W. M. C.

EXHIBIT D5,
6/26/25 L

Mary A. Wootton,
To
Atlantic City,
Deed

This Agreement made the twenty-eight-day of December in the year of our Lord one thousand eight hundred and ninety-eight, Between, Mary A. Wootton of Atlantic City New Jersey, parties of the first part, and Atlantic City party of the second part: Whereas the City of Atlantic City, under and by virtue of the statutes of this State for that purpose made and provided have heretofore laid out and opened a public street of the width of sixty feet between high and low water mark as then ascertained along and upon the beach or Ocean front within the limits of said City and have constructed thereon and elevated steel board or plank walk. And Whereas in aid of the opening of said street and the construction of said walk and for and in consideration of the benefits to accrue therefrom, certain owners of the property on the line of the said street as there located granted to said City for the purposes aforesaid the lands and rights neccessary therefore and entered into certain covenants with said City in relation thereto. And Whereas since the making of the said conveyances and opening the said street it has been found advisable and for the interest of said City as well as the owners of the land fronting on the said Beach or Ocean front to change the location of the said street and move the line of the same and erect thereon a new walk. Now therefore this Indenture Witnesseth that the said parties of the first part for and in consideration of the premises and of 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 to 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 said street and building said new 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 above referred to the said parties of the first part, for themselves their and each of their heirs and assigns do hereby covenant and agree to and with the said party of the second part its successors and assigns that it shall and may be lawful for the party of the second part its successors and assigns, and its agents and servants and for any other person or person subject to such regulations and restrictions as the party of the second part may impose at all times to pass and repass, to use, occupy and enjoy so long as the same shall be used for the purpose of a street and a public steel, board or plank walk. All that sixty feet wide strip of land being sixty feet oceanward of the following described line (which line is the inland line of said sixty feet wide strip of land) viz. Beginning in the south line of Caspian Avenue at a point distant three hundred and sixteen (316) feet eastwardly from the west line of Maine Avenue thence (1) Southwardly to the south line of Pacific Avenue at a point distant two and thirty-six hundredths (2-36/100) feet Westwardly from the west line of Maine Avenue (2) Southwestwardly to the middle line of New Hampshire Avenue at a point distant four hundred (400) feet Southwardly from the South line of Pacific Avenue (3) Southwestwardly to the middle line of Massachusetts Avenue at a point distant one thousand and seventy-three (1073) feet Southwardly from the South line of Pacific Avenue (4) Southwardly to the middle line of Connecticut Avenue at a point distant thirteen hundred and thirty-five (1335) feet Southwardly from the South line of Pacific Avenue thence (5) Westwardly to the middle line of St. Charles Place at a point distant one thousand four hundred and thirty (1430) feet Southwardly from the South line of Pacific Avenue (6) Westwardly to a point

distant twenty-five (25) feet Westwardly from the East line of Maryland Avenue and one thousand four hundred and sixty (1460) feet Southwardly from the South line of Pacific Avenue (7) Westwardly parallel with Pacific Avenue to the middle line of *M*orth Carolina Avenue (8) Westwardly to a point distant one thousand three hundred and eighty-five (1385) feet Southwardly from the South line of Pacific Avenue and one hundred and twenty-five (125) feet Westwardly from the middle line of Tennessee Avenue (9) Westwardly to a point distant two hundred and five (205) feet Westwardly from the middle line of New York Avenue and twelve hundred and forty-four (1244) feet Southwardly from the South line of Pacific Avenue (10) Westwardly to a point distant ninety-five (95) feet Eastwardly from the middle line of Illinois Avenue and one thousand one hundred and fifty-three (1153) feet Southwardly from the South line of Pacific Avenue (11) Westwardly to a point in Park Place distant nine hundred and seventy-one (971) feet Southwardly from the South line of Pacific Avenue and two hundred (200) feet Eastwardly from the middle line of Ohio Avenue (12) Westwardly to the middle line of Arkansas Avenue at a point distant seven hundred and seventy-three (773) feet Southwardly from the South line of Pacific Avenue (13) Westwardly to the middle line of Mississippi Avenue at a point distant six hundred and eighty (680) feet Southwardly from the South line of Pacific Avenue (14) Westwardly to the middle line of Iowa Avenue at a point distant five hundred and ten (510) feet Southwardly from the South line of Pacific Avenue (15) Westwardly to the East line of Albany Avenue at a point distant three hundred and forty-one (341) feet Southwardly from the Southeast corner of Albany and Pacific Avenues

provided that the inland line of said street joining the two points fifty feet on either side of the above corners shall be the arc of a circle tangent at said points and not the broken line above described which said sixty feet wide strip of land is designated on the map hereunto attached and for greater certainty is made a part of this grant, together with the right to use, occupy and control the same so long as the same shall be used for the purpose of maintaining a street and a public steel, board or plank walk and when the party of the second part shall cease or neglect to use the same for that purpose it shall revert absolutely and without any condition or qualification to the grantors. It is hereby covenanted and agreed that the said sixty feet strip shall be used for no other purpose than that of a street and a public board or steel walk and that the grantors hereto shall have at all times the right to connect their and each of their buildings with said walk on the land or Northwest side thereof and that Atlantic City shall not remove or cause to be removed nor permit its servants and agents or any other person or persons to remove any sand from said sixty feet wide strip or street and that the Boardwalk to be built on said sixty feet wide strip shall be elevated where it crosses the streets and avenues in Atlantic City to such height as will allow the grantors hereto free and unobstructed passage under the same with horses and wagons for the purpose of carting sand or driving with covered wagons and that whenever 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 such owners and City Council may agree upon. And the said parties of the first part for themselves, their heirs, executors, administrators and assigns do hereby covenant, promise and agree to and with the said party of the second part its successors and assigns that they and each of them their heirs, executors, administrators and assigns shall not and will not put or erect or allow to be placed or erected on the lands hereby granted or on the ocean side thereof any building or structure except as above and hereafter provided and the said party of the second part hereby covenants and agrees that it will not place or erect or allow to be placed or erected any buildings or structures of any kind or description on the lands above described except as above provided and that these covenants shall attach to and run with the lands and premises hereby granted and the lands on the ocean side thereof so long as the same shall be used for the purpose of a street and a public steel, board or plank walk and that the same may be enforced or its breach or non-observance may be restrained or enjoined at any time by the said party of the second part its successors and assigns. And it is further covenanted and agreed by and between said parties that the present elevated boardwalk may remain until the new walk is built on the line of the new street as hereby located and described. And it is further covenanted and agreed by and between said parties except for the purpose of maintaining the said boardwalk now constructed as herein provided that whenever and as soon as the said City, by a resolution or ordinance passed by its Council for that purpose shall accept this conveyance and cause the same to be recorded that thereupon and thereafter all the right, title and interest,

possession and right of possession (except for the purpose of maintaining the said boardwalk now constructed as before expressed) of, in and to all lands lying Westerly and Northerly of the said Westerly and Northerly line of said street as herein described and located shall immediately cease and determine and revert to the grantors of said land their heirs, executors, administrators and assigns. And the said City of Atlantic City shall cause to be incorporated in the resolution or ordinance accepting this deed a formal release and abandonment of the land now occupied by the boardwalk extending over the property of said Mary A. Wootton and this Agreement shall be of on effect until such ordinance or resolution containing such release shall be duly passed by said Council but that said release and abandonment shall not take effect until the Boardwalk now upon said property shall be moved to the new site. And the said City hereby agrees to vacate the said street or such part or parts thereof as lie Westerly and Northerly of said line without expense to the said owners their heirs or assigns they also covenanting and agreeing to waive all allowances for damages if any accrue by such vacation. Provided however that the within grantors shall not be prohibited from building a pier in front of their property and connecting the same to the new walk about to be erected and upon the further condition that the said pier shall be of at least one thousand feet in length extending into the ocean beyond the present sixty feet wide strip and constructed of iron or steel and shall not permit the sale of any commodity upon the same and be confined to charging only an entrance fee. And provided further that the City Council shall not grant a right of way to any railroad company or street railway company now incorporated or to be hereafter incorporated

over and along the same and provided further that nothing in this agreement shall be construed as preventing the grantors from sinking such piling, placing or planting such brush or placing such sea walls jetties or other things or structures of wood, stone, iron or other material on the ocean front, along and across said sixty feet wide strip and along and under the walk to be erected upon said sixty feet wide strip as may be neccessary for the protection of its, his, her or their property from the encroachment of the ocean and the reclaiming of lands. And it is hereby further covenanted and agreed by and between the parties hereto that the walk to be erected on said sixty feet wide strip where the same crosses the land of the within named grantor shall be completed and the old walk removed on or before April thirtieth, 1899, by and at the expense of said party of second part. In Witness Whereof the said part of the first part have hereunto set and affixed her hand and seal and the said party of the second part has caused to be hereunto affixed its common or corporate seal attested by its proper officers.

Signed, Sealed and delivered in the presence of

Harry Wootton as to Mary A. Wootton

Mary A. Wootton, (seal)

Atlantic City (corporate) (seal)

Attest, E. D. Irelan, City Clerk.

By, F. P. Stoy, Mayor.

State of New Jersey, County of Atlantic } ss.

Be it remembered that on this twenty-eighth day of December, A. D. eighteen hundred and ninety-eight, before me the Subscriber a Master in Chancery of New Jersey, personally appeared Mary A. Wootton who I am satisfied is the grantor mentioned

in the within instrument and I having first made known to her the contents thereof she acknowledged that she signed, sealed and delivered the same as her voluntary act and deed for the uses and purposes therein expressed.

Harry Wootton,
M. C. C. of N. J.

State of New Jersey, } ss.
County of Atlantic }

Be it known that on this twenty-eighth day of July, A. D. nineteen hundred, before me the subscriber a Master in Chancery of New Jersey personally appeared Emery D. Irelan who being by me duly sworn according to law did on his oath say that he is the City Clerk of Atlantic City the grantee mentioned in the foregoing instrument that he knows the seal of said City that the seal affixed to the said instrument is the common seal of said City that F. P. Stoy is the Mayor of said City and did by its order sign, seal and deliver the said instrument as its voluntary act and deed in the presence of this deponent and that the said deponent did at the execution thereof, subscribe his name as a witness thereto.

Sworn and subscribed before me
the day and year above written.

Carlton Godfrey, E. D. Irelan,
M. C. C. of N. J.

Rec'd. and recorded August 8th. 1900.

Lewis P. Scott,
Clerk.

STATE OF NEW JERSEY
COUNTY OF ATLANTIC

I, Edwin A. Parker, Clerk of the County of Atlantic, do hereby Certify, That the foregoing is a true copy of the record of a certain Deed made by Mary A. Wootton to Atlantic City as the same is of

record in my office in Book #248 of Deeds page 215 In Testimony Whereof, I have hereunto set my hand and affixed my Official Seal at May's Landing, N. J., this second day of May A. D. 1914.

Edwin A. Parker
(Seal) Clerk
By Burton A. Gaskill,
Deputy Clerk

[ENDORSED]
CERTIFIED COPY
OF
DEED
MARY A. WOOTTON
TO
ATLANTIC CITY
DEED BOOK # 248, PAGE 215

EXHIBIT D6.
6/26/25 L.

THIS AGREEMENT, Made this 26th day of February, A. D., 1900.

BETWEEN, MARY A. WOOTTON, of Atlantic City, New Jersey, party of the first part, and H. J. HEINZ, of Pittsburg, Pennsylvania, party of the second part;

WITNESSETH; That the said party of the first part has let and by these presence does grant, demise and to farm let unto the said party of the second part, his heirs, administrators and assigns, all that certain strip of Riparian ground, owned by the party of the first part, on the Beach front of Atlantic City, New Jersey, located at or near the foot of Massachusetts Avenue, and now immediately oc-

cupied by that certain iron and wooden structure known as the Iron Pier, extending from the Boardwalk into the Ocean at or near the foot of said Avenue; also such part of a strip of ground having a frontage on the Ocean side of the Boardwalk, owned by the said party of the first part, as may be contained within Fifty (50) feet from the Easterly boundary of land now occupied by said Iron Pier, at its point of connection with the Boardwalk, and extending into the Ocean parallel with said Pier a sufficient distance to enable the party of the second part to erect a structure to be connected with said Pier, known as a Pavilion or Sun Parlor, which Pavilion or Sun Parlor the said party of the second part agrees to erect; for the term of Twenty (20) years from January 1st, A. D., 1900, provided, however, that at the expiration of ten (10) years; that is to say, January 1st, A. D., 1910, said party of the first part, her heirs, administrators and assigns, shall have the option to purchase said Iron Pier or any structure connected therewith, to be erected by said party of the second part as aforesaid, by giving three (3) months previous notice in writing to said party of the second part, his heirs, administrators and assigns, at a price to be determined by five (5) appraisers, and selected as follows:— Two (2) by the party of the first part; Two (2) by the party of the second part, and the fifth by the four (4) selected as above. The parties hereto, their heirs and assigns, agree to abide by the decision of said appraisers.

For the annual rental of Three Hundred and Fifty ($350) Dollars, payable annually on the first day of July of each year.

This agreement is conditioned upon the purchase of said Iron Pier by said party of the second part within Forty (40) days from the date hereof, and if

for any reason said party of the second part shall not purchase said Pier within said time, then this agreement is void and of no effect.

At the expiration of lease, the party of the second part reserves the right of removing said Pier and all structures connected therewith, that have been erected by said party of the second part. If however, the said Pier shall be destroyed by the elements or if the City of Atlantic City shall acquire title thereto by condemnation or other wise, than by purchase, then the rent herein reserved shall cease and this lease shall become void.

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals this 26th day of February, A. D., 1900.

Mary A. Wootton
(Seal)

H. J. Heinz

SEALED, SIGNED & DELIVERED
in the presence of
Harry Wootton

STATE OF NEW JERSEY }
ATLANTIC COUNTY }

BE IT REMEMBERED, that on this 26th day of February, A. D., 1900, before me a Master in Chancery of New Jersey, personally appeared Mary A. Wootton and H. J. Heinz, who, I am satisfied, are the grantors mentioned in the above lease, and I having first made *know* to them the contents thereof, they acknowledged that they signed, sealed and delivered the same as their voluntary act and deed.

Harry Wootton
M. C. C. of N. J.

[ENDORSED]
Lease and Agreement
Between
Mary A. Wootton
and
H. J. Heinz
John C. Reed, Esq.,
1531 Atlantic Ave.,
Atlantic City, N. J.
Rec'd. Mch. 14 - 1907 at 3.30 P. M. and recorded in the Clerk's office of Atlantic County, at May's Landing, N. J., in Book # 357 of Deeds folio 57 &c.
Lewis P. Scott,
Clerk.

EXHIBIT D7.
6/26/25 L.

Mary A. Wootton,
To
Atlantic City
} DEED

This Indenture made the eighth day of April in the year of our Lord one thousand nine hundred and seven. Between Mary A. Wootton, widow of Jonah Wootton, Sr. deceased, of the City of Atlantic City, County of Atlantic and State of New Jersey parties of the first part, and Atlantic City, a municipal corporation of New Jersey party of the second part. 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 "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 or encroachment" approved April twenty-sixth, eighteen hundred and ninety-four. And Whereas the said City Council of the said City for this purpose did on the ninth day of October, eighteen hundred and ninety-nine, duly pass an ordinance of the said City to lay out and open such park and to establish the interior or inland lines thereof; And Whereas, the said City Council has relocated or is about to relocate said interior or inland line between the middle line of Connecticut Avenue and a point in the West line of Maine Avenue twenty-five and two-tenths feet Northwardly of the South line of Pacific Avenue, so that the interior or inland line of said park shall be as follows: Beginning in the South line of Caspian Avenue at a point distant three hundred and sixteen (316) feet Eastwardly from the West line of Maine Avenue; thence (1) Southwardly to a point in the West line of Maine Avenue distant twenty-five and two-tenths (25.2) feet Northwardly from the South line of Pacific Avenue; thence (2) Southwardly along the said line of Maine Avenue four hundred

and eighty-five and two-tenths (485.2) feet to the South line of Oriental Avenue (3) Southwestwardly to the *the* middle line of New Hampshire Avenue at a point distant nine hundred and ten (910) feet Southwardly from the South line of Pacific Avenue (4) Southwestwardly to the middle line of Vermont Avenue at a point distant twelve hundred and ten (1210) feet Southwardly from the South line of Pacific Avenue (5) Southwestwardly to the middle line of Rhode Island Avenue to a point distant thirteen hundred and thirty-five (1335) feet Southwardly from the South line of Pacific Avenue (6) Westwardly parallel with Pacific Avenue to the middle line of Connecticut Avenue (7) Westwardly to the middle line of St Charles Place at a point distant one thousand four hundred and thirty (1430) feet Southwardly from the South line of Pacific Avenue (8) Westwardly to a point distant twenty-five feet Westwardly from the East line of Maryland Avenue and one thousand four hundred and sixty (1460) feet Southwardly from the South line of Pacific Avenue (9) Westwardly parallel with Pacific Avenue to the middle line of North Carolina Avenue (10) Westwardly to a point distant one thousand three hundred and eighty-five (1385) feet Southwardly from the South line of Pacific Avenue and one hundred and twenty-five (125) feet Westwardly from middle line of Tennessee Avenue (11) Westwardly to a point distant two hundred and five (205) feet Westwardly from the middle line of New York Avenue and twelve hundred and forty-four (1244) feet Southwardly from the South line of Pacific Avenue (12) Westwardly to a point distant ninety-five (95) feet Eastwardly from the middle line of Illinois Avenue and one thousand one hundred and fifty-three (1153) feet Southwardly from the South line of Pacific Avenue (13) Westwardly to a point in Park Place distant nine hundred and seventy-one (971) feet Southwardly from the South line of Pacific Avenue and two hundred (200) feet Eastwardly from the middle line of Ohio Avenue (14) Westwardly to the middle line of Arkansas Avenue at a point distant seven hundred and seventy-three (773) feet Southwardly from the South line of Pacific Avenue (15) Westwardly to the middle line of Mississippi Avenue at a point distant six hundred and eighty (680) feet Southwardly from the South line of Pacific Avenue (16) Westwardly to the middle line of Iowa Avenue at a point distant five hundred and ten (510) feet Southwardly from the South line of Pacific Avenue (17) Westwardly to the East line of Albany Avenue at a point distant three hundred and forty-one (341) feet Southwardly from the Southeast corner of Albany and Pacific Avenues (18) Westwardly parallel with Atlantic Avenue to the middle line of Jackson Avenue. Provided that the inland line of said Park joining the two points fifty feet on either side of the above corners shall be the arc of a circle tangent at said points and not the broken line above described. Said ordinances fixing and establishing the limits and said boundaries of said Park or place for public resort and recreation as follows. Beginning in the South line of Caspian Avenue at a point distant three hundred and sixteen (316) feet Eastwardly from the West line of Maine Avenue; thence (1) Southwardly and Westwardly along the interior or inland line of said Park or place for public resort and recreation as above described, to the middle line of Jackson Avenue (2) Southwardly along the middle line of Jackson Avenue to the exterior line established by the Commissioners appointed under the authority of the act entitled "An Act to ascertain the rights of the State and of Riparian own-

ers in lands lying under the waters of the Bay of New York and elsewhere in this State" approved April eleventh, eighteen hundred and sixty-four, and the supplements thereto; (3) Eastwardly and Northwardly along said exterior line the several courses and distances thereof to the South line of Caspian Avenue extended (4) Westwardly along said line of Caspian Avenue to the place of beginning. And Whereas the said City Council in pursuance of the power and authority given by said act and in pursuance of its provisions has caused the inland line of the said Park to be established and suitably marked upon the ground, and has caused a description of the same to be filed in the office of the City Clerk of the said City in pursuance of and in conformity with the provisions and directions of the said act. And Whereas, the said City has heretofore constructed and is about to reconstruct within the limits of the said park for a considerable distance along and near to the inland line so established an elevated boardwalk and purposes hereafter to continue such construction along the entire line. 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, that the parties of the first part for and in consideration of the premises, and of 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 to the said parties of the first part, at and before the sealing and delivery of these presents 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, have and by these presents do, for themselves and each of them, their heirs, successors and assigns, give, grant, bargain, sell and convey to the said party of the second part and its successors, all their and each of their right, title and interest in and to the above described tract of land and every part and parcel thereof, including such parts and parcels thereof as are or may be covered by water. To have and to hold the 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, re-construct, 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. That no railroad nor street railway shall ever be constructed, operated or maintained over, upon or across any portion of the premises hereby granted and conveyed, and that said land shall never be used for any railroad purposes or uses whatever. This conveyance subject however to the leasehold interest of H. J. Heinz rent thereunder being reserved by grantor. And the said party of the second part hereby covenants and agrees to and with the said grantors, parties of the first part and to and with each and every one of them and to and with their and each of their as-

signs as follows: First. To maintain the said elevated boardwalk as now constructed or hereafter constructed or extended along the inland line of the land hereby conveyed as an open public walk and to reconstruct and maintain said walks between the points of the line relocated as aforesaid. Second. To permit the owners of property contiguous thereto lying inland from the line so established and marked to connect their and each of their lands and properties with such elevated boardwalk by building and maintaining proper approaches for this purpose on the inland side thereof. Third. That whenever a formation of land by accretion shall occur within the bounds of the land hereby conveyed to such an extent that the high water line of the ocean shall not be less than three hundred feet oceanward from the inland line so established, the grantee and its successors shall upon the written request of the grantors, their heirs and assigns, owning not less than three contiguous City blocks of the land hereby conveyed upon which such accretion may have formed, cause the elevated boardwalk erected thereon to be moved oceanward three hundred feet or any less distance that such owners and the party of the second part may agree upon, and whenever the said elevated boardwalk shall be moved oceanward by virtue of this provision the inland line of the said park shall be moved oceanward to correspond therewith, and all the land hereby conveyed, lying inland from the line so re-established shall be released from the dedication hereby made and revert to the owners thereof, their heirs or assigns. 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 inconsistant with its use as a public park or place for public resort and recreation. In Witness Whereof, the said parties of the first part have hereunto set their hands and seals and the said party of the second part has caused its corporate seal to be hereunto affixed, and attested by its proper officers the day and year first above written.

Mary A. Wootton, (seal)
Atlantic City, by
Franklin P. Stoy,
Mayor

(corporate)
(seal)

Signed Sealed and Delivered
in the presence of
Harry Wootton,
Attest,
Edward R. Donnelly,
City Clerk.

State of New Jersey, } SS.
County of Atlantic, }

Be it remembered that on this eighth day of April in the year of our Lord one thousand nine hundred and seven before me a Master in Chancery of New Jersey personally appeared Mary A. Wootton (widow) who I am satisfied *are* the grantors named in the above deed, and I having first made known to them the contents thereof, they did acknowledge that *they* signed, sealed and delivered the same as *their* voluntary act and deed for the uses and purposes therein expressed. All of which is hereby certified.

Harry Wootton,
M. C. C.

State of New Jersey, } SS.
County of Atlantic, }

Be it remembered that on this fourteenth day of May in the year of our Lord one thousand nine hundred and eight, before me the subscriber, a Master of the Court of Chancery of said State, personally appeared Edward R. Donnelly, Clerk of the City of Atlantic City, who being by me duly sworn, doth depose and make proof to my satisfaction that he well knows the corporate seal of the City of Atlantic City named in the foregoing deed or agreement that the seal thereto affixed is the proper corporate seal of the said City, that the same was so affixed thereto and the said deed or agreement was signed and delivered by order of City Council of Atlantic City by—who was at the date and execution thereof Mayor of the said City, in the presence of the said deponent as the voluntary act and deed of the said City and that said deponent did thereupon attest and sign the same as subscribing witness.

Edward R. Donnelly,

Sworn and subscribed before me
at Atlantic City the date aforesaid.
Harry Wootton,
M. C. C. of N. J.

Recd. & recorded May 15, 1908 at 9.30 A. M.

Edward S. Lee,
Clerk.

State of New Jersey, } SS.
Atlantic County, }

I, SAMUEL KIRBY, Clerk of the Court of Common Pleas in and for the County of Atlantic, the same being a Court of record, do hereby certify, that the foregoing is a true, full and correct copy of a certain deed, Mary A. Wootton, to Atlantic

City, as the same is recorded in my said office in Deed Book #381, page 286 &c.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of
(Seal) Atlantic County, at May's Landing, N. J. this twenty-sixth day of November, A. D. one thousand nine hundred and ten (1910).

Samuel Kirby,
Clerk.
per Albert C. Abbott,
Deputy Clerk.

[Endorsed]
CERTIFIED COPY OF DEED
MARY A. WOOTTON
TO
ATLANTIC CITY
DEED BOOK #381, PAGE 286 &c.

EXHIBIT D8.
6/26/25L.

State of New Jersey
to
Atlantic City
} Grant

The State of New Jersey:
TO ALL TO WHOM THESE PRESENTS SHALL COME OR MAY CONCERN: GREETING.

Whereas the City of Atlantic City in the State of New Jersey, has, in an application made to the Riparian Commissioners of the State of New Jersey represented that the City Council of the city of

Atlantic City, by virtue of an act of the Legislature 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 or along the beach or ocean front of said city and to purchase or condemn lands, property and rights therefor, and to preserve the same from obstruction or encroachment," approved April twenty sixth eighteen hundred and ninety four, has, by an *ordinance* approved on the thirteenth day of October, eighteen hundred and ninety nine, laid out and provided for a public park along and fronting upon the Atlantic Ocean and Absecon Inlet front of said City.

AND WHEREAS, pursuant to an act of the Legislature of said State, approved April 8th, 1903 entitled "A further supplement to 'An Act to ascertain the rights of the State and the riparian owners in the lands lying under the waters of the bay of New York and elsewhere in the State,' approved April eleventh one thousand eight hundred and sixty four." The city of Atlantic City has applied to the Riparian Commissioners of the State of New Jersey for a grant of the lands under water hereinafter described and which are included within the limits of the park described in said ordinance and to have the said commissioners fix the boundaries of the said lands under water and determine the price or compensation to be paid to the State therefor and the terms and conditions of said grant.

AND WHEREAS the said Riparian Commissioners to wit: Edward C. Stokes, Governor, William Cloke, Robert Williams, M. F. McLaughlin and John R. Reynolds having due regard to the interest of navigation and the interests of the State have agreed to grant the lands under water hereinafter

mentioned upon the terms here in set forth and have determined the sum of twenty one thousand and sixty two and 50/100 ($21062.50) Dollars as the price or reasonable compensation to be paid to the State for the said lands.

NOW THEREFORE the said State of New Jersey by the said Riparian Commissioners the Governor approving in consideration of the premises, the terms and conditions hereinafter contained and the said sum of twenty one thousand and sixty two and 50/100 ($21,062.50) Dollars duly paid by the said The City of Atlantic City to the said State, the receipt whereof is hereby acknowledged does *hereby* grant, bargain, sell and convey all its estate, right, title and interest, subject to the terms covenants, conditions and limitations herein contained unto the said The City of Atlantic City, and to its successors and assigns forever. in and to all those several parcels of land and land flowed by the tide waters of Absecon Inlet and the Atlantic Ocean lying at Atlantic City in the County of Atlantic and State of New Jersey described as follows:

Being all of the land and land under water lying between the high water line of the westerly shore of Absecon Inlet and the exterior line established by the Commissioners appointed under the authority of the act entitled "An Act to ascertain the rights of the State and of Riparian owners in the lands lying under the waters of the bay of New York and elsewhere in this State approved April 11th, A. D. 1864 and the supplements thereto and between the northerly and southerly lines of the following Avenues extended easterly in straight lines to said exterior line Caspian Avenue, Adriatic Avenue, Mediterranean Avenue, Baltic Avenue, Arctic Avenue, Atlantic Avenue, Euclid Avenue and Pacific Avenue. Also all the land and land under

water lying between the high water line of the Atlantic Ocean and the exterior lines established by the Commissioners appointed under the authority of the act aforesaid approved April 11th, A. D. 1864 and the supplements thereto and between the easterly and westerly lines of the following avenues and streets extended southerly in straight lines to said Exterior line, Vermont Avenue, Rhode Island Avenue Massachusetts Avenue, Connecticut Avenue, New Jersey Avenue, Delaware Avenue, Maryland Avenue, Virginia Avenue, Presbyterian Avenue, Pennsylvania Avenue, Mansion Alley, North Carolina Avenue, the westerly half of South Carolina Avenue, the easterly half of *Tennesee* Avenue, New York Avenue, the easterly half of Kentucky Avenue, the westerly half of Illinois Avenue, Indian*n*a Avenue, Ohio Avenue, Michigan Avenue, Arkansas Avenue, Mississippi Avenue, Georgia Avenue, Florida Avenue, Bellevue Avenue, Texas Avenue, California Avenue, Belmont Avenue, Brighton Avenue, Morris Avenue, Chelsea Avenue, Montpelier Avenue, Sovereign Place, Boston Avenue, Providence Avenue, Hartford Avenue, the easterly half of Albany Avenue, the westerly half of Annapolis Avenue, Richmond Avenue, Raleigh Avenue, Columbia Avenue, Bartram Place, Milledgeville Avenue, Berkley Square, Tallahassee Avenue, Plaza Place, Montgomery Avenue and the easterly half of Jackson Avenue.

This grant is made expressly by virtue of the powers conferred upon the Riparian Commissioners by an act of the Legislature of the State of New Jersey, approved April 8th, 1903 and entitled "A further supplement to an Act to ascertain the rights of the State and the Riparian owners in the lands lying under the waters of the bay of New York

and elsewhere in the State' approved April eleventh, one thousand eight hundred and sixty four" This grant is also expressly subject to such right, title and interest in and to the premises hereby conveyed as were conveyed in and by a certain grant made by the State of New Jersey to the United States Government of America dated August 17th, 1878 and recorded in the office of the Riparian Commissioners of the State of New Jersey in Liber D, page 260 etc. and also provided that the land under water hereinbefore described is granted and conveyed for park uses and purposes and none other and shall be kept and maintained as an open public park or place for public resort and recreation and that no building or other structures shall be erected on such park or on the lands under water hereby granted and conveyed inconsistent with its use as a public park or place for public resort and recreation; provided however that public walks and drives may be constructed along and upon any portion of the said lands under water.

Ans also provided that if at any time hereafter such public park or the land under water hereby granted shall cease to be used as such park or place for public resort and recreation then and in that event this grant, and all the right, title and interest in said lands under water hereby granted shall cease and determine and the lands under water hereinbefore described shall forthwith thereupon revert to the State; Provided that the State of New Jersey by its Riparian Commissioners or any other lawful authority may, from time to time change the exterior lines for solid filling and piers and fix the same further from the shore than formerly, even though such action may effect the lands hereby granted whenever the State may deem it necessary for its interest so to do, and if such exterior lines

shall be placed out further from the shore than formerly then the party or parties claiming under this instrument may within such period as may be fixed by the State either through said riparian Commissioners or any other lawful authority have the exclusive right to apply for and receive a lease or grant of the additional land under water lying between the present exterior line or lines above described and the new exterior line or lines that may hereafter be fixed, upon payment of such additional rental or compensation and upon such terms as shall be fixed by said Commissioners or other lawful authority, under any present or future law of this State

And also provided that the State of New Jersey may grant or lease any of the lands of the State lying in front of the exterior line for solid filling or piers mentioned or referred to herein for the cultivation of oysters or other fish or for any other purpose whatever provided that such grant or lease shall not operate to interfere with the reasonable use of and access by water to the lands under water hereby granted and with the free and un*ter*rupted navigation between said lands under water and the main channel of the said Atlantic Ocean and Absecon Inlet.

And also provided that if the exterior line for solid filling and the exterior line for piers or either of said lines now established or lines that may be hereafter established by the Riparian Commissioners or other lawful authority of the State of New Jersey shall be hereafter changed by the action of the authorities of the United States Government and the grantee herein or any party claiming hereunder shall suffer damages the claim or claims therefor must be made against the authorities of

the United States Government and not against the State of New Jersey.

TOGETHER with all and singular the hereditaments and appurtenances thereunto belonging.

TO HAVE AND TO HOLD all and singular the above granted and described lands under water and premises subject to the terms conditions and limitations aforesaid, unto the said The City of Atlantic City, its successors and assigns forever.

IN WITNESS WHEREOF, the said Commissioners have hereunto respectively set their hands and these presents have been signed by the Governor and the Great Seal of the said State has been hereunto affixed and attested by the Secretary of State, this thirteenth day of February, in the year nineteen hundred and seven.

E. C. Stokes, Governor
William Cloke
Robert Williams
M. F. McLaughlin
J. R. Reynolds
Witness: John C. Payne

Attest:
S. D. Dickinson
Secretary of State
(Great Seal)

State of New Jersey, County of Hudson, ss.

BE IT REMEMBERED that on this thirteenth day of February nineteen hundred and seven, before me, the subscriber a Master in Chancery of New Jersey personally appeared John C. Payne, who being by me duly sworn on his oath saith that he saw Edward C. Stokes, Governor, William Cloke, Robert Williams, M. F. McLaughlin and John R. Reynolds the within named commissioners, sign, and deliver the within deed as their voluntary act and that he

the said John C. Payne thereupon subscribed his name as an attesting witness thereto.

John C. Payne

Sworn and subscribed before
me at Jersey City, the day
and year aforesaid.
M. J. Currie
Master in Chancery of New
Jersey.

Reed and recorded Mch 27, 1907 at 8.40 A. M.
Lewis P. Scott, Clerk.
Deed book No. 354 page 359.

STATE OF NEW JERSEY
COUNTY OF ATLANTIC

I, EDWIN A. PARKER, Clerk of the County of Atlantic, and also Clerk of the COMMON PLEAS Court holden therein, said court being a court of record, having a common seal, DO HEREBY CERTIFY, That the foregoing is a true copy of a certain Grant; The State of New Jersey to Atlantic City, as the same is recorded in my said office in deed book 354 page 359 etc

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my Official Seal at May's Landing N. J., this twenty fourth day of March A. D. 1923.

(Seal)

Edwin A. Parker
Clerk

By
Deputy Clerk

[Endorsed]
CERTIFIED COPY
OF
GRANT
State of New Jersey

to
Atlantic City.
RECEIVED
MAR 25 1923
BY W. M. C.

EXHIBIT D9.
6/26/25L.

THE STATE OF NEW JERSEY:
TO ALL TO WHOM THESE PRESENTS SHALL COME, OR MAY CONCERN, GREETING:

WHEREAS, Pursuant to an act of the Legislature of said State, approved April 8th, 1915, entitled "An Act creating a department to be known as the Board of Commerce and Navigation, and vesting therein all the powers and duties now devolved, by law, upon the Board of Riparian Commissioners, the Department of Inland Waterways, the Inspectors of Power Vessels, and the New Jersey Harbor Commission," and other acts and joint resolutions of the Legislature of said State, H. J. HEINZ COMPANY, a corporation of the State of Pennsylvania, having necessary consent from the owner of lands fronting on Atlantic Ocean, in the City of Atlantic City, in the County of Atlantic and State of New Jersey, which lie above high water mark, and in front of which the lands under water hereinafter described are situated, has applied to the Board of Commerce and Navigation of said State for a lease of the said lands under water and to have the said Board of Commerce and Navigation fix the boundaries of certain land under water which has been occupied for Pier purposes since

1885, under and by virtue of an Ordinance of the City of Atlantic City, in the State of New Jersey, passed May 11th, 1885, entitled "AN ORDINANCE Granting the Atlantic City Ocean Pier Company the right of way to the ocean end of Massachusetts Avenue from a point at the present Boardwalk into the ocean."

AND WHEREAS, the said Board of Commerce and Navigation, to wit: J. SPENCER SMITH, RICHARD C. JENKINSON, WILLIAM L. SAUNDERS, W. PARKER RUNYON, WILLIAM T. KIRK, ROBERT F. ENGLE, HENRY C. BROKING and DAVID W. McCREA, having due regard to the interests of navigation and the interests of the State, have agreed to lease the lands hereinafter mentioned upon the terms herein set forth and have determined the sum of ONE HUNDRED AND FIFTY-ONE AND 70/100 ($151.70) DOLLARS to be the annual rental to be paid for said lands under water so designated, subject as hereinafter stated, from the day of the date hereof, for and during and until the full end and term of fifteen (15) years, except as otherwise provided.

NOW THEREFORE, the said State of New Jersey, by the said Board of Commerce and Navigation, the Governor approving, in consideration of the premises and of the rents, covenants and conditions herein contained, does hereby demise, lease and to farm let unto the said H. J. HEINZ COMPANY, and to its successors and assigns, until default is made in the punctual payment of the annual rentals herein fixed, or until this instrument and all estate or rights arising thereunder has been declared forfeited by said Board of Commerce and Navigation or their successors in office, for breach of any of the covenants or conditions herein contained, or until the same has been in any other manner forfeited or terminated.

ALL that tract of land flowed by tide water of Atlantic Ocean now lying under and occupied by that structure known as the Heinz Pier, situate in the City of Atlantic City, in the County of Atlantic and State of New Jersey, bounded and described as follows:

BEGINNING in the Exterior Line established June 17, 1876 by the former Riparian Commissioners of the State of New Jersey, the same being the Exterior Line called for in the grant by the State of New Jersey to Mary A. Wootton of December 1, 1898, where the said former Exterior Line is intersected by the southwesterly side of the existing structure of the Heinz Pier;

Thence (1) Southeastwardly along the southwesterly side of said Heinz Pier as constructed, one hundred and forty-seven (147) feet, more or less, to a point;

Thence (2) Southwardly, still along the side of said Heinz Pier as constructed, seventy-five (75) feet, more or less, to a point;

Thence (3) Southeastwardly, still along the side of said Pier, eighty (80) feet, more or less, to a point;

Thence (4) Eastwardly, still along the side of said Pier, twenty-five (25) feet, more or less, to the outer face of said Pier;

Thence (5) Northeastwardly, along the outer face of said Pier, one hundred and five (105) feet, more or less, to a point;

Thence (6) Northwardly, along the side of said Pier, twenty-five (25) feet, more or less, to a point;

Thence (7) Northwestwardly, along the northeasterly side of said Pier, eighty (80) feet, more or less, to a point;

Thence (8) Westwardly, along the side of said Pier, seventy-five (75) feet, more or less, to a point;

Thence (9) Northwestwardly, along the northeasterly side of said Pier, one hundred and forty-three (143) feet, more or less, to the former Exterior Line established as aforesaid by the former Riparian Commissioners of the State of New Jersey June 17, 1876;

Thence (10) Southwestwardly, along said former Exterior Line of June 17, 1876, thirty (30) feet, more or less, to the place of BEGINNING.

The intent of this description being to cover the lands under water outside of the former Riparian Commissioners' Line of June 17, 1876, now actually occupied by the aforesaid structure known as Heinz Pier, the location whereof is shown on the map attached hereto and made part hereof.

But the lands herein described are not to be used for any purpose whatsoever except the erection of a pier or piers thereon, underneath which the tide may ebb and flow, and no solid filling shall be placed thereon.

PROVIDED, that the State of New Jersey, by its Board of Commerce and Navigation or any other lawful authority, may, from time to time, change the exterior lines for solid filling and piers, and fix the same further from the shore than formerly, even though such action may affect the lands hereby leased, whenever the State may deem it necessary for its interest so to do; and if such exterior lines shall be placed out further from the shore than formerly, then the party or parties claiming under this instrument may, within such period as may be fixed by the State, either through said Board of Commerce and Navigation or any other lawful authority, have the exclusive right to apply for and receive a lease or grant of the additional land under water lying between the present exterior lines above described and the new exterior line or lines that may hereafter be fixed, upon payment of such additional rental or compensation, and upon such terms, as shall be fixed by said Board of Commerce and Navigation or other lawful authority, under any present or future law of this State; such additional land to be used for solid filling and for piers respectively as directed by the said Board of Commerce and Navigation or their successors, or other lawful authority, under any present or future law of this State.

AND ALSO PROVIDED, that the said State of New Jersey may grant or lease any of the lands of the State lying in front of the exterior line for solid filling or piers mentioned or referred to herein, for the cultivation of oysters or other fish, or for any other purpose whatever, provided that such grant or lease shall not operate to interfere with the reasonable use of and access by water to the lands under water hereby leased and with the free and uninterrupted navigation between said lands under water and the main channel of the said Atlantic Ocean.

AND ALSO PROVIDED, that if the said H. J. HEINZ COMPANY is not the owner of the land adjoining the land under water hereby leased, or does not secure from such owners, proper consent and permission upon request so to do, that in such case, this instrument and conveyance, so far as the same binds the State, and all the covenants herein on the part of the State, shall be void, as affecting any part or parts of said land, joining land not owned by the said H. J. Heinz Company, or lands from the owners of which the said H. J. Heinz Company has not obtained proper consent, and the said H. J. Heinz Company shall not be required to pay

rent reserved under this lease on and after the same shall have been declared null and void by the said State of New Jersey, or on and after the said H. J. Heinz Company shall have been ousted from the possession of the demised premises.

AND ALSO PROVIDED, that if the exterior line for solid filling and the exterior line for piers, or either of said lines, now established, or lines that may be hereafter established by the Board of Commerce and Navigation or other lawful authority of the State of New Jersey, shall be hereafter changed by the action of the authorities of the United States Government, and the grantee herein or any party claiming hereunder shall suffer damages, the claim or claims therefor must be made against the authorities of the United States Government, and not against the State of New Jersey.

TO TAKE, HAVE, HOLD, use, exercise and enjoy, as lessee for the term aforesaid, the said lands and premises, and all the rights and privileges aforesaid, exercisable within and over, or with reference to the same, to and for the said several uses, intents and purposes, and in the manner and form that they are above leased unto the said H. J. HEINZ COMPANY, and to its successors and assigns, subject to the regulations now imposed by law on the exercise of said rights of property hereby leased, and to such as shall hereafter be made by the Legislature or the said Board of Commerce and Navigation or a majority thereof, yielding and paying therefor unto the State of New Jersey the annual rent of ONE HUNDRED AND FIFTY-ONE AND 70/100 ($151.70) DOLLARS to be paid to the State of New Jersey by the said H. J. HEINZ COMPANY, its successors and assigns in two equal half yearly payments in advance, the first half yearly rental to be paid on the delivery of this lease

and thereafter the half yearly rentals shall be paid in advance on the eighteenth days of August and February in each and every year.

And the said H. J. HEINZ COMPANY does hereby for itself, its successors and assigns covenant and agree to and with the State of New Jersey, that it the said H. J. HEINZ COMPANY, its successors and assigns shall and will from time to time, and at all times well and truly pay, or cause to be paid to the State of New Jersey, the yearly rent or sum of ONE HUNDRED AND FIFTY-ONE AND 70/100 ($151.70) DOLLARS hereinbefore reserved, upon and before the several days and times hereinbefore appointed for the payment thereof, so long as the said H. J. HEINZ COMPANY shall not be ousted from the possession of the above demised premises by the State of New Jersey, or any agency representing the same, or any other person or persons, or corporation claiming the upland or the land under water between the land above described and the upland, and that if it shall happen that the said yearly rent, or any part thereof, shall at any time hereafter be behind and unpaid after the same shall become due, it shall be lawful, immediately and without demand for such rent in arrear, for the State of New Jersey, by its officers and agents or otherwise, into the said tract of land and every part thereof to enter and distrain all things on said premises for said annual rent, or such part thereof as shall be behind and unpaid, and the distress and distresses there found to take and convey away and detain and keep, or otherwise dispose of according to law until the said rent and all arrears thereof and the costs and charges occasioned by the nonpayment thereof at the time in that behalf above mentioned shall be fully paid and satisfied; and also that in such case it shall be lawful, without de-

mand for such rent in arrear, for the said State of New Jersey, by its officers, or agents or otherwise, into the said tract of land hereby leased to re-enter and the same and every part thereof, and all improvements, and all the rights, liberties, privileges and franchises aforesaid to have, possess and enjoy as of its first and former estate, anything herein contained to the contrary notwithstanding, and upon such re-entry by the State all covenants herein on the part of the State shall forthwith cease and determine and the said lease and this instrument shall become null and void.

It is distinctly understood and mutually agreed between the parties to these presents that the payment of the annual rentals on the days and times appointed shall be of the essence of this contract, and that the State of New Jersey does not covenant and is not bound by any law, obligation, lease or contract to make any renewal of the lease of said lands within the said period of fifteen (15) years except at such valuation and terms as may be fixed by the said Board of Commerce and Navigation.

And also at the expiration of the said fifteen (15) years herein fixed as the duration of this lease, or any previous time by reason of the ouster of the said H. J. HEINZ COMPANY from the demised premises or of the non-payment of rentals as herein provided, the estate hereby granted shall terminate and the lands hereby leased and all the appurtenants, betterments and improvements thereto, shall revert to the State of New Jersey and belong to the said State, without any entry or re-entry by the said State.

That at the expiration of the term of this lease, the Board of Commerce and Navigation or other lawful authority of the State of New Jersey, shall

have the power to fix the terms and conditions for a subsequent lease.

IN WITNESS WHEREOF the said Board of Commerce and Navigation have hereunto respectively set their hands, and these presents have been signed by the Governor, and the Great Seal of the said State has been hereunto affixed and attested by the Secretary of State, and the said H. J. HEINZ COMPANY has caused these presents to be signed by its and its corporate seal, duly attested by its to be hereunto affixed, this eighteenth day of February, in the year nineteen hundred and twenty-four.

Geo. S. Silzer
Governor,
J. Spencer Smith
W. Parker Runyon
R. F. Engle
William T. Kirk
D. W. McCrea
Henry C. Broking
Witness: Victor Gelineau

(New Jersey Seal)
Thomas F. Martin,
Secretary of State

H. J. Heinz Company
By Howard Heinz
President

(H. J. Heinz Co. Seal)
Attest: E. D. McCafferty
Secretary

STATE OF NEW JERSEY, } SS.:
COUNTY OF HUDSON. }

BE IT REMEMBERED, That on this twenty-first day of February, nineteen hundred and twenty-four, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared VICTOR GELINEAU who being by me duly sworn on his oath, saith that he saw J. SPENCER SMITH, W. PARKER RUNYON, R. F. ENGLE, WILLIAM T. KIRK, D. W. McCREA, HENRY C. BROKING, the within named Board of Commerce and Navigation, sign and deliver the within lease as their voluntary act, and that he, the said VICTOR GELINEAU thereupon subscribed his name as the attesting witness.

Victor Gelineau

Sworn and subscribed before me
at Jersey City, the day and
year aforesaid.
Robert J. Bain
Master in Chancery
of New Jersey.

ALLEGHENY COUNTY, } ss:
STATE OF PENNSYLVANIA, }

No. 23156

I, JOHN VOGT, Prothonotary of the Court of Common Pleas in and for the County of Allegheny, in the Commonwealth of Pennsylvania, the same being a Court of Law and Record, and having a seal, do hereby certify that A. L. Schiel Esquire, before whom the foregoing AFFIDAVIT was taken, and who has thereunto, in his own proper handwriting, subscribed his name to the certificate of the proof and acknowledgment of the annexed instrument, was at that time and is now a NOTARY PUBLIC in and for the Commonwealth of Pennsylvania, resident of said County aforesaid, duly commissioned and sworn and authorized by law to take and certify affidavits and the acknowledgments and proof of deeds to land, etc., to be recorded, to all whose acts as such due faith and credits are, and of right ought to be, given throughout the United States and elsewhere; and further, that said instrument is executed in accordance with the laws of this Commonwealth, and that I am acquainted with his signature, and believe the same to be genuine.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, at Pittsburgh, in said County this 8th day of April in the year of our Lord one thousand nine hundred and twenty-four.

John Vogt
(Seal) Prothonotary.

Impression of seal not required, by law.
to be filed in this office

STATE OF PENNSYLVANIA, } SS.:
COUNTY OF ALLEGHENY, }

BE IT REMEMBERED, That on this 8th day of April in the year nineteen hundred and twenty-four before me, the subscriber, a Notary Public personally appears E. D. McCafferty who, being by me duly sworn, doth depose and make proof to my satisfaction, that he well knows the corporate seal of H. J. Heinz Company the lessee named in the foregoing instrument; that the seal thereof affixed is the proper corporate seal of the said Company; that the same was so affixed thereto and the said instrument signed and delivered by Howard Heinz who was at the date and execution thereof the President of said Company, in the presence of said deponent as the voluntary act and deed of the said Company,

and that the said deponent thereupon signed the same as subscribing witness.

E. D. McCafferty

Sworn and subscribed before me at Pittsburgh, Pa. the date aforesaid.

A. L. Schiel

(Seal) Notary Public

My Commission Expires February 17th, 1927.

(Map attached.)

[Endorsed]
RETURNED
APR 16 1924
WM. A. BLAIR
CLERK
RECEIVED
APR 17 1924
BY W. M. C.

Received April 10, 1924 at 8 A. M. and recorded in the Clerk's Office of Atlantic County, at May's Landing, N. J. in Book of Deeds No. 738 page 251 &c.

William A. Blair
Clerk.
A. A. F.

3325

BOARD OF COMMERCE AND NAVIGATION
of the State of New Jersey
Recorded in Liber E1,
Folio 341 &c.

THE STATE OF NEW JERSEY
TO
H. J. HEINZ COMPANY.

LEASE
Dated February 18, 1924.
Principal Sum, ...$
Annual Rental, ...$151.70
Payable semi-annually August 18th and February 18th
Address
See 6th floor
file #136

EXHIBIT D10.
6/26/25L.

THIS INDENTURE, Made the twenty first day of January, A. D. eighteen hundred and ninety eight:

BETWEEN the Ocean Front Iron Pier Company, a corporation of the State of New Jersey, of the first part:

AND H. J. Heinz, A. M. Heinz, F. J. Heinz, S. Mueller, H. F. Dunham and W. H. Robinson trading etc as H J. Heinz Company, of the City of Pittsburg, in the State of Pennsylvania, of the second part:

WITNESSETH, That the said party of the first part has let and by these presents does grant, demise and to farm let unto the said party of the second part, that certain steel structure situated on the Boardwalk at Massachusetts avenue, in the city of Atlantic City, New Jersey, known as the iron pier, with the appurtenances from January twenty first eighteen hundred and ninety eight to January twenty first eighteen hundred and ninety nine, with the privilege of four additional years at the rent or sum of one thousand Dollars for the first year,

Seventeen hundred Dollars for the second year, Seventeen hundred Dollars for the third year, Sixteen hundred Dollars for the fourth year and Fifteen hundred Dollars for the fifth year, to be paid as follows: Five hundred Dollars upon the signing of this lease and Five hundred Dollars on July 1st, eighteen hundred and ninety eight and in succeeding years, one half of the respective sums on January twenty-first and one half on July 1st of each year: It being agreed and understood between the parties hereto that in case the said party of the second part may wish to discontinue the lease at the expiration of any year, they shall give three months written notice of such intention to the said party of the first part.

Provided, That if any rent shall be due and unpaid or if default shall be made in any of the covenants herein contained, then this lease shall cease and become void, and it shall be lawful for the said party of the first part, without notice and without any demand for said rent, to re-enter the said premises and remove all persons therefrom, or to proceed by action for the recovery of the possession thereof, or otherwise however.

AND the said party of the second part does hereby covenant and agree, to and with the said party of the first part, to pay the said yearly rent in the proportions and upon the conditions aforesaid: and also at the expiration of the said term, to yield up and surrender possession thereof, with the appurtenances, in as good state and condition as the same now are, or may be put into by the said party of the first part, reasonable wear and tear and accidents happening by fire or other casualties excepted.

It is understood and agreed by the parties hereto that if any part of the main structure shall be washed down at any point between the Boardwalk

and the out end of the first pavilion, it shall be rebuilt by the said party of the first part but if any portion of the pier shall be washed away between that point and the outer end, it shall be at the option of the said party of the first part whether it be re-built or not. If said portion be not re-built within thirty (30) days, the rental under terms of this lease shall cease, and any monies that may have been paid as rent heretofore shall be refunded proportionate to the yearly rental for time of occupancy of said Pier.

And it is further agreed and understood by the parties hereto that the said party of the second part shall have the option to buy the said leased premises at any time within six months from the date hereof at the price of ten thousand dollars with interest thereon at the rate of six per cent from this date to date of purchase and that any sums paid as rental before said purchase shall be deducted from said purchase price.

AND the said party of the first part does covenant that the said party of the second part, on paying the said rent, and performing the covenants aforesaid, shall and may peacably and quietly have, hold and enjoy the said premises for the term aforesaid:

IN WITNESS WHEREOF, The said parties hereunto have interchangeably set their hands and seals, the day and year first written.

The Ocean Front Iron Pier Company,
by John L. Young, President.
H. J. Heinz Co.

Signed, Sealed and Delivered
in the presence of
Joseph Thompson.

[ENDORSED]
Copy Lease
Young et al
H. J. H. Co.

CONCLUSIONS.

(Filed Oct. 2, 1925.)

IN CHANCERY OF NEW JERSEY.

Between RICHARD MCALLISTER, *Complainant*, and H. J. HEINZ CO., a corporation, *et al.*, *Defendants.*	On Bill for Injunction. On Final Hearing. Memorandum.

MESSRS. BABCOCK & CHAMPION, for the complainant.
MR. ROBERT H. MCCARTER, for the defendant.

INGERSOLL, V. C.:

On December 15th, 1902, the complainant became the owner of an undivided one-half interest in certain premises on the beach front in Atlantic City, New Jersey, extending to the exterior line as fixed by the Riparian Commissioners.

In 1886, the structure now known as Heinz Pier was erected. As originally built, the landward end of the pier was within the lines of Massachusetts Avenue, and extended diagonally, across the *locus in quo*. What is termed the inner pavilion was added to the pier in 1900. By "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 or encroachment," *P. L.* 1894, *Comp. Stat. Vol. I, page* 1075, Atlantic City was authorized to create a park oceanward of the Boardwalk, as then existing or thereafter built.

In January, 1907, the complainant, his co-tenants, and other owners of land adjoining the Boardwalk presented to the City Council of Atlantic City, a petition, signed by the owners of all the land on the ocean front between Connecticut Avenue and Maine Avenue, stating "that by reason of the formation of land by accretion, the high water line as it now exists is not less than 300 feet oceanward from the present location of the 60 feet wide street upon which is erected the public boardwalk at the time of the execution 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 6th, 1889, and the ordinances of Atlantic City passed in virtue of said Act, and its supplements and amendments.

"Petitioners further show that the land owned by them as stated, comprises more than three contig-

uous 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 300 feet oceanward or such greater or less distance as the rights of your petitioner under said easement deed, and public interest may require * * *."

On April 22nd, 1907, the City Council of Atlantic City passed a resolution as follows "Be it resolved by the City Council of Atlantic City that for and in consideration of a consent in writing, to be approved by the City Solicitor and Streets, Walks & Drives Committee from H. J. Heinz Company, of Pittsburg, for the relocation of a boardwalk forty feet wide along the interior line of the Beach Front Park, located by ordinance of April 10th, 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 to be 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 in carrying out a scheme for the acquirement by the City of all lands within said Beach Front Park, and that the Mayor and City Clerk be hereby authorized to sign such agreement."

The Boardwalk was accordingly moved oceanward, about 300 feet, which resulted in the landward end of the pier being cut off and the pier shortened more than 300 feet, the landward end being a considerable distance Eastwardly from Massachusetts Avenue.

On April 7th, 1907, the complainant and other owners of land along the Atlantic Ocean, made and executed to the City of Atlantic City a deed generally known as the park deed, in which, after several recitals, and describing by meets and bounds, the said park deed provided as follows:

"And Whereas, the said City has heretofore constructed and is about to reconstruct within the limits of the said park for a considerable distance along and near to the inland line so established, an elevated boardwalk and proposes hereafter to continue such construction along the entire line. 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 provision of the said act. This Indenture Witnesseth, That the parties of the first part, for and in consideration of the premises and of 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, to the said parties of the first part, at and before the sealing and delivery of these presents—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 or ordinance above referred to have and by these presents do, for themselves and each of them, their heirs, successors and assigns, give, grant, bargain, sell, and convey to the said party of the second part and its successors, all their and each of their right, title and interest

in and to the above described tract of land and every part and parcel thereof, including such parts and parcels thereof as are, or may be covered by water, to have and to hold the 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: That no railroad, nor street railway shall ever be constructed, operated or maintained over, upon or across any portion of the premises hereby granted and conveyed, and that said land shall never be used for any railroad purposes or whatever. And the said party of the second part hereby covenants, and agrees to and with the said grantors, parties of the first part, and to and with each and every one of them, and to and with their and each of their assigns, as follows: First, To maintain the said elevated boardwalk as now constructed or hereafter constructed or extending, along the inland line of the land hereby conveyed as an open public walk, and to reconstruct and maintain said walk between the point of the line relocated as aforesaid; Second, To permit the owners of property contiguous thereto lying inland from the line so established and marked to connect their and each of their lands and properties with such elevated boardwalk by building and maintaining proper approaches for this purpose on the inland side thereof. Third, That whenever a formation of land by accretion shall

occur within the bounds of the land hereby conveyed to such an extent that the high water line of the ocean shall not be less than three hundred feet oceanward, from the inland line so established, the grantee and its successors shall upon the written request of the grantors, their heirs and assigns, owning not less than three contiguous city blocks of land hereby conveyed upon which such accretion may have formed, cause, the elevated boardwalk, erected thereon, to be moved oceanward three hundred feet or any less distance that such owners and the party of the second part may agree upon; and whenever the said elevated boardwalk shall be moved, oceanward by virtue of this provision, the inland line of the said park shall be moved oceanward to correspond therewith, and all the land hereby conveyed, lying, inland from the line so re-established shall be released from the dedication hereby made and revert to the owners thereof, their heirs or assigns. 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 such 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 deed was acknowledged by the several grantors on April 8th, 1907, and proven by the grantees on May 15th, 1908, and recorded on May 16th, 1908, in Book 383, page 124, etc.

Some time in August, 1924, during a severe storm, a barge was washed against the pier, and about 136 feet of the pier was destroyed, of which break, about 50 feet was landward of the exterior line as existed in 1878, and upon the land, extending between the

ocean front of the McAllister land and said exterior line. At the time of the break the pier consisted of a floor decking 29.75 feet in width with a railing on each side. The pier, so far as the two pavilions and all else of it except the inshore end was in 1902 exactly as it was at the time of its partial destruction, and has been there, except the inner end that has been cut off due to extending the boardwalk, from the time it was built to the said time (evidence complainant, pages 14 and 17), and that the Heinz Company were using the pier at the time of the break, just as they were when they were paying rent to the complainant and there was no difference whatever in their treatment of the pier "today" from what it was during the period of payment of rent, during which time the complainant made no objection whatever to the fact that there were pavilions on the pier or that they were using it just as they are using it "today." The words "today" evidently meaning the time of the break.

On December 18th, 1924, the complainant filed his bill praying that the said "H. J. Heinz Co., its contractors, officers, servants, agents and workmen be enjoined from performing, continuing or further proceeding with any work looking to the reparation or restoration of said pier or structure and that said defendants be decreed to take down, destroy or undo any such work already done or performed.

That the continued existence of said pier or structure and the use thereof for commercial purposes be decreed to be inconsistent with the use of said land as a public park or place for public resort and recreation within the meaning of said Act of the Legislature and a violation of the covenants contained in said grant and the defendant, H. J. Heinz Company enjoin from using the same for commercial purposes and the defendant, City of Atlantic

City, be enjoined from authorizing or permitting said structure to be so used."

An order to show cause, with restraint was advised, upon the hearing of which by consent, an order was made permitting the defendant to construct a twelve foot passage way, over the construction already erected at the "break" for the purpose of removing the valuable articles then in the outer pavilion, and otherwise continuing the restraint until the final hearing, which occurred on June 26th, 1925. The last brief was received by the Court on September 22nd.

At the hearing on the order to show cause, the defendant presented a riparian deed from the State of New Jersey, conveying to H. J. Heinz Company the "lands under water outside of the former Riparian Commission line of June 17th, 1876, now actually occupied by the aforesaid structure known as Heinz Pier."

In the examination of this cause and the making of the orders herein, McAllister's title has been accepted as extending only to the Riparian line of 1876, that being the exterior line of the conveyance to him and his co-tenants.

In 1905, the Court of Errors and Appeals in *Wm. Burkardt, et als., defendant-in-error, and H. J. Heinz Co., plaintiff-in-error,* 71 N. J. Law, 562, affirmed a judgment of the Atlantic County Circuit Court in favor of the plaintiffs in a suit of ejectment describing the lands in question whereupon an agreement was entered into between the complainant and defendant, leasing the said land at a certain rental. This rental was paid until the defendant ascertained that a deed had been made to the City, when it ceased the payment of rent, insisting that McAllister had by said deed conveyed his title and interest to Atlantic City. Later, McAllister and his associates

made application for a writ of mandamus to enjoin Atlantic City to procure title to the land within the limits of the "Park," and to cause the pier to be removed therefrom—the City filed a plea, to which a demurrer was filed. This was overruled. *McAllister v. Atlantic City,* 90 N. J. L. 93, affirmed 91 Ibid. 701.

McAllister and his co-tenant filed a bill in this court seeking to compel Atlantic City to specifically perform its covenant in the deed above recited, and that the land conveyed for park purposes should be forever "open and unobstructed." A motion to strike out defendant's answer was made and denied. *McAllister v. Atlantic City,* 90 N. J. Eq. 357.

The cause proceeded to final hearing with the result that the following decree was entered:

"This cause coming on to be heard upon bill, answer, replication and proofs, before the Honorable Edmund B. Leaming, the Vice-Chancellor to whom the same had been regularly referred by the Chancellor, in the presence of C. L. Cole of counsel with the complainants, and Joseph B. Perskie of counsel with the defendant, and the pleadings and proofs having been read and the arguments of counsel heard and considered, and it appearing that the City Council of Atlantic City, being the governing body of said City, resolved to open and lay out along the 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 use 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 or to purchase or condemn lands, property and rights therefor, and to preserve the same from obstruction or encroachment, approved April twenty-sixth, 1894;' and it further appearing that the City Council of said City for this purpose did on the 8th day of October, 1899, duly pass an ordinance in the said City to lay out and open such park and to establish the interior or inland lines thereof; and it further appearing that the City Council of Atlantic City, by ordinance approved April 10, 1907, relocated said interior or inland line between the middle line of Connecticut Avenue and a point in the west line of Maine Avenue twenty-five and two-tenths feet northwardly of the south line of Pacific Avenue, so that the interior or inland line of said park is now as follows: (description); and it further appearing that on the 8th day of April, 1907, of the tract described in the deed aforesaid, the complainants were the owners of a part of the land described in said deed as a tract of land in the westerly line of Rhode Island Avenue and easterly line of Metropolitan Avenue, and south of Oriental Avenue and running southwardly between parallel lines of said avenues to the exterior line established by the Commissioners appointed under the authority of the Act entitled, 'An Act to ascertain the rights of the State and of riparian owners in the lands lying under the waters of the bay of New York and elsewhere in this State;' and it further appearing that in the deed by the complainants to the defendant under date of April 8, 1907, there was provided among the several covenants, the following designated as 'Fourth': '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 PARK 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;' and it further appearing that at the time the complainants made the conveyance described in the deed under date of April 8, 1907, they, the complainants, petitioned the said City of Atlantic City to relocate the Boardwalk; and it further appearing that at the time complainants conveyed said land to the defendant, to wit, April 8th, 1907, there was and still is on a part of said land and premises what is commonly known as 'Heinz Pier' a structure of approximately 40 feet in width and 500 feet in length extending oceanward from the Boardwalk with two enclosed pavilions thereon, the outer or larger one being oceanward of the exterior line and not within the lines of said park, and the smaller one being inland of the said exterior lines and within the lines of said park and no part of which is on the land which complainants conveyed to the City of Atlantic City; that only about 100 feet of the said pier between the two pavilions crosses the part of the land which the complainants conveyed to the City; that the said pier, though privately owned, was and still is at all times open to free public use for the purpose of recreation; that the land conveyed by the complainants to the defendant under deed dated April 8, 1907, is wholly maintained as a public park or place of recreation except insofar as the structure Heinz Pier may be thought otherwise as to the extremely limited territory which it occupies; that there has been no abandonment of the park plan by the defendant; and it further appearing that prior to the date of conveyance by the complainants to defendant, to wit, April 8, 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 complainants and others, owners of more than three of said contiguous blocks, petitioned the City Council of said City to move the said Boardwalk oceanward, and thereupon did enter into a solemn agreement with H. J. Heinz Company of Pittsburgh, owners of the Heinz Pier, that in consideration of the relocation by the defendant of the Boardwalk, forty feet wide along the interior line of the beach front, approved by ordinance April 5th, 1907, said location cutting through at that width the iron pier located at the ocean end of Massachusetts Avenue, that if, the defendant, would not interfere or disturb the occupancy or possession of the said H. J. Heinz Company with the said pier as now erected on the lands owned or hereafter to be acquired by the defendants within the limits of the beach front part, unless such interference or disturbance should 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; and it further appearing that there are at least five other parcels of land, to wit, Heinz Pier, Garden Pier, Steel Pier, Young's Old Pier and Million Dollar Pier, which piers, and the land on which they stand, have approximately the value of $3,000,000, and that the defendant is unable to purchase or condemn the said lands; and it further appearing that there is no limitation of a determinable estate in the hab-

endum clause in the deed by the complainants to the defendant; and it further appearing that complainants are not entitled to the relief prayed for.

It is, on this 29th day of June, A. D. 1920, on motion of Joseph B. Perskie of counsel with the defendant, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered adjudged and decreed that the defendant has not violated the covenants and conditions in the above recited deed of conveyance set forth; that the complainants are not entitled to be restored to the free possession of the land described in their said deed or to have a reconveyance thereof; and that the complainants' said bill of complaint be dismissed with costs of suit to be taxed."

I am bound by this decree. The testimony is undisputed that the use of this structure is the same as at the time of the previous suit, that the reconstruction will place the pier in and only in the same condition as at that time.

It was decreed that the defendant had not violated the covenants and conditions in the deed of conveyance, *i. e.* that the structure known as Heinz Pier or the use thereof did not violate the covenants and conditions and being unchanged, it necessarily follows that the pier and the use thereof does not now violate them.

Much stress is made by the complainant that "The park is to be kept free, open and unobstructed."

It is to be noted that Vice-Chancellor Leaming in his decree specifically recited the condition that the lands shall remain "open, etc.," and decrees that "the defendant has not violated the covenants and conditions thereinbefore recited."

A decree will be advised dismissing the bill.

CONCLUSIONS.

(Filed Oct. 2, 1925.)

IN CHANCERY OF NEW JERSEY.

Between
RICHARD MCALLISTER,
Complainant,
and
H. J. HEINZ Co., a corporation, *et al.*,
Defendants.

On Bill for Injunction.
On Final Hearing
Memorandum.

MESSRS. BABCOCK & CHAMPION, for the complainant.
MR. ROBERT H. MCCARTER, for the defendant.

INGERSOLL, V. C.:

In the defendant's brief it is asserted that the bill should be dismissed because of the non-joinder of other tenants in common, as parties complainants or defendants.

An examination of the record shows no objection was made at the hearing, although counsel for the complainant admit "it was intimated in the oral argument."

Both parties in their briefs cite, *Wilson v. American Palace Car Co.*, 67 N. J. Eq. 262, which states, "That the general rule is that an objection for want of parties can also be taken on the hearing and the Court may of its own motion, arrest the suit for want of parties."

Vice-Chancellor Reed in that case, on page 264, said: "It is for the reason that the rule respecting the necessity of having in all the parties whose presence is essential for a complete settlement of the rights that the doctrine is modified when it appears that a person who should be a party, is out of the jurisdiction of the Court."

Had an objection for want of parties been made at the hearing, the complainant would have been in position to present evidence, if it be the fact, to show that the parties not joined, were non-residents of this State, and out of the jurisdiction of this Court.

The defendant cannot now avail himself of the rule quoted and thereby prevent the complainant from presenting facts which would, if proven, present a case in modification of the rule.

This becomes particularly essential in view of the statement of counsel of complainant in his reply brief, that the "co-tenants are non-residents of the State of New Jersey," although there is no proof of this in the transcript.

An examination of the testimony, however, shows an apparent want of parties, and the attention of the Court having been directed to the alleged defect, which is so radical that the Court, of its own motion should hold the suit to give the parties an opportunity to present such proof as may to them seem necessary.

October 13th, 1925, at ten o'clock in the forenoon, and Chancery Chambers at Atlantic City, will be

the time and place for such hearing without further notice than the receipt of this memorandum.

September 30th, 1925.

ORDER DISMISSING BILL.

(Filed October 27, 1925.)

IN CHANCERY OF NEW JERSEY.

Between RICHARD MCALLISTER, *Complainant,* and H. J. HEINZ CO., a corporation, *et al.*, *Defendants.*	On Bill, &c. Order Dismissing Bill.

This cause coming on to be heard before the Honorable Robert H. Ingersoll, the Vice-Chancellor to whom the same was in due course referred, and Messrs. Babcock & Champion appearing for the complainant, and Robert H. McCarter for H. J. Heinz Co., a corporation, and Joseph B. Perskie for the City of Atlantic City, and the pleadings having been read, and the testimony offered on behalf of the complainant and defendants respectively having been heard and the arguments of counsel likewise having been heard and considered, and the Court being of opinion that the bill of complaint should be dismissed, it is thereupon, on this 27th

day of October, 1925, on motion of McCarter & English, solicitors of the H. J. Heinz Co., a corporation, and of Joseph B. Perskie, solicitor of the City of Atlantic City,

Ordered that the complainant's bill be, and the same hereby is dismissed with costs.

E. R. Walker,
C.

Respectfully advised.

R. H. Ingersoll,
V. C.

NOTICE OF APPEAL.

(Filed Dec. 2, 1925.)

IN CHANCERY OF NEW JERSEY.

Richard McAllister, *Complainant,* v. H. J. Heinz Company, *et al.,* *Defendants.*	On bill, etc. Notice of Appeal.

The complainant, Richard McAllister, hereby appeals from the final decree of the Chancellor made on the advice of Vice-Chancellor Robert H. Ingersoll, in the above entitled cause on October 27, 1925, and from the whole and every part thereof, to the

Court of Errors and Appeals in the last resort in all causes.

Dated October 28, 1925.

Babcock & Champion,
Solicitors for and of Counsel with Complainant.

I conceive there is good cause for appeal in the above entitled cause.

Chas. C. Babcock,
Of Counsel with Complainant, Richard McAllister.

[Endorsed]

Due service is hereby acknowledged of within notice.

McCarter & English,
Solrs. for Defendant
H. J. Heinz Company.

Service acknowledged.

Jos. B. Perskie,
W. Frank Sooy,
Counsellors at Law for City of Atlantic City, Edw. L. Bader Construction Co.

PETITION OF APPEAL.

(Filed)

NEW JERSEY COURT OF ERRORS AND APPEALS.

RICHARD MCALLISTER, *Complainant-Appellant*, v. H. J. HEINZ COMPANY, a corporation, *et al.*, *Defendants-Appellees.*	On Appeal from the Court of Chancery. Petition of Appeal.

To the Honorable, the Court of Errors and Appeals in the Last Resort in all Cases:

The petition of Richard McAllister, the appellant in the above entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by an order made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date October 27, 1925, in a certain cause in said Court of Chancery wherein said Richard McAllister was complainant and H. J. Heinz Company, Edward L. Bader, Bader Construction Company and the City of Atlantic City were defendants, in this respect, to wit: that said order orders that complainant's bill be dismissed with costs.

And petitioner appeals from said order of the Chancellor, which orders and decrees as aforesaid, upon the ground that the same is erroneous in that the Court of Chancery should have found and decreed:

1. That the City of Atlantic City be enjoined from authorizing, consenting to or permitting the reparation or restoration of the pier or structure mentioned in the bill of complaint and from issuing its permit therefor.

2. That said H. J. Heinz Company, its contractors, officers, servants, agents and workmen be enjoined from performing, continuing or proceeding with any work looking to the reparation or restoration of said pier or structure and that said defendants be decreed to take down, destroy or undo any such work already done or performed.

3. That the continued existence of said pier or structure and the use thereof for commercial purposes be decreed to be inconsistent with the use of said land as a public park or place for public resort and recreation within the meaning of said Act of the Legislature and a violation of the covenants contained in said grant and the defendant, H. J. Heinz Co., enjoined from using the same for commercial purposes and the defendant, City of Atlantic City, be enjoined from authorizing or permitting said structure to be so used.

4. That the maintenance and use of the pier as disclosed by the testimony in the case is inconsistent with the aforesaid Act of the Legislature and with the deed of dedication made by the complainant and

others to the City of Atlantic City and mentioned in the bill of complaint.

5. That the maintenance and use of the said pier structure is unlawful and in direct violation of the said act and the terms and conditions of said deed.

6. That the maintenance and use of said pier constitutes an obstruction to the view oceanward from the Boardwalk in violation of the said deed and Legislative Act.

7. That the restoration or reparation of said pier structure is inconsistent with the said deed and Legislative Act.

8. That the restoration or reparation of said pier structure constitutes an obstruction to the view of the ocean from the Boardwalk in violation of the terms and conditions of the aforesaid deed and the provisions of the aforesaid Legislative Act.

Petitioner therefore prays that the said decree or order of the said Chancellor may be, in the particulars aforesaid reversed, set aside and for nothing holden, and that petitioner may have such other relief in the premises as to this Court shall seem proper.

BABCOCK & CHAMPION,
Solicitors for and of Counsel with Appellant.

ANSWER TO PETITION OF APPEAL.

(Filed .)

NEW JERSEY COURT OF ERRORS AND APPEALS.

RICHARD MCALLISTER, *Complainant-Appellant,* v. H. J. HEINZ COMPANY, a corporation, *et al.*, *Defendants-Appellees.*	On Appeal from the Court of Chancery. The Answer of Edward L. Bader, Bader Construction Company, and City of Atlantic City.

The defendants-appellees, Edward L. Bader, Bader Construction Company and the City of Atlantic City, not acknowledging all or any of the matters which in the said petition of appeal are contained to be true, for answer thereto, nevertheless, say and admit, that an order was, on the 27th day of October last past, made and entered in the Court of Chancery, in the cause for that purpose mentioned in the said petition, as is therein stated; but as to substance and form thereof, this respondent prays to refer thereto when the same shall be produced. And these defendants-appellees, as above mentioned, are advised and believe, that the said order is agreeable to equity, and they pray that the

same may be affirmed, with costs to be adjudged to these defendants-appellees.

W. Frank Sooy,
Joseph B. Perskie,
Counsellors-at-Law for Edward L. Bader, Bader Construction Company, and City of Atlantic City.

ANSWER TO PETITION OF APPEAL.

(Filed .)

NEW JERSEY COURT OF ERRORS AND APPEALS.

Richard McAllister,
Complainant-Appellant,
v.
H. J. Heinz Company, a corporation, *et al.*,
Defendants-Appellees.

On Bill, &c.
Answer to Petition of Appeal.

The answer of H. J. Heinz Company, a corporation, one of the above named defendants-appellees to the petition of appeal of the above named complainant-appellant.

This appellee not acknowledging all or any of the matters, which in the said petition of appeal are contained, to be true, in answer thereto, neverthe-

less, says and admits that an order was on the 27th day of October, 1925, made and entered in the Court of Chancery in the cause for that purpose mentioned in the said petition as is therein stated; but as to the substance and form thereof, this appellee prays to refer thereto when the same shall be produced. And this appellee is advised and believes that the said order is agreeable to equity, and it prays that the same may be affirmed with costs to be adjudged to this appellee.

McCarter & English,
Solicitors for and of Counsel with Defendant-Appellee, H. J. Heinz Company.



Boardwalk and Water Lines
added Oct. 27, 1914.
By - W. I. Risley,
Civil Engineer.

William H. Burkard et al
VS.
H. J. Heinz Co.
} In ejectment.

Survey and map made Dec. 1903.
By - Ashmead & Hackney,
Civil Engineers

9-42





No 170

STATE OF NEW JERSEY

BOARD OF COMMERCE AND NAVIGATION

EXTENSION OF PIERHEAD LINE

FROM YOUNGS MILLION DOLLAR PIER EASTWARDLY TO
ABSECON INLET, ATLANTIC CITY.

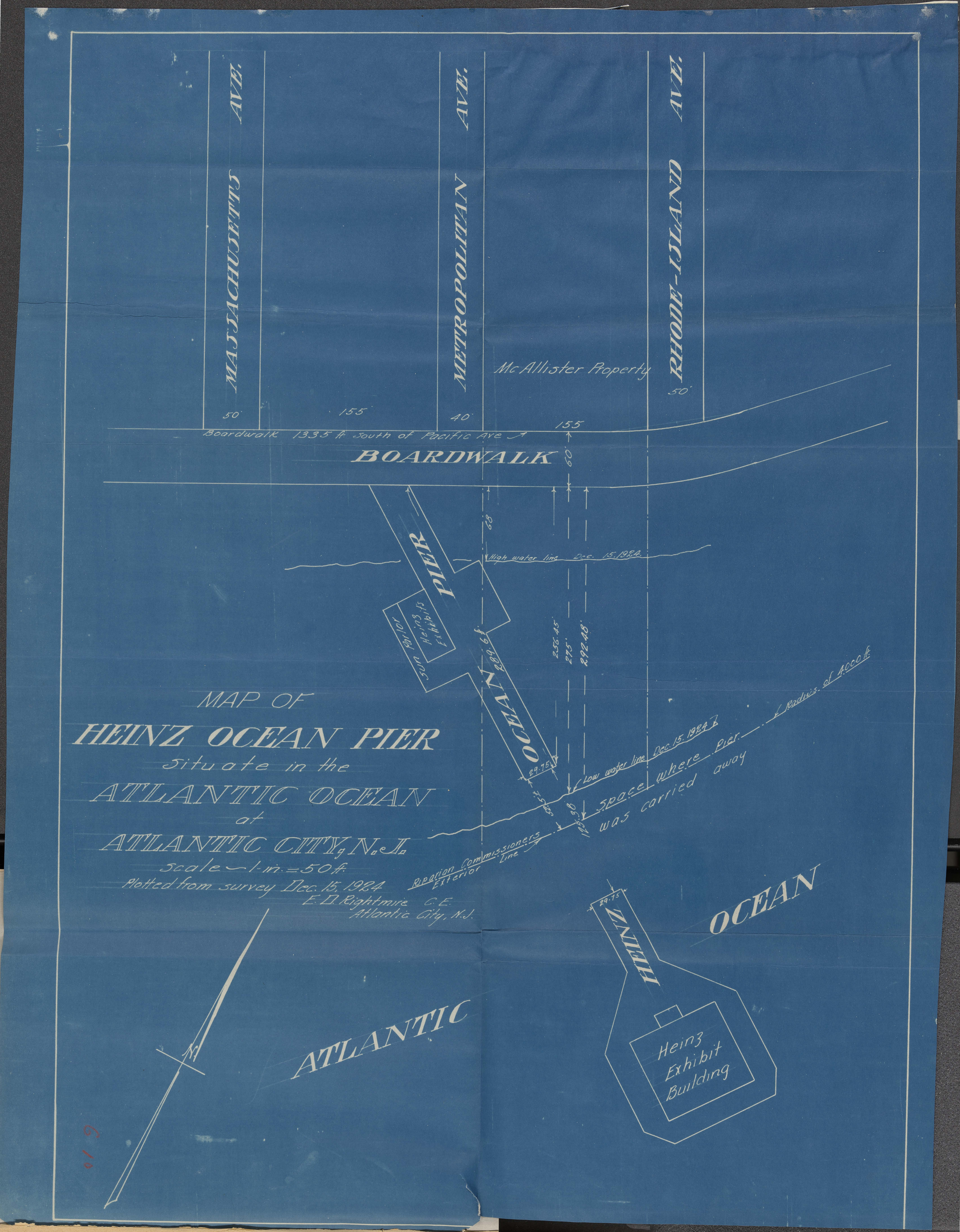
ADOPTED JANUARY 21, 1924.

Members of Board

J. Spencer Smith
Richard G. Jenkman
W. Parker Runyon
William T. Kirk
R. F. Engle
P. W. McCrea
Henry De Broking

Victor Gelineau
DIRECTOR.

6/16/24


MAP OF
HEINZ OCEAN PIER
situate in the
ATLANTIC OCEAN
at
ATLANTIC CITY, N.J.
Scale — 1-in. = 50 ft.
Plotted from survey Dec. 15, 1924
E. D. Rightmire C.E.
Atlantic City, N.J.
MASSACHUSETTS AVE.
METROPOLITAN AVE.
RHODE-ISLAND AVE.
McAllister Property
50'
155
40'
155
50'
Boardwalk 1335 ft. South of Pacific Ave
BOARDWALK
60'
68
PIER
Sun Parlor
Heinz Exhibits
High water line Dec. 15, 1924
OCEAN
289.6 ft.
256.45'
275'
292.48'
29.75'
Low water line Dec. 15, 1924
Space where Pier was carried away
Radius of 4000 ft.
Riparian Commissioners Exterior Line
52.5'
125.38'
29.75'
HEINZ
OCEAN
Heinz Exhibit Building
ATLANTIC
N

Affidavits 1
Final Decree 5
Order 12

AFFIDAVITS.

STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } *ss.*

Be it remembered, that on this eighth day of April in the year of our Lord, one thousand nine hundred and seven, before me, the subscriber, an attorney-at-law of New Jersey, personally appeared, ROBERT H. INGERSOLL, Secretary of the Dewey Land Co., who, being by me duly sworn doth depose and make proof to my satisfaction, that he well knows the corporate seal of the Dewey Land Company, the grantor named in the foregoing deed or agreement; that the seal thereupon affixed is the proper corporate seal of the said company, that the same was so affixed thereto by order of the Board of Directors of said company and the said deed or agreement was signed and delivered by James A. Cathcart, who was at the date and execution thereof the vice-president of the said company, in the presence of the said deponent as the voluntary act and deed of the said company and that the said deponent thereupon signed the same as subscribing witness.

ROBERT H. INGERSOLL.

Sworn and subscribed before me at Atlantic City the date aforesaid.

JAMES H. HAYES, JR.,
Attorney-at-law of New Jersey.

STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } *ss.*

Be it remembered, that on this fifteenth day of May in the year of our Lord, one thousand nine hundred and eight, before me, the subscriber, a Master of the Court of Chancery of said State personally appeared Edward R. Donnelly, Clerk of the City of Atlantic City, who being by me duly sworn, doth depose and make proof to my satisfaction, that he well knows the corporate seal of the City of Atlantic City named in the foregoing deed or agreements, that the seal thereto affixed is the proper corporate seal of the said city, that the same was so affixed thereto, and the said deed or agreement was signed, and delivered by order of City Council of Atlantic City, by ..... who was at the date and execution thereof mayor of the said city in the presence of the said deponent as the voluntary act and deed of the said City and that said deponent did thereupon attest and sign the same as subscribing witness.

EDWARD R. DONNELLY.

Sworn and subscribed before me at Atlantic, the date aforesaid.

HARRY WOOTTON,
M. C. C. of N. J.

STATE OF NEW JERSEY, }
COUNTY OF ATLANTIC, } *ss.*

Be it remembered, that on this eighth day of April in the year of our Lord, one thousand nine hundred and seven, before me, an attorney-at-law of New Jersey, personally appeared James A. Cathcart, widower, Richard M. McAllister, Josephine McAllister, Newlin Haines, Eva B. Haines, Henry E. Stevens, Jr., and Ida S. Stevens, who, I am satisfied, are the grantors named in the above deed, and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, for the uses and purposes therein expressed. And the said Josephine McAllister, Eva B. Haines and Ida S. Stevens, being by me privately examined, separate and apart from their said husbands, did further acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, freely, without any fear, threat or compulsion of their said husbands. All of which is hereby certified.

JAMES H. HAYES, JR.,
Attorney-at-law of New Jersey.

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

Be it remembered, that on this eighth day of April in the year of our Lord one thousand nine hundred and seven, before me, an attorney-at-law of New Jersey, personally appeared Walter Walls, Amanda M. Walls, Henry C. Schmidt, Louisa M. Schmidt, Henry C. Schmidt, attorney for Edward A. Schmidt and Emma B. Schmidt, who I am satisfied are the grantors named in the above deed and I having first made known to them the contents thereof, they did acknowledge that they signed, sealed and delivered the same as their voluntary act and deed for the uses and purposes therein expressed, and the said

Amanda M. Walls, Louisa M. Schmidt, being by me privately examined separate and apart from their said husbands did further acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, freely without any fear, threats or compulsion of their said husbands. All of which is hereby certified.

JAMES H. HAYES, JR.,
Attorney-at-law of New Jersey.

Recd. and recorded May 16, 1908, at 9.00 A. M.
EDWARD S. LEE,
Clerk.

STATE OF NEW JERSEY, } *ss.*
ATLANTIC COUNTY, }

I, SAMUEL KIRBY, Clerk of the Court of Common Pleas, in and for the County of Atlantic, the same being a court of record, do hereby certify that the foregoing is a true, full and correct copy of a certain deed, made by Walter Walls, *et ux., et al.,* to Atlantic City, as the same is recorded in my said office in deed book #383, page 124, &c.

In witness whereof, I have hereunto set my hand and affixed the seal of Atlantic County, at May's Landing, N. J., this twenty-sixth day of November, A. D. one thousand nine hundred and ten (1910).

SAMUEL KIRBY,
Clerk.
Per ALBERT C. ABBOTT,
Deputy Clerk.

FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Between RICHARD MCALLISTER, HENRY C. SCHMIDT and EDWARD A. SCHMIDT, *Complainants,* and CITY OF ATLANTIC CITY, *Defendant.*	On Bill, etc. Final Decree.

This cause coming on to be heard upon bill, answer, replication and proofs, before the Honorable Edmund B. Leaming, the Vice-Chancellor to whom the same had been regularly referred by the Chancellor, in the presence of C. L. Cole, of counsel with the complainants, and Joseph B. Perskie, of counsel with the defendant, and the pleadings and proofs having been read and the arguments of counsel heard and considered, and it appearing that the City Council of Atlantic City, being the governing body of said City, resolved to open and lay out along the 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 use 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 or encroachment," approved April twenty-sixth, 1894; and it further appearing that the City Council of said City for this purpose did on the 8th day of October, 1899, duly pass an ordinance in the said City to lay out and open such park and to establish the interior or inland lines thereof; and it further appearing that the City Council of Atlantic City, by ordinance approved April 10, 1907, relocated said interior or inland line between the middle line of Connecticut Avenue and a point in the west line of Maine Avenue twenty-five and two-tenths feet northwardly of the south line of Pacific Avenue, so that the interior or inland line of said park is now as follows: BEGINNING, in the south line of Caspian Avenue at a point distant three hundred and sixteen (316) feet eastwardly from the west line of Maine Avenue; thence (1) southwardly to a point in the west line of Maine Avenue distant twenty-five and two-tenths (25.2) feet northwardly from the south line of Pacific Avenue; thence (2) southwardly along said line of Maine Avenue four hundred and eighty-five and two-tenths (485.2) feet to the south line of Oriental Avenue; (3) southwestwardly to the middle line of New Hampshire Avenue at a point distant nine hundred and ten (910) feet southwardly from the south line of Pacific Avenue; (4) southwestwardly to the middle line of Vermont Avenue at a point distant twelve hundred and ten (1210) feet southwardly from the south line of Pacific Avenue; (5) southwestwardly to the middle line of Rhode

Island Avenue to a point distant thirteen hundred and thirty-five (1335) feet southwardly from the south line of Pacific Avenue; (6) westwardly parallel with Pacific Avenue to the middle line of Connecticut Avenue; (7) westwardly to the middle of St. Charles Place at a point distant one thousand four hundred and thirty (1430) feet southwardly from the south line of Pacific Avenue; (8) westwardly to a point distant twenty-five feet westwardly from the east line of Maryland Avenue and one thousand four hundred and sixty (1460) feet southwardly from the south line of Pacific Avenue; (9) westwardly parallel with pacific Avenue to the middle line of North Carolina Avenue; (10) westwardly to a point distant one thousand three hundred and eighty-five (1385) feet southwardly from the south line of Pacific Avenue and one hundred and twenty-five (125) feet westwardly from the middle line of Tennessee Avenue; (11) westwardly to a point distant two hundred and five (205) feet westwardly from the middle line of New York Avenue and twelve hundred and forty-four (1244) feet southwardly from the south line of Pacific Avenue; (12) westwardly to a point distant ninety-five (95) feet eastwardly from the middle line of Illinois Avenue and one thousand one hundred and fifty-three (1153) feet southwardly from the south line of Pacific Avenue; (13) westwardly to a point in Park Place distant nine hundred and seventy-one (971) feet southwardly from the south line of Pacific Avenue and two hundred (200) feet eastwardly from the middle line of Ohio Avenue; (14) westwardly to the middle line of Arkansas Avenue at a point distant seven hundred and seventy-three (773) feet southwardly from the south line of Pacific Avenue; (15) westwardly to the middle line of Mississippi Avenue at a point distant six hundred and

eighty (680) feet southwardly from the south line of Pacific Avenue; (16) westwardly to the middle line of Iowa Avenue at a point distant five hundred and ten (510) feet southwardly from the south line of Pacific Avenue; (17) westwardly to the east line of Albany Avenue at a point distant three hundred and forty-one (341) feet southwardly from the southeast corner of Albany and Pacific Avenues; (18) westwardly parallel with Atlantic Avenue to the middle line of Jackson Avenue; provided that the inland line of said park joining the two points fifty feet on either side of the above corners shall be the arc of a circle tangent at said points and not the broken line above described. Said ordinances fixing and establishing the limits and said boundaries of said park or place for public resort and recreation, as follows: BEGINNING in the south line of Caspian Avenue at a point distant three hundred and sixteen (316) feet eastwardly from the west line of Maine Avenue; thence (1) southwardly and westwardly along the interior or inland line of said park or place for public resort and recreation, as above described to the middle line of Jackson Avenue; (2) southwardly along the middle line of Jackson Avenue to the exterior line established by the Commissioners appointed under authority of the 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," approved April eleventh, eighteen hundred and sixty-four, and the supplements thereto; (3) eastwardly and northwardly along said exterior line the several courses and distances thereof to the south line of Caspian Avenue extended; (4) westwardly along said line of Caspian Avenue to the place of beginning; and it further appearing that on the 8th day of April,

1907, of the tract described in the deed aforesaid, the complainants were the owners of a part of the land described in said deed as a tract of land in the westerly line of Rhode Island Avenue and easterly line of Metropolitan Avenue, and south of Oriental Avenue and running southwardly between parallel lines of said avenues to the exterior line established by the Commissioners appointed under the authority of the act entitled "An act to ascertain the rights of the State and of riparian owners in the lands lying under the waters of the Bay of New York and elsewhere in this State;" and it further appearing that in the deed by the complainants to the defendant under date of April 8, 1907, there was provided among the several covenants, the following designated as "Fourth": "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 PARK 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;" and it further appearing that at the time the complainants made the conveyance described in the deed under date of April 8, 1907, they, the complainants, petitioned the said City of Atlantic City to relocate the Boardwalk; and it further appearing that at the time complainants conveyed said land to the defendant, to wit, April 8, 1907, there was and still is on a part of said land and premises what is commonly known as "Heinz Pier," a structure of approximately 40 feet in width and 500 feet in length, extending oceanward from the Boardwalk with two

enclosed pavilions thereon, the outer or larger one being oceanward of the exterior line and not within the lines of said park, and the smaller one being inland of the said exterior lines and within the lines of said park and no part of which is on the land which complainants conveyed to the City of Atlantic Ciyt; that only about 100 feet of the said pier between the two pavilions crosses the part of the land which the complainants conveyed to the City; that the said pier, though privately owned, was and still is at all times open to free public use for the purpose of recreation; that the land conveyed by the complainants to the defendant under deed dated April 8, 1907, is wholly maintained as a public park or place of recreation except insofar as the structure Heinz Pier may be thought otherwise as to the extremely limited territory which it occupies; that there has been no abandonment of the park plan by the defendant; and it further appearing that prior to the date of conveyance by the complainants to defendant, to wit, April 8, 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 complainants and others, owners of more than three of said contiguous blocks, petitioned the City Council of said City to move the said Boardwalk oceanward, and thereupon did enter into a solemn agreement with H. J. Heinz Company of Pittsburgh, owners of the Heinz Pier, that in consideration of the relocation by the defendant of the Boardwalk, forty feet wide along the interior line of the beach front, approved by ordinance April 5, 1907, said location cutting through at that width the iron pier located at the ocean end of Massachusetts Avenue, that it, the defendant, would not interfere or disturb the occupancy or possession of the said H. J. Heinz Company with the said pier as now erected on the lands owned or hereafter to be acquired by the defendants within the limits of the beach front park, unless such interference or disturbance should 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; and it further appearing that there are at least five other parcels of land, to wit, Heinz Pier, Garden Pier, Steel Pier, Young's Old Pier and Million Dollar Pier, which piers, and the land on which they stand, have approximately the value of $3,000,000, and that the defendant is unable to purchase or condemn the said lands; and it further appearing that there is no limitation of a determinable estate in the *habendum* clause in the deed by the complainants to the defendant; and it further appearing that complainants are not entitled to the relief prayed for,

It is, on this 29th day of June, A. D. 1920, on motion of Joseph B. Perskie of counsel with the defendant, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed that the defendant has not violated the covenants and conditions in the above recited deed of conveyance set forth; that the complainants are not entitled to be restored to the free possession of the land described in their said deed or to have a reconveyance thereof; and that the complainants' said bill of complaint be dismissed with costs of suit to be taxed.

E. R. Walker,
C.

Respectfully advised,
E. B. Leaming,
V. C.

ORDER.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
RICHARD MCALLISTER,
Compl't.-Appellant,
and
H. J. HEINZ COMPANY, *et al.,*
Def'ts.-Respondents.

On Appeal from Chancery. Petition, etc. Order.

It appearing by petition duly verified that Richard McAllister, the above-named appellant, died on or about April 6, 1926, pending the said appeal; that Josephine McAllister and Richard McAllister, the petitioners, have as devisees under the provisions of his last will and testament succeeded to his rights and interest in the subject matter of the said appeal and are desirous of continuing the presentation thereof:

It is thereupon on this day of 1927, on motion of Babcock & Champion, of counsel with the appellant, ordered that the death of the said Richard McAllister be suggested on the record of said appeal, and that the said cause on appeal proceed and be continued and the said Josephine McAllister and Richard McAllister, devisees under the will of Richard McAllister, deceased, be admitted to prosecute the said appeal as appellants in the place and stead of the said Richard McAllister, deceased.

[ENDORSED]

Consent to within order is hereby acknowledged.

Joseph B. Perskie,
Sol. for City of Atlantic City & Bader Construction Co.
McCarter & English,
Solicitors for H. J. Heinz Company.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between
RICHARD MCALLISTER,
Complainant-Appellant,
and
H. J. HEINZ COMPANY, *et al.*,
Defendants-Respondents.

ON APPEAL FROM CHANCERY.

BRIEF FOR APPELLANT.

GENERAL STATEMENT.

This is an appeal from a decree of the Chancellor made on the advice of a Vice-Chancellor, dismissing the bill of complaint filed in this cause, the Vice-Chancellor having determined that the complainant in the bill, the appellant here, is not entitled to the relief sought upon the facts found and for the reasons stated in his conclusions filed in the Court of Chancery.

The facts appearing in the record, in brief, are these:

On April 8, 1907, Richard McAllister, the appellant owned in fee an undivided one-half interest, in

common, in a parcel of land located on the beach or ocean front in Atlantic City, lying within the boundaries of Rhode Island and Metropolitan Avenues, south of Pacific Avenue, as shown on the city map, and extending southwardly, approximately one hundred and fifty feet in width to the Riparian Commissioners' exterior line as then established, which interest he had owned since December 15, 1902, when by deed of that date he acquired title from Albion Real Estate Company, the owner of the other undivided one-half interest being William H. Burkhard whose title was derived from the same source, through the same deed of conveyance. The appellant and Burkhard continued their common ownership of the land until April 8, 1907, when the title to the interest of Burkhard passed by conveyance of that date to one Schmidt, while the title of McAllister continued in him until his death since the final hearing of this cause and is now in his devisees by the provisions of his last will. On December 28, 1898, Mary A. Wootton a preceding owner of the land executed a deed conveying to the City of Atlantic City a right of way or easement over a strip sixty feet wide crossing the land, for the purpose of erecting thereon a public steel, board or plank walk, which deed or grant contains a covenant, among others, on the part of the municipal grantee reading as follows:

> "Whenever 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 purposes cause the same to be moved oceanward said three hundred feet," etc. *Exhibit D5, Case, pp.* 164, 168.

This deed was one of many alike in form executed by owners of adjoining beach front lands, making the sixty-foot strip or right of way continuous along the ocean front. Appellant acquired his land burdened with this easement as modified by the quoted covenant. At the time appellant acquired title there had been theretofore erected and was then occupying a part thereof a pier or structure known as "Heinz Pier," extending diagonally across the land into the Atlantic Ocean. That pier as originally constructed was so located that the landward end thereof was within the lines of Massachusetts Avenue. It was constructed about the year 1886. On May 11, 1885, the then governing body of Atlantic City passed an ordinance granting John Heinz and others, and their associates forming Atlantic City Ocean Pier Company, right of way to the ocean end of Massachusetts Avenue from a point at the (then present) Boardwalk into the ocean, for the purpose, as the ordinance states, of erecting and extending an iron pier from a point at the (then present) boardwalk to extend about one thousand feet into the ocean. *Exhibit C2, Case p.* 146.

The pier was completed, occupied and ever since the completion has been used for various purposes purely commercial, and is now and for many years past has been maintained and used for a locus from which to proclaim to the world the undoubted excellence of the "57 Varieties." In 1894 the Legislature passed an act, approved April 26, 1894, 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 on encroachment." *P. L.* 1894, *p.* 146; 1 *Comp. Stat.* 1075.

Section six of that act provides that the city government may acquire the necessary land by (a) condemnation, (b) purchase and (c) dedication, and expressly declares the intention of the act to be that:

> "When such lands are so purchased, condemned or dedicated and devoted to the public use aforesaid, that the view of the ocean from the interior line so established, and from the elevated public walk—shall be free and open and unobstructed, and no use shall be made of the said lands and property inconsistent with the purpose of this act."

Atlantic City determined to avail itself of this legislation, and acting under the authority of its provisions the governing body of the city, on October 9, 1899, passed an ordinance to lay out and open a public park or place for public resort and recreation along the ocean front, establishing the interior or inland line of such park and the limits and boundaries thereof and providing for the issuing and sale of bonds to defray the cost thereof etc. *Exhibit C1, Case, p.* 138, *Section* 2 of that ordinance ordains that:

> "All the land lying oceanward from the interior line so established—be and the same are hereby devoted to public use as a park or place for public resort and recreation *exclusively,* and for such use shall be kept open and unobstructed forever."

And Section 5 of the ordinance empowers the city solicitor to cause to be condemned for public park purposes all lands, property and rights within the limits of such park which shall not be dedicated to such use by the owners thereof and accepted by the city or shall not be purchased by the city for such purpose.

In 1904, the appellant and his co-tenant Burkhard commenced an action of ejectment against the pier company in which they had judgment for possession and that judgment was on March 6, 1905, affirmed by this Court. *Burkhard v. Pier Co.,* 71 N. J. L. 562. Such being by the course of legislation and judicial decision the situation respecting the appellants' title and interest in the land, on April 8, 1907, he joined other owners of beach front land in executing to the municipality a deed of dedication of their several lots or parcels of ocean front land to the public purposes and uses authorized and indicated by the legislation referred to. That deed bears date April 8, 1907, and is duly recorded and commonly known as the "Park Easement Deed." *Exhibit C4, Case p.* 147. By the deed of dedication appellant and owners of adjoining lands conveyed to the city the lands owned by them respectively lying between the interior line of the boardwalk, as then located or about to be located, and the riparian commissioners' exterior line for park and recreation purposes. The dedication by the property owners limits the use of the land dedicated for a certain specific purpose, and by express aiding covenants on the part of the grantee contained in the dedication deed, it is provided that the lands thereby granted and dedicated to public use "shall forever be and remain open so that the view oceanward from said elevated boardwalk erected and to be

erected as above mentioned shall be free, open and unobstructed," etc. *Case p.* 145. Shortly after the signing of the dedication deed of April 8, 1907, the boardwalk was moved some three hundred feet oceanward of its then location which resulted in cutting off part of the landward end of the pier to effect its junction with the newly erected boardwalk at a point somewhat eastwardly from Massachusetts Avenue, its original point of contact with the old boardwalk.

In the month of August, 1924, during a severe storm a barge was broken from its moorings by the violence of wind or wave and driven against the pier with such force that some one hundred and thirty-six feet thereof was knocked down and destroyed, According to the Riparian Commissioners' exterior line established in 1877 about fifty feet in length of the destroyed or broken part was landward of that line and on appellants' property but by the recent survey in evidence showing the exterior line since established and now existing the entire pier is landward of the newly established line, and the entire destroyed portion is within the park area and on appellants' dedicated land. Being informed of the intention of the pier company to restore the destroyed portion of its pier and continue its use for commercial purposes and conceiving such use to be contrary to the intent of the dedication deed and to the public purpose of the dedication and in violation of the covenants in the deed, appellant objected to such restoration and gave written notice of his objection to the pier company and to the municipality and promptly thereafter filed the bill of complaint in this cause for the relief therein prayed which relief was denied on final hearing and the bill dismissed for the reason set forth in the filed conclusions of

the learned Vice-Chancellor who heard the cause, and it is from that decree so disposing of the controversy that this appeal is taken.

Richard McAllister, complainant below and appellant in this court died pending this appeal and his death has been suggested in the record and an order entered permitting the devisees under his will who have succeeded to his property rights to continue the prosecution of this appeal.

Bill of Complaint	Case, pages		1-19
Answer of Edward L. Bader	"	"	56
Answer of Atlantic City	"	"	57-59
Answer of H. J. Heinz Co	"	"	60-65
Replications	"	"	66-69
Order of Reference	"	"	70
Testimony	"	"	74-137
Conclusions	"	"	208-220
Final Decree	"	"	223
Notice of Appeal	"	"	224
Petition of Appeal	"	"	226-228
Answers to Petition of Appeal	"	"	229-231

ARGUMENT.

The learned Vice-Chancellor after referring in his conclusions to prior adjudications affirmed in this Court instituted by the appellant and involving this particular land, and quoting in its entirety, the final decree of the Chancellor in *McAllister v. Atlantic City,* 90 N. J. Eq. 357, placed his decision squarely upon the authority of that judgment and concluded that he was bound by that decree, reasoning to that conclusion in this language (on page 220 Case):

> "The testimony is undisputed that the use of this structure is the same as at the time of

the previous suit, that the reconstruction will place the pier in and only in the same condition as at that time. It was decreed that the defendant had not violated the covenants and conditions in the deed of conveyance, *i. e.,* that the structure known as Heinz Pier or the use thereof did not violate the covenants and conditions and being unchanged, it necessarily follows that the pier and the use thereof does not now violate them.

Much stress is made by the complainant that 'The park is to be kept free, open and unobstructed.' It is to be noted that Vice-Chancellor Leaming in his decree specifically recited the condition that the land shall remain 'open, etc.,' and decree that 'The defendant has not violated the covenants and conditions therein above recited.' ''

Apparently the learned Vice-Chancellor in thus relying wholly upon the authority of *McAllister v. Atlantic City* just cited failed to note the essential distinction between the claims or causes of action involved in the cases and the precise issues dealt with and decided by Vice-Chancellor Leaming.

The property here involved was the subject of three previous litigations, each different from the others in character, in parties and in the nature of the relief sought. The first of these in chronological order is *Burkhard, et al. v. Heinz Co.,* 71 N. J. L. 562, instituted in 1905 affirming in this Court a judgment of the Atlantic County Circuit Court in favor of the plaintiffs (appellant here) in an action of ejectment describing that part of the appellant's land covered by the pier. The legal title and the possessory right thus confirmed stood in the appellant and his co-tenant in this situation when by

the operation of the deed of April 8, 1907, the lands were dedicated to public use and vested in the municipality in trust for public uses. Next came the suit instituted in 1917 in which it was sought to compel the city to acquire by condemnation proceedings or otherwise the title to the land within the limit of the public park upon which the pier known as ''Heinz Pier'' is located, and to cause so much of the pier as is within the limits of the park to be removed therefrom. That suit was before the Supreme Court on demurrer to the plea to an alternative writ of mandamus obtain on the application of the appellant and the demurrer was overruled, *McAllister v. Atlantic City,* 90 N. J. L. 93, which judgment this Court affirmed in 91 N. J. L. 701. The plea of the city to the alternative writ of mandamus was (1) the statute (P. L. 1894, p. 146) fixes no time for acquiring land for park purposes, and the necessity therefor is for the determination of the city, that (2) since the giving of the dedication deed the relators had consented to the use of the pier by the pier company and collected from it rent for such use, that (3) the city had agreed with the pier company not to interfere with its possession or use unless all other piers within the park limits were acquired by condemnation which (4) the city was unable to do since condemnation would require an issue of bonds beyond its legal limit. There was a demurrer to the plea and the argument was that the presence of the pier within the boundaries of the park was an obstruction in violation of the terms of the deed. The matters decided were (1) that the act imposes no legal duty upon the city to acquire land for park purposes; that (2) the writ of mandamus is never rested on a contractual obligation and (3) the writ will never compel what cannot law-

fully be done, since it appeared that the city had no funds to pay any award and could not raise the required sum without a bond issue exceeding the city's legal limit of indebtedness.

Failing in the effort to compel the city, by mandamus to procure the title to all the land within the limit of a public park upon which "Heinz Pier" is located (already vested in it by the dedication deed) the appellant and his co-tenant next filed their bill in the Court of Chancery seeking to compel the municipality to specifically perform the covenant contained in the deed of April 8, 1907 (dedication deed) to the effect that the land conveyed should be forever "open and unobstructed" or in default of a decree for specific performance of the covenant, a decree declaring the deed to be "null and void." The City of Atlantic was the sole party defendant and filed an answer setting up the same defense pleaded by it in the *mandamus* case, averring among other things (1) that it was impossible for the municipality to comply with the covenant at that time, (2) that the city was bound by an agreement made by it with the owner of the pier to the effect that it would not interfere with the possession of the pier by its owner or its then present location except by condemnation proceedings instituted against all piers on the ocean front, and averred the existence of four other piers so situated. The answer also set up that complainants and others had petitioned the city to move the boardwalk oceanward of its then location in order that the intervening land might be utilized by the grantors, that the inner end of the pier occupied part of the intervening land, and that the agreement contemplated that the part of the pier oceanward of the new location of the boardwalk should not be disturbed except by carrying out the general scheme of condemnation of all piers necessary to accomplish the end then sought by complainants, was known to and acquiesced in by them and inured to their benefit. There was a motion to strike out this answer, which was denied because the inability of the city to comply with its covenant without raising funds by a bond issue in excess of its statutory limit precluded a decree for specific performance which was the primary relief sought, and a valid defense to the bill. Upon the second branch of the case, the claim for the alternative relief of forfeiture of the grant, the learned Vice-Chancellor (Leaming) construed the dedication deed and declared that neither in the granting part nor in the habendum is there to be found the usual and appropriate words creating a determinable estate, nor does the language of the habendum suggest that no obstructions to the view shall exist. That language is to be found only in the covenants on the part of the city and even there is not to be found language creating a determinable estate. It is the use and not the duration of the estate that is referred to; it is in structural form a mere covenant of the municipality and not a condition subsequent.

McAllister v. Atlantic City, 90 N. J. Eq. 357.

On final hearing the learned Vice-Chancellor disposed of the primary relief in these words:

> "Specific performance cannot be decreed. This Court cannot by its decree compel the municipality to violate its solemn contract with a third party without that party being heard and specific performance by the municipality is otherwise impossible."

The clause of alternative relief of declaring the

deed to be void is, of course, grounded upon the construction of the deed. On that point it was said:

> "Nor can the alternative relief of declaring complainants' deed void be awarded. It will be noted that the habendum declares the nature of the use for which the grant is made but in no way specifically limits the duration. The usual and appropriate method of creating a determinable estate is to insert in the *habendum* the appropriate language for that purpose, such as 'so long as and no longer.' See authorities cited to that effect in *Freeholders v. Buck*, 79 N. J. Eq. 472, and in 18 *Corpus Juris*, p. 352, Sec. 367, and p. 357, Sec. 371."

It is quite evident that the decree advised by Vice-Chancellor Leaming relied on by the learned Vice-Chancellor who advised the decree under review did no more than authoritatively determine and judicially settle the legal construction of the dedication deed of April 8, 1907, for the purpose of that case and under the operation of the rule *stare decises* was controlling on the present case to that extent only. *Delaware L. & W. R. Co. v. Breckenridge*, 57 N. J. Eq. 154.

Affirmed 58 N. J. Eq. 581.

The learned Vice-Chancellor who sat below was not bound by the former adjudication since the case before him differed from the former case in the identity both of parties and cause of action. It will be remembered that it was decided in the mandamus case 90 N. J. L. 93 before referred to, and affirmed in this Court, that the city could not be required under the Act of 1894 (P. L. p. 46), to condemn land for park purposes merely because it had acquired a

part or because of a covenant in a deed for some of the land, and the object of the bill in the case before Vice-Chancellor Leaming was to compel the city to condemn lands for park purposes by specifically enforcing an agreement to which complainant was not a party, in a suit to which neither the owners of the four piers which were to be condemned nor the other party to the agreement with the city were brought into court as parties defendant, or decree a forfeiture of the land granted by complainants, and the Vice-Chancellor on final hearing merely decided that no decree affecting the interests of persons not parties to the suit could be made, nor could a forfeiture be decreed of the estate granted since the duration of the estate was in no wise limited in the deed of grant. It therefore appears that the parties were not the same.

The cause of action and the issues and proof in the former adjudication were wholly different from the present. The former suit was based upon an agreement between the municipality and the pier company to which agreement the complainant was not a party and in which suit the pier company was not a party and the object of the suit was specific performance of the agreement. The present suit is based upon the covenants contained in the deed of dedication on the part of the municipality and seeks to restrain the city from authorizing a violation of the covenant. That covenant reads as follows:

> "Fourth. That the lands hereby granted shall forever be and remain open so that the view ocean ward from the said 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," etc.

That covenant is based upon section six of the Act of 1894, in which it is declared as being the "intention, that when such lands are—dedicated and devoted to public use—that the view of the ocean from the—elevated public walk—shall be free, open and unobstructed, and that no use shall be made of the said lands and property inconsistent with the purpose of this act," and also provides that the city may "prevent any obstruction thereof and any encroachment thereon;" section one of the act authorizes cities to open and lay out a public park for public resort and recreation and to devote the lands, etc. "to such use exclusively;" section three authorizes cities to purchase or condemn lands, real estate property and rights, lying within and between the (interior or inland) line so established and the exterior line established by the riparian commissioners—and devote the same "exclusively to public use as a public park, etc., and to keep the same forever open and unobstructed for such public use, and section three of the ordinance establishing the park (Case, pp. 138, 141) provides that all the lands so established be and the same are hereby devoted to "public use as a public park or place for public resort and recreation *exclusively* and for such use shall be kept open and unobstructed forever."

The proof was that at the date of the deed dedicating the land to the city for public use there stood on a part of the land so dedicated Heinz Pier, the right of possession of which had been adjudged by the Atlantic Circuit and affirmed in this court to be in complainant: that the city was permitting the use of the pier for commercial purposes and private gain, that in August, 1924, something like 136 feet of the pier resting upon the dedicated land was completely destroyed rendering its continued or further use for private purposes impossible without rebuilding which the occupants of the pier proposed to do and the city proposed to permit. Whereupon the complainant filed his bill of complaint in the Court of Chancery seeking to enjoin the rebuilding of the pier and the resumption of its use when rebuilt or restored as a violation of the covenant in the deed to the city dedicating the land to public use upon the ground that the city held the title in public trust for public use exclusively and proposed to permit the use of the land for uses not exclusively public. Both the city and the pier company were made parties defendant.

The question here was not whether the city should carry out its supposed agreement with the pier company nor to disturb its present possession without condemning all piers but whether the pier company should be permitted to impose upon the dedicated land what amounted to a new construction and use that structure for a purpose inconsistent with the purpose of the dedication. The appellant takes the position that the alleged agreement between the city and the pier company never in fact existed, its existence resting merely upon a stipulation in the *Mandamus* case for the purposes of that case and so appearing in this case, and further, that such an agreement would be *ultra vires* and illegal, as contrary to the express intent and policy of the act.

The present action is founded upon a different claim or demand from that upon which the first action was founded and the parties are not the same. In the former action the deed was sought to be destroyed. In the present case the deed is sought to be upheld and the covenants enforced. It is the doctrine of the cases that there is a difference in the effect of a judgment when it is relied on in a second

action, founded on the same claim or demand on which the first action was founded, and when it is set up in a second action, founded on a different claim or demand from that on which the first action was founded. When the second action is founded on the same claim or demand the judgment is conclusive, not only as to all matters which were actually litigated and decided, but as to such matters as were actually litigated and determined.

City of Paterson v. Baker, 51 N. J. Eq. 49;
Cromwell v. Sac County, 94 U. S. 351.

In *City of Paterson v. Baker, supra,* Vice-Chancellor Van Fleet says:

> "There can be no doubt, then, that of the complainant's right to relief in this suit rests upon the same point or question which, in essence or substance, was litigated and determined in the suit at law, the matter or controversy here must be regarded, as between these parties, as having been finally and conclusively settled by the judgment at law, and to stand *res adjudicata.*"

And as was said by Mr. Justice Field in *Cromwell v. Sac County, supra*:

> "But where the second action is upon a different claim or demand, but between the same parties, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered in one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determined, for it is only upon such matters as were actually litigated and determined that the judgment is conclusive."

We have seen that the act of the legislature directs that lands dedicated to public use as a park, etc., shall be devoted "to such use exclusively;" that it is the intention of the act that such land so dedicated and devoted shall be "free, open and unobstructed" and that the city may prevent "Any obstruction thereof and any encroachment thereon;" that the land lying between the interior park line when established and the riparian commissioners' exterior line shall be devoted "exclusively to public use;" that the ordinance laying out and establishing the park declares that the same is "hereby devoted to public use as a public park or place of public resort and recreation *exclusively* and for such purpose *shall* be kept open and unobstructed forever" and that the covenant of the city in the dedication deed is that the land so dedicated shall "forever be and remain open and unobstructed" and that "no use shall be made of the said land inconsistent with the purpose" of the act. It can hardly be contended that the possession of the land and its use by a private concern in the advertisement and sale of merchandise for profit is a devotion of the land "exclusively to public use." Nor that such use comports with declared intention of the act, and equally unavailing is the claim that the permission of the city or its license to a private corporation to erect upon the land a structure designed and intended to be occupied in promoting a private business for profit is such a use of the dedicated land

as is consistent with its use as a public park or with the purpose of the dedication. In the present action the appellant did not seek to compel the city to go forward in perfecting the park scheme by condemnation or otherwise, nor did it seek the removal of the pier or the forfeiture of the dedication of grant. The bill merely sought to prevent by injunction the building upon the land dedicated and the use of the structure when built, in a manner wholly inconsistent with the scheme of the legislative act, the ordinance, the covenant and the purpose of the dedication. It is respectfully submitted that none of these points or questions was litigated or determined by Vice-Chancellor Leaming nor were they actually decided by him or necessary to his decision. Therefore, the points or questions here involved were not *res judicata* and that decision could not have been binding upon the learned Vice-Chancellor below nor controlling of his judgment. The case was therefore open for controversy and decision upon the issues presented.

COMPLAINANT HAS A STANDING TO OBJECT.

The undisputed evidence in this case shows that the complainant by the ejectment suit established his title to the land and his right to the possession thereof.

Prior to the execution of the deed to the city the complainant was entitled to his property as against the whole world and that condition has obtained since the execution of the deed, except in so far as the limited rights which the city acquired by the conveyance are concerned.

The pier company had no right to the McAllister land at the time of the deed of dedication and it has acquired no rights since that time. The pier company has acquired no rights by agreement with the complainant and the complainant disclaims any knowledge of any agreement with the city and denies that any such agreement exists. There has been no acquiescence on the part of the complainant that the pier company should occupy his land. The evidence discloses that immediately following the ejectment suit the pier company recognized the possessory rights of the complainant and paid rent up. until the time the easement deed was signed. Therefore, the occupation by the pier company of the McAllister land between the time of the ejectment suit and dedication deed was as a tenant. Upon the deed being signed the pier company ceased to be a tenant and refused to pay rent and from that time it would appear that the complainant has been objecting to the unlawful occupation by the pier structure of his property and there is an entire absence of any proof in this case to show that the complainant has ever acquiesced, much less agreed touching the continuance of the pier.

The complainant has not parted with all of his interest in the land. Should there be an abandonment of the park scheme the land to the extent of the grant to the city would revert to him. If the ocean recedes he is entitled to further reversionary rights by having the boardwalk moved oceanward, etc. In short, the complainant has done nothing more than give the city the right to make a limited and specified use of his property.

THE DEDICATION DEED.

The authority for the establishment of the public park along the ocean front is the above mentioned Act of 1894 (P. L. 1894, p. 146—C. S. Vol. 1, p. 1075). The purpose of the act which is clearly stated in its title, is to enable cities located on or near the ocean "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 preserve the same from obstruction or encroachment."

A city has no authority under the act to acquire land along the beach front for any purpose other than a public park or place for public resort or recreation on or along the beach and ocean front, and it is required that except for the purpose of the construction and maintenance of an elevated boardwalk the park shall always be kept open and unobstructed.

Section 3 of the act gives the right to construct and maintain an elevated boardwalk along the interior line of the park but expressly requires that the land acquired for park purposes shall be devoted "exclusively to public use as a public park or place for public resort and recreation" and the city is required to "keep same forever open and unobstructed for such public use."

Three methods are provided by the act for the acquisition of lands for park purposes, *i. e.* purchase, condemnation or dedication, but however the land is acquired the limitation upon its use is the same and the effect of conveyances to the city and of condemnation is not open to doubtful construction but is definitely settled by the legislative act, it being provided in Section 6 of the act:

> "It being the intention, when such lands are so purchased, condemned or dedicated and devoted to the public use aforesaid, that the view of the ocean from the interior line so established, and from the elevated public walk, when the same is or shall be constructed, as herein provided, shall be free and open and unobstructed, and that no use shall be made of the said lands and property inconsistent with the purpose of this act."

On October 13, 1899, Atlantic City, pursuant to the authority of said act, passed an ordinance laying out a park along the ocean front (C. 1, p. 138) and by section three provided:

> "And be it ordained, that all the lands lying oceanward from the interior line so established from the boundaries above defined, be and the same are hereby devoted to public use as a public park or place for public resort and recreation exclusively, and for such use shall be kept open and unobstructed forever, in the manner and to the extent as in any of the said act is directed and prescribed."

The easement deed (C. 4, p. 147) is made in consideration of the premises and the sum of one dollar and in consideration of the benefit and advantage to be derived by the grantors by the laying out of said park (pp. 151, 152) and grants to the city the property along the ocean front "to have and to hold the said premises with all and singular the appurtenances, unto the said party of the second part, * * * for and only for use as a public park or place of resort and recreation * * * in accordance with the provisions of said act * * *" (p. 152).

Immediately following are several covenants on the part of the city including "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 such 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" (p. 154).

The Act of the Legislature clearly defines the use to be made of the park lands and expressly provides that the same shall be free, open and unobstructed. The ordinance was passed pursuant to that act, and so recites, and the deed by its recitals was made and executed with reference both to said act and said ordinance and if there was nothing more in the deed than the mere statement that the conveyance was made for park purposes in pursuance to the authority of said act and said ordinance the deed would necessarily have to be construed as a dedication for park purposes subject to all of the provisions and limitations of the act but the deed also by its habendum limits the conveyance for use as a public park or place of resort and recreation in accordance with the provisions of said act. By statute, ordinance and grant, the park is required to be kept open, free and unobstructed.

The policy of the statute is plain. It was regarded as of value to the city and to the property owners to have an elevated public walk along the entire beach front and to have the land oceanward free from buildings of all kinds so that the view from the walk should be open and unobstructed and the strand unincumbered for bathers and as a place for public resort and recreation. The property owners

on that assumption and guarantee have dedicated beach front property worth millions of dollars and they are entitled to have their rights preserved and are entitled to enjoin others from doing what they, themselves, are not permitted to do.

If the pier company or any third party can build across the complainant's land, surely the complainant can build in front of his own property and all other owners may likewise build in front of their respective properties with the result that the whole purpose of the park scheme would entirely fail.

THE HEINZ COMPANY IS USING THE PIER EXCLUSIVELY FOR COMMERCIAL PURPOSES.

According to the testimony of the officers of the pier company the pier is used exclusively for the advertisement and sale of the Heinz products. The free admission of the public and the incidental exhibition of occasional art pieces or antiques are merely steps in the advertising and commercial scheme. The building is covered with advertisements, every card and piece of stationery is an advertisement and the admitted purpose of the pier is to advertise and sell merchandise. That the public is admitted free is no evidence that the pier is conducted for the benefit of the public. Naturally, one would not expect the pier company to invite the public to see exhibits of its goods, hear lectures as to how they are produced and to place orders for merchandise and then charge an admission. It is an admitted fact that the pier is maintained as an advertising medium and as a place for the sale of merchandise. If such use is not a violation of the

easement deed large exhibitors may construct buildings of any dimensions and in any number outside of the boardwalk, advertise and take orders for merchandise, provided they admit the public without cost to enter the buildings to inspect samples and place orders.

THERE IS NO LEGAL AUTHORITY FOR THE EXISTENCE OF THE PIER.

The pier company never owned or had any interest in the McAllister property. The ordinance of 1895 did and attempted to do nothing more than to grant the right to construct the pier within the lines of Massachusetts Avenue. The city did not own the McAllister property, and, of course, could not confer authority on the pier company to construct a pier across his premises. Some deeds and bills of sale were offered in evidence by the defendant pier company, showing title to the pier structure in the Heinz Company but those instruments do not affect the complainant's property.

The case is barren of any evidence which even tends to show any authority in the pier company even in the beginning to construct its pier on the complainant's property, but even if it were otherwise the ejectment suit settled the rights of the parties and at the time the complainant executed the easement deed the pier company had no right upon his land and could acquire no right unless obtained through him.

The resolution of April 22, 1907, did not change the situation. The deed was executed on April 8, 1907, and the rights between the grantors in the deed and the city were determined by the provisions

of the deed and could not be changed by a resolution adding additional burdens to the easement.

The moving of the boardwalk oceanward was an act within the express provision of the deed and it formed no consideration for a resolution of which the complainant had no knowledge and in which he did not in any way participate. The resolution does not contemplate reconstruction and it attempts to do nothing more than to authorize the city to execute a contract. The resolution does not amount to a contract and the case discloses that no contract exists.

The statute, the ordinance and the deed all provide limits upon the use of the property and any act on the part of the city to subject the property to an additional or inconsistent use would be *ultra vires.*

See *Hill v. Belmar,* 127 Atl. 789.

The lease from the state to the Heinz Company, Exhibit D9, contains a provision as follows:

> "And also provided, that if the said H. J. Heinz Company is not the owner of the land adjoining the land under water hereby leased, or does not secure from such owners, proper consent and permission upon request so to do, that in such case, this instrument and conveyance so far as the same binds the state, and all the covenants herein on the part of the state, shall be void, as affecting any part or parts of said land, joining land not owned by the said H. J. Heinz Company, or lands from the owners of which the said H. J. Heinz Company has not obtained proper consent. * * *"

The Heinz Company is not the shore owner, holds no consent from the owner and the lease is void.

The result is that the pier company has no lawful permission from any source and the pier should not be permitted to remain. The reconstruction of the pier is in the nature of a new undertaking and should be so regarded.

THE PETITION TO MOVE BOARDWALK OCEANWARD AND RESOLUTION BY CITY COUNCIL DO NOT AFFECT RIGHTS OF COMPLAINANTS.

Shortly after the easement deed was signed, the property owners made petition (D1, p. 156) to city council requesting the boardwalk be moved oceanward. The petition was presented at a meeting held January 28, 1927. Prior to that time and on April 22, 1907, council passed a resolution authorizing a contract with Heinz Pier respecting the continuance of the pier structure (D2, p. 159).

The easement deed provides for the moving of the boardwalk oceanward (C4, p. 153). The petition was based upon the contract and condition contained in the easement deed. This action was consistent with the easement deed and the property owners lost no rights by making the petition.

The resolution (159) was not the result of any consent or action of complainants.

The easement deed was executed April 8, 1907, and the rights between the grantors of the deed and the city which were determined by the provisions of the deed and of the statute and the ordinance could not be changed by a resolution subsequently passed by city council on April 22, 1907, adding additional burdens to the dedication.

The resolution is not self executing. It does nothing more than to authorize the making of a contract between the city and the Heinz Pier upon the Heinz Pier, filing a written consent to the moving of the boardwalk oceanward. The resolution by its terms is to become operative upon and "for and in consideration of a consent in writing to be approved by the city solicitor from H. J. Heinz Co. of Pittsburgh, for the relocation of the boardwalk," etc. Upon such consent the city agrees concerning the continuance of the pier. It is clear that the agreement authorized by the resolution was intended to be represented by a written agreement as the resolution concludes with "and that the mayor and city clerk be hereby authorized to sign such agreement." Assuming the city had lawful authority to pass the resolution, it amounted to nothing more than an authority to the mayor and city clerk to execute a written contract between the city and the Heinz Co. upon the Heinz Co. filing with the city a written consent to the relocation of the boardwalk. There is no evidence in the case to show that either the written consent or a written contract were ever made.

As far as the evidence in this case discloses there never was any written consent or written contract but if the same existed the rights of the grantors in the deed of dedication would not be disturbed. Any action on the part of the city to subject the park to an additional burden would be *ultra vires*. See *Hill v. Belmar, supra.*

COMPLAINANT HAS THE RIGHT TO REQUIRE THE CITY TO OBSERVE ITS AGREEMENTS.

The complainant, without consideration, divested himself of the control of his property and intrusted that control to the city for certain purposes specified in the deed and has a right to insist that the city observe its covenants to him and execute the trust for which it holds that control.

Any structure oceanward of the boardwalk is a violation of the dedication deed. The Heinz Pier structure is a very pronounced obstruction of the view oceanward from the boardwalk and its reconstruction and maintenance are inconsistent with the provisions of the statute and of the deed of dedication.

The present case is entirely different from the case of *Sea Isle Realty Co. v. Sea Isle City,* 79 N. J. L. 459. In that case the dedication required that the park be kept "open and unobstructed for public use." In the present case the imperative requirement of the statute and of the dedication is "that the lands * * * shall forever be and remain open so that the *view* oceanward from said elevated public wall * * * shall be free, open and unobtsructed and that no use shall be made of the said land * * * inconsistent with its use as a public park or place for public resort and recreation." In the Sea Isle case, the city, the public, was acting, in the present case, a private concern is operating.

It is respectfully submitted that the decree below should be reversed and that relief be granted as prayed in the bill of complaint.

BABCOCK & CHAMPION,
Solicitors of and Counsel with Complainant and Appellant.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

Between

RICHARD MCALLISTER,
Complainant-Appellant,

and

H. J. HEINZ COMPANY, a corporation, *et al.,*
Defendants-Respondents.

On Bill, &c.

BRIEF FOR DEFENDANTS-RESPONDENTS.

The Heinz Pier—the bone of contention in this suit—was built in 1886, with the outer pavilion as it stands today then erected on it, and has (with the exception of its inner end) continued in daily use from that time to the present. It was built pursuant to leave given by an ordinance of the city (Exhibit C. 2) and with title from the Fralingers (Exhibit D. 4), the Wottons (Exhibits D. 5 and D. 6), and the State (Exhibits D. 8 and D. 9). The inner pavilion was added on the south side of the pier as erected in 1900 (p. 114), and has stood there and been used, as it is now used, from that time uninterruptedly.

By deed dated December 15, 1902, McAllister and Burkard, as tenants in common, acquired title to a tract of land on the ocean front extending out to the exterior line as then established (Exhibit C. 3, pp. 76, 77). This deed, which was taken sixteen years after the erection of the pier, and two years after the erection of the inner pavilion, notes the inception of McAllister's interest in the situation.

An ejectment was brought by McAllister and Burkard against the Pier Company to obtain

possession of so much of the pier as was located on the property they had thus acquired. The plaintiffs in that action prevailed by a judgment dated February 16, 1904. See *Burkard, et al.* v. *The Pier Company,* 71 N. J. Law 562.

For several years thereafter the Pier Company recognized the title of McAllister & Burkard to the locus by paying them rent; and the Pier Company, of course, continued to use and enjoy the pier just as before. No one—least of all McAllister & Burkard—contended that it was an improper structure or violated anyone's rights.

The Burkard interest (co-tenant with McAllister) in all the property passed to the Schmidts about eighteen years since. Evidence (p. 86). The city, availing itself of the authority contained in the so-called Park Act, had, as is well known, started a campaign to acquire all the land oceanward of the pier "as a place of resort and recreation." By the express terms of that act (1 Compiled Statutes, page 1075), the city could acquire and establish its proposed rights (Section 3) by purchase or condemnation, or (Section 5) by dedication. By the terms of the act, which was passed in 1894, authority was given to create a park oceanward of the boardwalk as then existing. In the meantime extensive accretions had occurred, so that a large area of land had made out in front of much of the property, including that in which Mr. McAllister and his associates were interested. The land owners, desiring to have the boardwalk moved eastwardly so that they could utilize this accreted land, presented in January, 1907 (Exhibit D. 1, p. 156), their petition to the city, setting up that

> "by reason of the formation of land by accretion, the highwater 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 the 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 etc."

The prayer of the petition was that the city

> "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."

Mr. McAllister and his co-owners, the Schmidts, joined in this petition. Compliance with the prayer of that petition entailed not only a removal oceanward of the boardwalk, but a cutting off of the land end of the pier for a considerable distance; and as that pier had, as we have seen, been constructed with the express consent of the city, of course, the Pier Company had to be considered before the prayer of the petition could be granted. The result was the passage of a resolution by the city (Exhibit D. 2, p. 159), as follows:

> "Be it resolved by the City Council of Atlantic City that for and in consideration of a consent in writing, to be approved by the City Solicitor from H. J. Heinz 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 to be 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 in carrying out a scheme for the acquirement by the city of all lands within said Beach Front Park, and that the Mayor and City Clerk be hereby authorized to sign such agreement."

On the faith of that resolution the Pier Company consented to its removal and shortening; and as is undisputed, the boardwalk was later moved oceanward, and as a consequence the land end of the pier shortened several hundred feet. Mr. McAllister admits in his evidence that he signed this petition (p. 88), and while he concedes on page 89, that the resolution just recited was passed pursuant to the petition, he insists he had no knowledge of the phraseology of the resolution until he heard it read in court in this cause. If one can believe that, then it must be true that Mr. McAllister's co-owners gave the matter their personal attention. Indeed (p. 88), he says they were "handling the matter." It is interesting to note that they are not called by him in this cause, and are not parties to this action. It is also interesting to note that in the *mandamus* proceedings hereinafter referred to, Judge Cole, representing McAllister, stipulated (p. 135) that after the presentation of the foregoing resolution, an agreement was subsequently entered into and completed as provided for in the resolution. Mr. McAllister and his associates then joined in a park deed to the city (Exhibit C. 4) in which, after reciting the determination of the city to lay out along the beach front a public park or place for public resort and recreation by virtue of the Act of the Legislature al-

ready referred to, and the passage of the ordinance thereunder; the determination of the city to relocate the inner inland line of the said park as described in said deed; then having described by metes and bounds the limits and boundaries of the park or place for public resort, provided:

> "for the purpose of enabling the said city to use the lands lying oceanward from the inland line so established * * * as a public park and place of resort and recreation, the parties of the first part, for and in consideration of the premises and of 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 City) * * * 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 or ordinance above referred to, the parties of the first part, have, and by these presents do give, grant, bargain, sell and convey unto the party of the second part, and its successors, all their and each of their right, title and interest in and to the above described tract of land and every part and parcel thereof, including such parts and parcels thereof as are, or may be covered by water, to have and to hold the said premises with all and singular the appurtenances unto the 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 the party of the second part and its successors, however, the right to construct, reconstruct, repair, complete and maintain upon the land so conveyed along the inner or inland line of said park or place of public resort, as established as aforesaid, an elevated boardwalk in accordance with the provisions of the said act,

but subject to the following conditions and restrictions: That no railroad, nor street railway shall ever be constructed, operated or maintained over, upon or across any portion of the premises hereby granted and conveyed, and that said land shall never be used for any railroad purposes whatever."

Then followed certain covenants on the part of the city with reference to the land so conveyed, including the following:

"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,*opean* and unobstructed, and that no such 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 deed, though bearing date April 8, 1907, was not acknowledged by the city, the grantee therein, whose covenants formed the basis of this suit, until May 15, 1908, and was not delivered and recorded until May 16, 1908. The resolution was, as we have seen, passed on the 22nd of April, 1907. It is conceded by Mr. McAllister that the land he secured as the result of the carrying into effect of this deed and the moving of the boardwalk and land end of the pier, was worth several hundred thousand dollars (p. 98).

At the time that the complainant joined in this deed, the pier was constructed and being used in every way the same as it was at the time the complainant filed his bill. There was no suggestion in the deed that as such it was an obstruction and that the city would remove it.

Vice-Chancellor Leaming has on two occasions construed this deed. In *McAllister* v. *The City*

of Atlantic City, 90 N. J. Equity 357, the complainant herein filed a bill against the city seeking to compel the city specifically to perform the covenant hereinabove quoted in the deed, to the effect that the land conveyed should be forever "open and unobstructed." The city answered this bill setting up, among other things, the terms of the resolution above quoted, and a motion was made to strike out the answer. The Vice-Chancellor, in declining the motion, referred to the averments and added:

"I think that the averments taken together may be said to disclose sufficient acquiescence of complainants in the execution of the agreement as an essential part of the general plan enuring to their benefit to equitably afford a bar to their now seeking relief inconsistent with the agreement. If complainants' deed to the city was in fact made to procure the removal of the boardwalk oceanward with knowledge of the fact that its removal and the removal of the inner end of the pier was to be accomplished through or in part through the instrumentality of the agreement referred to, it seems to me clear that they cannot now equitably seek to compel the city to pursue a course of action in repudiation of that agreement."

The bill in that case also, as an alternative relief, sought in default of a decree for specific performance, a decree declaring the deed to be null and void. Passing to a consideration of that phase, the Vice-Chancellor in his opinion, analyzed the deed with great care, and then added, 90 N. J. Equity, page 362:

"It may be tentatively conceded that the estate granted is a determinable fee, and that as such the city's abandonment of the use of the land 'as a public park or place of resort and recreation,' would be operative to determine it. But the answer fully discloses

that no such abandonment has occurred. The utmost that has occurred has been the failure of the city to free an outer corner of the land from the occupancy of the pier, and this pier, the answer avers, is necessary for purposes of health and recreation of the public, and is so used. But even conceding that the occupancy of this outer corner of the land by the pier for the purposes stated is violative of the covenant which the city has made touching its obligations to complainants, it does not follow that the breach of covenant in the limited respect stated, which covenant forms no part of the limitation expressed in the deed, is operative to divest the city's estate in the lands and cause the title to revert to complainants. *Camden, Atlantic and Ventnor Land Co.* v. *West Jersey and Seashore Railway Co.* (New Jersey Court of Errors and Appeals), 105 Atl. Rep. 229. If complainants have suffered appreciable damages through breach of this covenent the law courts would seem to be the appropriate tribunals for relief."

An examination of the Vice-Chancellor's opinion analyzing the deed, shows that the deed

> "expresses as a consideration for the conveyance one dollar and the benefits to be derived by the vendors by the laying out of the park and building the boardwalk, and the further consideration that the vendors' land will not be condemned."

It is obvious both from this opinion, and an examination of the deed itself, that the contention made by the complainant in this cause in his brief that there was no consideration for the deed, is groundless and without foundation.

The same case then came on for final hearing. A copy of Vice-Chancellor Leaming's conclusions (which do not seem to have been reported), is appended to this brief. In it, after having again

studied the deed, he uses the following language concerning it:

> "It will be noted that the habendum declares the nature of the use for which the grant is made but in no way specifically limits its duration. The usual and appropriate method of creating a determinable estate is to insert in the habendum the appropriate language for that purpose, such as, 'So long as and no longer.' See authorities cited to that effect in *Freeholders, etc.* v. *Buck*, 79 N. J. Eq. 472, and in 18 Corpus Juris, p. 352, Sec. 367, and p. 357, Sec. 371. Nor does the language of the habendum in any way suggest that no obstructions to the view shall exist, that element being found alone in the covenant of the municipality, and the obstruction to the view which is now complained of was there when the conveyance was made. The territory conveyed is in fact wholly maintained as a 'public park or place of recreation,' except insofar as the structure referred to may be thought otherwise as to the extremely limited territory it occupies, and there has been no semblance of an abandonment of the park as such. Nor is there to be found the usual and appropriate words for the creation of a determinable estate in the covenant of the municipality. It is the use and not the duration of the estate that is there referred to; it is in its structural form a mere covenant of the municipality and not a condition subsequent. But should it be permissible and possible to read into the deed by reason of its obvious purpose a controlling intent which could properly be regarded as the equivalent to an express condition or limitation to the effect that the estate granted was to endure only so long as the property conveyed was maintained as a park and was to then revert to the grantors, I am yet unable to conclude that the existence of the pier complained of has been operative as a forfeiture of the grant. The testimony discloses that al-

though the pier structure is privately owned it has at all times been open to free public use for purposes of recreation. (See *Sea Isle City Realty Co.* v. *Sea Isle City*, 79 N. J. Law 459) and that it was not only there and similarly used when the grant was made, but for six years thereafter complainants encouraged its existence and to that extent recognized its existence and use as consistent with the terms of the grant, since during that period the structure occupied the lands on which it stood under the express authority of complainants. The pier structure also occupies but a small portion of the territory granted and in my judgment in no way constitutes an abandonment of the general park scheme contemplated by the grant. If the structure is in any way violative of the terms of the covenant damages for breach of the covenant would seem to adequately satisfy any private rights that complainants may enjoy other than specific performance."

It is undisputed that the title to the portion of the pier that had been established in the complainant by the ejectment suit, passed by this deed to the city.

As soon as the Pier Company heard of this deed, whereby the title of complainant and his associate owners passed from them to the city, it ceased paying rent or recognizing their title (McCafferty, p. 117; McAllister, p. 93). During these ten years, while McAllister was enjoying rent, he never objected to the use that was made of the pier by the defendant, which is exactly the same use to which he now objects. He found in the pier no violation of the covenant contained in the deed.

The first step he took (after the Pier Company ceased paying rent), was an application for a *mandamus* against the city, to cause so much of the pier as was within the limits of the park to

be removed. This case is reported in 90 N. J. Law 93, and on appeal in 91 *Id.* 707. In this suit he was unsuccessful. He then filed the bill of complaint above referred to in which he was also unsuccessful. The final decree in that suit was offered in evidence, together with the record, on page 136. A certified copy of the decree is included in the exhibits, and really forecloses the defendant from further progress in this cause. It recites the determination of the city to lay out a park pursuant to the Act of the Legislature and the ordinance, describes the property by metes and bounds, recites the fourth clause hereinabove quoted in the deed of April 8, 1907, the fact

> "that at the time the complainants made the conveyance described in the deed under date of April 8, 1907, they, the complainants, petitioned the City of Atlantic City to relocate the boardwalk."

It then further provides:

> "and it further appearing that at the time complainants conveyed said land to the defendant, to wit, April 8, 1907, there was and still is on a part of said land and premises what is commonly known as 'Heinz Pier,' a structure of approximately 40 feet in width and 500 feet in length, extending oceanward from the boardwalk with two enclosed pavilions thereon, the outer or larger one being oceanward of the exterior line and not within the lines of said park, and the smaller one being inland of the said exterior lines and within the lines of said park and no part of which is on the land which complainants conveyed to the City of Atlantic City; that only about 100 feet of the said pier between the two pavilions crosses the part of the land which the complainants conveyed to the city; that the said pier, though privately owned, was and still is at all times open to free public use for the purpose of recrea-

tion; that the land conveyed by the complainants to the defendant under deed dated April 8, 1907, is wholly maintained as a public park or place of recreation except insofar as the structure Heinz Pier may be thought otherwise as to the extremely limited territory which it occupies; that there has been no abandonment of the park plan by the defendant; and it further appearing that prior to the date of conveyance by the complainants to defendant, to wit, April 8, 1907, the land oceanward of the boardwalk lying between Connecticut and Main 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 complainants and others, owners of more than three of said contiguous blocks, petitioned the City Council of said city to move the said boardwalk oceanward, and thereupon did enter into a solemn agreement with H. J. Heinz Company of Pittsburgh, owners of the Heinz Pier, that in consideration of the relocation by the defendant of the boardwalk, forty feet wide along the interior line of the beach front, approved by ordinance April 5, 1907, said location cutting through at that width the iron pier located at the ocean end of Massachusetts avenue, that it, the defendant, would not interfere or disturb the occupancy or possession of the said H. J. Heinz Company with the said pier as now erected on the lands owned or hereafter to be acquired by the defendants within the limits of the beach front park, unless such interference or disturbance should 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; and it further appearing that there are at least five other parcels of land, to wit, Heinz Pier, Garden Pier, Steel Pier, Young's Old Pier and Million Dollar Pier, which piers, and

the land on which they stand, have approximately the value of $3,000,000 and that the defendant is unable to purchase or condemn the said lands; and it further appearing that there is no limitation of a determinable estate in the habendum clause in the deed by the complainants to the defendant; and it further appearing that complainants are not entitled to the relief prayed for,

It is, on this 29th day of June A. D. 1920, on motion of Joseph B. Perskie, of counsel with the defendant, by Edwin Robert Walker, Chancellor of the State of New Jersey, ordered, adjudged and decreed that the defendant has not violated the covenants and conditions in the above recited deed of conveyance set forth; that the complainants are not entitled to be restored to the free possession of the land described in their said deed or to have a reconveyance thereof; and that the complainants' said bill of complaint be dismissed with costs of suit to be taxed."

On or about the 24th of December, 1924, the pier was bisected by a large float running into it, and the piling and flooring of a portion of it, including a part that covered the land formerly owned by the complainant, were destroyed. Before this bill was filed, the piling had all been restored, and the Court permitted, as a temporary measure pending the cause, the laying of a twelve-foot strip of flooring to connect the outer pavilion with the inner pier. The important question in the cause is whether the restoration of the pier to the condition in which it had formerly been should have been prevented by the Court. It will be noted that the restoration which under the decree has taken place, simply means the restoration of the flooring which is about three feet above the level of the boardwalk (p. 130), and the restoration of the outside rails across the broken portion, at the full width of the pier. Neither of the pavilions was

touched by the accident, and therefore, the restoration cannot be in any way an obstruction to the view.

I.

The matter in issue here is res adjudicata.

The decree of this Court, which is not appealed from and in fact settles the matter that the pier itself, with the pavilions and the use that has constantly been made of them, is not a violation of the covenant in the deed.

As the proofs show, there are some four or five other piers in constant use within the park limits, whose presence indicates that piers as such, are no violation of the park restrictions. See *Sea Isle City Realty Company* v. *Sea Isle City,* 79 N. J. Law 459; *Knight* v. *Cape May,* 61 *Id.* 146; *Ross* v. *Long Branch,* 73 *Id.* 292.

The fourth paragraph of the complainant's prayer for relief in the bill seems to concede this by confining the prayer for an injunction against the using of the pier for commercial purposes. We submit that the mere fact that the pavilions in the pier are used for displaying the goods made by the company, and for lectures upon the advantages and benefits of the use of such goods, as well as for lectures on other topics, in no way is inconsistent with the use of the pier as a public park or place for public resort and recreation. The proofs show that the city derives a revenue from the concession for chairs used on the beach. The pier is open to the public free of charge. They are furnished, without charge, with seats and benches on which to enjoy the cool breezes; and they are furnished with free stationery. Does the mere fact that there are advertisements, by signs upon the pier, of the

defendant's wares, and the fact that the public are permitted to receive instructions with reference to such wares, as well as upon artistic and other subjects, interfere with, or in any way is it inconsistent with the use of the park as a place of public resort and recreation?

Complainant refers to the recent case of *Hill* v. *Belmar,* reported in 127 Atl. Rep. p. 789. Examination of the opinion of the Supreme Court in that case shows that there was no deed conveying the absolute fee with a mere covenant as to use, but a dedication of the property by the filing of a series of maps, coupled with declarations by the dedicators, made at the time of the sale, as to the *status* of the lots in question. The second reason relied on by the prosecutor in that case for the *certiorari,* states that the borough held the property upon a public trust "the trust being that the property shall remain forever free, open and unencumbered of any building whatsoever." The opinion says, referring to previous suits:

> "The result of these suits and the testimony before us show conclusively that there was a dedication of the tract in question as and for a public park and that the purchaser of lots purchased upon such representation, and that the plot would be kept open, insuring an unobstructed view of the ocean."

The conclusion reached was that the building of a swimming pool upon the territory thus dedicated was inconsistent with the dedication, and such use was therefore interdicted.

The case has no application whatever. The appellant seeks to avoid the force of this decree by adverting to the fact that in the case in which it was entered the precise purpose of the bill was either to compel the city to secure specific performance of the covenant, or else to have it

decreed that the deed should be cancelled; while here the purpose is to compel a compliance with the terms of one of the covenants in the deed.

In any event, a construction of the deed is involved, and the Court in the earlier case so construed the deed as to disentitle the complainant to the desired relief in this cause. In the earlier case the Court in a controversy between the complainant and the city, construed the deed as giving to the complainant no right whatever in a Court of Equity, and so in this case, the complainant cannot assert a contrary view. The relief here sought is against the city (the sole defendant in the earlier case), and the Pier Company. The mere fact that the Pier Company is present in this case, in no way prevents the application of the rule of *res adjudicata.* The only way the complainant obtains any equity in this suit is by way of the city, and as against the city, he is met by the decree.

But even if the doctrine of *res adjudicata* does not apply, the principles which underlay the decision were rightly applied, and should govern. The mere presence of the pier—constructed and utilized as it is, is in no sense a violation of the covenant. Piers and other structures are important accompaniments of a public park (*Sea Isle City* v. *Sea Isle,* 79 N. J. Law 459; *Knight* v. *Cape May,* 61 *Id.* 146; *Ross* v. *Long Branch,* 73 *Id.* 292), and the conduct of the complainant in receiving rent from the Pier Company for the privilege of maintaining the portion of the pier on the land which the defendant supposed the complainant still owned, indicates he did not deem the pier a violation of the covenant. Everything that the two opinions of *Vice-Chancellor Leaming* contains is conducive that the complainant should not have been accorded the desired relief in this case.

The appellant persists in speaking of the deed in which complainant joined as a deed of *dedication,* and as an easement deed. The fact is that the grantors (including the complainant) made an out and out deed of land to the city. It is in no sense a grant of an easement, and it is in no sense a mere dedication. The deed contains a covenant that the premises shall forever be and remain open so that the view oceanward from the elevated boardwalk erected and to be erected 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 of public resort and recreation. The complainant for ten years, by the receipt of rent, acquiesced in the use of the pier as it now is—and for twenty-five years has failed to claim as against the Pier Company, that its use of the pier was a violation of this covenant.

II.

The failure to join the Schmidts as parties complainant or defendant is fatal.

There is no doubt that the complainant is only a tenant in common of the upland he now is interested in. It is well settled that all persons interested in property should be parties so that the final decree will be in fact final. 1 *Pomeroy's Equity Jurisprudence,* 4th Edition, Section 114; *Fletcher* v. *Newark Telephone Company,* 55 Equity 47; *Somerville* v. *Johnson,* 36 Equity 211. So important is this that the matter has been provided for in the rules of the Court of Chancery. See Rules 5 and 6.

Complainant says that in the absence of the point being made by the answer, the Court will

not consider the subject. He refers to *Wilson* v. *American Palace Car Company,* 67 Equity 262. Vice-Chancellor Reed in that case expressly held that an objection for want of proper parties

> "can also be taken on the hearing and the Court may, of its own motion, arrest the suit for want of parties."

Because of the absence in another state of the co-parties over whom it was impossible to acquire jurisdiction, the Vice-Chancellor determined that their presence was not essential. Under such condition of affairs as here exists, there was no difficulty, if the Schmidts would not join as co-complainants, in making them co-defendants. The Court's attention was called to this both on the motion for a preliminary injunction, and at the argument. On a motion for a preliminary injunction, the mere absence of one of the co-complainants might, and should not prevent the Court from administering temporary relief, but when the final decree is made, if the complainant has not amended his bill by adding the party to whose absence attention has already been directed, he should suffer from his default. *Morgan* v. *Rose,* 7 C. E. Green 583; *Kreissl* v. *Distilling Co.,* 61 N. J. Equity 5.

III.

Even if the use by the Pier Company of its pier were a violation of the covenant, it is not a party to the deed, nor is it privy to it.

This pier was there at the time the covenant was made, and as settled by this Court, and the Court of Errors and Appeals in *White* v. *Youngs Hotel & Pier Company,* 78 N. J. Equity 498; affirmed 79 *Id.* 598, structures that existed anterior to and at the time of the making of the easement or park deeds, are not in themselves

violative of the covenants contained in those deeds.

The complainant has no ownership of the land on which the pier stands. What title he had at the time of the ejectment has subsequently been conveyed to the city by an absolute deed. His right to make any objection to a structure erected upon land which he does not own himself, if it be a right, resides in, and depends wholly upon the covenant in the deed which he made to the city. The Pier Company is not party or privy to that deed, but the pier was there at the time the deed was made. No one not a party or privy to such a deed can, in a suit based upon a right arising out of the deed, be held amenable to the restrictions or covenants therein contained.

The deed to the City was not delivered until May 15, the day it was acknowledged by the City. The rights, if any, of McAllister against the City or the Pier Company arise by virtue thereof. The Pier Company had, by the resolution of April 22 (p. 159) procured a license from the City not to interfere with its possession of the pier. It is not shown that the Pier Company had any notice of the contents of this projected deed, and hence cannot be bound by the covenants therein contained. *Hayes* v. *Waverly & Passaic Ry. Co.,* 51 N. J. Equity 346, and cases cited.

For all these reasons, it is respectfully but confidently submitted that the appeal should be dismissed.

ROBERT H. McCARTER and
JOSEPH B. PERSKIE,
Counsel for Respondents, the City of Atlantic City and H. J. Heinz Company.

May Term, 1927.

[Copy of Conclusions of Vice-Chancellor Leaming on Final Hearing.]

IN CHANCERY OF NEW JERSEY.

Between RICHARD MCALLISTER, *et als.*, *Complainants,* *and* CITY OF ATLANTIC CITY, *Defendants.*	*Final Hearing on Bill for Specific Performance and Relief.* *Conclusions.*

Hon. C. L. Cole for complainants.

Jos. B. Perskie, Esq., for defendant.

LEAMING, *V.-C.*

The memorandum heretofore filed herein by me touching the sufficiency of the answer adequately recites the issues tendered by the pleadings. At final hearing all the facts disclosed were in substantial accord with the averments of the respective pleadings except the claim of defendant that complainants know of the plan of the municipality to enter into the pier agreement at the time complainants executed the conveyance to the municipality; that averment of the answer defendant failed to sustain by adequate evidence.

I fully adhere to the views heretofore stated. Specific performance cannot be decreed. This Court cannot by its decree compel the municipality to violate its solemn contract with a third party without that party being heard, and specific performance by the municipality is otherwise impossible.

Nor can the alternative relief of declaring complainants' deed void be awarded. It will

be noted that the habendum declares the nature of the use for which the grant is made but in no way specifically limits its duration. The usual and appropriate method of creating a determinable estate is to insert in the habendum the appropriate language for that purpose, such as, "So long as and no longer." See authorities cited to that effect in *Freeholders, etc.* v. *Buck*, 79 N. J. Eq. 472, and in 18 *Corpus Juris*, p. 352, Sec. 367, and p. 357, Sec. 371. Nor does the language of the habendum in any way suggest that no obstructions to the view shall exist, that element being found alone in the covenant of the municipality, and the obstruction to the view which is now complained of was there when the conveyance was made. The territory conveyed is in fact wholly maintained as a "public park or place of recreation," except insofar as the structure referred to may be thought otherwise as to the extremely limited territory it occupies, and there has been no semblance of an abandonment of the park as such. Nor is there to be found the usual and appropriate words for the creation of a determinable estate in the covenant of the municipality. It is the use and not the duration of the estate that is there referred to; it is in its structural form a mere covenant of the municipality and not a condition subsequent.

But should it be permissible and possible to read into the deed by reason of its obvious purpose a controlling intent which could properly be regarded as the equivalent to an express condition or limitation to the effect that the estate granted was to endure only so long as the property conveyed was maintained as a park and was to then revert to the grantors, I am yet unable to to conclude that the existence of the

pier complained of has been operative as a forfeiture of the grant. The testimony discloses that although the pier structure is privately owned it has at all times been open to free public use for purposes of recreation (see *Sea Isle City Realty Co.* v. *Sea Isle City,* 79 N. J. Law 459) and that it was not only there and similarly used when the grant was made, but for six years thereafter complainants encouraged its existence and to that extent recognized its existence and use as consistent with the terms of the grant, since during that period the structure occupied the lands on which it stood under the express authority of complainants. The pier structure also occupies but a small portion of the territory granted and in my judgment in no way constitutes an abandonment of the general park scheme contemplated by the grant. If the structure is in any way violative of the terms of the covenant damages for breach of the covenant would seem to adequately satisfy any private rights that complainants may enjoy other than specific performance.

Submitted December 29, 1919.
Determined April 30, 1920.