New Jersey Court of Errors and Appeals.

Between— THE CITY OF ATLANTIC CITY, Complainant-Respondent, AND NEW AUDITORIUM PIER COMPANY, Defendant-Appellant.	Cases 15 and 16, June Term, 1904.

SUPPLEMENTAL BRIEF FOR APPELLANTS, upon questions suggested by the Court at the argument, upon which additional reference to the facts and law was requested by the Court.

I.

There is no proof of Loper's intent to convey subject to the agreement of 1896.

It is alleged in the bill of complaint:

> "It was the intention of the said Richard F. Loper and all his said grantees to make the said conveyance [from Loper to the defendant's lessors] not only subject to the second dedication agreement or deed bearing date the thirtieth day of April, eighteen hun-

> dred and ninety-six, but also subject to the said dedication deed made January second, eighteen hundred and ninety " (Case, *p.* 4, *l.* 38-40).

It was so argued by counsel upon the hearing of this appeal.

We submit that such intent is not to be inferred without evidence, either in the conveyances themselves or outside of them. The conveyances are entirely barren of indications of such intent (Case, *pp.* 143, 147). Nothing was brought out in the testimony of Loper or of any other witness that in the remotest degree indicated such intent. On the contrary, the testimony of Loper is that the deeds were drawn by the West Jersey Title Co., to which he delivered the papers for that purpose (Case, *p.* 108, *l.* 27). Presumably they were so drawn as to express his intent. The care with which the transaction was carried through is evidenced by the fact that the title company took pains to execute two separate full warranty deeds of the two parcels in the Loper tract, making the one conveyance, that of the riparian rights, free from all restrictions, and the other, that conveying the upland, subject to the Evans agreement of 1890.

So far as the complainant's case rests upon the presence of such intent it must fail for the want of proof.

II.

The deeds of June 6, were in consummation of the contract of May 4, 1896.

Complainant's counsel, upon the hearing of the appeal, argued that the deeds of June 6, 1896, from Loper to Mary A. Riddle Co. and Brady (Case, *pp.* 143, 147), do not appear to have been in fulfillment of the agreement of May 4, 1896, the grantees named not having been parties to the contract.

That the deeds in evidence were given in pursuance of the contract of May 4, 1896, is specifically testified by Loper (Case, *p.* 105). He further testified in answer to a direct question on the point that the deeds of June 6, 1896, were made at the direction of Mr. Riddle, carrying out the contract of sale (Case, *p.* 108, *ll.* 24, 37, 38). He was not cross-examined on this point and nothing was adduced to the contrary. The point was never raised until the argument of this appeal, and for the purpose of that argument, the connection of the deeds with the contract of May 4, must be taken to be established by the testimony of Loper.

III.

The evidence that the agreement of 1896 was not signed till after May 4, 1896, is conclusive.

This point is fully discussed in the brief already submitted in behalf of the appellant (*pp.* 13, 14). The Vice-Chancellor's finding, that the deed was signed on May 9, is there referred to (Case, *p.* 172, *l.* 34). We submit that the legal presumption that the agreement of 1896 was executed on the day it bears date, April 30, by the light of the testimony there referred to, and the internal evidence of the deed itself becomes absurd. It bears sixty-four signatures (Case, *pp.* 22, 28). It purports to have been acknowledged by all the signers on May 9th (Case, *pp.* 23, 23*a*). That these sixty-four people should have signed the instrument on one day, some of them in Philadelphia and some in Atlantic City (Case, *p.* 68, *l.* 26; *p.* 70, *l.* 5), and should then have all come together in Atlantic City ten days afterward to acknowledge the instrument before the witness Endicott, as the acknowledgments show

they did, is not impossible. In view, however, of Endicott's testimony that the signatures were obtained during a period covering several days (Case, *p.* 67, *l.* 10, *et seq.*), and that the acknowledgments were taken "on that day or prior to that day" (Case, *p.* 66, *l.* 25), the most favorable inference that the complainant can draw from the facts is that the signature of Loper was not later than May 9. The position of his name shows that if he signed this paper, he was far from being among the first to sign.

The testimony of Endicott is clear that the deed was not signed until after May 4th:

> "Q. I understood you to say that this deed was preceded by the ordinance before it was secured? A. Yes" (Case, *p.* 70, *l.* 22).

But Loper testifies that he must have signed the agreement after May 9, 1896 (Case, *p.* 107, *l.* 34), and there is nothing in the evidence to overcome this statement of his. He swears that the paper in evidence is not a copy of the paper he signed, but of a document similar thereto, a printed form having been used for all signers (Case, *p.* 109).

IV.

There is no evidence that defendant's lessor, Brady, executed the agreement of 1896.

Counsel for the respondent in his brief submitted on this appeal says:

> " Also, Joseph A. Brady was himself one of the signers of the same deed signed by Loper, probably in order to bind other property which he then owned " (*p.* 11).

This statement is probably based on the language of the learned Vice-Chancellor in his opinion on the motion for a preliminary injunction where he said:

> "Brady himself joined in the deed to the City, but probably in respect to other lands crossed by the Board walk strip."
>
> Atl. City *v.* New Aud. Pier Co., 18 Dick., 644 (668).

We did not remark upon this point in our main brief for the reason that the question was not argued in the Court below upon final hearing nor was any evidence offered on this point by complainant and the Vice-Chancellor makes no mention of it in his later opinion upon final hearing (Case, *p.* 165, *et seq.*), having apparently abandoned this position as unsound.

The statement indeed would appear to be ill considered since there is no adequate foundation for it in the record. It rests upon an assumed identity between the defendant's lessor and one Joseph A. Brady whose name appears on the agreement of 1896, as offered in evidence (Case, *p.* 22). But there is no proof offered that the Joseph A. Brady who signed the agreement, if such there was, is the Joseph A. Brady to whom the Loper parcel was conveyed nor does the complainant so charge in his bill. Nor is there any evidence that the grantee of Loper had any "other property which he then owned." As above stated, the point was not raised on the trial nor argued below and a mere similarity of names can be no proof of identity of person.

Moreover the evidence regarding the signing of this agreement of 1896 is of such a character that the Court cannot assume from the presence of the name "Joseph A. Brady" on the paper in evidence that any person of that name ever did in fact sign the instrument. The attempt of the respondent to prove that the instrument offered was a copy of an original instrument signed by the sixty-four persons whose names appear on the copy broke down

utterly (Case, *p.* 109). So complete was the failure of proof as to this that the most the learned Vice-Chancellor felt able to find was that Loper

> "Did in fact execute the covenant on one of the printed forms which are all alike" (Case, *p.* 177, *l.* 9).

This is precisely what Loper says he did (Case, *p.* 109, *l.* 11), but this fact is far from lending any appearance of authenticity to an instrument which the proof shows was not and could not have been the one that Loper signed, but which nevertheless bears his name.

V.

The board walk of 1890 was not located upon the premises described in the ordinance and board walk agreements signed by Chas. Evans and others, nor upon the premises described in the map made by Hillman, annexed to and made a part of the board walk agreement of 1890.

It is not true, as contended by complainant, both in his brief and on oral argument, that the board walk of 1890, while not located on the premises described on the map annexed to the board walk agreement of that year, is located upon the premises described in that agreement and provided for by ordinance.

The testimony of John W. Hackney, referring to the tracing map made by Ashmead & Hackney, shows clearly the following to be the facts regarding the location of the board walk of 1890:

First.—That the *yellow* strip marked "Board walk erected in 1890" correctly designates the

actual location of that board walk as erected (Case, *p.* 60, *l.* 31, *et seq.; p.* 62, *l.* 14, *et seq.*).

SECOND.—That the two unbroken lines in *red* which pass over the map from one end to the other represent the 1890 right of way as described in the ordinance and the agreements following that ordinance (Case, *p.* 61, *l.* 11, *et seq.*).

THIRD.—That the two unbroken lines in *orange* located oceanward of the two unbroken red lines correctly designate the right of way for the 1890 board walk as it appears on the map made by M. Hillman, which was annexed to the board walk agreement of that year (Case, *p.* 61, *l.* 16, *et seq.*).

From the testimony of John W. Hackney it appears that:

> "The lines shown on the map accompanying the deeds to the City are some 40 feet further oceanward than the lines according to the description in the ordinance and the description in the deed" (Case, *p.* 62, *l.* 20).

And it further appears by an examination of the tracing map made by Ashmead & Hackney and in evidence in this case that the yellow strip designating the board walk as actually erected in 1890, is not upon either the lands described in the ordinance and the agreements following its description nor upon the lands in the map annexed to these agreements, and further that both the right of way as described in the agreement made by Chas. Evans and others in 1890 and the right of way described in the map annexed to that agreement were below the high water mark of that time (Case, *p.* 60, *l.* 40; *p.* 61, *l.* 1, *et seq.*). But the property of Evans was bounded by the high water line. The riparian rights were acquired by Loper after Evans had parted with his rights to Loper (Case, *p.* 48, *l.* 35). The deed of Evans, therefore, did not describe the

site of the board walk of 1890, and conveyed no interest therein. Moreover, it described property to which Evans had no title and therefore conveyed nothing.

VI.

The mere fact that the agreement of May 4th, between Riddle and Loper, and deeds given in consummation of that agreement, described the property as beginning at a point "two hundred and fifty feet from the line of the new board walk," is not proof that Riddle or the Riddle Company and Brady had any notice of the restrictive covenants on the land outside the board walk.

It is contended by counsel for the respondents, both on his oral argument and in his brief, that the fact that the property sold on the 4th of May by Loper to Riddle, and subsequently deeded to the Riddle Company and Brady, was described as beginning at a point two hundred and fifty feet from the new board walk, constituted notice of the restrictive covenants on the land outside.

We contend that this is not so. It is admitted that the new board walk was in process of construction across the Loper property prior to the agreement of May 4th, and the re-location of the board walk, at that point, was well known to both Loper and Riddle, neither of whom had any objection to it. It is only reasonable, therefore, to assume that if the parties wished a monument of any permanency by which to bound the property, they would adopt the new site of the walk instead of the old one, as it was of common knowledge that the old

walk would be destroyed as soon as the City had completed the re-location.

Moreover, an examination of the contract and addendum clearly shows why the board walk was a necessary monument by which to bound the property. What Riddle was buying was frontage on the board walk, and this frontage was a basis on which the parties arrived at the price to be paid for the property—$140,000 for 150 feet frontage, and a reduction of $22,499.91 in case the purchaser could not use the entire 150 feet front. This is clearly an attempt to provide for a proportionate rebate on the purchase price in case the Evans 27 foot restriction was found to be binding on the purchaser after an examination of the title. It would therefore appear that the re-located walk was a necessary monument not only for the purposes of location, but also as determining the price of the property. The fact that the parties bounded the property by the new board walk can in no wise be said to indicate that they had notice as to the restrictions on the land outside.

It cannot be argued that the mere moving seaward and re-location of the old board walk gave any notice that the City would subsequently claim certain rights in the lands oceanward.

It was well known that the old walk of 1890 was built along the water front in an arbitrary fashion by the City, and that a large number of the beach front owners had never signed any agreement giving the City that right (Case, *p.* 45, *l.* 13, *et seq.*). It was also known that the old board walk had never been erected on the line as laid out by the City Surveyor at that time, and that there had been a movement on foot to re-locate the walk and straighten it in many places along the water front.

The parties could justly assume that the building of the new board walk was a re-location under the terms of the agreement of 1890 itself, for the reason that the agreement provided that, whenever the high water mark should be three hundred feet fur-

ther seaward, the City should, on the request of the beach front owners, move the walk further seaward (Case, *p.* 153, *l.* 13, *et seq.*), and, as a matter of fact, the extensive gains of the beach by accretion along this particular part of the shore was one of the causes of the re-location of the walk, as the high-water mark was then, in 1896, some two hundred and fifty feet outside of the board walk of 1890 as constructed (see tracing map made by Ashmead & Hackney).

The Vice-Chancellor himself says, in his opinion in this case, in 18 Dickinson, at page 663:

> "An inspection of the deeds above referred to shows, beyond dispute, that one of the objects sought in making the deed of the owners at the ocean front to Atlantic City was a re-location of the board walk. Some portions of it laid in satisfactory locations, other portions laid in unsatisfactory places. The face of the deed shows what was desired, and its legal effect accomplished the intended result. The purpose sought and accomplished was the continued maintenance of the board walk in places where it was satisfactorily located, the abandonment of the inconvenient portions, and their return to the possession of the grantors or their assigns, and the establishment of it in the new places, which were substituted for the ill-placed portions surrendered to the grantors. There never was, in fact, in law, or in intent any abandonment of the continuity of the easement for a board walk.
>
> The legal operation and effect of the whole transaction was a re-location of the site of the easement by the acts of all the parties interested."

It cannot, therefore, be contended that the knowledge of the re-location and straightening of the old board walk and the erection of it at other points than those originally occupied by it, could affect the parties with notice of restrictions in any new agreement which they had never seen or signed, particu-

larly as it was known that the City built a continuous walk in 1890, whether they had the consent of the owners or not (Case, *p.* 45, *l.* 13, *et seq.*).

The question of how far the existence of the board walk is notice of the restrictive covenants on adjoining lands is fully discussed in the brief already submitted in behalf of the appellant (*pp.* 21-23).

VII.

There was no warrant of law for complainant's attempted restriction on the beach front property.

In *Mitchell* v. *D'Olier*, 68 N. J. L., 375 (380), it is said:

> "The 'right of way' of a railroad company and the right to divert water, as held by an aqueduct company, stand upon a footing of their own; such rights being, by express legislative sanction, annexed to the franchise in whose aid they are held."

The language there used is distinctly applicable to the present case, for it indicates the limitations upon the power to create or enjoy such an easement as annexed to a legislative franchise, to wit: that it must be created and enjoyed "*by express legislative sanction.*" This point is referred to in our original brief (*p.* 17), but in view of its importance as developed upon the argument, the provisions of the statutes applicable thereto, and of the ordinance under which the proceeding for the relocation of the board walk was instituted are given more in detail.

The first statute authorizing the location of streets, walks or drives on the beach front by municipalities located on the ocean was Chap. CXXIX.,

L. 1889, which prescribed the manner of acquiring rights to the land occupied, as follows:

> "That where in any such city, an ordinance has been duly passed and approved for this purpose * * * it shall be the duty of the city counsel, or other principal law officer of such city, on behalf of such city, to make application to the Circuit Court of the county wherein such city is situate, for the appointment of three commissioners to estimate the damages and benefits which the opening, laying out, construction or improvement of any such street walk or drive will occasion."

A later and supplemental statute, Chap. CVII., L. 1890, provided:

> "That it shall and may be lawful for the *common council or other governing body* of any such city to accept any dedication of lands or rights which have been or may be made for the purpose of enabling such city to open and lay out any such street or streets, drive or drives, for the purpose of constructing any such walk or walks, or for the purpose of making any such improvement in or to the same."

Chap. 5, L. 1896, provides for the re-location of existing walks and the surrender of existing sites upon the acquisition of new ones. It adds nothing to the previous statutes as to the manner of proceedure.

It is seen, therefore, that the powers delegated to a municipality by the statutes were definitely circumscribed. It was authorized to proceed:

1. By condemnation.

2. By acceptance of dedications acting *through its common council or other governing body.*

By the ordinance of May 4, 1896, the city through its council elected which course it would pursue and

directed the City Solicitor to proceed by condemnation (Case, *p.* 26). Certainly until this ordinance was repealed or superseded, there was no authority to proceed otherwise. Acceptance could be made only "*by the common council or other governing body.*"

The latter course was adopted by the City on June 8, 1896. But this we contend was too late, as it *post* dates the defendant's deeds of June 6. The distinct direction of the statutes as to the manner in which acceptance of any dedication should be made, effectually disposes of the argument that the building of the board walk upon the land was itself an acceptance.

All of which is respectfully submitted.

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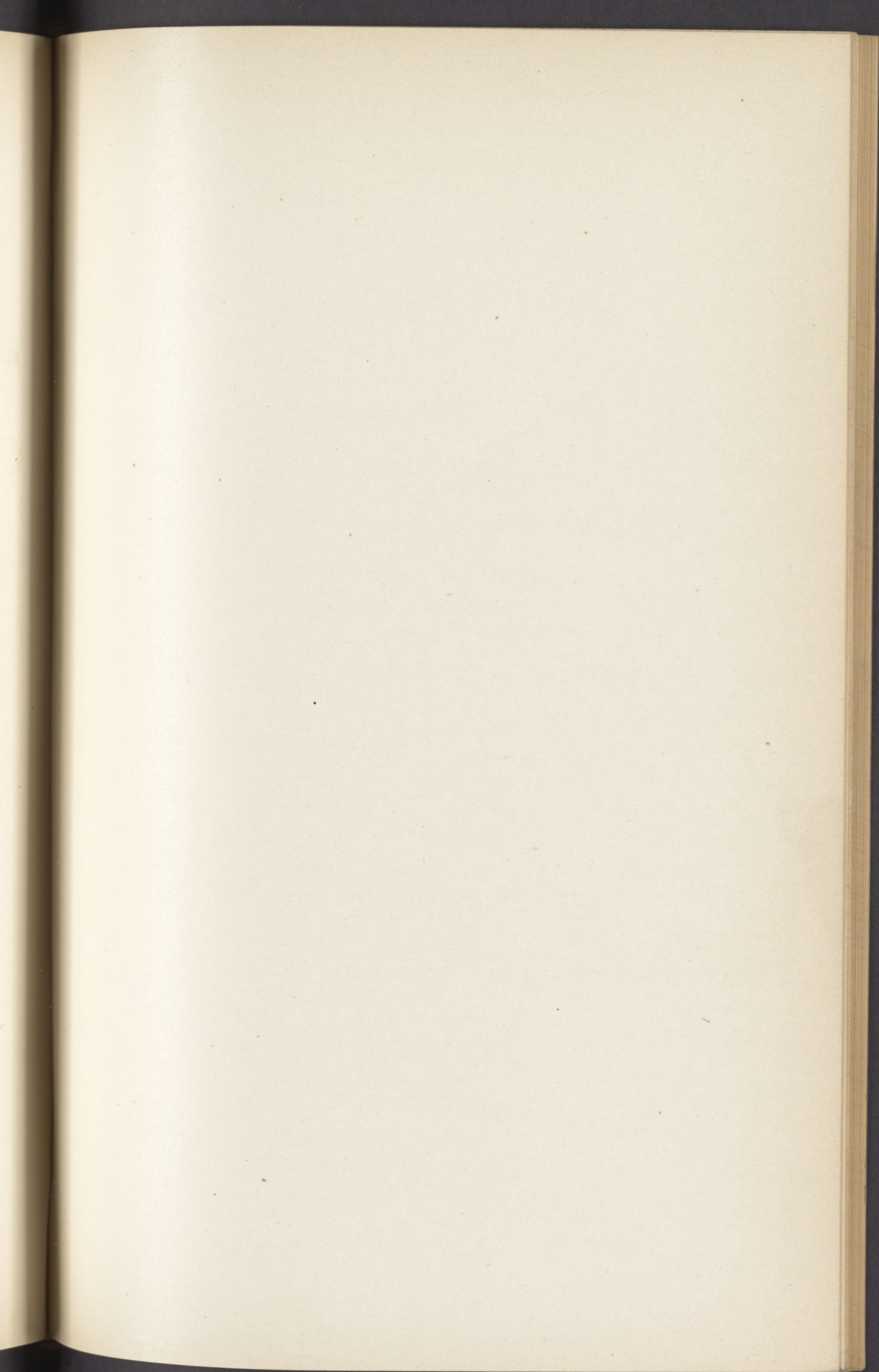

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New Jersey Court of Errors and Appeals

Between ATLANTIC CITY, *Complainant and Respondent,* *and* NEW AUDITORIUM PIER COMPANY, *Defendant and Appellant.* ——— *Between* CHARLES EVANS, *Complainant and Respondent,* *and* NEW AUDITORIUM PIER COMPANY, *Defendant and Appellant.*	*On Appeal.*

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20

SUPPLEMENTAL BRIEF FOR RESPONDENTS.

I.

30

LOPER'S GRANTEES WERE CHARGEARLE WITH NOTICE OF THE NEW BOARDWALK AND OF THE AIDING COVENANTS IN THE CITY'S DEED THEREFOR, RELATING TO LANDS OCEANWARD.

The conveyance by Loper to Riddle Company and Brady, for the upland, dated June 6, 1896 (Ex. C. 2 and Ex. D. 2), conveyed premises beginning 250 feet to the landward of the new boardwalk, and extending across and including the sites of the old and new boardwalks, to high-water line of the ocean.

40

The beginning point in the description refers to the new boardwalk.

The alleged agreement by Loper with Riddle, dated May 4, 1896, was for the same premises. It was across this land that the new structure was being erected on April 30, 1896, the date of the city's easement deed, under the terms of that deed.

The lands now held by the defendant under lease, lying oceanward of the new boardwalk, were included
10 in that conveyance, and were not separated from the remainder of the tract until January 2, 1899, when Riddle Company and Brady made the lease to Thomas U. Parker, (Evans case, p. 31), which lease is now held by the defendant.

The boardwalk had then been in use for the purposes for which it was designed, for nearly three years, and the city's deed had been recorded.

20

II.

Defendant's rights are not enlarged by reason of the agreement of May 4, 1896, by Loper with Riddle.

(1). The case shows that the city's deed was dated April 30, 1896, and acknowledged May 9. The acknowledgment does not fix the time of its execution. In the absence of proof to the contrary the presumption is that deeds were executed on their date. The
30 evidence of Judge Endicott is very uncertain as to the exact date of the execution or of the acknowledgment. It may have been, and probably was, executed prior to its acknowledgment, at one of the public meetings held by the owners.

Loper was a party to the plan in pursuance of which this deed of April 30, 1896, was executed. He referred to this new boardwalk in his agreement with Riddle, as well as in his deed. The fact that the city had prior to April 30 built the new boardwalk up to
40 this property, and was then building this expensive

structure over the property in question, shows that the deed was probably signed at that time. Whether it was signed then or not, Loper knew of the plan and had consented to it, and effectively dedicated it to public use for the purpose of an ocean boardwalk, and could not by any contract with Riddle give him any superior rights to those which he himself possessed, as against the city or other owners, in relation to the open and notorious structure then being erected, and all incidents 10 reasonably apparent therefrom as to the lands oceanward, considering its surroundings, structure, purpose and location, and the existence and use of the old walk for the same general purpose. Inquiry from any beach owner, on May 4th, such as Riddle was bound to make, would have shown the plan to its full extent. It was a matter of common knowledge.

(2). Under the easement deed of April 30th, both the city and the owners who joined in the plan were bona fide purchasers for value, without notice, as 20 against Riddle's rights under his agreement, and the structure being well advanced on May 4th, the date of Loper's agreement with Riddle, the latter was chargeable with notice of the city's rights under the agreement and easement deed executed in pursuance of it, both to the strip and lands oceanward, necessary to its use.

The consideration moving from the city is stated in the easement deed to be "the benefit and advanatge to be derived by the parties of the first part by the 30 laying out of said street and building said steel walk, and in consideration also that the lands of the parties of the first part will not be condemned, as is provided by the act of Legislature." The owners were also given the right to connect with the boardwalk on the landward side. The city also agreed not to grant a right of way over the strip to any street railroad, and covenanted that the walk should be moved oceanward 300 feet or less at the request of grantors owning three contiguous squares, whenever land should be 40

formed by accretion. If the city had condemned the strip it could not have been so moved, and valuable rights thus secured to the owners by the deed would in such case have been lost to them. By the Park Act of 1894 (P. L., p. 146) the city had power to condemn and remove all structures from the lands oceanward of the boardwalk, and keep the entire property oceanward free from any structures.

The consideration so far as the owners were con-
10 cerned was the mutual agreement between them, and surrender of their private rights for the common benefit.

There is no pretense that either the city or any of the other owners had either actual or constructive notice of the alleged agreement by Loper with Riddle. Riddle neither took possession nor recorded his agreement. The statute (Revision, Vol. 1, p. 857, Sec. 23), provides that such agreements may be recorded, and makes the record notice from the date of recording.
20

III.

Defendant failed to prove that it possessed whatever rights Riddle had under the agreement of May 4, 1896.

In order for the defendant to avail itself of the position of Riddle under his agreement, whatever his rights might have been, it was bound to show that it
30 became possessed of such rights.

The answer says (paragraph 7) that the deed was made to Riddle Company and Brady "at the direction of said Riddle." There is no evidence from Riddle that he ever so directed, nor was any assignment of the agreement proved. The only evidence on this point is that contained in the testimony of Loper. His counsel asked him a question on this subject (Evans case, p. 103) which was not only leading but contained the whole answer. Notwithstanding this
40 Loper did not answer this question directly. He

never testified directly that Riddle's contract had been assigned to Riddle Company and Brady. There is nothing to show that he had any knowledge on that subject. There is merely a possible inference of such assignment from the fact that he made a deed to Riddle Company and Brady instead of to Riddle personally. This falls short of proving the allegation in the answer, that the deed was made at the direction of Riddle.

10

IV.

DEFENDANT IS NOT ONLY CHARGEABLE WITH NOTICE OF THE RIGHT OF THE CITY TO ERECT THE NEW BOARDWALK, BUT ALSO OF AIDING COVENANTS AS TO THE LANDS OCEANWARD.

At the argument defendant's counsel insisted that whatever the city's rights might have been as to the strip, on which the boardwalk was being built, as defendant's title under the leasehold interest held by them was only to the oceanward line of the boardwalk they were not chargeable with any covenants relating to the premises held by them, the boardwalk not being located on any part of their lands. 20

This matter is referred to in paragraph 1, above.

Defendant is chargeable with notice of all that Loper's grantee, its predecessor in title, was chargeable with, for the reasons above stated, in paragraph 1.

The old walk built in 1890 was in constant use by a large number of people at the season of the year (May and June) when Loper made his agreement and deed. It was being gradually supplanted by the new walk. The new walk was referred to in both the deed and agreement. In this condition of affairs, Loper's grantees were bound not only by what they would have discovered on any reasonable inquiry as to the nature and extent of the city's rights, but could actually see, from the physical conditions existing, that there must necessarily be some provision, in the plan 30 40

under which both the old and new walks had been and were being built, for keeping the lands oceanward practically free from obstructions; otherwise neither the old nor the new walk would be of any use whatever as an ocean boardwalk. It had not the appearance of an ordinary street. It extended for several miles along the ocean front of the central portion of the city, and was evidently a public thoroughfare of a peculiar kind, constructed and controlled by the city
10 for a peculiar purpose. On the landward side it was closely built up, but on the oceanward side it was almost entirely unoccupied. There were only two piers on the whole front. This was evidence and notice, if any were required, of the use and purpose of these walks, and of their natural requirements for the purposes for which they were built, and that there were probably covenants and restrictions of some nature as to the lands oceanward, sufficient to put a man of ordinary prudence upon inquiry which would
20 fully inform him on the subject. The boardwalk ordinance had been introduced on April 13, and was passed on May 4th.

Defendant now attempts to separate the lands leased by it, to the oceanward of the boardwalk, from the other lands over which the walk was constructed. No subsequent conveyance or lease of this portion of their lands by Loper's grantees could confer upon their successors in title any greater rights or immunities than they themselves possessed. They were cer-
30 tainly chargeable with notice, and could not release any portion of their lands from the legal effect of such notice.

Defendant is also bound by the acquiescence of Riddle Company and Brady, from 1896 to 1899 (the date of the lease to Parker), in the building of the new boardwalk by the city and use of it by the public as an ocean boardwalk, with full knowledge of the attending covenants, and also by the recognition of the covenants, by the Auditorium Pier Company, in
40 building its pier of iron and making it 1,000 feet long,

thus conforming to the permissive clause in the city's deed, and by the connection of the Auditorium pier with the new boardwalk and use of the same as a means of access to the auditorium; thus enjoying the benefits mentioned in the deed as the consideration for its execution.

V.

Riddle Company and Brady had actual notice of the city's deed. Brady himself was one of the signers of the same deed signed by Evans, Loper and others, offered in evidence; the deed shows that his acknowledgment was taken on the same day that a great number of the signers acknowledged it.

VI.

By the deed of April 30, 1896, an easement was created in favor of the city, and held by it in trust for the public. It was not necessary that the word "grant" should appear in this instrument in order to create an easement. It may be acquired by contract where, from the nature of the subject matter, it is evident that the parties intended that privileges designed for the permanent use of the property should form an incident of the principal contract.

Jones on Easements, Sec. 104.

Although such agreement may be a mere personal covenant, which neither runs with the lands nor binds the alienee at law, it would be enforced against the alienee in equity, when he was chargeable with notice of the contract.

Brewer v. *Marshall*, 4 C. E. Green, 537 (544), and cases cited in the opinion.

In the above case the only reason why it was held not binding was that the agreement in question was in restraint of trade.

(See *Jones on Easements*, Sec. 107).

Even if the agreement amounted merely to a license, being founded upon a valuable consideration it was irrevocable, the city having incurred expense under it, and there being a mutual agreement to do other acts, which were fully performed by the city.

Jones on Easements, Sec. 78.

10 VII.

If the defendant's contention that he is not bound by the easement deed and the covenants contained therein be correct, the whole boardwalk, or any part of it, could be rendered almost entirely useless at any time; certainly so far as any sea view from it is concerned. Defendant contends that the record of the easement deed is invalid, and it is therefore not constructive notice; also that the existence of the boardwalk is not notice of any covenants affecting lands to 20 the oceanward. If this be so, any owner could now sell his lands oceanward of the boardwalk to a *bona fide* purchaser not having actual notice of the easement deed and its covenants, and such purchaser could build any kind of structure at any point on the lands so purchased, and thus practically destroy the usefulness of the boardwalk. The effect of this would be to deprive all the other owners, including the complainant, of the chief element of value in the boardwalk. Its value to the property both oceanward and land- 30 ward of it depends almost entirely upon its attractiveness to the persons who resort to it for the purpose of viewing the ocean.

VIII.

Objection is made upon the ground that the 1890 walk was not located on the land described in the deeds of that date.

This matter is discussed in the original brief for 40 respondents.

The respondents claim that unless the deed of 1896 became effective the provisions of the 1890 deed were not and could not be changed by any action of the city, and that the covenants and agreements in those deeds were and are effective down to the point of highwater line as it existed when the bill was filed, and not as it existed in 1890.

Each owner charged his lands, not strictly to high-water line as it existed in 1890, but to the whole extent of his title, which would carry it to the point to which his title or boundary line might afterwards extend by reason of natural and imperceptible accretion.

There is no reason why the covenants in the 1890 deeds should be limited to the high-water line as it then existed. The owner's boundary line on the ocean, and also the boundary of the State's riparian lands, were moving lines, and were both subject to changes by natural accretion or reliction. This matter is discussed, and authorities cited in respondent's original brief, section VI, as to its application to the 27-foot restriction in the deed from Evans to Loper. It also applies to this 1890 easement deed.

Not only did the owners bind the upland owned by them at that time, but also the riparian lands afterward acquired by any of them, or their grantees with notice of these covenants, for the reasons following:

In the case of *Hoboken* v. *Pennsylvania R. R.*, (124 U. S., 656), the city, claiming in the right of the public, claimed that streets extending to the former high water line, and which were laid out by Col. Stevens, the former owner of the upland, were extended by estoppel to the new line established by filling in over riparian lands granted by the State to the defendants, who were Stevens' grantees. The city claimed, not that Stevens' dedication could impose a burden on the State's lands, but that when his grantee acquired the State's rights such grantee was estopped from denying that these streets extended to the new water line. The court held that if Stevens had made an express covenant with the city, that when he acquired the

State's title he would continue the streets to the new water line, it would bind him and his assigns; but that the dedication, to have the same effect, would operate only on the principle of estoppel; that if it were admitted that an estoppel would arise from the dedication, so that if Stevens' grantee had acquired title from any other source than the State the lands so acquired would have been affected by the estoppel, yet the estoppel could not apply to the defendants, as
10 successors of the State's title, because the State's grant created an estoppel against an estoppel; for the State, as the representative of the public in respect to the easements claimed, was superior to the city of Hoboken; that the easement would defeat the absolute grant of the State, as the representative of the public, and the public, by reason of the State's absolute grant, was estopped to deny the estoppel created by its grant, and its action bound the local authorities asserting the public right; that the estoppel was a mere con-
20 clusion of law, and might be extinguished by a subsequent law, so far as the public rights were concerned.

It is apparent, and the opinion practically so states, that this decision would not apply to the case of individual citizens claiming under deeds for lots on streets made by Stevens or his grantees.

The cases at bar are essentially different from the Hoboken case above cited. The right of Atlantic City to enforce the restrictions of the 1890 deed as against
30 the riparian lands arises not only by estoppel but from the express covenants on the part of the land owners. They agreed (Evans case, p. 177) that neither they nor their heirs nor assigns should erect "on the lands hereby granted *or on the ocean side thereof* any building or structure except as above provided, and that this covenant shall attach to and run with the lands and premises hereby granted and the lands on the ocean side thereof," etc.

Even if the public, represented by Atlantic City,
40 may be held to be estopped by the State's absolute

grant, under the authority of the Hoboken case, Evans was not so estopped to set up the estoppel created by the 1890 deeds. If it be considered that the covenants could not as such bind the owners of the upland or their grantees, as to riparian lands afterward acquired by them, their covenants did operate as an estoppel as to such lands. The 1890 deed was a mutual contract between all the owners, containing the provision above quoted. The extent of the covenant was not limited in terms to the lands then owned by them, 10 but its terms applied to all lands oceanward of the boardwalk, and must have been intended to so apply, so far as the signers or their grantees were concerned, in order to make it effective for the purposes for which it was designed. The deed shows (Evans case, p. 174), that it was intended by the parties that there should be no buildings on the oceanward side of the boardwalk "to the end that there shall be an unobstructed prospect from the board or plank walk to be erected on said lands, oceanward, except such open 20 pavilions as the city council may upon application allow." It is thus apparent that the covenants were intended to extend beyond the confines of the lands then owned by the signers. All such lands as were contemplated will be bound by these covenants, in the hands of the signers or their grantees, although there was here no conveyance by warranty. The intention of the parties governs, without reference to the form of words used.

See— 30

Herman on Estoppel, Vol. 2, Secs. 646, 647.

The deeds were founded upon a consideration, as between themselves, of surrender of individual rights for the common benefit. The plan was fully performed, and the owners and their grantees accepted the benefits thus conferred, and are bound by these covenants unless those contained in the 1896 deed became substituted and released the former covenants by operation of law. The city had no power to release 40

the public rights unless the 1896 deed did become effective. There is nothing in the case to show that the owners waived their rights as between themselves under the 1890 deed, except from implication by substitution of the provisions of the 1896 deed.

IX.

10 It was not necessary that the deed of April 30, 1896, should have been signed by every owner at that time, in order to be binding upon the ones who did sign. The deed does not so provide. No time was fixed within which the signatures of all, or of any particular number, should be obtained. New signatures were and are constantly being obtained. The intention was that the scheme should be put in practical operation by obtaining signatures of enough owners to effect the main purpose, and that it should be made as 20 effective as possible, as soon as this could be done. The conduct of the owners should be regarded as construing their agreement among themselves and with the city. They did not wait until all the signatures were obtained, but the city at once built the walk, at great expense, and the owners received the benefit of it and still continue to enjoy it. They should not now be heard to make the objection that a comparatively few owners have not yet signed the deeds. The walk is a practical success, and furnishes 30 the facilities which the owners who signed were desirous of obtaining.

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Counsel for Charles Evans.

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Counsel for Atlantic City.

B. C. GODFREY,
Of Counsel with Respondents.

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New Jersey Court of Errors and Appeals.

Between

THE CITY OF ATLANTIC CITY,
Complainant-Respondent,

AND

NEW AUDITORIUM PIER COMPANY,
Defendant-Appellant.

BRIEF FOR APPELLANT.

The subject of controversy in this suit is a certain clause contained in a written agreement made between the City of Atlantic City and the defendant's predecessor in interest, about the 9th day of May, 1896. The question involved is its effect as binding or not on this defendant.

The clause is as follows:

> "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, *the said parties of the first part, 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 provided by ordinance*, and the 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 structure 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 or assigns" Case, *p.* 20).

The entire agreement is printed in the record (Case, *pp.* 15–23*b*, Exhibit I).

The instrument bears date April 30, 1896 (Case, *p.* 15, *l.* 31), and purports to have been acknowledged by Richard F. Loper, defendant's predecessor in interest, on the 9th day of May, 1896 (Case, *p.* 23, *l.* 35). The evidence shows that it cannot have been executed earlier than the 9th of May, 1896 (Case, *p*, 107, *l.* 34; *supra*, *p.* 13).

Richard F. Loper, by whom as owner of the property affected the agreement was executed, held title to a portion of the premises under a deed from one Charles Evans, dated July 22, 1895, which conveyed so much thereof as lay above and was bounded on the ocean side by the high-water mark of that year,

> "Subject also to the easement or right of way over sixty feet of the above described land granted by the said Charles Evans and wife to the City of Atlantic City, by indenture dated January 2, 1890" (Case, *p.* 140, *l.* 20, *et seq.*).

On August 29, 1895, Loper procured from the Riparian Commission of the State of New Jersey a deed of the interest of the State in and to all the

lands below high-water line, adjoining the parcel above conveyed (Case, *p.* 148, *l.* 16, *et seq.*).

The agreement of 1896, so far as it provided for a relocation of the boardwalk, affected only that portion of the property of Loper which he took by deed from Evans, upon which property the new boardwalk was to be erected. So far as the agreement purported to restrict the use of land oceanward of the boardwalk, it affected all the land, title to which was vested in Loper at the time he signed the agreement.

On May 4, 1896, and before signing the above agreement, Loper entered into a contract for the sale of the property claimed to be affected by the said agreement, to one William Riddle, under whom defendant claims, and $1,000 was paid at the time under said contract (Case, *pp.* 101, 104).

In consummation of said contract, on June 6, 1896, two deeds were executed by Loper and wife to Mary A. Riddle Co. and Joseph A. Brady.

The former of these deeds conveyed the portion of the Loper parcel covered by the deed of Evans,

> "Under and subject also to the easement or right of way of the City of Atlantic City over the portion of said property granted to said City of Atlantic City for the boardwalk as granted by Charles Evans and wife by indenture dated January, 2, 1890" (Case, *p.* 144, *l.* 20, *et seq.*).

The latter of these deeds conveyed the portion of the Loper parcel covered by the deed of the Riparian Commission, and contains no mention of any restrictive covenant or other burden upon the land (Case, *p.* 147).

Although the boardwalk agreement of 1896 is dated April 30, it was not until May 4, 1896, that the City Council of Atlantic City passed the ordinance fixing the site of the boardwalk as described in said agreement. This ordinance was approved on May 6, 1896 (Case, *p.* 24, Exhibit II.; *p.* 30).

As early as April, 1896, the City had entered upon the Loper parcel and had begun thereon the erection of the steel structure to support the boardwalk. This substructure was substantially completed on the 29th day of April, 1896, and before the ordinance above mentioned was passed (Case, *p.* 46, *l.* 5).

By the terms of the agreement of 1896, it was provided that the City's acceptance thereof should be evidenced by a resolution or ordinance passed by its Council for that purpose, and that the agreement should become binding after such acceptance and recording by the City (Case, *p.* 21, *l.* 8).

On June 8, 1896, the City Council passed the resolution accepting and ratifying the agreement. This ordinance was approved on June 10, 1896 (Case, *p.* 44, *l.* 22).

On June 10, 1896, the deeds of Loper to Mary A. Riddle Co. and Brady were recorded (Case, *pp.* 143, 147).

On June 16, 1896, the agreement signed by Loper was placed on record by the City (Case, *p.* 24).

For convenience of reference, the various dates above mentioned are tabulated as follows:

RIDDLE'S TITLE. 1896.	CITY'S CLAIM. 1896.
	April 29. Boardwalk in process of construction.
	April 30. Date of Boardwalk Agreement.
May 4. Contract of purchase.	May 4. Ordinance relocating Boardwalk passed.
	May 6. Ordinance approved.
	May 9. Boardwalk Agreement of 1896 executed by Loper.

June 6.
Deeds from Loper to Riddle Co. and Brady executed and delivered.

June 8.
Ordinance accepting Boardwalk Agreement passed.

June 10.
Deeds from Loper to Riddle Co. and Brady recorded.

June 10.
Ordinance accepting Boardwalk Agreement approved.

June 16.
Boardwalk Agreement recorded.

POINTS.

The Boardwalk Agreement of 1896 is insufficient in itself to operate as contended by the complainant. The restriction sought to be imposed on the beach front is a nullity.

FIRST.

The agreement of 1896 is insufficient to convey an interest in the lands in question to the complainant herein.

1. The operative words of the instrument are not such as will pass an estate in land. The words are

> "*It shall and may be lawful* for the party of the second part * * * *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" (Case, *p.* 17, *l.* 22, *et seq.*).

An absence of operative words has often been held to be fatal to the intent, although clearly evidenced, to convey an estate in lands, notwithstanding the deed was otherwise formally complete.

Webb *v.* Mullins, 78 Ala., 111.
Johnson *v.* Bantock, 38 Ill., 112.
McKinney *v.* Settles, 31 Mo., 541.

2. The instrument begins "this agreement" (Case, *p.* 15), and thereby itself negatives the contention that it was intended to operate as a grant of lands.

3. It provides that under certain conditions and upon the request of the contracting beach owners, the walk may be removed at any time and reconstructed on another site (Case, *p.* 20). This provision is utterly inconsistent with a grant in land. An interest in real estate the *corpus* of which may be shifted at the will of another cannot be construed as a grant.

The most that this instrument can be construed to confer is a *license* in the boardwalk strip, a mere personal privilege, which involves no interest in the lands affected.

Wiseman *v.* Lucksinger, 84 N. Y., 31.
Kronkhite *v.* Kronkhite, 94 *Id.*, 323.

SECOND.

The agreement of 1896 is insufficient to create an easement.

1. What has been heretofore said regarding the insufficiency of the instrument to create an estate in lands is directly applicable here, for without the

words necessary to create such an estate there can be no easement. It is to be observed that this is a case where the same instrument that creates the easement claimed, creates also the estate, if any, that is vested in the party claiming the easement.

> "A claim for an easement must be founded on prescription or a grant by deed, for it is a permanent interest in another's land."
>
> Wolfe *v.* Frost, 4 Sandf. Ch. (N. Y.), 72 (91).

2. There can be no easement *to restrict the use of real property* unless it be for the benefit of an estate in lands, to the enjoyment of which the easement is appurtenant. But since the instrument under which the City claims created no estate, it can have given rise to no easement.

> "The essential qualities of easements are these: * * *. There must be two distinct tenements, the dominant to which the right belongs and the servient upon which the obligation rests."
>
> Wolfe *v.* Frost, 4 Sandf. Ch. (N. Y.), 72 (89).
>
> Pierce *v.* Keator, 70 N. Y., 419 (421).
>
> Washburn on Easements and Servitudes, 4th Ed., *p.* 3.

> "It is hardly necessary after the above definitions to add that the existence of two distinct and separate estates or tenements is implied in the existence of an easement."
>
> Washburn, *p.* 8.

> "These being interests in land, can only be acquired by grant, and ordinarily by deed, or what is deemed to be equivalent thereto."
>
> *Id.*, *p.* 18.

A license, therefore, "to use, occupy and enjoy" the boardwalk strip, if such was conferred by the agreement of 1896, involving no interest or estate in

lands, cannot support an easement in adjoining property for its benefit, in the nature of a restriction such as is claimed to be imposed by the agreement of 1896.

While it is true that a covenant may create an easement constituting a burden that runs with the land, the courts enforce such covenants only in cases when they are imposed for the advantage of other neighboring lands of the covenantee. In a word there must be a servient and dominant tenement, a fact which bring covenants enforceable against the lands into close analogy with true easements.

Brewer *v.* Marshall, 18 N. J. Eq., 337; *cases cited.*

The covenantee here having no possible interest in the lands, a court of equity will not enforce this covenant against the defendant, especially since their lessors and predecessors in interest were *bona fide* purchasers for value.

THIRD.

If the restrictive clause in the agreement of 1896 be construed to be a covenant, nevertheless it is not one which binds the defendant.

There is no privity either of estate or contract between the defendant and complainant. The complainant having no estate in the lands affected by the agreement of 1896, there can, of course, be no privity of estate between the parties to the action. There is no privity of contract, because the defendant was not party to the contract.

Bouvier's Law Dict., *tit.*, Privity.

Where there is no privity of estate between the covenantor and the covenantee or their assigns, the covenant does not run with the lands to bind the purchaser thereof, but is a purely personal one, enforceable only against the covenantor.

Spencer's Case, 5 Coke, 16; I. Smith's L. C.

Savage *v.* Mason, 3 Cush., 500.

Kettle River R. Co. *v.* Eastern Ry. Co., 41 Minn., 461 (471).

"It is not sufficient that the covenant is concerning land, but to make it run with the land there must be a privity of estate between the covenanting parties, and the covenant must have relation to an interest created or conveyed."

8 Am. & Eng. Encyc. of Law, 2nd Ed., *p.* 147.

"To charge land with the burthen of a covenant there must be some privity of estate between the covenantee and the assignee of the lands so burthened, or he will not be charged with the covenant. This was so laid down by the Court in delivering their opinion in Bally *v.* Wells, 3 Wilson, 29: '*There must be always a privity between the plaintiff and defendant to make the defendant liable to an article of covenant.*' The reasoning of Lord Brougham in Keppell *v.* Bailey, in 2 Mylne & K., 517, is founded upon and illustrates this principle; The decision of the Supreme Court of Massachussetts in Hurd *v.* Curtis, 19 Pick., 462, is expressly placed upon the ground that there is no privity of estate between the plaintiff and defendant. The covenant was between the owners of mills on the same stream as to the use of the water in their respective mills; it was drawn to bind their assigns. The defendant was assignee of the mill of one of the covenantors. It was held that he was not bound, as there was no privity of estate between him and plaintiff. See also Plymouth *v.* Carver, 16 Pick., 183."

Brewer *v.* Marshall, 18 N. J. Eq., 337 (343).

"In order to make a covenant run with the land of the covenantor and bind his heirs and assigns, *the covenantee must, according to all authorities, have such an interest in that land as to amount to a privity of estate between the parties to the covenant.* * * * An interest in the nature of an easement *in the land which the covenant purports to bind*, whether already existing or created by the very deed which contains the covenant, constitutes a sufficient privity of estate to make the burden of a covenant *to do certain acts upon that land* for the support and protection of that interest and the beneficial use and enjoyment of the land granted, run with the land charged."

Bronson *v.* Coffin, 108 Mass., 175 (180).

It will be noted that there must be in the covenantee, an *estate in the lands to be bound*, which we contend is lacking here.

FOURTH.

The agreement of 1896 is insufficient to create a license in the premises sought to be restricted.

A license is a privilege *to do some act* upon the lands of another without possessing any estate therein.

Jones on Easement, § 63.

Only in so far as the instrument therefore seeks to confer the right to maintain a boardwalk can it be regarded as a license. *The restriction upon the use of the adjoining property, involving no positive privilege or right to do an act, is in no sense a license.* It cannot, therefore, be supported by the argument that the license conferred by the agreement became irrevocable upon the building of the

walk by the City. This may be true as to the rights conferred in the boardwalk strip, in which the defendant is not interested and with which it has nothing to do. But whatever rights were thus acquired by the acts of the City, they must be confined to the lands actually occupied, since it is only to these that the license extended.

The equities of the defendant are superior to any rights which the city could have acquired under the Boardwalk Agreement of 1896.

FIFTH.

By the agreement of May 4, 1896, the equitable title to the property vested in Riddle, and Loper became in equity a trustee.

It has long been held in this State that the vendor of an estate is from the time of his contract a trustee for the purchaser.

> Hoagland *v.* Latourette, 1 Gr. Ch., 254–256.

The question is discussed in *Toothe* v. *Bryce*, 5 Dick. Ch., 589 (609), where the rule is laid down that the complainant is clearly entitled to have the premises in the condition in which they were at the time he made the contract. His right to them vested at that date. The familiar rule in equity is, that from that time on, the premises in question belonged to the complainant, subject to the lien of the purchase price, and that the purchase price belonged to the defendant.

In equity, upon an agreement for the sale of lands, the contract is regarded for most purposes as if specifically executed. The vendor is the trustee of the legal estate for the vendee. Before the contract is executed by conveyance, the lands are devisable by the vendee and descendible to his heirs as real estate.

Houghwout *et al.* *v.* Murphy, 7 C. E. G., 541 (546).

The contract itself determines the rights and obligations of the parties *inter sese*, and is regarded as if it had been specifically executed.

Jacobus *v.* Mutual Life, 12 C. E. G., 604 (609).

In *Young* v. *Young*, 18 Stew., 26 (40), it is said that the purchaser with notice, or one who has given no value for the land, has no equity against him who in good faith contracts with the grantor, and gives value on the faith of that contract.

This case applies particularly to the case at bar, because there is no evidence of any consideration to Loper for any grant of an easement in the lands oceanward from the boardwalk.

In *Jones on Easements, Sec. 81*, it is said, one who owns an estate less than fee, such as an equitable estate or an estate for years, cannot, of course, grant a permanent easement, but only an easement to continue during the continuance of his estate.

It is a fundamental rule of equity jurisprudence that under an agreement for the sale of land the purchaser becomes the owner of the land and the vendor becomes the owner of the purchase money. The contract creates a trust. By force of it the vendor becomes trustee of the legal estate for the vendee and the vendee becomes trustee of the purchase money for the vendor.

Schmidt *v.* Opie, 6 Stew. Eq., 138 (140).

Under these cases, it is clear that Mr. Loper could not create any right in the land outside of the boardwalk which is good as against Riddle or the defendant's lessors.

SIXTH.

The complainant acquired no interest in the property till after May 4, 1896.

1. It was not until the evening of May 4, 1896, that the City Council of Atlantic City passed the ordinance relocating the boardwalk upon the site described in the agreement of 1896. Nor was this ordinance approved until two days later (Case, *pp.* 24-30).

At the time, therefore, when Riddle succeeded to the rights of Loper, the City had not even determined to take the steps necessary to acquire by condemnation or otherwise the site upon which the boardwalk structure was to be built.

2. Moreover, it was not until May 9th, or thereafter, that Loper signed the agreement with the City out of which the controversy has arisen.

For the purposes of this argument, the time may be taken as fixed by the opinion of Vice-Chancellor Grey. Referring thereto, he says:

"Loper signed the deed on May 9th, 1896." He must be presumed, therefore, to have found as a fact that on this date the instrument was executed by Loper, and there is ample evidence to show that it could not have been signed earlier.

The agreement purports to have been acknowledged on May 9, 1896. The testimony of Judge Endicott supports the inference that the signatures were secured between May 6, 1896, when the or-

dinance was approved, and May 9, 1896, when the instrument purports to have been acknowledged (Case, *pp.* 70, 71).

But the clear testimony of Mr. Loper is that he did not sign it until after May 9, 1896 (Case, *pp.* 107, 108).

Moreover, Judge Endicott testified that he believes that the signature of Loper was obtained in Atlantic City, where the agreement purports to have been acknowledged (Case, *p.* 70).

But Loper testified that he was not in Atlantic City after the date of the agreement until May 30, 1896 (Case, *p.* 108).

In considering the evidence given by Judge Endicott, little weight if any should be given to the presumption of regularity of the acknowledgment, for the reason that in one instance a similar boardwalk agreement dated *May 20th, 1896*, signed by the Children's Sea Shore House, &c., purports to be acknowledged before Judge Endicott on the *30th day of April, 1896*. Again a similar boardwalk agreement, made by J. B. Thompson *et al.*, dated *March 1, 1898*, seems to have been acknowledged before Judge Endicott *March 1, 1896*. And again, a similar boardwalk agreement made by the Provident Life and Trust Company dated *April 6th, 1896*, was acknowledged before Judge Endicott *April 7th, 1898* (Case, *pp.* 76, 77; Exhibits C-8, C-10, C-11).

It is an unquestionable fact that Judge Endicott started early in April, 1896, with a lot of the printed forms for these boardwalk agreements and obtained signatures by the property owners from time to time covering a period of two years (see list of exhibits, Case, *pp.*, 76, 77), and did not trouble himself to change the dates in any of the forms. When confronted with these agreements and their inconsistent dates of execution, acknowledgment and record, he says that he cannot recall just when or how the agreements were executed or acknowledged.

As further evidence of the manner in which these agreements were executed and the acknowl-

edgments taken, there is abundant evidence that Mrs. Loper *never acknowledged the signature of her husband as her attorney in fact.* Judge Endicott says he has no recollection of having taken Mrs. Loper's acknowledgment, but presumes he must have done so, since her name appears as having acknowledged the execution of the agreement. But it is in in evidence that Mrs. Loper was not in Atlantic City in 1896, prior to May 30 (Case, *p.* 108).

SEVENTH.

There was nothing in the facts as they existed on May 4, 1896, to charge the defendant's lessors with notice of any rights of the City to the lands in controversy.

The City's possession of the boardwalk strip and their erection of a boardwalk structure on the premises in controversy—begun in April, 1896, and substantially constructed by May 4, 1896—could not be notice to the defendant's lessor on that date of any rights beyond those which the City had acquired at that time.

The question of notice to Riddle is to be determined by the information which he would have obtained had he made inquiry on May 4, 1896. Had he made the most diligent search for information, he would have found that no ordinance had yet been passed authorizing the relocation of the boardwalk, and that no consent to the building thereof had been signed by his grantor, Loper. The possession of the City was the possession of a trespasser pure and simple, and conveyed, therefore, notice of no rights whatever.

EIGHTH.

The agreement of April 30, 1896, did not, by its mere execution, vest any rights in the City.

By the terms of the agreement, it was to become operative between the parties only when the City

> "by resolution or ordinance passed by its council for that purpose shall accept this conveyance and cause the same to be recorded" (Case, *p.* 21, *l.* 6, *et seq.*).

It seems to be the position of Vice-Chancellor Grey that the possession of the City after May 9, 1896, and its persistence in the work of erecting a boardwalk thereon was a sufficient ratification and acceptance of the agreement.

This position is, however, untenable. The agreement of April 30, 1896, provided the manner in which it should be accepted by the City of Atlantic City, to wit, by resolution or ordinance of council. It could not be held that the offer was accepted until it was accepted in the terms of the agreement itself, certainly not as to an innocent third party whose rights are to be precluded by that acceptance. Moreover, the subsequent acceptance by the City of the agreement in the manner provided by the agreement, to wit, by resolution of council, is a sufficient answer to any claim on the part of the City that it accepted the agreement at an earlier date by entering upon the land and constructing its boardwalk.

This is not the case of a conveyance which may be accepted by user, but a mere agreement, conveying no interest in land, and as to which the rule of acceptance of a contract is operative, that it must be in accordance with the tenor of the offer; in this case by resolution of council.

Moreover, the boardwalk ordinance of May 4, 1896 (Case, *p.* 24), conferred no authority upon any representative or pretended representative of the city to proceed in the manner adopted in the agreement in evidence. It did instruct the city solicitor to proceed by condemnation (Case, *p.* 26, *Sec.* 3). This was in accordance with the law (Laws of 1889, *p.* 206; L. 1890, *p.* 159; L. 1896, *p.* 18).

In procuring the signatures of the property owners to the agreement he acted as a mere volunteer. The instruments were nothing more than offers on the part of the property owners, in no way binding upon the city, nor amounting in any sense to contracts until accepted. If capable of acceptance at all, they could be accepted or the acts of the city solicitor ratified only by competent authority consciously exercised to that end, and if this was done at all it was done by the ordinance of June 8, 1896, which was two days after title vested in the defendant's lessor.

Raritan Water Power Co. *v.* Veghte, 21 N. J. Eq., 463.

The elements of offer and acceptance and capacity of parties to make a contract were lacking at the time of signing the agreement of 1896.

There was no valid offer or acceptance on the part of the city, as there was no person authorized to make an offer for the city which, if accepted, would bind it; nor was any person authorized to accept, and thereby to bind the city, for the reason that there was no power vested in any one to dispense with condemnation proceedings. The pretended agreement of 1896 was therefore of no effect, since the ordinance and the law which it followed expressly directed that the property be acquired by condemnation proceedings.

For the like reasons, the city's occupation of the boardwalk strip cannot be construed as an acceptance. This occupation was in the beginning wrongful and without authority, either from the property

owners or from a competent organ of the municipal government. The passing of the ordinance of May 4, 1896, cannot change the character of the occupation for the purpose of affecting the rights of innocent third parties, nor is the city now in a position to claim that an occupation which began without a shadow of right, without authority from the city itself, and before the consent of the property owners had been obtained by the agreement of 1896, became by the signing of such agreement,—one which the city solicitor had no authority to procure—an occupation under that agreement, for the purpose of ratifying and accepting the same.

Vice-Chancellor Grey in his opinion (18 Dick., 669) says:

> "The clause in the City's deed regarding acceptance by resolution did not refer to the time when that deed should operate as a conveyance of the new site for the easement described. The provision regarding acceptance of the deed by resolution, &c., is made simply to fix the date when the site of the old boardwalk should be discharged from that easement and be returned to the possession of the grantors."

Such a construction of this clause would read an entirely different intention into the agreement from that which is to be gathered from its terms. If the Vice-Chancellor is corrct the property owners might be charged with two contemporaneous rights of way, with all the burdens connected with each. This was never the intention of the parties. If this were the meaning of the instrument, the city would have but to refrain from passing the required ordinance accepting the new site to prolong indefinitely its possession of and its right in the old strip, while still being in rightful possession and enjoyment of the new. The agreement of 1896 is called a *relocation agreement* not only by its own terms, but by the Vice-Chancellor and by counsel for complainant, *i. e.*, an agreement for the relocation of the old

boardwalk of 1890, and such relocation could not be construed to become in any way effective until the old location had been abandoned. This is in accordance with the language of the ordinance which is entitled "An ordinance to relocate," etc. (Case, *p.* 24). In other words, the term *relocation* precludes the possibility of there existing at one and the same time two locations for boardwalks, both in the rightful possession of the city, and both burdened with an easement which could be removed only by its voluntary act.

Indeed, the contention of the Vice-Chancellor would involve holding the agreement operative to impose an easement upon the new site, but inoperative to release that upon the old. But this, upon the authority of the learned Vice-Chancellor himself, is an unjustifiable construction of the instrument. It cannot operate for the one purpose at one time and for another purpose at another and different time. In another portion of that opinion he says:

> "The deed of April 30, 1896, cannot be deemed to have been operative to release the previously charged easement from the old site, but inoperative to impose the same easement in the new site" (18 Dick., 662).

NINTH.

The equities of Riddle under the agreement of May 4, 1896, were not cut off or impaired by the subsequent acts of the city.

It was not until June 8, 1896, that the ordinance accepting the boardwalk agreement was passed in council, and not until June 10th that it was approved (Case, *p.* 44).

Six days later, on June 16, 1896, the agreement was recorded, and thereby the rights of the city, whatever they were, in the boardwalk strip were perfected. Thus, for the first time, the possession of the city ceased to be that of a trespasser and became rightful, and thus for the first time the defendant's lessor became affected with notice of the city's rights.

In other words, we maintain that the possession of the city, wrongful at the beginning, continued to be wrongful until it had accepted the agreement and recorded the same, and that such possession before the acceptance and record of the instrument was not notice of any rights which the city might have or claim.

The doctrine that possession is notice of the rights of the party in possession is qualified. The possession must be such as would cause a reasonably prudent man to assume that the possession might be a rightful one. The possession must be inconsistent with the title of the record owner.

Brown *v.* Volkening, 64 N. Y., 76 (82).

But in the present case, the city came upon the property as a trespasser without shadow of right. It came upon the property and began the erection of its structure, before that erection had been authorized by its own governing council. The relocation of the boardwalk was proposed and there had been more or less talk of the property owners consenting to the change of location, but from the fact of the city's possession, an inference that it had obtained such consent should scarcely be held to follow. It is in evidence that as to some of the property occupied by the boardwalk, and over which the walk had been completed, the city had not, up to the time of trial, obtained any consent but was a mere trespasser or licensee thereon (Case, *p.* 71, *l.* 30, *et seq.*).

Moreover, it appears that as to the agreement of 1890, many of the beach front owners refused to sign,

but the walk was, nevertheless, built upon their properties (Case, *p.* 45).

The most, therefore, that a reasonably prudent man could assume from the facts, would be that the city was going ahead to build a walk without right, trusting to subsequent proceedings for the acquisition of title, either by consent or by condemnation.

TENTH.

Assuming that the possession of the City between May 9 and June 6, 1896, was notice of anything, it was not notice of the restriction contained in the agreement of 1896.

The only property in possession of the city was that on which the boardwalk was in process of construction. The existence of this boardwalk was undeniably constructive notice to the purchaser of the city's claim to rights in the *property actually occupied*, but can in no way be said to affect the purchaser with notice of any restrictions on the abutting lands not in the possession of the city. The authorities are unamious upon this point, that for possession to operate as constructive notice such possession must be an actual, open and visible occupation, and not equivocal, occasional, constructive or for a particular purpose.

> Holmes *v.* Stout, 10 N. J. Eq., 419 (421).
> Coleman *v.* Barklew, 27 N. J. Law, 357 (359)
> Rankin *v.* Coar, 46 N. J. Eq., 566 (572).
> Hodge *v.* Amerman, 40 *Id.*, 99.

"The character of a possession which is sufficient to put a person upon inquiry, and

which will be equivalent to actual notice of rights or equities in persons other than those who have a title upon record, is very well established by an unbroken current of authority. The possession and occupation must be actual, open and visible; it must not be equivocal, occasional, or for a special or temporary purpose; neither must it be consistent with the title of the apparent owner by the record."

Brown *v.* Volkening, 64 N. Y., 76 (82).

The only proof of notice of the restriction on the beach front property is an alleged constructive notice from the fact that the city was engaged in the active work of building the boardwalk upon an adjacent parcel prior to the date of the deeds to defendant's lessors.

The mere building of the boardwalk is not notice of any agreement as to the lands outside of the boardwalk.

R. R. Co. *v.* Bosworth, 2 L. R. A., 199.

We make no question of the city's right to maintain the boardwalk upon the sixty foot strip. Having no title to or interest in any part of the land included in the boardwalk strip, the defendant is not concerned in the city's use thereof. But there is nothing in the boardwalk itself which would give to the defendant's lessors notice that there was any covenant as to the lands outside.

We contend that possession of property for the purposes of a boardwalk does not carry any other notice than that the property so occupied was to be used as such walks are commonly used. Whether this possession was by license, covenant or conveyance of a fee is immaterial. There is nothing in the nature of a boardwalk which carries with it any notice or expectancy of use except for the purposes of a walk, nor any intimation of burdens by way of unapparent easements imposed upon the adjoining property.

Moreover, constructive notice of easements affecting property acquired *bona fide*, and for value, is confined to *apparent* easements.

Where there is no visible sign of the existence of an easement, and nothing apparent in the use or possession by the owner of the easement to charge the purchaser with notice, and no suggestion in the record title upon the subject, as is the case here, the purchaser who takes without notice of the easement takes free from its burdens.

Taylor *v.* Millard, 118 N. Y., 244 (251).
Snell *v.* Levitt, 110 N. Y., 595 (604).

ELEVENTH.

The execution and delivery of the deeds to Riddle Co. and Brady cut off any unapparent rights which the city may claim under the agreement of 1896.

On June 6, 1896, Loper, in accordance with the contract of May 4, 1896, executed and delivered the deeds of the property which he had previously contracted to convey. At this date, no move toward acceptance of the boardwalk agreement on the part of the city had been made. That agreement had never had an inception as a binding contract. There could be no possession under it, and possession of the city was therefore notice of nothing (*ante*, p. 15).

Such being the condition at the time when the deeds were executed and delivered, under the recording acts then in force the grantees had fifteen days within which to record their conveyances. Having been recorded on June 10, 1896, within these fifteen days, they became effective for all purposes as if recorded upon the date of their execution, and

cut off the rights sought to be acquired by the city subsequent to June 6, 1896, by the adoption of the ordinance and the recording of the agreement of 1896 (G. S., *p.* 865, *Secs.* 70, 71).

TWELFTH.

There was nothing in the deeds from Loper to the defendant's lessors to charge them with notice of the restrictions sought to be enforced.

The deed from Loper to the defendant's lessors conveying the upland portion of the parcel in question, that derived from Evans, recites that it was taken subject to a deed made by Charles Evans to Atlantic City, bearing date January 2, 1890 (Case, *p.* 144). The tracing map shows

(1.) That when Evans made the deed of 1890 he did not own the strip described therein.

(2.) That the boardwalk of 1890 was not constructed across the land described in that deed.

(3.) That deed by its own terms provided that the right thereby given was only the right to use the strip therein described for a public 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 as qualified to the grantors" (Case, *p.* 152, *l.* 28).

There was then no right whatever in the city under the deed of 1890, and when defendant's lessors took their title from Loper, the city had no rights under that deed.

Moreover, this deed from Loper conveyed no portion of the land which it is sought to charge with the easement in favor of the city. These lands, being the portion of the Loper tract below the high water line of 1895, derived by Loper from the Riparian Commission, were conveyed by another and distinct deed with warranty, and without mention of any restrictions or limitations (Case, *p.* 148).

THIRTEENTH.

The defendant is entitled to all the rights of a bona fide purchaser of the property in question.

The complainant has failed utterly to support the burden upon it of proving notice, actual or constructive, to the defendant's lessors of the encumbrance which it seeks to impose upon their land.

There is no particle of evidence that Riddle or Brady or the Riddle Co. had any actual knowledge of these restrictions, and the evidence of constructive notice fails for the reasons before mentioned.

The complainant's case, under its bill, does not allege notice, but claims that it was the *intention* of Loper to grant subject to the agreement of 1896, as well as to the agreement of 1890 (Case, *p.* 4, *ll.* 33, 34).

The bill is based also on another allegation that the citizens of Atlantic City conferred together and dedicated to public purposes the boardwalk (Case, *p.* 2, *par.* 3); that the work being done by the defendants was in violation of covenants and agreements entered into between the city and beach front owners, and in violation of a general scheme by the owners of beach front lands for the improvement of the ocean front (Case, *p.* 9, *par.* 14).

The proof has failed entirely to show any general scheme entered into in regard to the dedication

of the lands oceanward of the boardwalk. The only testimony adduced on this question is that of Judge Endicott, and he was careful in every case to say that the conferences held related entirely to the relocation of the line of the new boardwalk: that there was dispute and discussion as to where that boardwalk should be located, and that the conferences held related entirely to that question. There is no proof to show that there were any conferences upon the broader question of a dedication affecting the lands outside of the boardwalk (see Endicott's Testimony, Case, *pp.* 64–67, 72).

The complainant further shows by the testimony that not only was there no general scheme entered into for the dedication of the lands seaward, but that many citizens were forced to sign this agreement by the arbitrary refusal of the City's officers to build the boardwalk in front of their properties, even though the ordinance adopted provided that there should be a continuous boardwalk over the whole distance from Caspian avenue to Albany avenue, and the bonds were issued and the money raised on the basis of such a continuous line of walk; that some of them moreover had not signed the agreement at the time of the trial (Case, *p.* 71).

We, therefore, claim that the attorneys of the complainant have failed utterly to show any right upon which they may obtain the injunction sought. The rules that the party seeking to be protected by injunction in the possession or enjoyment of real estate must show a right, and that it must be such a right as the Court will feel bound to protect upon his own showing against the act of the defendant, and that the injunction would be refused where the title is disputed, apply distinctly to this case; no injunction can be granted upon the complainant's showing.

See

Outcalt *v.* Disborough, 2 Green, 214.
Smith *v.* Collyer, 8 Vesey, 89.
Morris Canal & Banking Co. *v.* C. R. R. Co., 1 C. E. G., 419.

FOURTEENTH.

Even if it be held that the land is burdened with an easement in favor of the board walk strip, as contended, the work attempted by the defendant does not violate the restriction.

There is nothing in the language of the restriction to limit the size or proportion of the pier to be erected upon the property, or to prohibit the widening of a pier when once constructed, by making lateral additions thereto. The whole restriction is that the pier shall be of steel and a thousand feet in length. So long as these requirements are complied with, there can be no restrictions imposed upon the dimensions of the pier. To contend that the rights of an owner of beach front are exhausted by the construction of a pier in the first instance, however narrow it may be, or however unsuited for practical use it may subsequently prove, is to burden the land far beyond the language of the instrument and the intention of the parties.

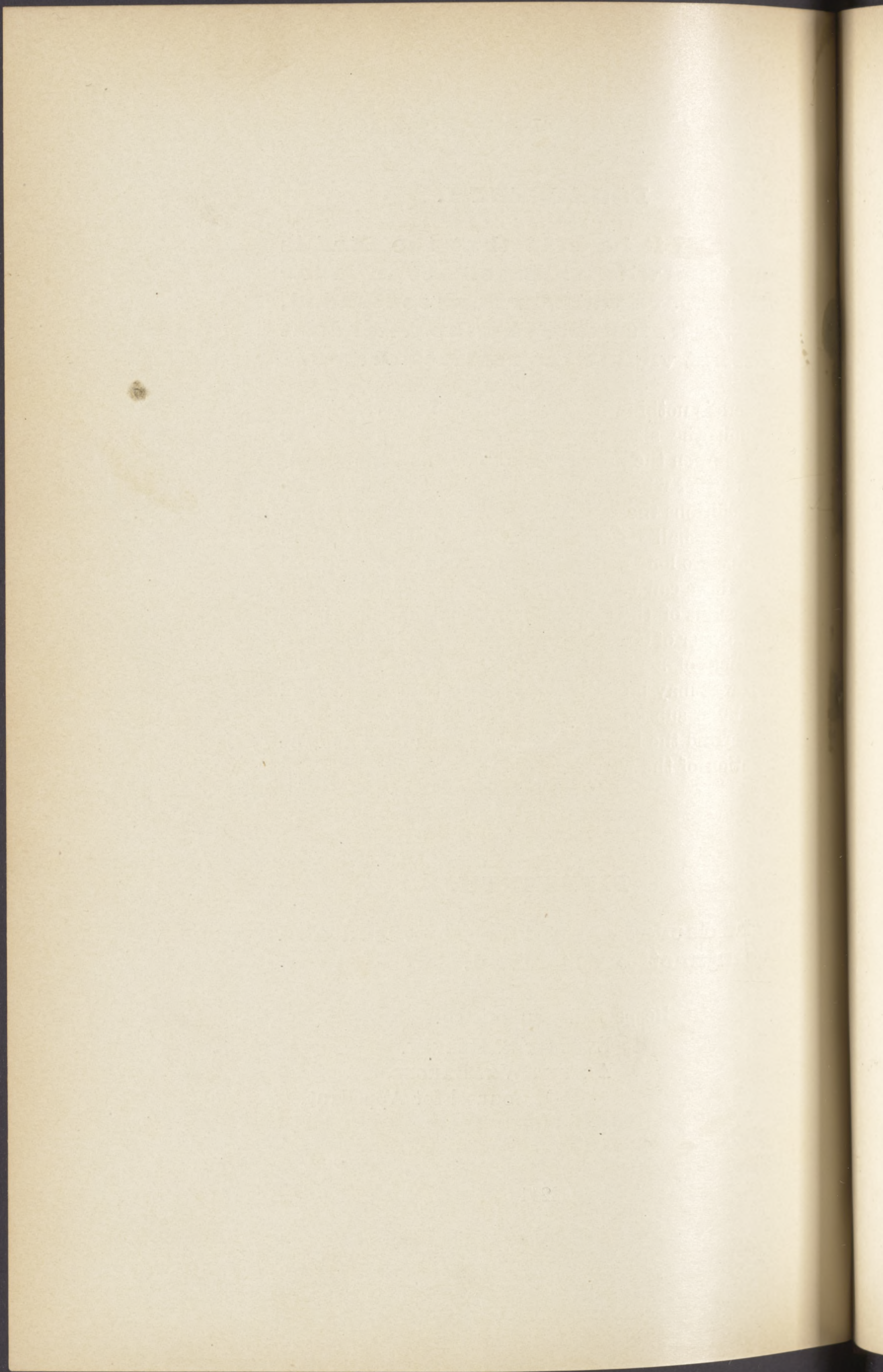
FIFTEENTH.

The decree should be reversed and the injunction dissolved.

Respectfully submitted,

Everett P. Hervey,
Arthur Wm. Barber,
Of Counsel for Appellant.

[O3241]



NEW JERSEY

Court of Errors and Appeals

BETWEEN CITY OF ATLANTIC CITY, *Complainant and Respondent,* *and* NEW AUDITORIUM PIER COMPANY, *Defendant and Appellant,*	*Cases 15 and 16.* *June Term, 1904.*
BETWEEN CHARLES EVANS, *Complainant and Respondent,* *and* NEW AUDITORIUM PIER COMPANY, *Defendant and Appellant.*	

BRIEF FOR APPELLANT.

These are two cases, bills for injunctions, one filed by the city of Atlantic City, and the other by Charles Evans against the New Auditorium Pier Company, a corporation of this State.

The bills were originally filed against George C. Tilyou, but they were amended making the corporation the sole defendant. The corporation has a lease of all the lands outside of the Board-walk adjoining Pennsylvania avenue on the south.

These bills were filed to enforce certain covenants contained in an alleged agreement made between various landholders and the city of Atlantic City,

called "The Board-walk Agreement," whereby it was claimed that the lands lying to the oceanward of the present Atlantic City Board-walk were to remain without being built upon, unless by the erection of an iron or steel pier having certain characteristics.

Atlantic City has maintained a public Board-walk along the ocean front for a number of years. The Legislature passed an act in 1889 (P. L. 1889, p. 206) giving power to lay out and construct Board-walks along the ocean front, and with authority to condemn lands for that purpose. By a supplement to this act (P. L. 1890, p. 159) authority was given to construct elevated Board-walks, and to accept dedication of lands or rights to make improvements of like character.

In 1896 (P. L. 1896, p. 18) a further supplement authorized the *relocation* of said walk.

This legislation was followed, so far as applied to Atlantic City, by several ordinances passed by the said city arranging for the building and *relocation* of the Board-walk along the ocean front. The latest of these ordinances was approved May 6, 1896, and provided for the *relocation* and building of the present Board-walk, and is annexed to both bills of complaint in this cause.

After the legislative act of 1890 a number of citizens of the city owning land along the ocean front joined in various agreements with the city, and the one affecting the lands in question is made by Evans and others to Atlantic City, bearing date January 2, 1890, and is printed in the Evans case on page 174, etc., whereby, in consideration of the fact that the Board-walk was to be constructed upon the lands described in the agreement, the parties signing it agreed that it should be lawful

for the city, and for any other person or persons at all times to pass and repass, use, occupy and enjoy so long as the same shall be used for a street or public board or plank walk. All that sixty foot wide strip of land, thirty feet on either side of the described line, which line is the centre of the sixty foot strip of land. Then follows the description of the line running along the water front several miles, from Caspian avenue near the Absecon Inlet to Albany avenue. The agreement contains two clauses to which the attention of the Court is directed. First, after the description, follows this language:

> "Together with the right to use, occupy and "control the same so long as the same "shall be used for the purpose of main-"taining a street, and public 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 con-"dition as qualified to the grantors." (Evans case, p. 176, l. 23-31); and again,

> "The parties of the first part, for themselves, "their heirs, etc., do hereby covenant "and grant to and with the party of the "second part, its successors and assigns, "that they and each of them, the said "parties of the first part, their heirs, "executors, administrators and assigns, "shall not and will not, build or erect, "or allow to be built or erected upon "the lands hereby granted, or on the "ocean side thereof, any building or "structure except as above provided, "and that this covenant shall attach

"to and run with the lands and premi-
"ses hereby granted, and the lands on
"the ocean side thereof, so long as the
"same shall be used for the purpose of
"a street or public Board or Plank Walk."
(Page 177, lines 21 to 28).

An ordinance was passed by the city of Atlantic City in 1890, and a Board-walk was erected. The Ashmead & Hackney Map shows the location of the Board-walk erected in 1890, the high water lines in 1889, 1893 and 1894, and also shows the sixty foot strip described in the agreement of Evans and others to Atlantic City, and also the sixty foot strip described in the ordinance.

At the point in question, west of Pennsylvania avenue at a point where it strikes the high water, the Board-walk was erected in part above the high water line, and in part below it. So far as any of that land is above high water, the Board-walk is not upon the premises described in the agreement, nor in the ordinance, but entirely landward of them. This physical situation is important, and will be explained more fully hereafter.

The Board-walk agreement of 1896—the one now claimed to be in force, and upon which the bills are filed—is dated April 30th, 1896, (At. City case, page 15; Evans case, 14 a), and purports to be acknowledged as to Loper on May 9th (case, p. 23, line 35).

It was accepted by the city by resolution June 8th, 1896 (Atlantic City case, p. 120), was acknowledged by Mayor, June 15, 1896, and recorded June 16, 1896.

These dates are important. The deeds from Loper to the Riddle Company and Brady—defend-

ants lessors—are dated June 6th, 1896, acknowledged the same day and recorded June 10th, 1896.

The Board-walk agreement of 1896 contains an agreement that the signers or their assigns, will not erect on the ocean side of the sixty foot strip therein described any building or structure (Atl. City case, p. 20, line 20) but there was a proviso that a steel or iron pier might be erected, if the same was at least ten hundred feet in length (A. C. case, page 21, line 26).

Both bills are based upon this agreement, alleging that the defendant was engaged in driving wooden piles, and also charging that, as the defendants' predecessor had built a pier behind the Auditorium building extending 1,000 feet in the ocean, the reserved rights under the proviso had been exercised, and no further building or enlargement of the present structure could be permitted.

The bills also charge that, even if the 1896 agreement was not effective, still Loper and the defendants' predecessors took subject to the Evans Boardwalk agreement of 1890, which also contained an agreement that no building or structure should be erected oceanward of this strip therein described (At. City case, p. 153, line 21).

The bill filed by the city claims a right to an injunction because of certain legislation enabling the city to take the lands in question for the purpose of a park. (At. City Bill case, page 10–13). But this claim was not pressed.

In the Evans case there is an additional claim of a right to enjoin the erection of any structure within twenty feet of the side line of Pennsylvania avenue because of a covenant in the deed from Evans to Loper (Evans case, page).

FACTS.

Many of the facts in both cases were settled by stipulation of counsel (At. City case, page 43-46). They were briefly:

Defendant was driving piles upon the leased premises within the lands conveyed to Loper by the Riparian Commissioners.

(1). The Board-walk ordinance was introduced, April 13, 1896; passed, May 4, 1896; approved, May 6, 1896. Right of Way Agreement accepted by city, June 8, 1896.

(2). The steel, board or plank walk of 1896 was actually constructed on the strip described in the ordinance.

(3). That agreement was not executed by all the owners of beach front. Many owners refused to sign, and some have not even yet signed.

(4). These tracts for the use of which the city holds no agreement are located in various places along the whole strip.

(5). The Board-walk of 1890 was located in many places between high and low water mark —and that the city did not obtain agreements for the location of that walk from all property owners.

(6). The city has never used its power of condemnation.

(7). The Goff blue print is correct and need not be proved.

(8). The Ashmead and Hackney Map is also correct in showing the facts there delineated.

(9). That the actual work of building a new steel walk was in progress on the property then owned by Loper on April 29th, 1896.

The defendants insisted in the Court of Chancery:

1. That the agreement of 1890 set up in the Evans case was ineffective to bind the lands in question, the said lands being below high water mark and owned at the time by the State.

This contention was sustained by the Vice Chancellor.

2. That even if the agreement of 1896 was proved to have been made—and the defendant insisted that it had not been proved—that it was inoperative to bind the lands in question because Loper, the owner, had agreed in writing to sell the said lands, and thus passed the equitable title before he signed the alleged Board-walk agreement, and that his signature of the said alleged Board-walk agreement was of no validity.

The Vice Chancellor overruled the offer of the contract of sale and the contention of the defendant.

3. That the defendants' lessor took the title of the premises in question without notice of the covenant affecting the lands to the oceanward of the Board-walk and was not bound by said covenant.

This contention was overruled by the Vice Chancellor, his Honor holding that the driving of piles for the new Board-walk over a part of the entire tract was sufficient to give notice of the covenant to an intending purchaser, although this covenant related entirely to lands outside of the Board-walk strip.

The decrees appealed from in these cases are found in the Atlantic City case on page 134, which enjoins the defendants from driving piling on the premises described in the deeds at any point on the lands oceanward from the Board-walk described in the deed of 1896, and also from making any lateral addition to the pier now built on the premises known as the Auditorium Pier, and for costs.

In the Evans case the decree is found on page 190, and it restrains the defendant from erecting or driving piling on the premises oceanward of the Board-walk, and from making any lateral additions to the pier now on the premises.

As the bills are practically similar, the general points can be argued together while some of the individual points in the two cases can be taken up separately.

POINTS.

The Decree is erroneous and should be reversed.

1. Because the complainants have not shown a case for injunction upon the proofs offered.

II. The restrictions claimed under the Board-walk agreement of 1896 upon use of the lands oceanward of the Board-walk cannot be enforced against these defendants, the agreement not having been recorded until after the record of the deed of defendants' lessor.

III. The restrictive covenant was not in existence at the time defendants' lessor took title.

IV. The defendants' lessor is a bona fide pur-

chaser for value without notice of the rights of the complainants.

V. Loper had nothing to convey to the city at the time he signed the agreement. The equitable title had passed from him.

VI. If the Board-walk agreement of 1896 is enforceable by the complainants the defendant has a right to build a steel pier and the injunction is too broad.

POINT I.

Because the complainants have not shown a case for injunction upon the proofs offered.

(a) The complainants have failed to prove the agreement upon which the cases are based.

(b) They failed to prove that defendants' lessor had notice thereof.

A certified copy of the record of this agreement of 1896 is not evidence.

The act respecting conveyances (Sec. 29, G. S. 858), in force in 1896, provides that the record of "such deed or conveyance, lease or other instru-"ment, and the transcript of such record, certified "to be a true transcript by the said Clerk in whose "office the record is kept, shall be as available in "law as if the deed or conveyance, lease or other "instrument, were then and there produced and "proved."

It becomes important in this connection to determine what is meant by "such deed or convey-"ance, lease or other instrument."

Section 4 provides that any deed or conveyance of land, tenements or hereditaments lying and being in this State, hereafter to be made and executed, shall be acknowledged, &c.

Sections 13 and 14 also apply to deeds and conveyances of lands.

Sec. 19 provides for the recording of leases of lands and tenements for life for a term of years; Section 21, for the assignment of leases; Section 23, that agreements for sale and conveyance of lands and any interest therein, may be recorded; Section 25, that the Clerk shall record in books all deeds and conveyances of lands, tenements and hereditaments lying and being in the County, acknowledged or proved, and Section 26, that it is the duty of the Clerk to record without delay, every such deed or conveyance or other instrument.

By the act of 1883, Section 143, G. S. 882, whenever any deed of conveyance or release of lands lying in this State or of any estate or interest in such lands, shall be recorded in the County where the lands lie, such record shall become and be forthwith notice to all persons of the execution thereof.

Section 145, that all deeds of conveyance or releases of lands lying in this State, or any interest therein hereafter to be made, shall until duly recorded in the County where such lands lie be void and of no effect against subsequent judgment creditors without notice, and against all subsequent bona fide purchasers and mortgagees for valuable consideration not having notice thereof, whose deed of conveyance or mortgage shall first have been recorded.

The meaning of these words of the statute have been constructed in Hutchinson vs. Bramhall, 15 Stew., 372-385, where it says:

"The words 'deeds or convevances' in the statute mean what they signify under the old rule of the common law, meaning a deed or conveyance of a freehold estate."

The "other instruments" within the contemplation of the revised laws, must have been leases for years, and assignments of such leases.

And this is borne out by the revision of the conveyance act of 1898, which provides (p. 670, §55) that the record of the instruments mentioned in the 21st section of that act shall be receivable in evidence; the 21st section (p. 677) does not include any instrument such as the one in question.

The paper in question is merely a license. It contains no words of grant. In the beginning it is named as an agreement, but after the recitals, it sets up that "This indenture witnesseth, that the party of the first part, in consideration, &c. (At. City case, page 17, line 21) "do hereby covenant and agree with the party of the second part, and it shall and may be lawful for the party of the second part * * * and for any other person or persons, at all times to pass and repass, use, occupy and enjoy so long as the same shall be used for the purposes of a street or a public steel or Board-walk, that sixty foot strip of land described, etc.; together with (page 19, line 18) the right to use and control the same so long as the same shall be used for the purpose of maintaining a street or public steel or Board-walk, and when the party of the second part shall cease or neglect to use the same for that purpose, it shall revert absolutely, without any conditions or qualifications, to the grantors."

There is no other covenant determining the city's title to this strip.

There being no words of grant and no words indicating a dedication, the only words being that the parties of the first part permit that to be done, which without such permission would be an illegal trespass, this agreement cannot be considered to be either a deed, as it has been referred to in the bill, and in the former cases in regard to the Board-walk, or a dedication agreement as it has been referred to in some of these former cases, but is only and strictly a license.

East Jersey Iron Co. v. Wright, 32 Eq., 5 Stew., 248-252.

Den. v. Baldwin, 21 Law, 1 Zab., 395-404.

In this last case it is said a dispensation or license properly passes no interest, nor alters or transfers property in anything, but only makes action lawful which without it would be unlawful. It is technically speaking, an authority to do some act, or series of acts, on the land of another, without passing any estate in the land.

To constitute a grant it is not indispensable that technical words should be used, but they must be words which will manifest the same intention.

East Jersey Iron Co. v. Wright, 5 Stew. Eq., 248.

In this case the instrument was an agreement that the party of the second part should have exclusive right and privilege of entering upon lands for the purpose of mining, and it was held a mere license; Mr. Vice Chancellor Van Fleet saying,

"Unless we attribute to the words a significance much more extensive than they have in legal science, or can have in virtue of their intrinsic

force, it is plain they pass no estate or property in the lands, or the minerals deposited in them. They at most merely gave Rude authority—we may say exclusive authority—to enter upon the lands of Williams and to do a series of acts there for his own use and profit without passing any estate or property in the lands. Such an authorization is a license."

Wood v. Leadbitter, 13 Meeson & Welsby Exch., 837.

This paper is not a dedication for a highway. It does not create the easement of a highway, or confer any of the incidents of a highway. It gives simply permission to pass and repass.

The conclusion is plain that the statute of conveyance does not provide for the recording of licenses, and that if it can not be recorded a certified copy of it has no available strength, because that strength is only gained from the power given to the record by the statute.

Although attempt was made to show that there was an original paper which had been lost, and that the copy produced in evidence was a copy of a copy which had been compared, the proof is lacking of the comparison of the first copy with the original.

There was no attempt in the Atlantic City case to prove any comparison with the original, and in the Evans case the witness, Moore, on cross-examination could not show that he had actually compared the papers, or knew that the record in the Clerk's office was a correct and true copy of the original. A grave doubt was also thrown upon this copy, from the lead pencil interlineations made

upon it, because it was shown that the words interlined did appear in the printed copies of the form of agreement used, and were not found in the certified copy. If the original was on a printed form, there were serious mistakes made in the certified copy, and it cannot be a true copy of the original or else there were some curious omissions of words in this particular printed form, none of which appear to have been noted in the attestation clause before it was recorded.

In injunction cases it is of the utmost importance that the rights upon which the complainants base their action should be clearly proved before an injunction shall be granted.

In Outcoult v. Disbrough, 2 Green, page 216, it is said it is a general rule that the party seeking to be protected by injunction in the possession or enjoyment of real property must show a right; and it must be such a right as the Court will feel bound to protect upon its own showing, against the act of the defendant.

When the title is a disputed one, the injunction will be refused.

Smith v. Collyer, 8 Vesey, 89.

In Morris Canal & Banking Co. v. C. R. R. Co., 1 C. E. Green, page 425, the Court says:

"In order to entitle the complainants to the in-
"junction which they seek, it is necessary that their
"title to the property and rights claimed by them,
"and for the protection of which they ask the in-
"terposition of this Court, should be made to appear

"in a clear and satisfactory manner. This is an es-
"tablished rule in applications of this nature."

It will be said that Mr. Loper admitted having signed a printed form of agreement in 1896 in regard to the Board-walk; his testimony (Atlantic City, p. 107, &c.), shows that he signed some paper some time after the 9th of May, 1896, probably after the 17th, and he does not believe he signed the paper, copy of which is produced. He says he signed a paper, but it did not have the list of names on it which appears on the printed copy.

Examination of the printed copy (At. City, p. 15-22), shows that there were annexed to the copy produced in evidence sixty-five names, all of which pretend to have been acknowledged on the 9th day of May, and the Lopers were the last names appearing on the first acknowledgment with the fifty others taken probably on the same date.

From Judge Endicott's testimony on page 66, it appears that he did not see them all on the 9th of May. He says he saw them on that day or prior to that day; they were signed at different times, but he thinks all were prior to the 9th of May (page 67). Yet Judge Endicott makes it appear by his certificate that they all acknowledged on May 9th.

Without desiring to attack Judge Endicott personally, it is apparent that there was great carelessness in regard to the dates of the acknowledgments. The attention of the Court is called to the Exhibits C 7-C 17 incl. (Evans case, p. 71). Agreement No. 3 is dated on May 20, and is apparently acknowledged on April 30th. That of the Provident Life & Trust Co., No. 6, is dated April 6, 1896, and acknowledged April 7, 1898; the one by the Female Academy of the Sacred Heart, No. 9, was dated and acknowledged April 30, and was not recorded

until June 20, later than several of the others. One, No. 5, is dated March 1, 1898, and acknowledged before Judge Endicott March 1, 1896. It is clear that there was little attention paid to the time when the acknowledgments were taken, or to the dates on the printed copy of this right of way agreement.

A printed copy of the form, such as was used for all of these exhibits, is found in the Atlantic City case, page 156, and shows that the originals were all printed as of a blank date in April, 1896, so that it is a question whether Judge Endicott's recollection at this time as to when he took Loper's acknowledgment, is correct.

POINT II.

The restrictions claimed under the Board-walk agreement of 1896, upon use of the lands oceanward of the Board-walk cannot be enforced against these defendants, the agreement not having been recorded until after the record of the deed to defendant's lessor.

Whether Loper signed the agreement or not, it is without force if not recorded prior to a subsequent record of a deed made to a bona fide purchaser for value. It is admitted that Loper sold to the Riddle Company and Brady by deeds which were dated on June 6, and acknowledged on June 10, and recorded on June 10th, while this agreement was not recorded until June 16. The deeds to the Riddle Company and Brady show that the consideration for the upland was one hundred and forty thousand dollars, and for the Riparian Grant, seven hundred and fifty dollars.

These deeds being on record before the agreement of 1896 was placed on record, it has no force against subsequent purchasers for value. The principle of law is familiar, and need not be enlarged upon, nor cases cited to sustain it.

POINT III.

The restrictive covenant was not in existence at the time defendant's lessor took title.

In the alleged agreement occurs this clause: Atl. City case, (p. 21, l. 2).

"And it is further covenanted and agreed by and between the said parties * * * 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, &c."

The resolution accepting the agreement was passed June 8, 1896: the agreement was recorded June 16, 1896.

The deeds from Loper were delivered on June 6, 1896, and recorded June 10, 1896.

Leaving out entirely the effect of the recording act which title is prior?

There is no question that to vest the title of property in a grantee there must be both delivery and acceptance.

And it is the law of this State that from an unconditional delivery of a deed to a third person for the benefit of the grantee, delivery may be presumed and that where there is doubt the question of acceptance is to be determined as a question of fact.

Jones vs. Swayze, 13 Vroom, 279.

In that case (p. 282) the Court cites with approval the doctrine of Stephens vs. Buffalo R. R. Co., 20 Barb., 232, and other cases that there must be both delivery and acceptance.

In the present case the city offered no evidence of any acceptance except by the resolution. This acceptance was the one contemplated by the agreement and the agreement did not become operative till the resolution, two days after the title to defendant's lessor, was passed. The agreement was delivered to Judge Endicott to be held for the acceptance by the city.

Until that acceptance it was an inchoate transfer and liable to be defeated by the intervening rights of others.

The acceptance cannot relate back so as to destroy rights acquired in good faith.

> 4 Greenleaf Cruise Digest (pp. 12, 13).
>
> Parmalee v. Simpson, 5 Wall, 85.
>
> Also Am. and Eng. Encyc. of Law, 2d Ed., Vol. 9, p. 162, note and cases cited.

That the acceptance was a necessary prerequisite to the completion of the agreement is shown moreover by this that the old walk was to continue till this acceptance. If the agreement was complete without acceptance the city could by refusing acceptance fasten the property with two Board-walks —something which no one ever intended.

POINT IV.

The defendant's lessor is a bona fide purchaser for value without notice of the alleged rights of the complainant.

The work done on the strip within the lines of the Board-walk gave no notice to the defendant's lessor of the existence of the covenant.

The work consisted of the sinking of columns and placing of floor beams.

All this work was done entirely within the sixty foot strip.

As we have seen there had been a Board-walk there for years, and it had been mislocated.

The new Board-walk was a relocation. It was called a relocation in the ordinance (Atlantic City case, p. 24, l. 24).

It was called a relocation by the surveyor (p. 52, l. 13), and by Judge Endicott (p. 64, l. 19).

A.

There was nothing on the ground to indicate to any one that anything was being done other than to straighten the walk or widen it.

What notice of any outside rights could the intending purchaser obtain?

If he ascertained that the city was doing the work, he might perhaps look at the ordinance under under which it was being done, but if he saw the ordinance he would find nothing in it as to this covenant.

(*Ordinance Atl. City, case, p. 24*).

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How was he to ascertain that there might be in Judge Endicott's pocket or in his desk a paper containing a covenant affecting property entirely outside of this sixty foot strip?

> "Possession and user of land by a person other than the grantor must, in order to afford notice, be open, notorious and exclusive; it must be unambiguous and unequivocal; it must be under claim of right. In short, like other matters from which constructive notice is sought to be imputed, it must be of such a character as will excite inquiry upon the part of a purchaser and will lead him, in the exercise of due diligence, to knowledge of the adverse rights in question."

Am. and Eng. Enc. of Law, 2d Ed., Vol. 23, p. 504.

In the case of *Coleman vs. Barcalow, 3d Dutcher, 357, the Court says:*

> "But the possession must be actual, distinct and unequivocal. It must, moreover, be visible and manifested by notorious acts of ownership, such as would naturally be observed and known by others.
>
> "Where land upon which there are no buildings, is used for pasture by the grantee and others, it is not such notorious, visible and exclusive possession of the grantee as amounts to constructive notice of ownership."
>
> "If the possession is of such a character that it is visible and notorious, then he will be presumed to have knowledge of the pos-

session, but if the possession is such that if, from its very character, it is not visible and of common report and would not attract the attention of an observing man, then it is not such a possession as is calculated to invoke inquiry and put a party upon his diligence, and a bona fide purchaser ought not to be concluded by it."

McCall vs. Yard, 3d Stockton, 58-62.

In *Groton Savings Bank vs. Batty, 3 Stewart, 126*, the Chancellor cites with approval the opinion in *Cook vs. Travers, 20 Barber, 400*:

"It is quite true generally, that the law regards *the actual occupancy of land* as equivalent to notice to all persons dealing with the title of the claim of the occupant, but this is not an absolute proposition which is to be taken as true in all possible relations. The circumstances known may be such that the occupancy will not suggest to a purchaser an inquiry into the title or claim under which it may be held, and when the inquiry may be omitted in good faith and in the exercise of ordinary prudence no one is bound to make it."

In the case of *Hodges' Executors v. Ammerman, 13th Stewart, 99*, the possession by the complainants was held to be of such character as to constitute notice to all the world of their title. In that case the land in question so held, was enclosed by a fence and hedge, separating it visibly from the adjacent lands, and the Court held that the do-

minion must be manifested by such open and notorious acts of ownership as will *naturally be observed by others*, and the acts must be of a character so certain and definite in denoting ownership as not to be liable to be misunderstood or misconstrued.

In the case of *Roll vs. Rea, 21 Vroom, 264*, the Court says: p. 269-270:

> "Parties dealing with real estate may always lawfully assume that the title is completely disclosed on the records unless there is some circumstance, of which they are bound to take notice which would apprise a reasonable man not merely that the records may be defective, for that is always possible, but that they actually are so in the particular case in hand."

> "Possession to give notice or to make inquiry a duty, must be open, notorious and unequivocal. There must be such an occupation of the premises as a man of ordinary prudence, treating for the acquisition of some interest therein would observe, and, observing, would perceive to be inconsistent with the right of him with whom he was treating and so led to inquire"

Rankin vs. Gar., 1 Dick., 566-572.

> "While the general rule is that possession of land is notice to a purchaser of the possessor's right therein, nevertheless such possession, to be effectual as notice, must be not only exclusive and uninterrupted, it must also be open, notorious and visi-

ble, that is, it must indicate the occupant."

Cox v. Devinney, 36 Vroom, 389, per C. J. Gummere.

The burden of proof to show notice is on the city.

Coleman v. Barklew, 3 Dutch., 357.

Roll v. Rea, 21 Vr., 264.

In this case there was absolutely no possession of the strip to the oceanward of the Board-walk. There was even no exclusive possession of the strip of the Board-walk. There were only some column sunk and a superstructure thereon under which people could walk along the sand.

We have found no case and we venture to say that there is none in existence where the possesion of one strip of land was held to put a party on inquiry as to a restrictive covenant over an adjacent tract of land.

B.

But there was nothing in the change of conditions from what there had been there before to suggest to the intending purchaser that any one had acquired new rights in the property. The property had been subject to the old Board-walk; that Board-walk had been there for years.

The intention was that there should always be a Board-walk there. It was probably talked about that the Board-walk was being relocated and straightened. The purchaser had a right to consider that the easement or right of a Board-walk, which had previously existed, was being continued and nothing else.

The doctrine, as a result of the review of a number of cases, is stated in the Encyclopedia as follows: (*Am. & Eng. Enc. of Law, 2d Ed., Vol. 23, p. 507*).

"Where it is sought to impute to a purchaser, notice of a prior sale or conveyance of the land by the same grantor, and possession of the prior purchaser or his tenant is relied upon to constitute notice, it has been held that in order for the possession to operate as notice, there must have been a visible change in the occupancy at the time of the first purchase or conveyance, that otherwise there is nothing in the *character* of the possession that would suggest to the purchaser's mind the existence of any rights in the land other than those held by the vendor and his tenants."

This principle was laid down in this language in this Court by Chief Justice Green, in the case of *Holmes vs. Stout, 2 Stockt., 419-428*.

"Every possession will not amount to implied notice. It must be an actual and exclusive possession manifested by notorious acts of ownership and such as would naturally be observed and known by others. * * * Nor does even actual, open and notorious possession of the land necessarily and in all cases create a presumption of notice. If, for example, the first purchaser, who was previously in possession as lessee and after purchase continue in possession as grantee, without any actual visible change in the *character* of his possession, this could not operate as notice to a second purchaser who knew of the previous possession as lessee and had no notice of the actual change of title. Citing:

McMahan vs. Griffing, 3 Pick., 149.

In the case before us there was no change in the *character* of the possession.

A strip of land had been taken for a Board-walk. A new strip of land adjacent to the old walk was being used for the same purpose. There was nothing to indicate that this change had anything to do with any rights toward the ocean-side of the Board-walk.

C.

In order to enforce a covenant of this kind, if it be enforceable at all, there must be actual notice brought home to the parties sought to be charged.

We insist that this covenant is not such a covenant as is enforceable anywhere. This point will be found elaborately argued in the brief of Mr. Hervey.

We insist, however, that if there is any right to enforce it in the Court of Chancery, such right is dependent upon actual notice of the covenant by the party sought to be charged therewith.

The case of *Brewer vs. Marshall, 4th C. E. Green., 538*, is the first and leading case in this State on this subject. In that case a personal covenant made by the grantor of one piece of land for the benefit of another was supported, Chief Justice Beasley saying:

"There is a class of cases in which equity will charge the conscience of an alienee of land with an agreement relating to such land, where clearly the agreement neither creates an easement nor runs with the title. This rule has been too frequently acted upon and is too deeply seated in our legal system to be passed unnoticed or to be rejected as unsound. * * * It will be observed that it is a feature common to all these instances that the party

in fault acquires the legal title in an unrestricted form, but in disregard of the known equitable rights of others. * * * It will be found upon examination that these decisions proceed upon the principle of preventing a party having knowledge of the just rights of another from defeating such rights."

This principle of the necessity of actual knowledge is mentioned in the cases following *Brewer vs. Marshall:*

Trout vs. Lucas, 9 Dick., 361–370.

Kirkpatrick vs. Peshine, 9 C. E. Green., 206.

Under the old Board-walk agreement there were and could be no restrictive covenants upon this property, as this property was below the line of high water mark at the time the restriction was made and was owned by the State of New Jersey, and the subsequent grant by the State of New Jersey conveyed this property to said Loper absolutely free of any such restrictions.

This point was correctly decided by Vice Chancellor Gray upon the authority of *Hoboken vs. Pennsylvania Railroad Company, 124 U. S., 656.*

City of Elizabeth vs. Central R. R. Co., 24 Vr., 497.

Morris & Essex R. R. Co. vs. Jersey City, 18 Dick., 45.

POINT V.

The equitable title had passed before Loper signed the Broad-walk agreement.

It was proved by the testimony of Mr. Loper that one thousand dollars ($1,000) was paid on account of the purchase on the 4th of May. It further ap-

pears that on that day he gave an agreement to William Riddle, which was offered in evidence (see p. 99) and by that agreement he sold to Riddle the lands in question. The learned Vice Chancellor refused to admit this agreement in evidence, although it was repeatedly offered, upon the ground that there was nothing to show that the complainant, Atlantic City, was in any way notified of the agreement, or that it was in any way binding upon the city by way of notice or otherwise. We do not apprehend that it was necessary that notice should be given to the city. What we claim is, by that agreement Riddle obtained a right to that land, and Loper stood from the day on which it was signed, the 4th of May, in the position of a trustee for the purchaser. It has been held in this State that the vendor of an estate from the time of his contract is the trustee for the purchaser.

Hoagland vs. Latourette, 1 Gr. Ch., 254–256.

The question is discussed in Toothe vs. Bryce, 5 Dick. Ch., 589–609, where the rule is laid down that the complainant is clearly entitled to have the premises in the condition in which they were at the time he made the contract, his right to that vested at that date, as the contract was positive and binding on both parties, the defendant being bound to convey, and the complainant to purchase and pay the price. A familiar rule in equity is that from that time on the premises in question, belonged to the complainant, subject to the lien of the purchase price, and that the purchase price belonged to the defendant.

In equity, upon an agreement for the sale of lands, the contract is regarded for most purposes, as if specifically executed. * * * After the

contract, the vendor is the trustee of the legal estate for the vendee. Before the contract is executed by conveyance, the lands are devisable by the vendee, and descendable to his heirs as real estate.

Houghwout vs. Murphy, 7 C. E. Gr., 541-546.

The contract itself determines the rights and obligations of the parties *inter sese* and is regarded as if it had been specifically executed.

Jacobus vs. Mutual Life, 12 C. E. Gr., 604-609.

In Young vs. Young, 18 Stew., 26, on page 40, it is said that the purchaser of the grantor's vendee, or purchasers, when they give value for the land, have no equity against him, who has in good faith contracted with their grantor, and give value on the faith of that contract. This case applies particularly to the case at hand, because there is no evidence of any consideration to Loper for any grant of an easement in the lands oceanward from the Board-walk.

In Jones on Easements, Section 81, it is said, "One who owns an estate less than fee, such as an equitable estate, or an estate for years, cannot, of course, grant a permanent easement, but only an easement to continue during the time his estate may continue. It is a fundamental rule of equity jurisprudence that upon an agreement for the sale of lands, the purchaser becomes the owner of the lands, and the vendor becomes the owner of the purchase money. The contract creates a trust, and by force of it the vendor becomes trustee of the legal estate for the vendee, and the vendee becomes trustee of the purchase money for the vendor.

Schmidt vs. Opie, 6 Stew. Eq., 138-140.

Under these cases, the claim that it is clear that Mr. Loper could not create any right on the lands outside of the Board-walk, which is good as against Riddle or the defendant's lessors. The fact that the deeds were made to the Riddle Company and Brady, although this agreement was made to Riddle, makes no difference in the position.

If then, Mr. Loper made this conveyance as was clearly proved, to Riddle on the 4th of May, he could not afterwards have made any agreement with the city which would bind these lands. He says that he did not sign this agreement until after the 17th of May, and he says that on the 30th of April, the date of that deed, he was at Baltimore, and it is not pretended by anybody that he signed the paper in Baltimore.

Evans case, p. 105, l. 8.

On page 102 he says that on the 8th of May he was in New York, and on the 9th of May he was in his home in Philadelphia, and that it must have been after the 9th of May, (p. 102, line 34). He says that he went to St. Louis on the 10th and was absent until the 17th, and on page 103, l. 22 he says that he is positive, as possible with the lapse of time, that it was after the 4th of May, that he signed the dedication agreement.

Judge Endicott's recollection is that he was positive that he secured it in Atlantic City, previous to the 9th of May, p. 65, l. 8, but Mr. Loper positively testifies that he was not in Atlantic City previous to the 9th of May. Judge Endicott's recollection is further attacked by the fact that he says that the ordinance had been passed before the deeds were signed, and that that ordinance was passed the 6th

of May, and thought he had secured those signatures before the 9th. It is to be observed in examining his testimony, however, that this same deed is signed a little lower down on the list for the Lopers in behalf of the Rutters, Larvel E. Rutter and Henry Rutter, and Judge Endicott says that they stopped building the Board-walk when they came to the Rutters, and that they signed before they went on with the Board-walk. The acknowledgment for the Rutters is dated the 9th of May, also. It is clear that the Board-walk was not built up to the Rutters' property, which lay to the east of this line, before the 9th of May, and therefore Judge Endicott's testimony as to the obtaining of these acknowledgments, and the dates on which they were given is open to criticism. If it is criticisable as to the Rutters, it is equally criticisable as to the Lopers.

POINT VI.

The defendant has under the agreement a right to build a steel pier one thousand feet in length.

There is no testimony to show that the defendant has exhausted this right.

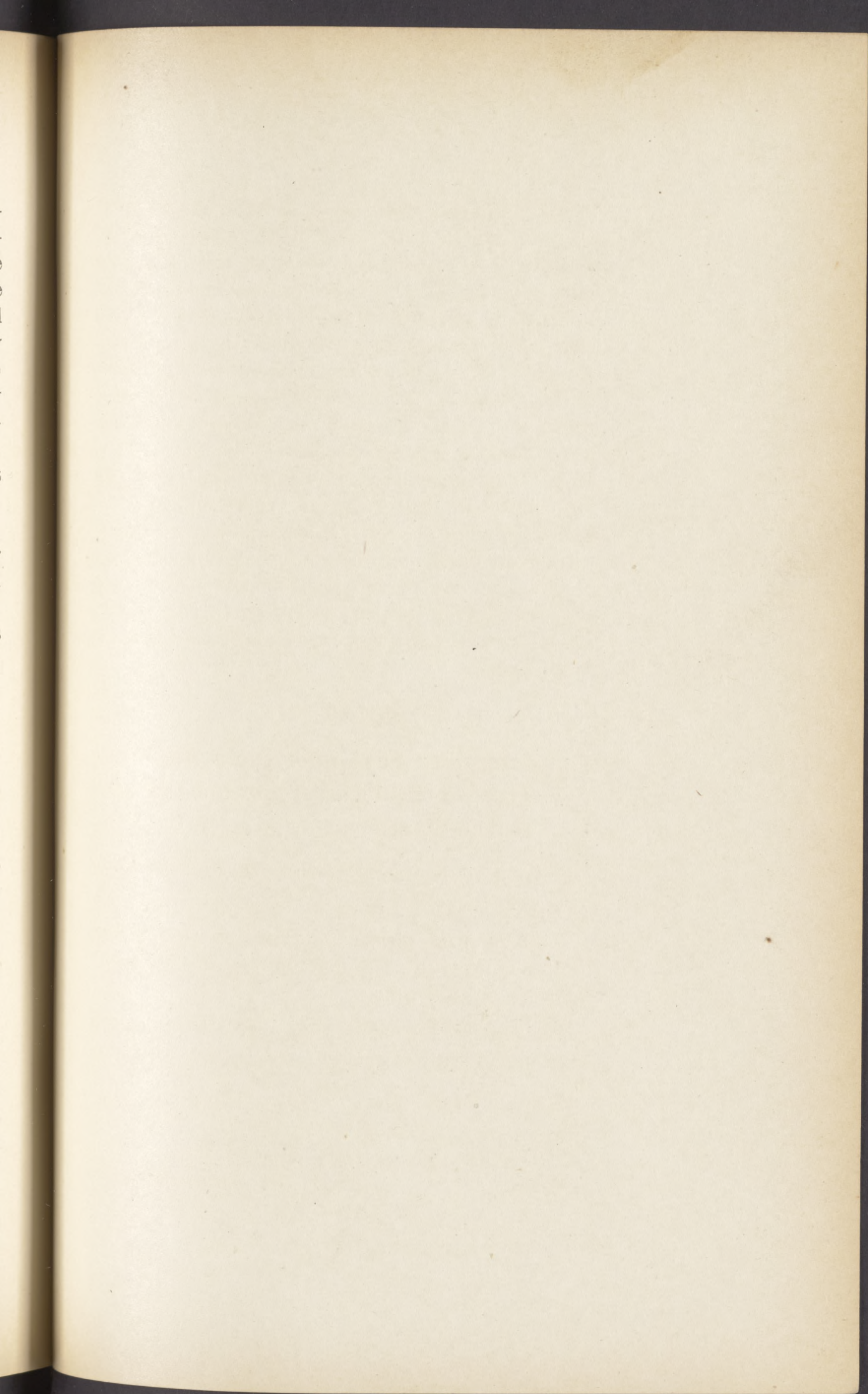
If the present pier is not built to the extreme limit of this right, the defendants have a right to extend it to this limit.

The decree for injunction restrains defendant from driving any piles and erecting any structure.

It is too broad.

Respectfully submitted,

CHARLES D. THOMPSON.



New Jersey Court of Errors and Appeals

Between CITY OF ATLANTIC CITY, *Respondent,* and NEW AUDITORIUM PIER COMPANY, *Appellant.*	On Appeal. February Term 1904.

BRIEF OF RESPONDENT.

This appeal is taken from a decree entered in the Court below on the twenty-sixth day of October, nineteen hundred and three, adjudging the covenants contained in the dedication deeds made by the owners of beach front property in Atlantic City, to the respondent, enforcible and binding on the appellant, and that the respondent is entitled to the benefit thereof.

The decree involves the right of the appellant to make a proposed construction on certain lands lying on the ocean side of the present boardwalk in Atlantic City, which were to remain without being built upon, except the erection of an iron or steel pier of certain characteristics. The premises in question, upon which defendant's pier is built, are shown upon a diagram offered in evidence (copy of which is printed in Vice Chancellor Gray's opinion, 18 Dick, 650).

By an Act of the Legislature of this State in 1889 (P. L. 1889, p. 205), cities located on or near the ocean, embracing within their limits or jurisdiction

any beach or ocean front, are authorized to lay out and open streets and driveways and to construct public walks along and upon the beach or ocean front, and to grade or otherwise improve the same and to regulate the use thereof. Subsequently several supplements were passed to this Act, and by a supplement of 1890 (P. L. 1890, p. 159) it was provided that any walk constructed or that might be constructed upon any such street so laid out should be elevated above the surface of the ground and be constructed on piling or other supports placed in the street; and when such elevated walk was constructed the city was given permission to permit approaches to be made from contiguous property on the landward side or on the side most remote from the ocean.

By this supplement any such city was authorized to accept any dedication of land or rights which might be made for the purpose of enabling such city to open and lay out such street, or for the purpose of constructing any such walk or making any improvements to the same.

By a further supplement of 1896 (P. L. 1896, p. 18) the Common Council of any such City was authorized to re-locate, in whole or in part, public walk or walks which may have been or which may thereafter be constructed or built.

Under the authority thus given, Atlantic City did lay out a street, sixty feet wide, along the ocean front and construct thereon a public boardwalk, elevated on piles or posts, and in the early part of 1896 re-located and laid out a street, sixty feet wide, along the beach or ocean front, and constructed thereon a new public boardwalk, forty feet wide, and about four miles long, of a more permanent and substantial character, elevated on piles or posts.

The sixty foot strip of land was designated by courses and distances extending from the most north-

erly point in Atlantic City along the ocean front almost to the southerly limit or boundary of the city.

The owners (with one or two exceptions) of ocean front land, over which the sixty feet wide strip was designated, voluntarily executed and delivered to the city agreements by which they dedicated over their respective lands the sixty feet wide strip and inserted in their deeds covenants protecting the use of the sixty feet wide strip and boardwalk and the lands on the ocean side thereof by the public and prohibiting the erection of buildings to the oceanward of the walk, for the purpose of preserving a continuous ocean view from the boardwalk.

The first deed of this character (Ex. C. 3, p. 150) was made by Charles Evans and others to the City, dated January 2nd, 1890. It conveyed an easement or right of way sixty feet wide over the land on the ocean front, designating the territory in which the right of way was by courses and distances, for the purpose of the erection of a boardwalk by the city.

This deed contained the following clause: "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, the said parties of the first part, 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 provided."

The above provision which dealt with the erection of any structure on the ocean side of the boardwalk strip related to sinking pilings, or placing sea walls on the ocean front to protect property from the encroachment of the sea, and such open pavilions as City Council might on application allow.

After the deed of Evans and others of January 2nd, 1890, to the City had been made and recorded, Evans on July 22, 1895, conveyed to Richard F. Loper (Ex. C 1, p. 139) a tract of land on the westerly side of Pennsylvania avenue, which bounded on the ordinary high water line of the Atlantic Ocean. The conveyance included the lands over which the old boardwalk was built and existed prior to 1896, and lands over which the new steel or board walk is located and was built in 1896.

Incorporated in this conveyance was a recital subjecting it to the easement or right of way of the city as granted by Evans to the city January 2nd, 1890. Subsequently, Loper, on the twenty-ninth day of August, 1895, received from the Riparian Commissioners of this State a grant of the lands lying to the oceanward of the high water line. The lot of land granted by this deed was one hundred and fifty feet in width on the high water line and extended of that width southeastwardly four hundred and twenty-eight feet to the Commissioners' exterior wharf line.

In the early part of 1896, by virtue of the above legislative authority, an ordinance was passed May 6th, 1896, to re-locate and enlarge the boardwalk in width and length (Stipulation p. 44, Ex. II p. 24). In aid of this relocation and enlargement of the boardwalk an agreement (second agreement), dated April 30th, 1896, was entered into with the owners of beach front property (Ex. C 3, p. 48 pp. 15 24 of Case). By this agreement they dedicated to the city a right of way over their respective lands, sixty feet in width. The description in this agreement is of the entire length and width of the street on which the boardwalk was placed and erected.

The particular portions owned by each grantor are not separately described. The deeds were on printed forms and were the same in all cases (Exhibits C 7 to C 18, pp. 76 and 156 of Case).

The agreement which was signed by Richard F. Loper, the predecessor in title of the defendant and appellant Company, was annexed to the bill of complaint (Ex. 1, p. 15).

In this agreement the grantors promised and agreed for themselves, their heirs and assigns, as follows: "We will not put or erect or allow to be placed or erected on the land hereby granted or on the ocean side thereof, any building or structure except as by ordinance provided and covenanted that the above covenant shall run with the land.

It is further hereby covenanted and agreed that the present elevated boardwalk may remain until the new steel walk is built by the said city on the line of the new street as hereby located and described, and until such new walk is built that no structure or improvements will be made between the said walk as now located and the westerly and northerly line of said street.

And it is further covenanted and agreed by and between the said parties, except for the purpose of maintaining such boardwalk now constructed as herein provided, that whenever and as soon as the said city, by 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 the said street as herein described and located, shall immediately cease and determine and revert to the grantors of said lands, their heirs and assigns, 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 grantors, their heirs or assigns; they also hereby

covenanting and agreeing to waive all allowances for damages (if any accrued by such vacation). Provided that the grantors shall not be prohibited from building a pier in front of their property and connecting the same to the new boardwalk about to be erected; and upon the further condition that the said pier shall be at least one thousand feet in length extending into the ocean beyond the present sixty foot strip and constructed of iron or steel, and shall not permit the sale of any commodities upon the same and be confined to the charging only an entrance fee." (Form of deed —Ex. C 7 to C 18, p. 156.)

This dedication agreement was executed by Richard F. Loper, his wife joining in the deed. By the certificate of acknowledgment Loper and his wife executed and acknowledged it on the ninth day of May, 1896. This deed was recorded in the County Clerk's office June 16th, 1896. On the 30th day of April, 1896, the date of this deed, and on the 9th day of May, 1896, when it is certified to have been made, delivered and acknowledged by Loper, he was the owner of the lot of land one hundred and fifty feet wide lying on the westerly side of Pennsylvania Avenue, over which the sixty foot strip crossed and was located, which was conveyed to him by Evans July 22d, 1895 (Ex. C, p. 139). Loper at this time was also the owner of the riparian grant lying below the high water mark adjoining the lot conveyed to him by Evans. Loper acquired the riparian grant in August, 1895.

On the sixth day of June, 1896, Loper and wife made a deed to the Mary A. Riddle Company and Joseph A. Brady (Ex. C 2, D. 2). This deed conveyed to the grantees the portion of the premises which Evans, July 22, 1895, had conveyed to Loper, which bordered on the high water mark for one hundred and fifty feet and lying landward of the high water mark and included the right of the old boardwalk and also that of the new boardwalk. This deed

contained a recital subjecting it to the easement or right of way of the city granted by Evans and wife January 2d, 1890.

On the same date, June 6th, 1896, Loper and wife made another deed to the Mary A. Riddle Company and Joseph A. Brady for the premises which the Riparian Commissioners, on the twenty-ninth day of August, 1895, had conveyed to Loper. The land conveyed by this deed lies immediately in front of that conveyed by the last recited deed and to the oceanward of high water mark. This deed contains no reference to any restriction.

These Loper deeds were acknowledged June 6th, 1896, and recorded June 10th, 1896. It is within the lands conveyed by Loper's last mentioned deed that the appellant Company (Loper's ultimate grantee) is restrained from driving piling and erecting thereon a structure.

In pursuance of this dedication deed of April thirtieth, 1896, the city constructed the steel walk, partly on the original right of way and partly on the relocated line; in fact, the construction of the new walk was begun prior to the date of the deed; evidently it was a thoroughly understood matter and the owners permitted the work to be begun without waiting for the formal deed.

On April 29 the steel columns had been sunk and the floor beams were being placed across the Loper property. During this construction the old boardwalk was in constant use by the public and was not torn down except in places were the locations were identical, and at such points only a few feet at a time, in order to permit the replacing of the old boardwalk by the new (Case pp. 55 56).

The defenses interposed are:

1. That the boardwalk of 1890, over the premises conveyed by Evans to Loper in 1895, was not built upon the lands described in the deed made in 1890 by

Evans and others to Atlantic City (Ex. C. 3), and that the city had never taken possession of the strip so described, but had built the walk about forty feet further toward the ocean; that prior to the conveyance by Evans to Loper the strip actually described had reverted to Evans, and the strip and the lands oceanward of it were not subject to any easement or restrictions by virtue of the deed of 1890.

2. That the dedication deed of 1896 did not become operative until formally accepted by the city, and was not so accepted until after Loper had conveyed to defendant's lessors, Mary A. Riddle Company and Joseph A. Brady, and that they purchased without notice of the city's claim under the deed of 1896.

3. That even if the lands were subject to the deed of 1896 the defendant had a right to proceed with its proposed construction provided it should use steel instead of wood.

4. That the lands are not bound by the deed of 1896 because it was not executed by all the owners of lands fronting on the beach, and the alleged general agreement therefore never became effective.

5. Denies that complainant will suffer any injury by the proposed structure, or that he has any right to enforce the restrictions against Loper's grantees on the theory that there was a general scheme agreed upon, which might be enforced by any party thereto.

6. Denies that the lands below high water line as it existed in 1895 are bound by the restriction as to building within twenty-seven feet of the line of Pennsylvania avenue, contained in the deed from Evans to Loper in 1895, and asserts that that portion of the property is held under the deed from the Riparian Commissioners to Loper.

7. At the final hearing the defendant for the first time raised the question that Loper had never signed the deed of 1896, of which a copy was annexed to the bill. Loper swore that he did sign a copy of the

printed deed, but not that particular one. Defendant objected to the sufficiency of the proof of the deed that was offered in evidence to bind Loper or his grantees.

I.

The restrictions in the deed of 1890 became binding on the lands in question, and are still binding unless they have been released by the substitution of those contained in the deed of 1896.

It is true that the boardwalk built under the 1890 deeds was not built wholly upon the exact line mentioned in the written description in the deed. This was due to an error in the wording of the ordinance and written description, which were the same. The survey and map for the right of way were made by M. Hillman, who was then city surveyor. This map was appended to and made part of the deeds (see p. 176; the right of way was correctly shown by this map, and the walk was actually built upon those lines; but when Mr. Hillman attempted to describe this line in the ordinance and deeds he made some errors in the wording of the description, and at the point in question the lien described was about forty feet further inland than as shown by the map and survey, and as the walk was actually located on the lines shown by the map (see testimony of Hackney, pp. 55-57). However, the actual location, as indicated on the map appended to the deeds, was according to the intention of all parties, and the walk as thus built was used and connected with by the owners; they ought not now to be heard to object on account of this clerical error in the written description. The map was as much a part of the description as the written or printed description, and there being an apparent error in the latter all parties should be concluded by their acquiescence in the use of the strip as shown on the map; they had

the benefit of the walk and connected their buildings with it. There can be no doubt that all parties intended that the strip shown on the map, and on which the walk was actually built and used for many years, and the lands oceanward therefrom should be bound by the restrictions in the deed. The precise location of the walk was evidently not considered to be a matter of vital importance; by the provisions of the deed the city was bound, upon the request of the owners of three contiguous squares, to remove it oceanward whenever a certain amount of land should be formed by accretion (p. 153, ll. 12-20). Such removal, although not agreed to by all owners, would not have the effect of discharging the restrictions, although the former strip would revert to the owners.

The effect of the deed of 1896, and the building of the new walk under it, was merely to relocate portions of the old walk, and rebuild the walk, and to change in some respects the restrictions upon the lands oceanward. It will be seen, however, by comparing the two deeds that the general plan of preserving the ocean front was practically the same.

Vice-Chancellor Grey in his opinion (18 Dick., pp. 660 to 662) states the situation on this point very clearly.

II.

The rights of the city under the deed of 1896, and of the parties thereto as between themselves, became operative before the conveyance by Loper to the Riddle Company and Brady; when they acquired title they were chargeable with notice of the rights accrued under that deed.

The deed was dated April 30, 1896, acknowledged by Loper and many others on May 9, 1896, and recorded June 16, 1896. Loper's deed to Riddle Com-

pany and Brady (p. 143) was dated June 6, acknowledged on the same day and recorded June 10, 1896. The city had taken possession of the new strip and had placed steel columns and floor beams for the new walk thereon over the premises in question on April 29, 1896 (see stipulation, p. 46). Also, Joseph A. Brady was himself one of the signers of the same deed signed by Loper, probably in order to bind other property which he then owned. Loper's grantees thus had ample warning and notice of the fact that the city claimed rights in the new strip, and were bound to inquire as to the extent and nature of such rights. This branch of the case is also fully presented in the opinion of Vice-Chancellor Grey (18 Dick., at pp. 665-672).

III.

The deed of 1896 operated as a covenant between the grantors and the city that each owner would surrender to the city his portion of the right of way and be bound not to build on the ocean side of the boardwalk, in consideration that the city would erect a boardwalk improvement.

The proof shows possession of the right of way was delivered to the city and that the city has erected a boardwalk improvement, which has been accepted and and used by the grantors in said deed for several years.

By this dedication deed the grantors surrendered their property and invested in the city, the grantee. This surrender and entire control over the property vested the grantee, the city, with a property right. It created something more than a personal privilege; mere leave and liberty to be enjoyed as a matter of indulgence at the will of the grantors; it was a binding agreement between the parties and implies an estate conveyed or seated.

IV.

The defendant has no right, under the deed of 1896, to build the proposed addition either of wood or steel. It is not a pier such as is permitted by that deed.

In the case of Atlantic City against the same defendant, in which the above mentioned opinion of Vice-Chancellor Grey was written, the affidavits appended to the bill of complaint showed that the piles being driven were wooden ones, and the Vice-Chancellor properly decided the motion for injunction on the ground that such piles were clearly in violation of the terms of the deed. At the argument complainant's counsel also raised the point that the proposed addition was not such a pier as the deed permitted. The Vice-Chancellor considered that it was unnecessary for him to decide that question, it not being denied that the piles were wooden ones, but states in his opinion (pp. 672-674) that if it were necessary to deside this point he would consider that the proposed addition was not such a pier as was permitted by the deed.

The defendant now claims the right to proceed with the construction, provided it shall use steel instead of wood, and that the injunction order preventing it from proceeding to drive any kind of piling is too broad.

We claim that this proposed latteral addition cannot be considered as within the terms of the permission given by the deed of 1896, permitting each owner to erect a pier at least one thousand feet long, built of iron or steel. The pleadings show that a pier purporting to comply with the permissive clause of the deed was built by the Auditorium Pier Company in 1899. The evidence also shows (pp. 56-58) that this company at first built the auditorium immediately adjoining the boardwalk; when proceedings were taken to enjoin this structure they built out into the

ocean, in the rear of it, what purported to be an iron pier, in order to conform to the letter of the deed. This addition was only twenty feet wide; the auditorium on the beach front was seventy or eighty feet wide (see diagram).

The defendants proposed to widen the existing pier for its full length, and by this means would cover nearly all the property held by them, being 150 feet in width; also to place thereon buildings and structures in which exhibitions and entertainments were to be given.

The principal value of the beach front property, and incidentally of nearly all other property in Atlantic City, depends upon the attractiveness of the beach front, and view of the ocean therefrom. It is apparent that it was to preserve this that the deeds of 1890 and 1896 were made; that was the only object of those deeds, and in order to give effect to this a strict construction should be given to the clauses permitting owners to make connections with the boardwalk, and build structures oceanward therefrom. Any owner proposing to build such a pier should show that he is acting strictly within the terms of the permissive clause. (Atlantic City vs. Atlantic City Steel Pier Company, 17 Dick., 139.) What is contemplated by the deed is a pier. This word should be construed in its ordinary sense, having in view the main purpose and object of the deed. It would seem to permit an open pier, with seats for the accommodation of persons going thereon from the boardwalk, possibly sun parlors, and any such erections in order to make the pier serve the use for which it and the boardwalk were contemplated and designed, viz: to permit the public to enjoy the sea view and air to the fullest extent; anything erected on the pier which would go further than this, and would tend to interfere with the enjoyment of these matters by the public who might resort to the beach front, and by the patrons of the hotels

erected adjacent thereto, would seem to be contrary to both the letter and spirit of this provision. It was not contemplated that the piers should be merely colorable, and used for the sole purpose of enabling any owner of the shore front to conduct thereon a business for his own benefit, which would require such structures as would materially interfere with the purpose and object of the dedication deeds. The purpose which the owners had in mind in this whole matter is shown by the fact that in the deed of 1890 no structures whatever were permitted, except "such open pavilions as the Common Council might on application allow" (p. 153-~~L. C.~~ ll 22-35).

The deed of 896 is merely supplemental to that of 1890. It recites the fact of the existing walk, and covenants in the deeds therefor, and that it was advisable for the interests of the city, as well as of the owners, to change the location and move the same, and erect a new walk; the owners then covenant not to erect on the lands granted or on the ocean side thereof, any structure "except as provided by ordinance;" the city covenants not to erect or allow any structure on the lands described (the right of way) "except as above provided." The only thing "above provided" to be erected on the right of way was the new board walk, and this is evidently what is here referred to.

In construing the meaning of the new clause in the 1896 deed, permitting owners to erect an iron or steel pier 1,000 feet long, the general intention evidenced by both the original and supplemental agreements should be considered.

Some light is thrown upon the intention which the parties had in mind by this clause by the following statement therein: "And shall not permit the sale of any commodity upon the same, and be confined to charging only an entrance fee." This indicates that the piers were not to be used for ordinary business

purposes, and further indicates, in our opinion, that they were to be used merely as accessories to the boardwalk, and to carry out the general purpose of the agreement to keep the beach free from any matters detrimental to the main purpose sought to be accomplished by these deeds, viz: the unobstructed view of the ocean and freedom from the objects which generally are sought to be established at such places for private gain, but which would seriously interfere with the purpose apparent in the minds of these beach front owners when they entered into these agreements.

The present pier contains large buildings, and is used for purposes which are subversive of this agreement; to permit the business so carried on to be extended would be finally to destroy the whole object sought to be accomplished by these deeds, and would result in incalculable loss both to the beach front owners and to the citizens generally.

V.

The deed of 1896 is binding on all parties who signed it, notwithstanding that it was not signed by every other owner.

The same objection as is here raised by the defendant on this point was raised in the case of Atlantic City v. Atlantic City Steel Pier Company (17 Dick., 139). Vice-Chancellor Reed there stated:

> "I have no doubt there was a general under-
> "standing that the scheme required deeds from
> "all the beach owners along the right of way.
> "The ground work of the scheme was a common
> "surrender by such owners of a certain degree of
> "control over their own property in considera-
> "tion of the benefit that would accrue to them
> "from similar conduct on the part of the other
> "owners. If the complainant had attempted to

"hold the defendant to its covenant, while all or
"most of the beach owners refused to make simi-
"lar deeds, it would have presented a case of
"hardship in the highest degree inequitable. But
"in this instance the scheme is substantially exe-
"cuted. Out of the very numerous beach owners,
"as already remarked, two or three only have not
"yet made their deeds. These owners, so far as
"appears, are not in the vicinity of the land of the
"defendant. The defendant has been silent while
"all the improvements have been made. It knew
"that the city was building upon the land in ques-
"tion by reason of the license which they had
"given in the deed. Under any aspect in which
"the facts can be viewed, it is now too late for the
"defendant to say that there was no delivery of
"its deed of dedication to the city."

There were several parties on the outskirts who did not sign ; very few along the two miles of the central and built-up section failed to sign (case, pp. 71-72; also p. 66). There was no limit upon the time within which signatures should be obtained ; their signatures were constantly being obtained (p. 75); evidently all parties were desirous that the new walk should proceed as far as practicable.

Loper and his grantees and the other owners who signed acquiesced in the situation, and took the benefit of the walk so far it was constructed, which was sufficient for all practical purposes.

VI.

Both the pleadings and proofs show that Loper did execute the dedication deed of 1896.

We submit that in view of the condition of the pleadings the complainant was not bound to offer any proof of the fact of the execution by Loper of the dedication deed of 1896.

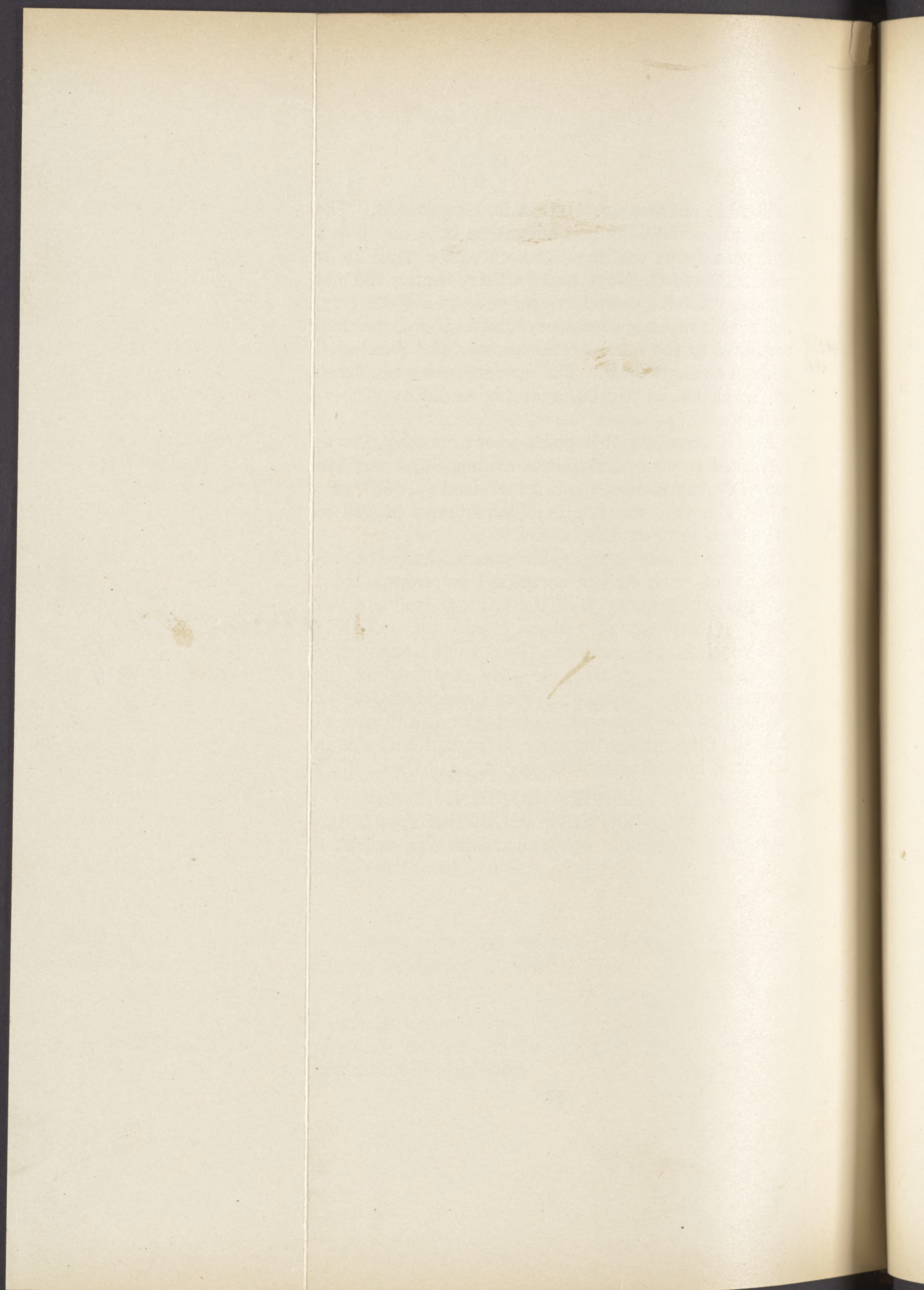
The bill charges (p. 4) that he executed it. The answer does not deny this allegation, but sets up as a defense a denial that it was executed on April 30 or was delivered in May, and further, that it did not become effective until formally accepted by the city, and that it was not so accepted until after Loper had conveyed to the defendant's lessors, who purchased without notice thereof. This operates as an admission of the charge in the bill that Loper did in fact execute it.

But if proof on this point was necessary, it was furnished by the admission in evidence of a certified copy of the record of the original deed (p. 156), also p. 48, Ex. C 3, the original having been proved to have been lost (pp. 122-125).

In order to meet any possible question as to the sufficiency of proof by the certified copy, complainant also proved the contents of the original deed as a lost deed. (Testimony of witness Moore, pp. 149-158.) of Evans case) pp. 92-100 121-132 city record

In conclusion we refer the Court to the exhaustive discussion of the matters in issue contained in the above mentioned opinion of Vice Chancellor Grey on the motion for preliminary injunction in the case of Atlantic City against the same defendant, and also in this case, immediately following it. (18 Dick., 674.)

HARRY WOOTTON,
GODFREY & GODFREY,
Of Counsel with Respondent.



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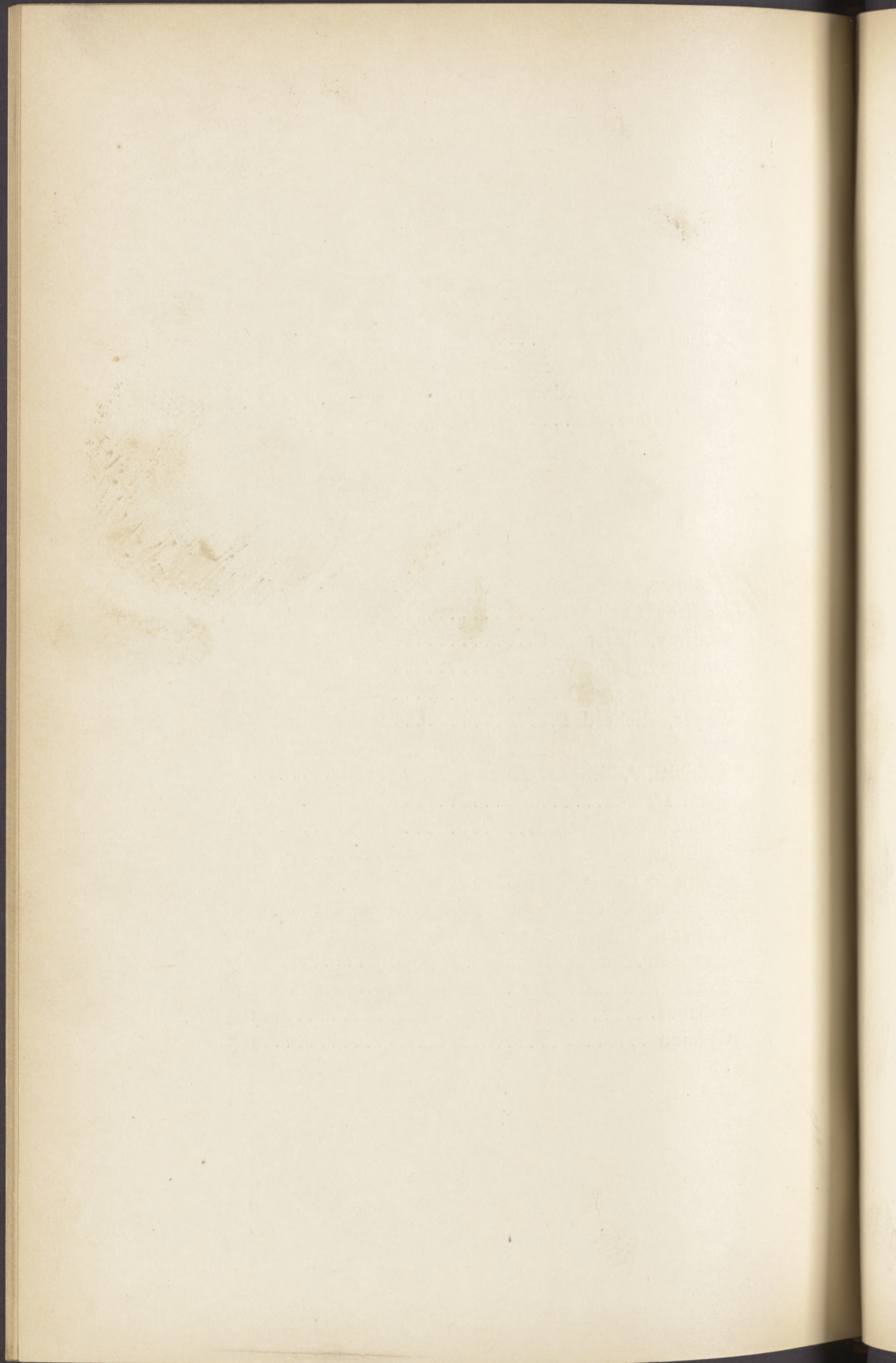

IN CHANCERY OF NEW JERSEY.

Between ATLANTIC CITY, Complainant, and THE NEW AUDITORIUM PIER COMPANY, Defendant.	)	On Bill, &c.

10

20

Hearing in the above matter before His Honor Martin P. Grey, one of the Vice Chancellors of this State, at the Chancery Chambers, in the City of Trenton, on Monday, the 13th day of October, 1902.

Mr. Harry Wootton, and Mr. Burrows C. Godfrey for the complainant. 30

Mr. C. D. Thompson and Mr. E. P. Hervey (of the New York Bar) for defendant.

Mr. WOOTTON: There is a matter we omitted to put in the stipulation.

That Mr. Richard F. Loper received from the State of New Jersey a grant of the riparian land, by deed of the Riparian Commissioners of the State of New Jersey, dated August 29, 1895, conveying the lands beyond high water mark, oceanward of the 40

lands in question, and including a place in which the defendant company is engaged in constructing or driving its piling.

Counsel submit a stipulation dated October 3, 1892, entitled in the cause, signed Harry Wootton, Solicitor for Complanant, and Thompson and Hall, solicitors for defendant, admitting without proof some of the facts in dispute in this case, which stipu-
10 lation the Vice Chancellor marked "Filed October 13, 1902."

The stipulation is as follows:

It is stipulated by counsel for the respective parties hereto that the following facts are admitted on both sides and need not be proved.

First. That the minutes of the City Counsel show that the "Boardwalk Ordinance" (attached to the bill) was introduced in the said Council on April
20 13th, 1896; went to second reading on the same night, and was passed May 4th, 1896, and approved May 6th, 1896. That on June 8th, 1896, a resolution was adopted accepting the dedication made by property owners along the right of way, and instructing the City Solicitor to have the right of way recorded in the County Clerk's Office.

Second. That the steel board or plank walk of 1896 was actually constructed and is in use along
30 the beach or ocean front from Vermont avenue to Texas avenue, on the lands laid down in the ordinance, and described in the agreement of April 30th, 1896, and that a wooden or plank walk extended from Vermont to Caspian avenue, and from Texas to Hartford avenue, on lines near those laid out in the ordinance.

Third. That the agreement for the Board walk of 1896 was not executed by all the owners of beach
40 or ocean front, along the sixty foot wide strip de-

scribed therein; that many owners of land comprising part of the entire strip described, refused to execute that agreement; and a few owners have not as yet signed any agreement with the City, in common with other property owners, relative to a right of way, upon any terms.

Fourth. That the several tracts for the use of which the City holds no agreement, are located in various places along the whole strip. 10

Fifth. That in regard to the old boardwalk, the strip described in the agreement and in the ordinance of 1890, was located at many places or points between high and low water mark; the dedication agreements were not executed by all of the owners of the strip therein described; that some refused to execute the agreement, and did not sign any agreement with the City dedicating said strip; that the 20 parcels of land for which the City held no agreements were scattered along the whole line of that boardwalk.

Sixth. That the City has never taken and fully prosecuted any proceedings to condemn an easement over any of the lands for which it holds no agreement for dedication.

Seventh. That the blue print map entitled "Map 30 showing a portion of Atlantic City, New Jersey," and made by R. L. Goff, C. E., April 7th, 1899, correctly shows the various matters laid down thereon, and need not be proved.

Eighth. That the tracing map made by Ashmead & Hackney, and showing the right of way for the boardwalk of 1890, as shown on the map of M. Hillman, surveyor, together with various other matters indicated thereon, correctly locates the boardwalk 40

and other lines purporting to be shown thereon, and need not be proved.

Ninth. That the actual work of building the new steel walk by the City of Atlantic City commenced by the sinking of the steel columns and placing floor beams for its support, and that along the property now owned by the defendant lessors, the columns were sunk, and the floor beams were being placed on April 29th, 1896.

Dated October 3rd, 1902.

HARRY WOOTTON,
Solr. of Complt.

THOMPSON & HALL,
Solrs. of Deft.

Mr. WOOTTON: If your Honor please, in the stipulation, it is admitted that the ordinance of 1896 was admitted April 13, and passed May 4, approved May 6, this being the ordinance known as the "Boardwalk Ordinance," under which the city of Atlantic City proceeded to construct the steel boardwalk, and if the original is desired, this is the original.

Mr. THOMPSON: A copy is annexed to the bill.

Mr. WOOTTON: Yes.

It is admitted that the copy of the ordinance annexed to the bill is a true copy of the ordinance as passed.

Mr. WOOTTON: We desire to offer a certified copy of a deed from Charles Evans to Richard F.

Loper, dated July 22, 1895, acknowledged July 22, 1895, and recorded July 23, A. D., 1895, in the Clerk's Office of Atlantic County, Book 192 of Deeds, fol. 384, etc. Which deed conveys the premises described on the blue print map, referred to in Section 7 of the stipulation, as made by R. L. Goff, which will be referred to hereafter as the "Goff Map;" being that lot on said map which is included 10 within the red lines, and marked "Evans to Loper, July 22, 1895," the description purporting to run to high water mark.

Marked Exhibit C—1.

Also a certified copy of a deed from Richard F. Loper and wife to the Mary A. Riddle Co., and Joseph Brady, dated June 6, 1896, acknowledged June 6, 1896 recorded June 10, A. D. 1896, in the 20 Clerk's Office of Atlantic County, in Book 203 of Deeds, fol. 381, etc., and conveying a portion of the upland, part of the lands conveyed by Evans to Loper, by deed of July 2, 1895, the portion by the deed to said Riddle Co. and Brady, being the part bordering on high water mark and running landward 362 feet, and including the sites of the old boardwalk, and also the new steel boardwalk.

Marked Exhibit C—2. 30

Also a certified copy of the deed and agreement signed by Charles Evans, et al., dated January 2, 1890, made between Charles Evans, et als of the City of Atlantic City, acknowledged by Charles Evans, Feb. 5, 1890, recorded in the Clerk's Office of Atlantic County, March 28, A. D. 1893, in Book 173, fol. 11, etc., purporting to convey the right of way for the purpose of the boardwalk, and also to have certain covenants with relation to the land to the ocean- 40

ward right of way. For exact description see the deed.

Marked Exhibit C—3.

Also a certified copy of the deed of right of way, signed Henry W. Leeds, Richard F. Loper, et als., dated April 30, 1896, acknowledged by Richard F.
10 Loper, May 9, 1896, and recorded June 16, A. D. 1896, in the Clerk's office of the County of Atlantic, in Book 206 of Deeds, fol. 22.

Already printed on pp. 15-24 of Case.

Mr. THOMPSON: I object to this being in evidence at all, on the ground that the statute does not permit the making of a certified copy of a paper of this sort evidence.This is not a deed, nor is it a conveyance of land; the word "grant" or "conveyed" does not occur in it. It is not within the statute
20 which permits a certified copy being offered.

The VICE-CHANCELLOR: Have you the original deed?

Mr. WOOTTON: We have not, we made diligent search, coverin~ several days, and we have not been able to find the original deed. We hope to locate it, but we have not been able to find it. It may have been mislaid and got in with some other papers. We hope to produce it and want to produce it.
30

The VICE-CHANCELLOR: I am not willing to pass upon this question in any way which will exclude the opportunity to offer other proof of this important conveyance if the original instrument cannot be found, I am not willing to pass upon this question upon a mere objection to the form in which evidence is presented. An opportunity should be afforded to produce the original, or to prove that the paper submitted is a true copy if the original be shown to
40 have been lost.

Mr. WOOTTON: I have witnesses here to prove the apparent loss of the deed and our inability to find it.

The VICE-CHANCELLOR: I do not want to pass upon this, Mr. Thompson, in this shape, unless I am compelled to do so. There are questions of substance involved in this instrument, and it has gone through the Court of Appeals, and has several times been recognized as an efficient record. Practically, it would go far to decide this case upon the exclusion of this paper. It would be better to admit it and pass upon the matter in final hearing affording further time to offer other proof if it need be. 10

Mr. THOMPSON: This is an action brought for an injunction to restrain us from using our property. If we are satisfied that they have not got any such paper as one upon which they base their claim, we are entitled to the strictest construction of the rules of law. 20

The VICE-CHANCELLOR: The cause may be tried in such a way as to preserve to the defendant company all its rights and at the same time have it in such shape as to determine it on its real merits.

Mr. THOMPSON: It does seem to me that it is hardship to us; we have lost all this summer's business because we were misled about this paper. 30

The VICE-CHANCELLOR: Do you deny that this deed of April 30, 1896, is forceful to affect any interest in the lands it refers to?

Mr. THOMPSON: Yes, I do.

The VICE-CHANCELLOR: You deny that on the face of the certified copy as produced? 40

Mr. THOMPSON: If this paper is what they have to rely on to sustain this injunction, I propose to argue to your Honor that they have no interest in the land whatever.

The VICE-CHANCELLOR: Then of what significance is it whether the original deed is produced, or a certified copy, because under the construction you
10 put upon it, you claim that the original deed passed no interest in the land. Your present objection is not to the force and effect of the conveyance or covenant but to the form in which proof of it is sought. You appear to wish to exclude any proof that such a deed was made.

Mr. THOMPSON: Not if they produce the original.

20 The VICE-CHANCELLOR: Assuming that the original is lost, your objection is not in accordance with your theory of the effect of the instrument. You say that the effect of the instrument, a certified copy of which is produced, is to pass no title and no interest in land. If that is your ground, it would be one which I could pass upon by an examination of the original deed or of any kind of a proven copy of it. You object to the admission in any form of the instrument, which you say does not pass any title, so
30 that the Court cannot consider what the effect of it really is.

Mr. THOMPSON: I hesitate to open my case in this way before my opponents have put in their case. But, in the first place, if they do produce the original deed, I think it will appear that if it was signed by Mr. Loper, it was not signed until after the conveyance to Mr. Riddle. If that is true and I prove that Mr. Riddle was owner in equity, if not by actual deed,
40 at the time Loper signed, then Loper had no power

to sign any kind of agreement which would bind Mr. Riddle or his assigns. I have a right to see the original to know what the date of the original signed by Mr. Loper was. My information is that this is not the true one. If they produce the original, I then propose to argue to your Honor that the original does not convey any interest in lands.

10

The VICE-CHANCELLOR: I will admit the certified copy of the deed here produced, and give Mr. Thompson the benefit of his objection to its admission.

Marked Exhibit C—4.

Mr. WOOTTON: We have other deeds, but I think we had better offer them when we prove them.

20

30

40

JOHN W. HACKNEY, sworn for the complainant:

DIRECT EXAMINATION by Mr. Wootton:

Q. Where do you reside? A. In Atlantic City.

Q. What position do you hold in Atlantic City? A. I am City Engineer of Atlantic City.

Q. About how long have you been City Engineer?
10 A. I think about four years.

Q. Do you know anything about what proceedings were taken to relocate a boardwalk in Atlantic City in 1896? A. I know what I did concerning it, and what my partner, Mr. John P. Ashmead, who was then City Surveyor, did.

Q. State what proceedings were taken? A. My recollection is that about the first thing that was done was for the regular committee of the City Council, called the Streets, Walks and Drives Committee,
20 in conjunction with the City Surveyor, to determine upon a new location for the new boardwalk, that would be agreeable to all the interests of property owners that would abut thereon. That took up considerable time; the measurements were made along the beach front, numerous maps, different lines were proposed and submitted to the City Council, and referred back again for further consideration, extending I think from October on until the following March, October, 1895, to March, 1896.

30 Q. Was a line for the new boardwalk finally located by you? A. Yes, sir; acting under instructions of the City Council I presented a plan which showed the location for a new 60-foot wide strip upon which the boardwalk was to be built; that was adopted, and the City Council—

Mr. THOMPSON: You cannot testify to what the City Council did unless you are a member of the City Council.

40

The VICE-CHANCELLOR: If it is the identification of an ordinance which was admitted, he may say what was done on the ground. He cannot prove the ordinance.

Mr. THOMPSON: The ordinance is admitted.

Q. What was done under your supervision actually upon this site as laid out by you as City Engineer? A. I and my partner Mr. Ashmead, who was City Surveyor, were working together. We visited the ground with the committee and found out from them where they wanted the line of the boardwalk to be placed. We prepared maps showing the line in that position and submitted it to City Council. We prepared the description for the ordinance showing the line. 10

Q. (By the Vice-Chancellor). That is the line where the proposed new way for the boardwalk should be located? A. Yes, sir. 20

Q. How did you run that line, did you run the two outsides lines, or the centre line, or one side line, or how did you run it? A. My recollection is that the physical work—

Q. Was the deed subsequently drawn, or the covenant which has been referred to, of April 30, 1896, in accordance with the work which you laid out? A. Yes, sir; describes the interior line.

Q. Then the lines which laid the site was the interior line of the new boardwalk as it was to be? A. Yes, sir; and of the new 60-feet wide strip. 30

Q. And the enclosure 60 feet beyond that seaward? A. Yes, sir.

Q. Running parallel to it? A. Yes, sir.

Q. It varied at different streets, getting somewhat narrower? A. The 60 feet?

Q. Yes? A. No, sir.

Q. Was it all 60 feet? A. From Albany avenue to the Inlet at Caspian avenue. 40

Q. Through the whole length? A. Yes, sir.

Q. And 60 feet through the land of Mr. Loper? A. Yes, sir.

Q. (Further direct). What structure was erected on this strip? A. Between Vermont avenue and Texas avenue, or I might say within 110 feet from the easterly line of Texas avenue, what we call the
10 steel boardwalk was built; the width of that boardwalk from Vermont avenue to Massachusetts avenue was 21 feet wide over all, and from Massachusetts avenue to this point within 110 feet of Texas avenue was 41 feet over all. I might say there was one interruption over the property of one Wm. Boker, who owned 65 feet in front at the corner of Mississippi avenue.

Q. (By the Vice-Chancellor). Where was this 41 feet wide new boardwalk erected with relation to the
20 60 foot wide strip in which it was placed? A. The interior or landward line of the new steel boardwalk, was placed an inch and a half southward or eastward of the interior line of the 60 foot wide strip. It was intended to be placed exactly upon the interior line, but it was found that the lumber which is furnished by the contractor was a little too short to enable it to be cut 41 feet long, and we took off an inch and a half.

Q. Then it lay within the 60 foot strip? A. Yes,
30 sir.

Q. Within an inch and a half of the landward side of it? A. Yes, sir.

Q. That left a 10 foot strip of the 60 foot strip to the oceanward side over which there was no construction? A. Yes, sir.

Q. (Further direct). Was that boardwalk of the 41 foot width erected across the property marked on the Goff map, "Evans to Loper, July 22, 1895"? A. Yes, sir.

40 Q. Set forth by the red ink? A. Yes, sir.

Q. At that point was it 19 feet from the outside line of the right of way? A. 19 feet 1½ inches.

Q. On that property? A. Yes, sir.

Q. (By the Vice-Chancellor). What was the structure itself? A. The structure itself was really three inches narrower than 41 feet.

Q. What was it? A. A boardwalk structure of wooden floor, upon wooden floor joists, supported on 10 steel girders, and supported on steel columns.

Q. How high does it stand from the sand or beach? A. That varies in different places, at the foot of Pennsylvania avenue about 7 feet, the floor of it.

Q| How were those steel girders supported? A. The steel girders were supported upon two steel columns, sunk in the sand.

Q. They stood then about seven feet above the sand, and on top of that girder was this boardwalk structure, over the joists on the top of the girder? 20 A. The boardwalk floor was supported on joists, they were of wood, and the joists were supported at each twenty foot interval on steel girders.

Q. What is the thickness of the plainking which made the flooring? A. The planking was two inches thick, and the floor joists were four inches by 14 inches, and the steel girders were three feet deep, except at the outer end, where they tapered up.

Q. (Further direct.) Did you attend to the civil engineering in connection with the erection of that 30 walk, give the lines? A. Yes, sir, I personally drove, I think, nearly all of the stakes for the location of the columns; we drove three stakes every twenty feet the whole length of the line.

Q. Do you know at what time in 1896 you were engaged in giving the lines on the property marked on the Goff map, referred to in the previous question? A. I looked the matter up from our book of charges for the services which we rendered to the City; my recollection is that the work began about April 20th. 40

Q. 1896? A. 1896.

Q. And continued how long? A. It continued until the walk was completed, I think all except the rails completed, some time in July, 1896.

Q. Then what time was the foundation, the steel structure, the steel part of the walk completed at the point in question?

10 The VICE-CHANCELLOR: That is at the foot of Pennsylvania avenue.

A. By reference to our charges I also find that the sub-structures, which would include the steel columns and steel girders, were erected across this property, called the Loper property, between the 20th of April and the 6th day of May, 1896.

Q. (Referring the witness to the Goff map) I ask, are you acquainted with the nature of the construction and the design of the building marked "Proposed Pier," and "Proposed new steel building" on the Goff map, in front of the Evans to Loper property? A. Yes, sir. I know about what the construction, what is constructed there.

Q. Will you state the nature of the construction, and the proportions, if possible; what is the nature of the building nearest to the boardwalk? A. There is a theatre.

Q. Is that the building called an auditorium? A. The Auditorium Pier. It consists of a sub-structure, upon which is erected a large building, I should say some 80 feet in width, by possibly 200 feet in length.

Q. (By the Vice-Chancellor) Running from the edge of the boardwalk? A. No, the building does not begin at the boardwalk, it begins possibly 75 feet from the boardwalk, the space between the building and the boardwalk is occupied with a platform construction.

Q. Connecting with the boardwalk? A. Yes, sir.

Q. So that it is walkable from the boardwalk to this building? A. Yes, sir.

Q. That is what the platform is for, for the purpose of approach? A. Yes, sir.

Q. What is the building used for? A. It has been used largely for theatrical purposes.

Q. An Auditorium for any purpose that will bring a large audience together? A. Yes, sir. 10

Q. (Further direct). Describe the materials that building is composed of? A. The building is chiefly composed of a wooden platform upon which it rests, with wooden floors, the joists are also of wood; the girders are all steel and the columns are of, I should say wrought or cast iron, I am not sure, I think it is wrought iron.

Q. (By the Vice-Chancellor). What do you mean, the posts that go down? A. Yes, sir.

Q. It stands upon posts? A. Yes, sir.

Q. And they are driven into the sand? A. Yes, sir. 20

Q. (Further direct). What is there on the pier outside of the auditorium building or theatre you have just described? A. Just beyond or eastward of the oceanward end of the theatre building, the pier structure narrows up to a width of possibly 20 feet, and then extends, I believe, to a point about 1,000 feet from the oceanward line of the 60 foot wide strip.

Q. Describe that continuation? A. The continuation consists of a structure quite similar to the steel boardwalk, constructed of plank floor, wood joists, 30 supported on steel girders, supported on wrought iron columns.

Q. Is that open to the public? A. It can be walked on by paying an admission fee to get on the pier.

Q. Did you ever see any persons on it? A. Yes, sir; I have walked on it myself.

Q. Were there others on that pier at the same time with you? A. Yes, sir.

Q. For what purpose? A. During an intermission of the Sousa Band Concert I walked out quite a con- 40

siderable distance on it, and other people did, too.

Q. (By the Vice-Chancellor). Is there any building other than this plank walk that you referred to, on the extension of the auditorium pier, after you leave the auditorium itself? A. At what time might you refer to, at the present moment?

Q. I am speaking of the time when this proceeding began, February, 1902, has there been any other
10 building? A. There was no building other than the Auditorium Theatre building, there is one now.

Q. What building has there been put beyond the auditorium building in addition to the pier as a structure on the plank walk; has there been any? A. A temporary structure was placed there for the convenience of the Floradora Troop as a dressing room this summer.

Q. That is an extension immediately connected with the auditorium building? A. I am not sure
20 whether it is absolutely directly connected, it is right close to it.

Q. But to the eastward of it? A. Yes, sir.

Q. Not literally on either side? A. No, sir; oceanward.

Q. (Further direct). Did you ever observe any preparation or making of improvements in the past Spring, on the ground at or near the land of the auditorium pier company? A. Yes, sir.

Q. What did they consist of? A. The firm of Ash-
30 mead & Hackney were employed to indicate the location for wooden piling, which were proposed to be erected, and we did so indicate a large number of points, and a number of piles were sunk in the ground. This was on the easterly side of the auditorium pier construction.

Q. The side towards Pennsylvania avenue? A. Yes, sir.

Q. (By the Vice-Chancellor). Was the point at which these wooden pilings were driven below high water mark as it existed at that time? A. I am not
40 able to say.

Q. Can you, by reference to the Goff map, determine the question whether or not this piling was within or outside of high water mark? A. The high water line changes, and to say where it was, that would have to be with relation to the time when the pilings were driven, I could not say. I did not indicate the points, Mr. Ashmead, my partner, did the actual work.

Q. You have seen it frequently? A. Yes, sir. 10

Q. Is there any question that piling was driven below high water mark as it existed in February, 1902? A. I don't think there is any doubt about it, because I know that the land was water soaken, and we had to cut holes to get the stakes in it; if it had not been high water mark, it would not have been so frozen.

Q. There is no question but it was below high water mark as it existed in 1895? A. I should say not. 20

Q. Another thing—when you were laying out the new boardwalk, when the construction of the new boardwalk was going on, where was the old boardwalk, was that still in use? A. There were places along it that we had to tear the old boardwalk down in order to make place for the new one, but that did not apply to the whole line.

Q. At the foot of the Pennsylvania avenue crossing, the property in question, the old boardwalk, if you look at the Goff map, was indicated to be considerable to the landward of the new boardwalk? A. Yes, that is true. 30

Q. When the construction of the new boardwalk was going on at that point where was the old boardwalk? A. That was there and still in use.

Q. Then there was the old boardwalk as it had theretofore existed, then in use, and new boardwalk then in process of construction going on at the same time? A. Yes, sir, in fact the old boardwalk was never torn down until the new boardwalk was ready 40

for service, except in those places where the locations were identical, and then we tore it down just a few feet in advance.

Q. What is the point in that? A. So as to enable the public to pass continuously along the beach.

Q. And that was the effort in the whole construction? A. Yes, sir.

Q. To keep a continuous line? A. Yes, sir.

10

CROSS-EXAMINATION by Mr. Thompson:

Q. You said this auditorium building was quite large; how high is it above the level of the platform; it is one story? A. Yes, sir; it is one story. I guess the roof extends up pretty high, it is because it is very wide; it is an ordinary V-shaped roof, I should suppose the eaves would be some 18 to 20 feet apart at the platform, I never measured it.

Q. With your permission, Mr. Wootton, although
20
it is not strict cross-examination, I will refer to this other map referred to in the stipulation.

Mr. WOOTTON: I have no objection.

Q. I call your attention to the map referred to in the stipulation in section 8, and called a "tracing map," made by Ashmead & Hackney, this map was made by you? A. Made in our office.

Q. And from records there in existence? A. Yes,
30 sir.

Q. I call your attention to the strip on the bottom of the map colored in yellow; what is that intended to indicate? A. That shows the boardwalk erected in 1890.

Q. Calling your attention now to the building on the land on the westerly side of Pennsylvania avenue, as indicating the location generally of the boardwalk of 1890, as it existed prior to the erection of the boardwalk in 1896? A. Yes, sir.

40 Q. I call your attention now to the blue lines pass-

ing across the yellow lines at the line of Pennsylvania avenue, and which appears at a point opposite, what is marked on the map as Va. These words "High water line in 1889." That shows the high water line in 1890, shown by your record? A. My recollection is that that is the high water line as shown on the map accompanying the easement deeds of grants to the city.

Q. Of 1890? A. Yes, sir. 10

Q. I call your attention to the two unbroken lines in red which pass over the map from one end to the other, what do they represent? A. They represent as marked on the map, the right of way for the 1890 boardwalk, as described in the ordinance.

Q. I call your attention now to two unbroken lines in orange, located somewhat south or oceanward of the two red lines which I have just referred to, and ask you what they describe? A. They show a 60-foot right of way for the boardwalk as it appears on the map made by M. Hillman, Surveyor, 20 accompanying a deed from Jos. H. Borton, and others, to Atlantic City.

Q. Is that the line described in the deed which has been offered in evidence as C—3, deed made by Evans et als. to Atlantic City, in 1890? A. No, sir, that does not follow the lines in that deed; the lines in that deed are copied from the ordinance; I can explain if you desire to know the discrepancy, why there are two sets of lines there, indicating two 30 different rights of way.

Q. You may explain? A. The line shown in orange represents the location which M. Hillman, the then City Surveyor, intended the boardwalk right of way should have.

Q. That is the boardwalk right of way of 1890? A. Yes, sir, and he showed it on every one of the plans which accompanied the easements or grants or agreements or right of way to the city, but in preparing his ordinance, or rather the description of 40

that right of way for his right of way, he made errors whereby the actual right of way or 60 foot wide strip as described by the ordinance, differs materially from the 60 foot wide strip, as he intended it should be, and as he indicated it at different places on the ground.

Q. This is the ordinance attending the right of 10 way of 1890? A. Yes, sir.

Q. So that as between the lines described in the deed, and the lines described in the ordinance, there is a descrepancy between the orange and the red unbroken lines? A. No, sir, the line described in the deed and the line described in the ordinance are identical, but the map accompanying the line does not conform to the description in the deed.

Q. (By the Vice-Chancellor.) At the place in question in what did the variance consist between the map and the deed at the foot of Pennsylvania ave- 20 nue? A. The lines shown on the map accompanying the deeds to the city are some 40 feet further oceanward than the lines according to the description in the ordinance and the description in the deed.

Q. All of this being with relation to the old boardwalk, preceding the boardwalk of 1896? A. Yes, sir.

Q. (Further cross) I want to call your attention to the broken red line, bearing the description 30 "North edge of boardwalk of 1902." That is the present boardwalk, and what has been spoken of here as the boardwalk of 1896? A. Yes, sir.

Q. And that shows the location of that line at the property in question in comparison with the other lines, and is the correct location, as you know it from your own surveys? A. Yes, sir.

Q. The respective lines showing the high water line of 1893 and 1894 and the present year are also put on there from records in your office, and are correct? A. Yes, sir, from actual surveys made by 40 Ashmead & Hackney.

The VICE-CHANCELLOR: I think the maps had better be offered.

Map referred to in the stipulation in the seventh clause heretofore referred to as the "Goff map" is marked Exhibit C—5.

Map referred to in the 8th clause of the stipulation called the "tracing map," made by Ashmead & Hackney, upon which the witness has been cross-examined, is marked Exhibit C—6. 10

Q. The differences in the description of this line for the location of the boardwalk in 1890 may readily occur from variations in the two magnetic instruments of the surveyors? A. No, sir.

Q. Is there not a way in which this description in the deed of 1890 is definitely tied up, so that it can be 20 located without any question? A. The deed of 1890, as you suggest, has two parts, one of description and the other map. Now, if you ignore the one you can locate the other, or if you ignore the other you can locate the first; they don't agree.

RE-DIRECT:

Q. You said that the auditorium building was one story in height; did it obstruct the view of the ocean 30 from the boardwalk. Does it now? A. Yes, sir.

Q. To what extent? A. If you look in the direction of the building you can't see the ocean at all except under and between the piling.

Q. It obstructs it to a greater or less extent? A. It depends where you stand and look at it.

Q. Suppose you were standing immediately in front of the building? A. Yes, sir; it would be a great obstruction to the view of the ocean.

40

ALLEN B. ENDICOTT, sworn for the complainant:

DIRECT EXAMINATION by Mr. Wootton:

Q. You are the Law Judge of Atlantic County? A. Yes, sir.

Q. In 1896 what official position did you hold in
10 Atlantic City? A. I was solicitor.

Q. Will you state what arrangement was made, and what conferences may have been had between the citizens in reference to the construction of the boardwalk, the steel boardwalk, known as the Boardwalk of 1896? A. You mean conferences which I had with citizens?

Q. Yes, or conferences which you know of between citizens, at which you were present? A. You mean now, 1896, THE RE-LOCATION?

20 Q. Yes? A. That was the result of several conferences held at the Seaside House and Haddon Hall, and some other hotels probably, at which the land owners along the land and ocean front were invited to be present; members of the City Council of Atlantic City were usually present at the same time.

Q. Were you present at any conference which was attended by one Richard F. Loper? A. I can't recall whether he was present at any of those conferences or not, sometimes there were 50 present.

30 Q. Composing the beach front owners? A. Yes, largely.

'Witness is shown Exhibit C—4, being the certified copy of what purports to be the right of way, signed by Henry W. Leeds, Charles Evans, Richard F. Loper, and others, and is asked:'

Q. If the original of that certified copy was ever in
40 his possession? A. Yes, and I think until my succes-

sor was appointed City Solicitor, which is nearly five years ago, then I delivered these deeds to the City Clerk of Atlantic City, as I recall it.

Q. Do you know where the original of that certified copy is at the present time? A. No, I haven't seen it for several years, or for a few years.

Q. Is that deed the result of the conference which took place between the citizens of Atlantic City in regard to the matters contained therein? 10

Objected to as leading; he has not proved what took place at any of these conferences, and Loper was not there at all.

The VICE-CHANCELLOR: The question is admitted. I do not think it is necessary that Mr. Loper should have been personally present at the conference, to have been a participator in the general scheme. If he conveyed in accordance with that general scheme, that fact makes him a participator whether he was at the conference or not. 20

A. Yes, but this deed was preceded by an ordinance which was the result of that conference, the deed naturally following as part of the scheme.

Q. Did you ever meet with Mr. Richard F. Loper at any time or place in reference to signing or entering 30 into the scheme for the construction of a boardwalk? A. I had one or two interviews with Mr. Loper before he executed the deed, explaining the nature of the deed and the purpose, but I don't know where or just when.

Q. But you remember the time as being prior to the execution of the deed? A. Yes, prior to the date of the deed, or prior at least to the acknowledgment.

Q. What was the purpose of those interviews? A. It was to secure him with all the other land own- 40

ers of the beach front, to join this scheme of dedicating a new right of way for the boardwalk.

CROSS-EXAMINATION by Mr. Thompson:

Q. Will you tell me when you had a meeting at the Seaside House that you speak of? A. I cannot, I did not know what I was summoned here to testify, 10 and I have nothing at this time to refresh my recollection as to the date, except that it was prior to the execution of this deed.

Q. That deed was executed as it is there produced before you, C—4? A. This is not the original, it purports to be a certified copy, and I believe it to be.

Q. Was it executed in the manner which it there purports to be? A. If this is a correct copy of the original, it was.

20 Q. Do you recollect that all of those fifty people came to your office on the 9th of May, 1896, and acknowledged the deed, or that you saw them all on that day and took their acknowledgment? A. No, I would not say that I saw them all that day, I saw them all on that day, or prior to that day. I think some of these deeds were signed at the meeting, a number had been drawn together.

Q. (By the Vice-Chancellor.) You mean that deed? A. I don't know, there were many forms, and 30 more than one deed was being circulated at the same time; sometimes many would sign it at the same time, as the result of a gathering or conference, but I can't say as to this particular deed.

Q. But you do say that you took the acknowledgment prior to the time when the acknowledgment was dated? A. Either on that date or prior.

Q. I understand you to say then, that that deed had all of those signatures on it, on the original deed? A. On the 9th day of May?

40 Q. Yes? A. I have looked at the acknowledg-

ment, and I would have to compare, as all those who are certified as having appeared before me and acknowledging it, did so.

Q. (Further cross). Do I understand that they all appeared on the 9th of May, or that that is the general date after all had acknowledged? A. I have said that I can't say positively as to that, I simply say it was on that day or prior. 10

Q. Would it not impress itself upon your memory that you took the deed to sixty people on one day and took the acknowledgments from all of them? A. I think the probability is that some signed on a date previous.

Q. How long prior, do you know? A. It would not be many days prior.

Q. What do you mean by not being many days prior? A. I can't specify the number of days.

Q. Now, were not those deeds signed as you have suggested a moment ago, on separate days by those 20 that were present at these various meetings? A. Yes, there were possibly a dozen deeds, all duplicates except as to signatures.

Q. Perhaps more than a dozen? A. Yes, likely.

Q. Were there not fifteen or twenty deeds? A. I think more than a dozen, possibly two dozen.

Q. Don't you recollect having the deeds bound in a book, in a calf covered book and people signing individual deeds in that book? A. I have no recollection of any book such as you describe. 30

Q. Were not a lot of those deeds bound together, and people signed those deeds in a book? A. No, they were all separate as they are here. (Looking at a file of deeds.) I am not sure whether I understand what you mean by a book, you mean several deeds?

Q. Several deeds bound in a book? A. I have no recollection of ever seeing one so bound.

Q. You sent that deed to be recorded, didn't you, to the Clerk's Office, the deed of April 30, 1896, 40

signed by Loper and others? A. I should say so, because I had all the deeds recorded.

Q. May I inquire why you put on that deed two acknowledgments on the same day by different people signing it?

Objected to as immaterial.

10 The VICE-CHANCELLOR: I cannot say that it is immaterial, but I cannot see what its bearing may be. It may be answered.

A. The only reason that occurs to me now would be that I used printed blanks for the acknowledgment, and the probability is that the first blank was filled by so many grantors, that it might have been necessary to use a second.

Q. (By the Vice-Chancellor.) You are referring now 20 to the deed you hold in your hand, dated April 30, 1896, signed by Loper and others? A. Yes, that is not my personal recollection, but it is a suggestion of what might have been the reason.

Q. (Further cross). Have you any recollection of going to Philadelphia to secure the signature of Mr. Loper, or any other person, on that day? A. I remember getting some signatures in Philadelphia, but where Mr. Loper signed I don't recall.

Q. I call your attention to the fact that that deed 30 purports to be signed by Mrs. Loper, by Richard F. Loper, attorney,—did you see the power of attorney at that time for Mr. Loper to sign for his wife?

The VICE-CHANCELLOR: Did Mrs. Loper in her own name, separate and apart from her husband, hold the title to any of the land here in question?

Mr. THOMPSON: No.

40

The VICE-CHANCELLOR: Her signature then only passed her possible dower right.

A. I cannot recall at this time whether I saw it or not.

Q. Did you take Mrs. Loper's individual acknowledgement as you have certified? A. I have no recollection at this time as to whether Mrs. Loper appeared before me personally, or whether Mr. Loper simply signed for her. 10

Q. You would not have certified that you took her acknowledgment if she did not appear before you, would you? A. Not intentionally.

Q. As a matter of fact, you would not certify that Mrs. Loper acknowledged that paper before you, if she did not appear, would you? A. I would not, except by error or mistake in putting in so many names. I qualify that because I see her name in the acknowledgment, and I do not see her name to the deed except as by Mr. Loper acting as attorney. 20

Q. I call your attention to the fact also that Mr. and Mrs. Loper's are the last names in the first acknowledgment appended to that deed, and that Mrs. Loper's is the last name of the acknowledgment by wives separate from their husbands; does that refresh your memory at all? A. No, sir; I see there are several in the deed after Mr. Loper's signature?

Q. Yes, there are. Do you recall going to Mrs. Loper's house in Philadelphia to take her acknowledgment? A. I do not. 30

Q. Do you think you ever went to her house? A. I don't think I was ever in Mr. Loper's or Mrs. Loper's house in Philadelphia.

Q. Is it not true that you went with Mr. Godfrey to Mr. Loper's in 1896 to get his signature? A. I do not thing Mr. Godfrey assisted in any way to get these acknowledgments. Judge Thompson and I were employed to do that work. 40

Q. At the time you took Mr. Loper's acknowledgment, if you took it in Philadelphia, was Mrs. Loper in the office, did she there acknowledge? A. I have no recollection of securing Mr. Loper's signature in Philadelphia, I am inclined to think it was in Atlantic City. I would have recalled it if it was in Philadelphia.

10 Q. You are positive you secured it previous to the 9th of May? A. Yes, sir.

Q. Would it not have been likely that it was on the 9th of May from the fact that it is on that acknowledgment? A. I don't think I can say any more as to the time of execution than I have already stated.

Q. Don't that indicate that that was the date on which you got Mr. Loper's acknowledgment? A. No, it does not.

Q. Have you any memorandum whatever in your office by which you could fix the date on which any 20 of these acknowledgments were taken? A. I think not.

Q. I understood you to say that this deed was preceded by the ordinance before it was secured? A. Yes.

Q. That ordinance has been offered in evidence as having been proved on the 6th of May, so that these signatures were taken between the 6th and the 9th, were they not? You certainly did not take any of them before you had the legal authority to build the 30 boardwalk?

Objected to, the witness has stated that he does not know, but he believes it was done within a few days prior to May 9th.

The VICE-CHANCELLOR: I think on cross-examination he is entitled to draw from him by any suggestion as to what the particular period was.

40

Mr. THOMPSON: I am endeavoring to refresh the witness's memory.

A. I can't say.

Q. You don't think you took any of them before the ordinance was finally adopted? A. I can't say, I might have done it, because it was well known and understood that most of the owners along the beach front had approved of the line as laid, and would sign the deed, and it may be that I secured some signatures before the ordinance was approved. I don't recall at all as to that, whether I did or not.

Q. As a matter of fact, there were quite a number of these people, a large number of people who had not signed when the ordinance was passed, or in fact until after the boardwalk was built? A. Quite a number had required some mild suasion to get them to sign.

Q. Some people you undertook to stop the boardwalk until they came in, and afterwards you had built the boardwalk without having secured the right of way in connection with quite a number of properties? A. I don't recall except possibly the Bokers.

Q. You built in front of the Rutter's before you got them? A. No, we came up to him on either side, stopped the boardwalk, and then he changed his mind.

Q. There were perhaps 20 of the boardwalk owners who had not signed before it was completed, were there not? A. I think all had signed before the walk was completed, except possibly 4 or 5, who did not sign for a long while.

Q. The testimony was that it was practically completed before the 1st of July; there are quite a good many who haven't signed yet? A. I think there are very few, my impression is there are only 4 or 5.

Q. (By the Vice-Chancellor). Was the boardwalk constructed continuously? A. No, sir; I think not.

Q. Are there breaks in the boardwalk? A. There were.

Q. I mean now? A. Now it is continuous.

Q. When the bill was filed, was there a continuous boardwalk, in February, 1902? A. Yes, sir; nearly 5 miles, I should say.

Q. (Further cross). Do you recollect when they went to work on this structure? A. I remember the facts, I don't remember the date.

Q. You don't recall they were working before you
10 got any of these deeds, do you? A. No, I don't recall that.

Q. As a matter of fact, they were at work there before you got any of the deeds? A. I think not.

Q. (By the Vice-Chancellor). How long was this matter in debate and arrangement preceding the final execution of these deeds and the final acceptance by the final ordinance of July, 1896; how long had it been in debate? A. I would say 2 or 3 months.

Q. Was it a matter of common discussion as to the
20 making of this boardwalk? A. Yes, very general; the newspapers were discussing it constantly.

Q. What was the thing discussed? A. The difficulty was to locate a line which would satisfy the many owners; nearly everybody had a different idea as to where the walk should go, and the difficulty was to harmonize them.

Q. There was a walk there? A. Yes, sir; there was.

Q. What was this proposition? A. Located further seaward.

30 Q. Did it locate it all further seaward? A. No, there were places where it was not deemed wise to go further seaward.

Q. And in those places the old walk was adopted? A. Practically.

Q. And other places the new walk was laid? A. Yes, sir.

Q. What became of the places where the old one was, where the new one was laid. Suppose there was an entirely new walk which was parallel to the old walk, what became of the old walk? A. It was re-
40 moved.

Q. It was in all those cases to the landward then of the new steel boardwalk? A. Yes, sir.

Q. What became of the site of the old boardwalk? A. The adjoining landowner got it.

Q. The landowner who owned the site simply absorbed it? A. Yes, sir; in the deed or ordinance there is a clause that the city should release to them; in fact, their grant was only so long as it should be used as a boardwalk. 10

Q. Was it not a fact that the thing having been arranged, the construction of the new boardwalk went on without much relation as to whether a release had been obtained or not; were not the two going on at the same time? A. They were, but I can't say there was some construction before any signatures were obtained; it might have been; I can't say.

Q. What season of the year was it being done? A. Spring.

Q. With relation to the use of the boardwalk by Atlantic City, was it a matter of haste? A. The effort was to secure it before the rush of the summer season, but the agitation commenced in the winter. 20

Q. When did the rush of the season begin? A. I should say with the 4th of July.

Q. (Further cross). How did it happen that in preparing this series of deeds you embodied in each deed a description of the whole strip, four miles, and did not take from the separate owners deeds for their respective properties? A. I think it was largely a matter of convenience in describing the property, and then it was easier to secure signatures in that way. 30

Q. A matter of economy in looking up the descriptions? A. Possibly that, too.

Q. Now, as a matter of fact, don't you recall that when this particular deed was sent up to be recorded, you put on one general paper the names of all those who up to that time had signed and acknowledged deeds, and sent it up to be recorded, for which you had duplicate originals in your office? A. I am not sure that I comprehend? 40

Q. I mean to say, didn't you take a whole series of these deeds which had been signed separately, and put the names of those deeds all on one general instrument, inasmuch as the description of the land and other covenants were the same, and send that composite deed, in view of the fact that it contained a number of grantors, whose names appeared in one in-
10 strument, up for record, instead of recording so many separate originals? A. No, sir.

RE-DIRECT:

Q. I show you some 10 deeds, marked "right of way," and signed by different people at Atlantic City; were they obtained by you at this time, or thereabouts, for the purpose of carrying out this scheme for the steel board erection in 1896? A. Yes, sir.

20 Q. And those are the names of other people other than those who had signed the deeds of Leed and others? A. Yes, sir.

RE-CROSS:

Q. Do you observe the language of that question, that it asks you whether this was done at this time, and some of these deeds are not dated until June and recorded in April, 1897? A. I didn't understand the
30 question to be specific as to any exact date, but generally about that time.

Q. That is all.

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Mr. WOOTTON: I offer these deeds, they are duly acknowledged.

Mr. THOMPSON: For what purpose?

Mr. WOOTTON: To show the intention on the part of the city to create and dedicate a strip known as the line of the new steel boardwalk, and that it has been going on since April 30, 1896, continuously to the present time.

Mr. THOMPSON: It seems to me that it is putting in a great deal of documentary evidence which has nothing to do with the case. I do not think the pleadings raise any question that anything was done since 1896.

The VICE-CHANCELLOR: The evidence is that there is a strip which is in the hands of the city, and Mr. Wootton's offer is that that purpose has been extending over a period of time, and not completed yet. Now, he offers deeds for the purpose of showing the accomplishment of these several portions, all going to make a complete boardwalk. Do you object?

Mr. THOMPSON: I do not care for my objection.

The VICE-CHANCELLOR: I will let the deeds in.

Mr. WOOTTON: There are three deeds which Mr. Endicott could not prove, and if they are admitted I will not have to call Mr. Godfrey.

AT THIS POINT A RECESS WAS TAKEN UNTIL 2:15 P. M.

Mr. WOOTTON: I desire to offer for the same reasons expressed in offering the 10 deeds, the following deeds:

10

1. Deed from John L. Young, et al., to Atlantic City, dated April 30, 1896, acknowledged May 21, 1896, before Joseph Thompson, M. C. C., recorded in the Atlantic County Clerk's office June 16, 1896, in Book of Deeds 206, fol. 16.

Marked Exhibit C—7.

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2. Deed by Jacob Keim to Atlantic City, dated May 25, 1896, acknowledged before Allen B. Endicott Master in Chancery, on May 30, 1896, recorded in the Atlantic County Clerk's office, in Book 206, fol. 11, on June 16, 1896.

Marked Exhibit C—8.

3. Deed by the Children's Seashore House, etc., to Atlantic City, dated May 20, 1896, acknowledged before Allen B. Endicott, Master in Chancery, April 30, 1896, on the part of the City, and proved before Carlton Godfrey on the day of May, 1896, recorded in Atlantic County Clerk's Office, April 9, 1897, in Book 211 of Deeds, fol. 407,

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Marked Exhibit C—9.

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4. Deed by the Somers Casino Co., a cor-

poration of New Jersey, and the Young and McShea Amusement Company, a corporation of New Jersey, to Atlantic City, proved by the Somers Casino Co., April 8, 1896, and by the Young and McShea Amusement Co., April 10, 1896.

Marked Exhibit C—10.

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5. Deed by Jesse B. Thompson, et al., to Atlantic City, dated March 1, 1898, acknowledged before Allen B. Endicott, March 1, 1896, recorded in Atlantic County Clerk's Office, in Book 221, fol. 352, on June 23, 1898.

Marked Exhibit C—11.

6. Deed by the Provident Life and Trust 20 Co. to Atlantic City, dated 4/6/1896, proved by A. S. Wing, Vice-President, and Actuary on 4/7/1898, recorded in the Atlantic County Clerk's Office in Book 223 of Deeds, fol. 131, etc., on April 26, 1898.

Marked Exhibit C—12.

7. Deed by Frederick Hemsley and et ux. and el., to Atlantic City, dated April 30, 1896, 30 acknowledged before Allen B. Endicott on April 30, 1896, recorded in Atlantic County Clerk's Office, in Book 211 of Deeds, fol. 401, on April 9, 1897.

Marked Exhibit C—13.

8. Deed by Frederick Clark to Atlantic City, dated June 3, 1896, acknowledged before Harry H. Smith, Jr., Commissioner of 40

Deeds of New Jersey, on June 30, 1896, recorded in Atlantic County Clerk's Office, in Book 212 of Deeds, fol. 205, on April 9, 1897.

Marked Exhibit C—14.

10 9. Deed by the Female Academy of the Sacred Heart to Atlantic City, dated April 30, 1896, proved before Allen B. Endicott, M. C. C., by P. Seymore, Secretary, etc., on April 30, 1896, recorded in Atlantic County Clerk's Office, in Book 206 of Deeds, fol. 29, etc., on June 20, 1896.

Marked Exhibit C—15.

20 10. Deed by the Columbia Real Estate Co. to Atlantic City, dated May 2d, 1896, proved by William Heyde, Secretary, etc., on May 2, 1896, recorded in the Atlantic County Clerk's Office, in Book 205 of Deeds, fol. 1, etc., on June 16, 1896.

Marked Exhibit C—16.

11. Deed by Ellen E. Thomas et al. to Atlantic City, dated April 30, 1896, acknowledged before Joseph Thompson, M. C. C., on May 15, 1896, recorded June 20, 1896, in the Clerk's Office of Atlantic County, in Book 206 of Deeds, page 35, etc.

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Marked Exhibit C—17.

12. Deed by Howard E. Roberts, et al., to Atlantic City, dated April 30, 1896, acknowledged before Allen B. Endicott, M. C. C., on

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May 30, 1896, recorded June 16, 1896, in Book 206 of Deeds, folio 1, etc.

Marked Exhibit D—18.

It is agreed by counsel that the last named thirteen deeds are all on the printed forms for the conveyance or covenant which appears on the deed dated April 30, 1896. 10

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CARLTON GODFREY, sworn for complainant.

DIRECT EXAMINATION by Mr. Wootton:

Q. You reside in Atlantic City? A. I do.

Q. Prior to June of this year what official position did you hold in Atlantic City? A. City Solicitor for about four years.

10 Q. Were you City Solicitor during any time in which agreements were obtained from citizens in Atlantic City, property owners along the Beach front, in regard to dedicating a strip sixty feet wide for a steel board walk along the ocean front of the city? A. I think I became City Solicitor, or at the time I became City Solicitor the boardwalk was built from about I think Vermont or Massachusetts avenue, southerly to a point I think half way between Texas avenue and Florida avenue. Soon after I 20 became City Solicitor, a movement was made to extend the boardwalk from its southerly end to Albany avenue. Of course it was my duty to obtain signatures for the boardwalk deeds between those points, which was done, and the boardwalk built. Then later the boardwalk was extended in the same way northerly, from the northerly end of the boardwalk to, I tihnk, about Atlantic avenue, and the same deeds signed by the property owners before the boardwalk was constructed.

30 Q. Then the boardwalk, as it stands today, has been from time to time constructed along the entire right of way mentioned in the ordinance of 1896? A. That is right.

Q. What has been done in regard to acquiring rights of way since you first took possession, or first became City Solicitor of Atlantic City? A. There has been an endeavor constantly to obtain signatures to the boardwalk deeds over the entire route, that has been done in almost every case.

40 Q. (By the Vice-Chancellor). In the meanwhile

what has been done on the ground? A. During the time I was City Solicitor no boardwalk was built to my knowledge, until the deeds were signed. In other words, when they came to the point of a person's property who hadn't signed, the boardwalk would stop, and then when the person signed the deed, it would go on.

Q. Is it true that the present boardwalk as now constructed, or at least as it was constructed the first of this year, is construced only over lands of persons who signed the deed which has been referred to? A. Up to that time, I don't know of a case that was built by the city over any one's property where the deed had not been signed. I know there was none during the period during which I was City Solicitor. In the Boker case is over the strip; in other words, it is connected over Boker's land, but that was not built by the city, it remained there as originally built.

Q. You mean the old walk? A. Yes, sir; the steel boardwalk does not extend across the Boker property, but it is connected.

Q. (Further direct). How far from the Pier Company's property is the point in question known as the Boker piece? A. I should say about 9 or 10 squares.

Q. Down the beach? A. Yes, sir; southerly; in other words, from Pennsylvania avenue to Massachusetts avenue, it is about 10 squares.

Q. Are you acquainted with the present condition of the present building on the pier known as the Auditorium Pier? A. I think so.

Q. Do they constitute an obstruction to the view of the ocean from people passing along the boardwalk?

Mr. THOMPSON: Is there any view of this case in which that is a proper question?

The VICE-CHANCELLOR: It is within the pleadings, if counsel chooses to direct his

questions to it. It is within the view of the pleadings.

A. To a person's standing or walking of course they are a total obstruction to the view of the ocean, walking or standing in front of the building.

Q. What can you say about the size and proportion and nature of the construction of the pier buildings? A. The Auditorium Pier is built as a structure about, I should think, 80 feet in front by 200 feet in depth, extending oceanward from the boardwalk. It is a high building, that is a high one-story building.

Q. On what is it erected? A. It is erected upon steel or iron pilings driven into the soil, and steel or iron girders.

Q. For what purpose is the building used? A. For the purpose of an auditorium, or a large room where theatres or other assemblages of people are held, mainly.

Q. In addition to the building of 80 by 200 feet, of what else is the structure composed? A. A narrow pier extending into the ocean, possibly 20 feet wide, extending into the ocean to a point that would be at least 1,000 feet from the boardwalk.

Q. Is that pier open to the public? A. Yes, no cover over it.

Q. Last question repeated? A. It is so far as I know.

Q. (By the Vice-Chancellor). Is it used in connection with the Auditorium Pier building? A. Yes, sir; I think so, as far as I know; there are very few people ever use it.

Q. It is part of that construction though? A. Yes.

Q. Then the extension of this narrow pier which you speak of, 20 feet wide, begins immediately at the oceanward end of the Auditorium building? A. Yes.

Q. And goes seaward the distance you name? A. It does.

Q. How long has that been finished? A. I think the Auditorium Pier was built about 1898, or 1899, possibly 1899.

Q. Has it been used as an auditorium since? A. In the summer season, yes.

. That is for the entertainments and assemblage of people? A. Yes.

Q. That is all.

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CROSS-EXAMINATION by Mr. Thompson:

Q. You were City Solicitor when the Auditorium Pier Company's pier was built? A. I was.

Q. And that building was afterwards connected up with the boardwalk? A. Yes.

Q. During the time it was built you didn''t take out any injunction aganst it? A. Yes.

Q. You did? A. Yes.

Q. And you afterwards permitted them to go on 20 and construct the building, didn't you? A. The theatre building was built alone, without the pier extending into the ocean, first, and the owners of the property or the tenant, attempted to use it for theatre purposes in violation of the provisions of the deed, which provided that no building shall be constructed except the pier, which pier shall be 1,000 feet long: so that a bill was filed against the persons attempting to use the property, to prevent them from using it until they had a pier 1,000 feet long. Of course, 30 when they built that and conformed it to the deed, the bill was dismissed.

Q. The bill was dismissed then after they built the pier? A. Yes.

You didn't raise any question about the obstruction to the view? A. I think not at that time.

Q. You permitted them to connect it with the boardwalk? A. They had a right to under the deed.

Q. You permitted it as City Solicitor, didn't you? A. When they built the structure in accordance with 40

the provisions of the deed, they had a right to connect with the boardwalk.

Q. You considered as City Solicitor that the minute they got that pier out there 1,000 feet they had a right to connect up with the boardwalk? A. I don't know as my opinion as City Solicitor is in question here.

Q. I ask you whether that was the result of your
10 action as City Solicitor, you permitted them to connect with the boardwalk? A. I have already recited what we did.

Q. Now, I understand you to say that standing on the boardwalk in front of this building it totally obstructs the view of the ocean? A. When looking directly oceanward.

Q. In other words, if you stand on the boardwalk at the edge of the boardwalk proper, which is at that point about 100 feet from the building, you cannot
20 see that portion of the ocean which the building hides? A. When standing in front of this building and looking at the ocean of course you cannot see the ocean.

Q. Do you mean to say that it hides any more; a person standing in front on the boardwalk, immediately in front of the building, can see past the corners and both sides? A. Then he would not be looking directly at the ocean.

Q. Your notion is, standing and looking toward
30 the ocean, or standing and looking at the building? A. Yes, sir.

Q. But unless you look directly at the building would not his sight take in from that point of view, all that would not be contained in the angle made between the person standing on the boardwalk and the two corners of that building? A. In looking up or down the Boardwalk and at such angles as would not strike the building, of course he could see the ocean.

40 Q. That is where the building is an obstruction, it

is an obstruction, and where it is not, it is not? A. Yes.

Q. As a matter of fact, your view of the ocean is very much more obstructed by the steel pier than it is by the auditorium building, from that point? A. That depends from where you are looking.

Q. If you are looking northeast from the point you have mentioned, is not your view very much more obstructed by the steel pier than by the auditorium building? A. If he is looking northeast, he would look directly up the boardwalk. 10

Q. If he looks east and southeast then, if you want to be strictly technical—

> The Vice-Chancellor: If he looks in the direction of the steel pier structure and its extension out into the ocean, would not that be a greater obstruction than the auditorium building, is what Mr. Thompson means. 20

A. If he is looking toward the building constructed upon the steel pier, that is there are buildings erected on the steel pier, of course there is ocean between the Auditorium Pier and the steel pier which would not be obstructed, but beyond the steel pier buildings a portion of the buildings, which would be in range with the person looking, of course those buildings would also obstruct the view of a person who was standing at that point, yet they can see the ocean just the same. 30

Q. A person standing at the point you speak of, directly in front of and in the middle of the Auditorium building, on the boardwalk, cannot see any ocean east of the steel pier? A. I am not prepared to say that.

Q. Just take the line indicated by the point that you suggest, let a person stand on the edge of the boardwalk at the nearest point to the Auditorium building, and look so that his view passes the cor- 40

ner of the Auditorium building, he cannot see any of the ocean beyond the steel pier? A. I think he can.

Q. He has got to see over the steel pier? A. No, there is ocean between the Auditorium pier and the steel pier.

Q. You think the ocean he can see is what runs between this Auditorium pier and high water line? 10 A. Of course the steel pier which contains the building would obstruct the view of a person looking in that direction.

Q. Now on the steel pier there are located four or more buildings, are there not? A. I believe there are.

Q. And all the way out, on the Goff map, it simply shows two lines, there is a covered passage way. A. There is an open covered passage way.

Q. And these buildings are, each of them two 20 story buildings, are they not? A. The building at the boardwalk, I think, is a two story building, the other buildings as far as I recollect, are all one story buildings.

Q. They are very high for one story buildings? A. About suitable height for that purpose.

Q. Now, looking in a southerly direction from the same point, is not the view of the ocean proper, I am not speaking of a limited part of the water, that may be between the Auditorium pier and the high 30 water line, but the view of the ocean spoken of, is not that very much obstructed by the Young Pier? A. There is quite a wide strip of ocean between that point and the Young pier.

Q. There is about 1,000 on the boardwalk between the Auditorium pier and the Young pier is there not? A. I should say from 1,000 to 1,200 between the two piers.

Q. I call your attention to this measurement, here are two lots 150, 335 and 210, is 840, and 100, 940, 40 and there is one street 40 feet, 985, and 150, mak-

ing 1,035, and one of 20—— A. It is between 1,000 and 1,200.

Q. And Young's pier runs out into the ocean 2,500 feet about? A. About 2,000 or 2,500 I should think.

Q. So that this cutting off of the view which you have spoken of of the general ocean, is much more produced by Young"s pier and the steel pier than by the Auditorium building, is it not? A. No, I don't think so. 10

Q. Where is located the Penrose strip on this boardwalk? A. That is just north of Albany avenue.

Q. There is quite a block there, you didn't have any consent for a good while? A. The Penrose strip I think is 300 feet, about 300 or 400 east of Albany avenue.

Q. Where is that? A. Near the extreme southerly end of the description set out in the deed in question. 20 It is about I should say nearly a mile and a quarter or a mile and a half down the beach toward Pennsylvania avenue.

Q. But it is within the limits of the boardwalk as described in the ordinance, and described in this deed, made by Leeds and Evans and others to the city, this agreement? A. Yes, sir.

Q. They have never obtained anything from Penrose, have they? A. I am unable to say, up to the time I ceased to be City Solicitor they had not. 30

Q. The boardwalk has been built there? A. Not during that period.

Q| It has been since? A. So far as I know, I haven't been there.

Q. From Atlantic avenue up to Caspian avenue, did you have any consent there? A. That walk was not built during my period in office.

Q. Has it ever been bult? A. I believe so.

Q. There was no consent during the time you were there? A. Oh, yes. 40

Q. Many of them? A. A number of them.

Q. What do you mean by a number of them? A. I should think including the boardwalk and the Park deed—

Q. I don't ask you about the Park deed. A. That gives consent to the boardwalk.

Q. We have nothing to do with the Park deed on the boardwalk.

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Mr. GODFREY: It seems to me as that question framed the witness has a right to answer it.

Mr. THOMPSON: The bill does not allege that the consents are under any other deeds except this one annexed.

The VICE-CHANCELLOR: Your criticism, as I understand it, is that the so-called

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Park deeds are not those upon which the complainants base their suit.

Mr. THOMPSON: But it is on a part of this same property that is described in this deed. I have a right to show that their proofs do not hold up the claim of their bill.

The VICE-CHANCELLOR: I will not extend the case any wider than the issues as

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framed by the pleadings. The question is broad enough to take in consents and covenants showing claims outside of the allegation in the bill. The consent or covenants on which the complainant claims title should be limited to those referred to in the bill.

Q. How many were under the boardwalk deed or agreement, not the Park deed so-called? A. You mean how many separate papers or deeds, or signa-

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tures, or what do you mean?

Q. I mean to inquire whether you had obtained the consents from Atlantic avenue northward under the dedication deed, during the time you were in a City office; you claimed that you did; now I ask you how many of them from Atlantic avenue northward on toward Caspian avenue did you obtain while you were City Solicitor? A. There were several such consents, but I am unable to tell you the names of them, because I haven't been asked to examine the papers. 10

Q. You don't recall? A. No.

Q. But there was quite a piece of that ground that was not consented to, was there not? A. I guess there was only about three or four squares of land in that distance from Atlantic avenue to the inlet, I think not exceeding three squares, and some of the ownerships are large, so that the number of deeds that could be signed would not be very great.

Q. Which end of the boardwalk is that? A. That 20 is near the inlet.

Q. How far is that from Pennsylvania avenue? A. About a mile, I should think.

Q. That is to the north? A. To the north.

Q. Did you have the Way estate? A. I don't think that the property owned by the Way estate was signed for during my term in office.

Q. That was quite a large piece of that property? A. About a square, I think.

Q. Those squares you speak of are the squares that 30 run the long ways; they don't run the short way; squares running the long way, not four squares this way? A. I think the squares there would average in the neighborhood of from four to five hundred feet.

Q. And the Way estate strip is between Caspian and Atlantic avenue, is it not? A. The Way estate is immediately joining Caspian avenue at the end of the walk.

Q. Now, Mr. Godfrey, there has been a series of 40

boardwalks; previous to the walk of 1890, there had been a boardwalk built prior to that time, some of them built right down on the sand? A. Not within my recollection.

Q. The boardwalk of 1800 was the first one that was built on steel beams? A. Yes, sir, on steel piers.

Q. The others were built, some up and some down 10 very irregular, were they not? A. During a number of years that I recollect, the condition of Atlantic City, there might have been some irregular, but there was a walk along the ocean there somewhat similar to the wooden walk that is now erected over a portion of this particular strip; for instance, as it is along the inlet.

Q. One more question about the Penrose strip; that was not built, was it, at the time of the filing of the bill in this case? A. I think not.

Q. Where was that? At the extreme southerly 20 end of the walk, about a mile from the property in question.

Q. How large a strip was that? A. About 300 feet.

Q. And the boardwalk absolutely stopped there? A. There was an opening, a break there.

Q. It broke off short, and then was built on there? A. Yes, sir.

RE-DIRECT:

30 Q. Your attention has been called to Young's pier on this map, was that built at that location before or after the deed of dedication of 1896? A. The pier was built before that time.

Q. Was the pier known as the steel pier built before or after the deed of dedication of 1896? A. It was built, I think, afterwards.

Q. To your knowledge has there been any change in the width of the steel pier since the time it was built upon that site? A. No change to my knowl-40 edge.

RE-CROSS:

Q. There is another pier known as Heintz's pier? A. There is.

Q. Which way is that from this point? A. That is probably half or three-quarters of a mile easterly or towards the inlet from the property in question.

Q. How long is that? A. I judge 1,200 feet. 10

Q. Has buildings on it? A. Has a building on it.

RE-DIRECT:

Q. Was it built before or after the deed of dedication of 1896? A. It was built before.

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EMERY D. IRELAN, sworn for the complainant.

DIRECT-EXAMINATION by Mr. Wootton:

Q. What is your official position in Atlantic City? A. City Clerk.

Q. Among other duties is it your duty to take 10 charge of and be responsible for the deeds and agreements belonging to the City of Atlantic City? A. It is.

Q. You were, I believe, served with a subpoena to produce various deeds in this suit regarding the right of way, and especially a deed made by Henry F. Leeds, et al., signed by one Richard F. Loper. Did you produce such a deed? A. I produced all except that one in question.

Q. State why you could not produce it? A. It 20 didn't appear among the batch on file.

Q. Did you make diligent search for it? A. I did.

Q. Did any others in your office make search for it? A. My assistant.

Q. Witness is shown what purports to be a certified copy of a deed made by Henry W. Leeds, et al., to the City of Atlantic City, marked Exhibit C—4, and is asked, do you remember seeing or having in your possession the original of which that purports to be a certified copy? A. If my memory serves me 30 right, I have.

Q. Can you state when, how long ago? A. Prior to January 26, 1901.

Q. How can you place that date? A. Because, I have a receipt where the deeds were taken out of my office and taken into court that date, or about that time.

Q. That is all.

Q. (By the Vice-Chancellor). Do you know on a trial of what case? A. I can't recall at this time, Mr. 40 Godfrey was the solicitor at the time.

Q. (Further direct). Have you a receipt given at that time for these deeds? A. I have.

Q. And that deed?

(Witness produced receipt.)

Q. By whom was that receipt given? A. Godfrey & Godfrey.

Q. Is that the receipt of the firm, or their representatives? A. That was Mr. Corsan's signature. 10

Q. Who is Mr. Corsan? A. He is connected with the firm of Godfrey & Godfrey. This receipt reads:

"Atlantic City, N. J., Jan. 26, 1901.

Received of E. D. Irelan, City Clerk, fourteen copies of rights of way for the new walk, and one package containing the rights of way of old walk, for use in Court. 20

(Signed) GODFREY & GODFREY,
P. CORSAN.

Receipt offered in evidence.

Offer objected to.

The VICE-CHANCELLOR: What do you undertake to show? 30

Mr. WOOTTON: Simply to clear any doubt as to whether or not there is any original deed for this easement.

The VICE-CHANCELLOR: If you want to lay a foundation to prove the execution of the deed, or that there was such a paper, this is one of the ways of tracing it, to the last person known to have it, and then if you cannot 40

produce it, produce secondary evidence. If this is one of the steps to do that, to fortify your case, I think it is admissible.

Q. (By the Vice-Chancellor). I understood you to say that the deed of which certified copy was shown you, was in your possession and delivered over to you
10 as one of the fourteen, did you say that? A. Yes, sir.

The VICE-CHANCELLOR: I think it is admissible.

Marked Exhibit C—19.

Q. (Further direct). Was the deed in question one of the deeds delivered to Mr. Godfrey and receipted for by this paper? A. Yes, sir; that is my understanding.
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CROSS-EXAMINATION by Mr. Thompson:

Q. Where did you get this receipt? A. I tore it out of my receipt book.

Q. When did you tear it out? A. This morning, no, yesterday.

Q. Did you personally on the 26th day of January give fourteen copies of rights of way for the new boardwalk to Godfrey and Godfrey? A. I did, yes,
30 sir, to Mr. Corsen.

Q. You did that personally, yourself? A. Yes, sir.

Q. Then what you gave at the time were copies of the rights of way? A. That is the original.

Q. Did you write this receipt? A. I did.

Q. What do you mean by saying that you gave copies of the rights of way? A. I mean the original deed.

Q. Why didn't you say original deeds if you gave original deeds from your custody as City Clerk, why
40 didn't you say original deeds in your receipt? A.

Just a mistake on the meaning, that was all, they were the original deeds which I gave.

Q. (By the Vice-Chancellor). Would you have any occasion to take receipts for copies, if you gave them? A. No, sir.

Q. If you gave copies, I cannot see any occasion for the receipts? A. No, sir, they were original papers.

Q. What others were there besides this one from Leeds and others? A. Quite a number which I cannot enumerate. 10

Q. Can you name any one of them that went into that fourteen? A. No, I can't, but I can tell you——

Q. You cannot name one besides this? A. No.

Q. Do you know why Messrs. Godfrey and Godfrey wanted these on January 26, 1901? A. The suit that was pending at that time.

Q. Whose property was that suit in connection with? A. If I am not mistaken, I think it was this same property in question. 20

Q. (By the Vice-Chancellor.) What do you mean by this same property? A. On the same strip, the Auditorium pier.

Q. (Further Cross). But you don't know any others that were mentioned in that fourteen but this one? A. No, sir.

Q. How is it that you can recall this, if you cannot recall any others of the fourteen? A. Because Mr. Charles Evans was interested in the suit at that time, and he, being one of the signers, and an argument took place in my office that Mr. Evans hadn't signed the easement deed, so to satisfy the parties holding the argument, I looked up the deed, and that is why it impresses itself upon my mind. 30

Q. Upon that date? A. No, prior to that date.

Q. How long prior? A. I suppose probably a week or so, I know it was an argument on account of this suit being brought up.

Q. Was it longer than that? A. No, I don't think it was. 40

Q. You have never seen that original deed since that time? A. I had no occasion to look it up.

Q. Had you ever seen the original deed before that time to examine it? A. Only when it was presented to me by the City Solicitor.

Q. Now can you swear that what you looked at, and what you gave, and the one you say had Evans' name in it, was not the Evans deed for the boardwalk
10 of 1890? A. No, I would not be positive as to that.

Q. If you were told that Mr. Evans had also given a deed for the boardwalk of 1890, then you are uncertain as to whether the deed made by Leeds and others was amongst that fourteen, are you not? A. That was the boardwalk of 1890, those papers were not used in that suit.

Q. Have you not in this very receipt mentioned that you gave a package containing rights of way for the old walk? A. Yes, sir.

20 Q. Now, can you identify the deeds that you gave containing Mr. Evans' name as one of the fourteen, or as one of the package containing the boardwalk rights of way of 1890? A. I can identify the original deed.

Q. I am not asking you that, it is very important for your memory to be straight upon this? A. I am trying to get it straight.

Q. Can you identify the Evans' deed, which you say you gave to Mr. Godfrey at that time as the
30 boardwalk deed of 1896, rather than the boardwalk deed of 1890? A. No, I could not.

Q. Now, do you know whether or not those deeds were ever returned to you, or any of them? A. They haven't been returned to me directly, they were returned during my vacation to my assistant.

Q. Then they were returned to the office, how long ago was that? A. Some time during the last eight days.

Q. Then, if that deed of April 30, 1896, was returned to you, where is it now? A. I say I haven't seen it
40 since.

Q. Have you made diligent search for that? A. Yes, sir.

Q. How long ago did you make this search? A. I made a search, spent the biggest part of yesterday, with the assistance of my assistant. I just returned from my vacation, and my assistant made several searches prior to that time.

Q. Where did you keep these rights of way prior to January 26, 1901? A. In my safe, a large safe. 10

Q. Have you ever had any of those that were given to Godfrey & Godfrey on January 26, 1901, until this time, eight days ago that you speak of? A. I think not.

Q. You never had any of the fourteeen, or any of the package containing the rights of way for the old walk? A. I think they were all returned together during my absence.

Q. Did you read through the deed that you say was signed by Mr. Evans at the time you took it from 20 the package, at the time of this argument that you speak of? A. Did I read it through?

Q. Yes. A. Not any more than to show that Mr. Evans had signed the easement deed.

Q. Then the only way in which you can identify this paper marked C—4 in this case was that original deed which you say you had in 1901, is by the fact that it contained Mr. Evans' name? A. Among others; yes, sir.

Q. Do you know whether or not the Evan's deed 30 of 1890 contains his name among others? A. Yes, sir.

Q. (By the Vice-Chancellor). Wasn't the deed of 1896 upon a form? A. Yes, sir.

Q. Was the deed of 1890 on a printed form? A. Yes, sir.

Q. Was that on a printed form? A. Yes, sir.

Q. (Further cross). Do you recollect the names of those gentlemen who had signed this deed in 1901 with Mr. Evans? A. I think it contained among others, the name of Henry W. Leeds. 40

New Jersey State Library

Q. Any others that you recall? A. No, sir.

Q. Did you see Mr. Elisha Robert's name? A. I don't remember anv other names except those two, I think Mr. Leed's name was on it.

Q. Do you remember whether or not it had several names attached to it, or only half a dozen? A. If my memory serves me right I think it contained quite a number of names, but I had no occasion to go over them.

Q. Do you recollect Mr. Irelan that you yourself executed this deed of 1896, Exhibit C—4, on behalf of the city? A. May I look at it?

Q. This don't contain your signature, this is a certified copy. A. I can't recall that.

Q. Do you recall executing any of these right of way deeds in 1896 on behalf of the city, attaching the seal after the Mayor had signed them? A. As a usual thing, I attest the Mayor's signature to all documents.

Q. Do you recollect whether or not you executed any of those rights of way agreements of 1896 prior to the adoption of the resolution of the counsel accepting the dedication on the eighth day of June? A. I don't remember.

Q. The certified copy Exhibit C—4 says, that you swore to this on the 15th day of June before Mr. E. A. Higbee, Master in Chancery, does that refresh the matter to your mind at all? A. I can recall going before Mr. Higbee and taking the acknowledgment.

Q. Do you think that was on the date that it bears date? A. I can't recall, I presume it was.

Q. Did you go to take the acknowledgment on the same day that you and the Mayor signed the agreement, and you affixed the official seal? A. I think Mr. Higbee came to my office, and the Mayor was present, and all signed at one time, if my memory serves me right.

RE-DIRECT:

Q. The matter that came up for discussion between you and the other gentlemen in the office, which you were speaking about, would that matter have been settled by reference to the deed of 1896, or to the deed of 1890, in reference to the talk about the suit? A. I presume it was the suit, on the new boardwalk, because of the fact that it was open and discussed on the street. 10

Q. Then to which deed would you look to settle the matter of discussion as to whether Charles Evans had signed? A. I would have been apt to look at the deed of 1896.

Q. (By the Vice-Chancellor). When you speak of the easement deed, what deed do you refer to? A. I call those deeds, the rights of way.

Q. What deeds? A. Deeds of right of way.

Q. What deed of right of way, there have been a 20 number of deeds of rights of way referred to; which ones; you said there was a controversy whether Charles Evans had signed the easement deed? A. This deed or right of way that was made by Mr. Evans, and this that we can't find.

Q. Your reference to the easement deed would refer either to the deed of 1890 or 1896? A. I made a mistake, it is the deed of the right of way.

Q. That refers to the deed of 1890 or 1896?

30

The VICE-CHANCELLOR: I did not ask him that; the language would include either one, but what was the dispute about that the question would raise?

Mr. THOMPSON: I don't believe that he understood the question.

Q. (By the Vice-Chancellor). That is what I asked, there was a dispute before you; when you looked 40

at the deed to see whether Mr. Evans had signed the easement deed, what easement deed was the subject matter of discussion? A. There was a suit then pending brought by Mr. Evans and others.

Q. Was it with relation to that suit that the easement deed was signed? A. Yes, sir.

Q. What easement deed was it that was under discussion? .A That would have been the easement
10 deed of 1896 in regard to the boardwalk.

Q. (Further cross). Did anybody deny that Mr. Evans had ever signed any deed? A. No, sir.

Q. How came there to be any discussion? A. It was just talked over, there were several parties at that time had not signed the easement deed, and in general conversation it was said that they don't believe Mr. Evans had signed the easement deed himself.

Q. That would refer even to the deed of 1890, or 1896, would it not? A. The only reason that I say it
20 was 1896, that I would not go back to 1890 to settle an argument that was open in 1896.

Q. That is all.

By consent, the witness, Richard F. Loper, produced on the part of the defendant, was here examined for the convenience of the
30 parties.

40

RICHARD F. LOPER, sworn for defendant:

DIRECT EXAMINATION by Mr. Thompson:

Q. Where do you reside? A. Philadelphia, 113 N. 19th street.

Q. How long have you resided in Philadelphia? A. 40 years.

Q. You were formerly the owner of some property in Atlantic City? A. Yes, sir. 10

Q. I show you a paper bearing date May 4, 1896, and ask you if that is your signature? A. It is.

> Paper opening "An agreement made this fourth day of May, A. D. 1896, by and between William Riddle, party of the first part, and Richard F. Loper, party of the second part," signed Richard F. Loper and William Riddle, with a memorandum additional agreement at the end, also signed Richard F. Loper and William Riddle; the paper is witnessed by subscribing witnesses whose testimony is not required. 20

Q. When was your signature placed where it appears on the first part of this paper? A. Either the fourth or fifth day of May.

Q. Where was that signed? A. In the office of Mr. Samuel Richards, to the best of my recollection, in the Drexel Building, Philadelphia. 30

Q. The consideration here stated is $1,000, was there any money paid to you on that day, and, if so, how much? A. There was $1,000 paid to me on the 5th day of May.

> Mr. GODFREY: I do not know what the purpose of counsel is in going into this incident; of course, if he proposes to bind us in any way by that, we want to get an objection upon the record. 40

The VICE-CHANCELLOR: Do you propose to offer that in evidence?

Mr. THOMPSON: Yes, I want to examine him on what took place before I offer it.

Complainant's counsel objects to the offer as irrelevant.

10

Mr. THOMPSON: If there is any question because I haven't offered it, I will offer it.

The VICE-CHANCELLOR: No, I do not think that is objected to, but merely as to the relevancy.

Mr. GODFREY: Yes, that is the point.

20

Paper referred to was then offered in evidence.

Mr. WOOTTON: Objected to on the ground that the instrument not being a matter of record, is immaterial and cannot affect the complainant's rights.

The VICE-CHANCELLOR: How do you connect that with Atlantic City? It appears to be a private matter between Mr. Riddle and Mr. Loper.

30

Mr. THOMPSON: I have not connected it yet, I simply offered it. I propose to show by Mr. Loper that he consummated that agreement by making a formal conveyance to the Mary Riddle Company and Joseph A. Brady, by one of the deeds which has already been put in evidence.

40

Q. (By the Vice-Chancellor). You claim as to this antecedent agreement, that Atlantic City was in any ways warned or advised of it?

Mr. THOMPSON: I don't think that is necessary.

The VICE-CHANCELLOR: Is that your claim? 10

Mr. THOMPSON: I claim that property having been sold to Mr. Riddle, Mr. Loper had no power after that time to affect this property by any agreement that he might have signed.

The VICE-CHANCELLOR: You claim that this is admissible in evidence irrespective of any knowledge on the part of Atlantic City? 20

Mr. THOMPSON: Yes.

The VICE-CHANCELLOR: The objection is that you offer a private paper, which is not made evidential by any record as affecting the complainant in this suit, who was the grantee in the deed or covenant, or whatever the instrument may be called, and as affecting the co-grantors with Mr. Loper in the creation of an easement, who were none of them notified, how can it bind them? 30

Mr. THOMPSON: The proposition as it now stands, is this:

(Counsel argued the offer.)

The VICE-CHANCELLOR: I think I should overrule your offer unless you show 40

that the other persons who joined with Mr. Loper in the scheme and in the deed of April 30, 1896, and Atlantic City, who was grantee in that deed, of April 30, 1896, had some knowledge of this antecedent agreement, presently offered of May 4, 1896; I will have it spread upon the record so that you may argue it fully on final hearing, and so that if I am mistaken you may have the paper in the testimony for review.

The paper referred to was then marked Exhibit D—1 for identification, and is as follows:

"An Agreement, made this fourth day of May, A. D. 1896, by and between William Riddle of the first part, and Richard F. Loper, party of the second part.

WITNESSETH, For and in consideration of the sum of One Hundred and Forty Thousand Dollars ($140,000), the party of the second part has hereby sold and agrees to transfer to the party of the first part all that certain piece of land lying shoreward two hundred and fifty feet from the line of the new boardwalk with all riparian rights in front thereof, with the further option of the purchase of the balance of the lot shoreward at the rate of two hundred and fifty dollars per foot front up to one hundred and fifteen feet of the land owned by Mary K. Loper, One Thousand Dollars ($1,000) having been paid on account of said purchase, receipt of which is hereby acknowledged, and the balance being payable upon signing and delivery of the deeds.

IN WITNESS WHEREOF, the parties

hereto have hereunto set their respective hands and seals, the day and year first above written.

Witness present:

J. Bartram (?) Richards,	Richard F. Loper, (Seal.)
Rejinold Redford,	Wm. Riddle. (Seal.)

It is further agreed that the sum of $22,-499.91 is not to be paid under this sale unless the Entire 150 Feet Front Upon the Boardwalk is used by the purchaser and thenceforth the said sum is due upon demand. 10

Witness present:

J. Bartram (?) Richards,	Richard F. Loper, (Seal.)
Rejinold Redford,	Wm. Riddle. (Seal.)

Q. The premises to which this agreement refers to are the premises located on the southwesterly side of Pennsylvania avenue, Atlantic City, and running from a point 250 west from the new boardwalk, and from there to the exterior line of solid filling? A. They are. 20

Q. Did you afterwards consummate that agreement or make deeds for that property? A. I did.

Q. I call your attention to two deeds, one of which has already been offered in evidence as C—2, and ask you if that is the deed by which you conveyed the upland to the Mary A. Riddle Company and Brady? A. Yes, sir. 30

Q. And on the same date you made another deed, is that it? A. It is, sir.

First deed offered, between Richard F. Loper and wife to Mary A. Riddle Company and Joseph A. Brady, dated June 6, 1896, acknowledged same date, recorded June 10, 1896, in Book 203 of Deeds, folios 381, and 40

conveys a portion of the land down to high water mark, marked on the Goff map as Evans to Loper, July 22, 1895, which portion is the whole of that lot mentioned on that map which fronts on the high water line, and includes the sites marked on that map of the new boardwalk, and the old boardwalk.

10

Marked Exhibit D—2.

Second deed dated June 6, 1896, Richard F. Loper and wife to Mary A. Riddle Company and Joseph A. Brady, acknowledged June 6, 1896, recorded June 10, 1896, in Book 203 of Deeds, folio 383, &c., and conveys the lands marked on the Goff map, as the riparian grant to Loper August 29, 1895, and is the land lying toward the ocean on the tract described in

20

Exhibit D—2.

Marked Exhibit D—3.

Mr. THOMPSON: I call your Honor's attention in connection with this Deed D—3, that is a conveyance of the land above noted, and contains no covenant or restriction upon the use of those lands for rights of way, or against the construction or erection of build-

30

ings to the oceanward of the boardwalk. And as to D—3, it conveys the fast land above mentioned, and contains the following clause, "subject nevertheless to the condition that there shall not be erected upon the said premises any house or other building, nearer the line of Pennsylvania avenue than 27 feet of the property line, as set forth in the deed above recited; under and subject also to the easement of the right of way of the City of

40

Atlantic City over the portion of the said

property granted to the said City of Atlantic City for the boardwalk, as granted by Charles Evans and wife by indenture, dated January 2, 1890, and recorded in the Clerk's Office of Atlantic County, etc., in Book 2 of agreements, page 273, etc., and in Book 173 of Deeds, page 11, etc.

10

Q. Do you know where you were on the fourth and fifth of May when this agreement with Riddle was made? A. I do, I was in Philadelphia.

Q. Do you know where you were on the 8th and 9th of May, 1896? A. I do.

Q. Where were you at that time? A. 8th of May, 1896, I was in my office in New York, on the 9th of May, which was Saturday, I was in my home in Philadelphia, or with my wife around Philadelphia.

Q. Were you in Atlantic City on April 30, or any 20 day succeeding that, between that and the 9th of May? A. No, sir.

Q. Do you recollect seeing Judge Endicott, or signing any paper in connection with rights of way for Atlantic City, between the 30th of April, and the 9th of May? A. I can't reconcile the dates between the 30th of April and the 9th of May. I have a distinct recollection of Judge Endicott, and I think, I believe it was, Judge Thompson, calling at my office in Philadelpha, 713 Chestnut street, for 30 me to sign that which turned out to be the easement deed, and I so understood it.

Q. Do you recollect when that was? A. It must have been some time after the 9th of May.

Q. Why do you fix that time? A. Because on Sunday, the 10th of May, I left for St. Louis at 4.30 in the afternoon, and I was absent from Philadelphia, between St. Louis, Chicago, Springfield. Illinois and my various western offices up until about the 16th or 17th of May.

40

Q. What time of that year did you go to Atlantic City? A. Decoration Day, May 30.

Q. When did Mrs. Loper go to Atlantic City that year? A. Decoration Day, May 30.

Q. She went down with you? A. Yes, sir.

Q. Do you know whether or not she had been in Atlantic City previous to that time during that Spring between April 30 and May 9? A. To the best
10 of my knowledge she had not been, up to May 30th.

Q. Was Mrs. Loper in your office on the day Judge Endicott and Judge Thompson called there? A. She was not.

Q. Do you recollect whether or not you acknowledged that dedication agreement when Judge Endicott was in your office? A. I had no recollection that I did at the time he was at the office; Judge Endicott was my counsel at Atlantic City, and had been for some time, and has been since.

20 Q. Are you positive it was after the 4th of May that you signed that dedication agreement? A. I am as positive as it is possible to be with that lapse of time.

Q. Your conveyance of those lands to the Mary A. Riddle Company and Joseph A. Brady was made at the direction of Mr. Riddle carrying out this agreement made with him? A. Well, the papers which I had in my possession, being the deed from Mr. Evans, myself and wife were given to Mr. Casselman in his
30 custody, I think, as trust officer of the West Jersey Title Company, or in whatever capacity he occupied, and they were made out by Mr. Casselman, and practically the papers were all made to the West Jersey Title Company, to the best of my knowledge the deeds were drawn, in fact, I know they were by the West Jersey Title Company.

Q. (By the Vice-Chancellor). What deeds do you refer to? A. These deeds, June 6, 1896.

Q. That is the deed by you to Mary A. Riddle and
40 Joseph A. Brady? A. Yes, sir.

Q. (Further direct). I now call your attention to the paper which has been produced here, purporting to be an agreement in regard to the right of way in Atlantic City, and I call your attention to the fact that the name Richard F. Loper appears on that paper following about forty names, do you recall whether or not the agreement which you signed with Judge Endicott and Mr. Thompson contained all of those names? A. To the best of my recollection, it did not, 10 I believe I signed a separate deed, the deed might have had several other names, but to the best of my recollection, it hadn't all that list of names.

Q. Do you think it would have impressed itself upon your mind if there appeared the names of all those people, Mr. Leeds and Mr. Evans, and all those people? A. I think it would, I haven't been consulted in the transaction, I never attended any of their meetings, they knew I was not in the way of any progress that was to be made, and Judge Endicott, 20 as I have previously stated, having been my counsel, expected that I would do anything that was for the best interests of Atlantic City, but I don't recollect signing a deed containing all these names, I believe I signed a separate deed containing a few names, that is the best of my recollection.

Q. What is your recollection as to the form in which it was presented to you, was it a printed deed? A. It was a printed deed, although I am not quite clear, and I have a very vivid recollection that 30 it was brought to me. It might have been a portfolio, or a calf skin portfolio, or that which would look like the ordinary business journal, bound in calf skin, and Judge Endicott and Judge Thompson went together and laid that down on the table, and I signed it, of which I have a distinct recollection; whether it was a bound book, or whether it was a number of these deeds that was together in a calf skin portfolio, it is very clear to me that that was the transaction. 40

Q. I call your attention now to the fact that this paper purporting to contain your signature is dated the 30th day of April, 1896, where were you on that day? A. If you will permit me to look at my diary I will refresh my memory.

Q. Certainly. A. (Referring to book.) The 2 day of April I was in Baltimore. I positively was not at my office on the 30th day of April, and the best of my knowledge and recollection, refreshing my memory from my diary, I was in Baltimore.

CROSS-EXAMINATION by Mr. Wootton:

Q. On such a deed as this might it not have been possible for many other names to have been added after you signed it? A. I have no doubt many names were added after I signed it, but they would naturally be subsequent to my signature and not preceding.

Q. Might not they sign at different places? A. Allow me to look at that.

Q. This is a copy? A. I understand that (examining deed) I will simply say that the names upon that paper are not taken in rotation as to the ownership of property, therefore it is fair to assume that they were signed prior to my signature, for the reason if they were taken in rotation, they mght be left blank to be signed aftewards.

Q. What do you mean by rotation? A. If you commence signing it at States avenue and come southward to Virginia avenue you will find the names not as they appear.

Q. Suppose I pick up the owners of the property wherever they may be all over the United States? A. You would not be likely to pick them up and let them sign as they are there.

Adjourned until Wednesday, October 15, at 11 A. M.

RICHARD F. LOPER.

Camden, N. J., Oct. 15, 1902.

The hearing in this matter was continued pursuant to adjournment. Appearances as heretofore noted.

RICHARD F. LOPER: 10

CROSS-EXAMINATION Continued:

Q. In reference to the date or the time at which you signed the easement deed, April 30, 1896, was it not at about that time that the walk was being erected upon the land?

Mr. THOMPSON: Objected to, the question should be more definite as to what is 20 meant by the time the walk was being erected on the land. The testimony here yesterday was that it was anywhere from the 20th of April to the first of July.

The VICE-CHANCELLOR: I think that is sufficiently definite.

Q. Was it not at or about the time that they were sinking the piling for the walk? A. It was some time during the interval between when the boardwalk was 30 started and the boardwalk work proper begun at the foot of Pennsylvania avenue.

Q. What do you mean by the boardwalk work proper? A. The boardwalk at Pennsylvania avenue was not built until well into June, 1896.

Q. You mean it was not completed? A. No, I don't mean built and completed, I mean not built; the old boardwalk was not even removed, the old boardwalk remained there after the 30th of May, 1896, and the boardwalk proper had only been con- 40

structed to the point of the land owned by Mr. Bellis.

Q. (By the Vice-Chancellor). Now, you are referring to the steel piling? A. Yes, sir.

Q. But the boardwalk covering the steel piling hadn't been finished? A. I am not clear that the steel piling had been put in at Pennsylvania avenue, I am positive that the boardwalk had not been put up.

10 Q. (Further cross). And it had not been begun? A. No, to the best of my knowledge there was not a particle of the old boardwalk removed.

Q. Had any work been done on the new boardwalk, what you call the steel boardwalk, at the time you signed this deed? A. I can't say, my memory is not clear, but it is absolutely clear on the fact that the old boardwalk had not been removed or any work done there.

Q. (By the Vice-Chancellor). Mr. Loper, the deed that you signed,—before Judge Endicott, as I un-

20 derstand it? A. Yes.

Q. I understood you to say was a printed form filled up? A. Yes, sir.

Q. And you thought, that on that particular deed that you signed, so far as you recollected it, had fewer names than appear on the copy here produced? A. That is my recollection.

Q. That is all.

30 A. I would like, with your Honor's permission to state that I was discharged at the last hearing without having finished a question that was put to me.

The stenographer read as follows from the testimony as shown on page 77: "Ques. What do you mean by rotation? Ans. If you commence signing it at States avenue and come southward to Virginia avenue, you will find

40 the names not as they appear. Ques. Sup-

pose I pick up the owners of the property wherever they may be all over the United States? Ans. You would not be likely to pick them up and let them sign as they are."

A. Mr. Wootton handed me a paper and I was about to show Mr. Wootton that the names in rotation could not possibly have left any blank, and mine come in rotation, and 10 blanks were not left.

The VICE-CHANCELLOR: I did not understand that there were any blanks left. Nobody pretends that there was any scheme that they were signed in rotation to the line of owners. I guess they signed wherever they could get them.

Q. That is all. 20

Mr. GODFREY: Before the complainant rests we would like to have an opportunity of producing that original deed. I find in the testimony that was taken in the Steel Pier case, where this deed was involved, that at the hearing of that case January 21, 1901, that I offered it in evidence and it was marked Exhibit C—8 in that case; and those exhibits, I have never obtained them, and possibly 30 they may be filed in the Clerk's office.

The VICE-CHANCELLOR: You mean to close, reserving the right to put that deed in.

Mr. GODFREY: Yes, sir.

Mr. THOMPSON: My ambition was to get hold of that original deed while Mr. Loper 40

was here. I wanted him to see the paper that they claim had his signature to it. We have never seen it. We don't know anything about whether it is like this certified copy or not. I objected to the production of this certified copy in the evidence on the ground that it was not such a document as could be produced under this statute. Your Honor 10 permitted them to produce secondary evidence after proving that it was lost. They have not seen fit to avail themselves of that offer, and there is no paper now which I think is, under the rules of evidence, entitled to be considered as the paper upon which they can base their bill. Your Honor sees that there is a great embarrassment to us.

The VICE-CHANCELLOR: I will take 20 care that you shall not be embarrassed. This is one of the exigencies where the Court itself may have brought about the embarrassment, and I would not allow the case to go on to prejudice you in the production of this deed. It may be, as the counsel suggest that the deed has been exhibited to the Court and retained by the Court for examination and used, and has not been returned to counsel. That is quite a plausible explanation and 30 to allow so important a document to be unproduced for this reason would certainly be a great injury to the parties, where there is nobody to be considered, but the convenience of Court. Mr. Loper is a resident of Philadelphia. If it is advisable that he shall see the original document, I will give him an opportunity at any time. The case may go over until it is produced here. Mr. Loper can be recalled to give further testimony on seeing 40 it. It is a mere matter of arrangement or

convenience of a week or something of that sort. The defendant company will not be prejudiced.

Mr. THOMPSON: I did not move to dismiss the bill—

The VICE-CHANCELLOR: No, I would not entertain that motion, I do not understand that you made any such suggestion. 10

Mr. THOMPSON: My present statement is made with a view of exactly what your Honor has said. I do not object to their finding it, whether Vice-Chancellor Reed has the paper or not, I told Mr. Godfrey that he was very likely right, but my present suggestion is that I want to be protected in every way. 20

The VICE-CHANCELLOR: I will take care that your client shall not be in the least danger of being prejudiced. I would much prefer to go on with the case today and let the complainant have their reservation. If they can produce the original deed you may look at it, and if you care to recall Mr. Loper you may do so. If you do not, we can close the case. It shall not prejudice you at all. 30

Mr. THOMPSON: Considering the stipulation which was presented before your Honor the day before yesterday, the facts are practically before your Honor as the case now stands. I had one additional question to ask Mr. Loper, which I cannot ask him until the book, which, unfortunately, was not brought from Philadelphia this morning, arrives. Besides that, I have but little to offer to your Honor, except to make now a formal offer of 40

the deeds which I proved by Mr. Loper the day before yesterday, and which were marked for identification as Exhibits D—2 and D—3, the deeds from Loper to the Riddle Company and Brady. One has already been offered on the complainant's side, and I desire to offer the other formally on our side of the case. I take it there is no objection to those documents.

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In addition to that I propose now to offer formally this agreement of May 4th, which was proved by Mr. Loper as having been executed by him, on the day before yesterday, and which your Honor, as I then understood it, thought it was not a proper matter to offer as evidence in this case unless I should identify with it all the other parties who were named as parties to the agreement of 1896; that they were entitled to notice of the fact that there had been an agreement made between Mr. Loper and Mr. Riddle.

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The VICE-CHANCELLOR: I said Atlantic City and the other grantors, Atlantic City is the party here against whom you offer evidence of a transaction betwen parties in no way noticed to Atlantic City.

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Mr. THOMPSON: Oh, I then misunderstood your Honor very much. I understood your Honor to say that I was obliged to notice all parties connected with the case.

The VICE-CHANCELLOR: The co-grantors who joined Mr. Loper in the scheme are not parties in this suit.

Mr. THOMPSON: No, they are not, but there has been some effort in the bill and in

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the examination on the other side to show that the City comes here, not representing itself individually in this matter, but as representing all the citizens who have entered into this agreement with the City.

The VICE-CHANCELLOR: I take it that Atlantic City in this suit represents the public interest in the same sense in which such suits 10 are brought by municipal authorities to save public rights in parks and other public privileges.

Mr. THOMPSON: I then desire now to offer this agreement of May 4th, without having, however, proved any notice to the City, of the fact that there was an agreement between Mr. Riddle and Mr. Loper on the 4th of May, I contend that Mr. Riddle when he 20 purchased this property from Mr. Loper in 1896, under this agreement of May 4th, had no notice, could have no notice that the City was in possession of that property in any way, but as a trespasser; that it has been shown in the case that the city was working on this property April 29, that the ordinance was adopted on the 4th of May and approved on the 6th of May, and that the proof as to the execution of the agreement of April 30, 30 1896, shows that it was not executed until between the 6th and 9th of May, and that therefore there was no notice as to any covenants on land outside, and that Mr. Riddle had a perfect right to buy that property without being subject to any covenant, which might be afterwards made by Mr. Loper regarding any of the property. I should perhaps add to that that an inspection of the situation and record having shown that the boardwalk deed of 40

1090 was not built upon the lands described in the deed made by Mr. Evans to the city in January, 1890, and that under the terms of that deed, the city having failed to use the land described therein, that it reverted without condition or limitation to the grantors, to Mr. Evans, and consequently to Mr. Loper. I claim, therefore, that this agreement is such a passage of title on the 4th of May, 1896, as makes Mr. Loper a trustee for Mr. Riddle, who afterwards secured the conveyance of the property to the lessors of the defendant.

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(A copy of this Exhibit D—1 appears in the testimony on page 104.)

The offer is objected to by complainant's counsel on the grounds heretofore stated.

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The VICE-CHANCELLOR: I overrule the offer of the agreement between Mr. Loper and Mr. Riddle dated May 4, 1896, upon the ground that there has been nothing to show that the complainant in the suit, Atlantic City, was in any way notified of the agreement, and that it is in any ways binding upon the city by way of notice or otherwise.

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RICHARD F. LOPER, recalled for the defendant.

DIRECT EXAMINATION by Mr. Thompson:

Q. I want to ask you if you have any other memorandum of this transaction of 1896, original memorandum made at the time, to which you can refer? A. I have.

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Q. Will you kindly refer to it? A. This book is Journal B—

> The VICE-CHANCELLOR: It is not submitted as a book, you have a memorandum, just look at it.

A. Upon page 49 of Journal B appears the following entry— 10

> The VICE-CHANCELLOR: Read the entry to yourself and refresh your memory.

Q. From the face of the book do you recollect having sold this pronerty in 1896, on the 4th of May, and receiving $1,000 therefor? A. I do.

Q. (By the Vice-Chancellor.) The sale was one which was made by virtue of the memorandum of agreement of May 4, signed by you and produced 20 here and to which you testified the day before yesterday. A. Yes, sir.

Q. That is the same sale? A. Yes, sir.

NOT CROSS-EXAMINED.

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OFFER OF EXHIBITS.

Mr. THOMPSON: I have one more matter, I offer a copy (which is not certified), but is admitted to be correct without certification or other proof of the resolution of the City Council of Atlantic City on June 8, 1896, and is as follows:

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11. That the City Council of Atlantic City adopted the following resolution on June 8th, 1896, viz.:

"Resolved—That Atlantic City hereby accepts the dedication made by property owners along the right of way of the new steel walk, and the City Solicitor is instructed to have recorded the said right of way in the County Clerk's Office, and that said Solicitor be instructed to prepare at once an ordinance vacating all lands heretofore enjoyed by the City for a right of way for the old boardwalk, to such persons as have granted the new right of way, their successors and assigns, except where such old right of way is coincident with the new right of way."

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Marked Exhibit D—4.

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Adjourned until Tuesday, Oct. 21, 1902, at 11 o'clock A. M., at the State House at Trenton.

40

BURROW C. GODFREY.

IN CHANCERY OF NEW JERSEY.

Trenton, N. J., Oct. 21st, 1902.

The hearing in this cause was continued pursuant to adjournment. Appearances as heretofore noted.

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Mr. WOOTTON: This matter was opened for the purpose of introducing the original deed. Mr. Godfrey thought he was upon the trail of it, but so far has not been able to find it, and I desire to have his testimonpy made part of the record, for the purpose of showing to what extent the search has been made for the missing instrument.

20

BURROW C. GODFREY, sworn for the complainant.

DIRECT EXAMINATION by Mr. Wootton:

Q. You are one of the solicitors in this case? A. I am.

Q. Were you prior to June of this year associated with Mr. Carlton Godfrey, as City Solicitor of Atlantic City? A. I was. 30

Q. Witness is shown Exhibit C—4, being certified copy of deed from Henry W. Leeds, Richard F. Loper and others to the city of Atlantic City, and ask, have you ever had in your possession the original of which this is a copy?

Mr. THOMPSON: I think it is proper to make an objection to that question in that form. It is an attempt perhaps to get Mr. 40

Godfrey to swear that that is a true copy of the original.

The VICE-CHANCELLOR: I should take it as an attempt to identify the instrument, as to the original of which he is to be examined.

10 Mr. THOMPSON: If that is the purpose, I will not object.

The VICE-CHANCELLOR: It is to show his acquaintance with the subject matter. You do not attempt to prove that that is a copy by this witness?

Mr. WOOTTON: No.

20 The VICE-CHANCELLOR: You want to interrogate him as to the original of which this purports to be a copy?

A. To the best of my knowledge, I have.

Q. Will you state the last time when the original was in your possession? A. I will be obliged to refer to the transcript of the stenographer's notes, which was taken in the case of Atlantic City vs. Atlantic City Steel Pier Company.

Q. In what year? A. January 28, 1901.

30 Q. Had you it in your possession at that time? A. I find by referring to the transcript of the stenographer's notes taken on that date, that I offered them in evidence———

Mr. THOMPSON: Won't it be better to read what you have?

A. "Question. I show you what purports to be a right of way or agreement made by Henry W. Leeds, J. Haines Lippincott, Charles Evans, etc., 40 etc., a number of others, and among the others

Richard F. Loper and Mary K. Loper, and I will ask you if that deed covers the description as shown on the first map which was designated as the boardwalk map, and which has been offered in evidence and marked Exhibit C—2. Answer. Yes, sir, it does.

Mr. GODFREY: I offer that deed in evidence. Marked Exhibit C—8." 10

Q. (By the Vice-Chancellor.) Were you a participant in that litigation? A. I was.

Q. And what was, generally, the subject matter of that litigation? A. The litigation was over the question of charging more than a single entrance fee to the pier that had been constructed under this easement deed.

Q. Of April 30, 1896? A. Yes, sir.

Q. The one referred to in the notes which you have just read? A. Yes, sir. 20

Q. (Further direct.) Was that the deed referred to in this suit as the agreement of April 30, 1896, regarding the right of way across the property of Loper, Riddle and others? Or a part of which the Auditorium pier now occupies? A. That was the deed upon which the bill in this case was framed.

Q. Do you know where that deed is now? A. I do not.

Q. Have you made search for it? A. I have.

Q. What search? A. I came to the Chancery Office 30 last Wednesday and requested that search be made for that deed, which was done by the clerks in the office in my presence.

Q. What other search? A. I further advised with Vice-Chancellor Reed.

Q. (By the Vice-Chancellor.) Before whom the Steel Pier case was tried? A. Yes, before whom the Steel Pier case was tried, and stated to him that among the exhibits in that case, the Steel Pier case, was the original deed, from Henry W. Leeds and others to the city, and that that exhibit had not been 40

returned to me, and he said he would search among his papers for it, and today he advised me that he had made the search that he desired to make—that is the search hadn't been so full as he would like it to have been.

Q. But you have never heard anything of the deed since? A. No.

Q. (Further direct.) What search did you make
10 in Atlantic City for it? A. We have searched in our safe where we keep those things, and where the other deeds, similar deeds, were kept.

Q. (By the Vice-Chancellor.) You had this Leeds etc., and Loper deed to Atlantic City on April 30, 1896, in your possession? A. That is the best of my recollection.

Q. You remember seeing it? A. Yes, sir.

Q. Didn't you say you drew this bill on it? A. Well, I drew the bill——

20 Q. On the certified copy? A. Yes, sir.

Q. Or what purports to be a certified copy? A. Yes, sir.

Q. When you had the original was it one of those which was filled in on printed form, such as is used and has been presented here as the conveyance of other persons, as to the new boardwalk? A. Yes, sir, it was a similar deed to those that have been offered as exhibits in this case.

Q. The deed contained, as those on the other print-
30 ed forms, no description of the specific lands, touching which the grantors covenanted or conveyed a right of way? A. No, sir, no specific description.

Q. It contained a description of the right of way itself running over all lands whatsoever it may cover, and the conveyance of the parties was simply related by whatever land they might hold within the description, was it not? A. Yes, sir.

Q. And it was on the printed form? A. Yes, sir.

Q. I show you Exhibits C—7, C—8, C—9 and
40 C—10, which have been offered in evidence in this

case, endorsed right of way, with the names of the grantors, to Atlantic City, and I ask you whether or not the printed form, which you say was the printed form in which the deed of Henry W. Leeds, Loper and others was expressed, is the same printed form which was expressed in those deeds here shown you? A. To the best of my knowledge and recollection, it was.

Q. (Further direct.) What has been the result of this continuous search that you have made? A. I have been unable to obtain the original deed. 10

Q. (By the Vice-Chancellor.) The deed of Loper, Leeds and others to Atlantic City of April 30, 1896? A. Yes.

Q. That is all.

CROSS--EXAMINATION by Mr. Thompson:

Q. Do I understand you to say positively that you had the original agreement made between Leeds and others to the City on April 30, 1896, in that Steel Pier case? A. That is my best recollection. 20

Q. I call your attention to this certified copy which has been marked in this case C—4, and which you say is similar in some respects to the one which you there offered as the original deed in the Steel Pier case, and to certain pencil marks in this deed?

The VICE-CHANCELLOR: Making part of the deed? 30

Mr. THOMPSON: I don't know what they are here for, I suppose something has been left out in the certified copy.

Q. On the third page of this certified copy, C—4, are the words "as is provided," written in, interlined between the fifth and sixth line in pencil. On the fifth page the word "southwardly" is interlined be- 40

tween the eleventh and twelfth lines in pencil. On the seventh page the words "or erected" are interlined between the seventh and eighth lines, also in pencil. I ask you to examine those interlineations, and tell me if you can in whose hand-writing they are? A. It resembles my own, that is, the last words "or erected."

10 Q. I call your attention now to the fact that the Clerk's certificate bears date the 26th day of April, 1899; that was prior to the beginning of the Steel Pier case, from which you have taken the notes which you have read to the stenographer? A. That is my impression, I won't be positive about that.

Q. The case against the Steel Pier depended upon the fact that an easement agreement had been executed by George W. Jackson, didn't it; that was the man who owned the land upon which the Steel Pier was built, after the corporation obtained the title?

20 A. It was in the case, that was a question in the case.

Q. Jackson was the man who would have signed the deed, was he not? A. Yes, sir.

Q. I now call your attention to the fact that in this copy there are pencil marks around the name George W. Jackson, and Mrs. M. Jackson, located on the 18th and 19th line on the 10th page of this copy, and ask you if that does not call to your mind the fact that this was the copy which was offered before Vice-Chancellor Reed in the trial of the Steel Pier case?

30 A. No, sir; it does not.

Q. You were City Solicitor in 1899 when this certified copy was made, were you not? A. I was not the City Solicitor, but I was in the City Solicitor's office.

Q. The City Solicitor was your partner, and you are the court man of your firm? A. I do that part of the work.

Q. Can you tell me whether you had the original deed of which this purports to be a copy when you ordered this certified copy in 1899? A. I don't think

40 that certified copy was ordered by us.

Q. I call your attention to the endorsements thereon and the names of Godfrey & Godfrey, Atlantic City, at the bottom, that is your firm? A. It is.

Q. Does it not now bring to your mind the fact that you ordered this certified copy from the Clerk? A. No, sir; that Godfrey & Godfrey was written on there after the preliminary hearing, or at the time of the preliminary hearing in this case, in order that the Vice-Chancellor might know who to return this Exhibit to. 10

Q. Where did you get that certified copy made in 1899, prior to the filing of the bill in this case? A. I think I got that from Messrs. Coult & Howell, of Newark.

Q. Do you recollect clearly having in your possession then an original deed signed by Mr. Loper at the time of the trial of the Steel Pier case? A. To the best of my recollection, as refreshing my memory from the transcript of the stenographer's notes. 20

Q. And you are guided entirely by this transcript? A. I am.

Q. The testimony which you read from was an examination by you of Mr. Hackney, the City Surveyor, was it not? A. I think so.

Q. There was no question raised in the Steel Pier case as to the validity of the right of way agreement between Jackson and the City, that question didn't arise in that case at all, did it? 30

Mr. WOOTTON: I cannot see what relevancy that question has.

The VICE-CHANCELLOR: Mr. Thompson is trying to show that there might be doubt as to the identification of the original deed, because there was no occasion to produce such deed in that case; it is admissible, certainly. 40

A. The question arose as to whether Mr. Jackson was bound by that deed or not.

Q. I call your attention to these interlineations in pencil, to which I have referred, and in addition to those already mentioned, I call your attention to the words "west" interlined between the fourth and fifth lines on the fourth page of this certified copy, and ask you whether it does not appear that this certified
10 copy has omitted these pencil interlineations from what appears to be in the printed copy, that are produced in evidence in this case; having the printed copy of any of the exhibits before you I call your attention to the word "west" interlined, and the words "southwesterly" on the third course, between the fourth and fifth lines on the fourth page, referring to the third course in the printed deed, that word is southwardly, is it not? A. Yes, sir, it is.

Q. Calling your attenton to the word southward
20 on the fifth page betwen the eleventh and twelfth lines, and comparing that with the twelfth course in the printed deed, the word "southwardly" is omitted from this copy C—4, is it not? A. It is.

Q. And interlined in pencil? A. It is.

Q. Calling your attention again to the words "or erected" on the seventh page, lines seven and eight, the words "or erected" appear in the printed form, do they not, and are interlined in pencil, and I understood you to say that was in your handwriting?
30 A. To the best of my knowledge.

Mr. WOOTTON: I ask that all evidence be stricken out as to the comparison with what purports to be in the certified copy; if there is the comparison it should be with the original to show mistakes.

The VICE-CHANCELLOR: No, I think it is admissible. I think there is in the evi-
40 dence sought by the question enough to form

the basis of an argument as to the accuracy of the certified copy. I think the offer is admissible. Mr. Loper himself, and everybody who has testified with relation to the original deed, has stated that it was on the printed form. I think Mr. Thompson is justified in his examination.

Q. I do not think I called your attention to the words "and right of possession," also interlined in pencil on the eighth page between the eleventh and twelfth lines, and the word "and" interlined on the same page between the tenth and eleventh lines. Do you know whose hand-writing that is in? A. No, sir; I could not tell; possibly it is mine, and may be some other persons. 10

Q. (By the Vice-Chancellor). You mean there is so little of it that you cannot tell by whom it is written? A. Yes, sir. 20

Q. (Further cross). Do you recollect going over this deed at any time to make the corrections which have been suggested with the printed copy? A. I do not.

Q. (By the Vice-Chancellor). Can you recall when any of the interlineations were made in that certified copy in pencil which have been adverted to here by you, and on what occasion? A. I could not, right the specific occasion, my notion is that sometime, in some cases that I appeared in for the city, that I have had that before me in the preparation of an argument, and possibly in comparison with the other deeds, the printed forms I spoke of, I have made those interlineations. I don't know that that is true, but that is my notion. 30

Q. (By the Vice-Chancellor.) You say the certified copy came from Coult and Howell? A. Yes, sir.

Q. Who are they? A. Practising attorneys in this State.

Q. Who were they acting for at the time you got 40

this deed? A. For Charles Evans, and one of the persons who signed the boardwalk easement deed.

Q. Has he got a suit, is he the same Evans that has a suit? A. Yes, sir. The first bill was filed under this easement deed was filed against the Auditorium Pier; that was filed by Coult and Howell, the gentlemen I spoke of. And this certified deed that has
10 been offered in evidence and marked Exhibit C—4, was used, I think, on that occasion.

Q. That is the suit by him against the Auditorium Pier? A. By Mr. Evans.

Q. A private citizen? A. Yes, sir.

Q. (Further cross.) Referring once more to those words I was asking you about "and right of possession" occurring, as I said, on the eighth page, between lines 11 and 12, they appear in the printed form, do they not? A. They do.

Q. Were Messrs. Coult and Howell engaged in the
20 Steel Pier case? A. No, sir.

Q. Can you explain in any way then those marks opposite the name of George W. Jackson, and Mrs. M. Jackson? A. I cannot, I may have made them as I made the others.

Q. Looking at the pencil marks there appearing, and comparing them with the interlineations that I have already called your attention to, does it or not appear that they were made by the same pencil. In other words, are they not the same sort of lead as
30 the interlineations to which I have called your attention? A. I could not say as to that, it is dark lead, it is not colored lead.

Q. (By the Vice-Chancellor.) It is all the same color? A. Yes, sir.

Q. (Further cross.) There are in this same paper C—4, other pencil marks that are not nearly as dark as that alongside the sides and other places about it? A. I can see very little difference.

Q. Did Mr. Vice-Chancellor Reed indicate to you
40 any recollection whatever of ever having had in his

possession the original agreement made between Leeds and Evans and others and the City of Atlantic City? A. No, sir, I don't think he did.

Q. Did you ever, before your application to him last Wednesday make any effort to get him to return any original exhibits which he might have had in that case? A. I did.

Q. When previously? A. I am not sure as to the date, but it was some time previous to the last term of the Court of Errors and Appeals. 10

Q. Did you get any exhibits at that time? A. I did not.

Q. Did you have any other original exhibits in that case but this one deed? A. Yes, sir.

Q. Did you ever get any of them back? A. Yes, sir.

Q. Did you at the time you got some of them back call the attention of the Vice-Chancellor to the fact that this original deed had not been returned? A. I did not. 20

Q. Did it occur to you at that time that the original deed had not been returned? A. I don't know that it did.

Q. Did it ever occur to you that you didn't have that original deed from the time that you introduced it in evidence on the 28th of January, 1901, until last week, when objection was made to this deed? A. Yes, sir.

Q. Then last Wednesday as I understand it was the first time that you thought it might be in the custody of Vice--Chancellor Reed? A. No, sir. I do not so state. 30

Q. It was not until you looked up this record? A. Yes, sir, it was prior to that, the time I make mention of, prior to the last term of the Court of Errors and Appeals.

Q. (By the Vice-Chancellor.) What occurred there? A. That the Vice-Chancellor made reply at that time, that his usual custom was to file exhibits in the case with the other papers, and I left word at 40

the Chancery Clerk's office, if these exhibits had been filed in the office by the Vice-Chancellor to forward them to our address, and in connection with them the other exhibits, the originals that were offered were taken by the Vice-Chancellor, the original deed and at least one section or two sections of the map showing the right of way.

10 Q. (Further cross.) What have you done with the other original exhibits that you had in that case? A. Returned them to the City Clerk of Atlantic City.

Q. Do you know whether or not, or can you say positively that the original deed was not returned to the Citv Clerk of Atlantic City along with the map? A. I did not testify that I returned any map to the City Clerk.

Q. I undersood you to say that you did. I ask you whether you returned the other exhibits, and I
20 understood you to say that you returned them to the City Clerk? A. The deeds, I said.

Q. What became of the maps which you say the Vice-Chancellor did not keep? A. I did not say that he did not keep the maps, you misunderstand me.

Q. I understood you to say that he did not keep any other original exhibits except this one deed? A. I say the Vice-Chancellor kept the maps, that is one section, possibly two sections and the original deed, the others he said he didn't need.

30 Q. Have you ever recovered those maps? A. No, sir.

Q. That is all.

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CASE CLOSED.

Mr. THOMPSON: I desire to make a motion. I move now to rule out the testimony offered of the contents of the deed, purporting to have been an agreement, purporting to have been made between Henry W. Leeds and others in Atlantic City. In the first place my objection was formally made, if your 10 Honor please, to the fact that this is not such a paper as the statute permits a certified copy to be offered in evidence of. In the second place, following that motion your Honor suggested that the other side might produce the proof necessary to prove the lost document. As I understand the rules of evidence the other side has wholly failed to prove the contents of any paper as a lost paper. They do not prove before your Honor that this is a 20 sworn copy, nor will anybody swear that it is a true copy of the original paper. In fact, this copy which is offered in evidence, is now shown by the testimony of Mr. Godfrey to differ in several instances from the printed copies, which he says, if he says anything about the original deed, was the form which was used in making the original deed. Therefore there is no proof before your Honor in any way, that this is a true copy even of what 30 the original deed contained.

(The Vice-Chancellor heard argument on motion, and reserved the decision.)

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FINAL DECREE.

IN CHANCERY OF NEW JERSEY.

Between	)	
CITY OF ATLANTIC CITY,	)	On Bill for In-
and	)	
Complainant,	)	junction, etc.
NEW AUDITORIUM PIER	)	Final Decree, etc.
COMPANY,	)	
Defendant.	)	

10

20 This cause coming on to be heard upon bill, answer replication and proofs, in the presence of Harry Wootton, and Burrows Godfrey, of counsel with the complainant, and Charles D. Thompson, of counsel with the defendant, and the Court having read the pleadings and proofs and heard the arguments of the counsel of the respective parties thereon, and duly considered the same, and being of the opinion that the complainant is entitled to the relief sought in the premises, it is therefore, on this twenty-sixth day 30 of October, A. D. One thousand nine hundred and three, ORDERED, ADJUDGED AND DECREED, that the New Auditorium Pier Company, its attorneys, workmen, agents and servants, be and they are hereby perpetually enjoined and restrained from erecting or driving piling upon the premises hereinafter described, in possession of the said defendant, and from building any building or structure thereon at any point on said lands oceanward from the boardwalk now built upon the public street sixty 40 feet wide, dedicated to public use by deed made by

Henry W. Leeds and others, bearing date the thirtieth day of April, A. D. Eighteen hundred and ninety-six; and also for making any lateral addition to the Pier now built upon the said premises, and known as the Auditorium Pier, the said premises being and lying along the Atlantic Ocean front of the said City of Atlantic City, and the same mentioned and described in the said bill of complaint as in the possession of the said defendant as lessee, and consisting of two parcels of land leased by Mary A. Riddle Company and Joseph A. Brady, as follows, viz.: The first lease being made by Thomas U. Parker, bearing date the second day of January, A. D. eighteen hundred and ninety-nine, and afterwards assigned to said defendant, being for a strip of land located about sixty-seven feet west of the westerly line of Pennsylvania avenue, and being about ninety feet wide, extending from the southerly line of said dedicated street to the exterior wharf line established by the Riparian Commissioners; the second lease being made to the Auditorium Pier Company, and afterwards assigned to said defendant, and bearing date the second day of January, A. D. Nineteen hundred, and being for a strip of land adjoining on the west side of Pennsylvania avenue, and being about sixty feet wide, extending from said southerly line of said street to said exterior wharf line;

AND IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant, the New Auditorium Pier Company, pay to the complainant the costs of this suit to be taxed, and that the complainant have execution therefor, according to the practice of this Court.

W. J. MAGIE,
C.

Respectfully advised,
M. P. GREY,
V. C.

PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Between

10 CITY OF ATLANTIC CITY,

Complainant, Respondent,

and

NEW AUDITORIUM PIER COMPANY,

Defendant, Appellant.

Petition of Appeal

20

To the Honorable Court of Errors and Appeals, as a last resort in all causes:

The petition of the New Auditorium Pier Company, the appellant in the above stated cause, respectively shows that your petitioner finds itself aggrieved by a final decree made in the Court of Chancery, by his Honor, William J. Magie, Chancellor of 30 the State of New Jersey, bearing date the twenty-sixth day of October, in the year one thousand nine hundred and three, the cause wherein the said City of Atlantic City was complainant and the said New Audtorium Pier Company was defendant, in this respect that the said decree adjudges that the said defendant, its attorneys, workmen, agents and servants be and they are hereby perpetually enjoined and restrained from erecting or driving piling upon the premises hereinafter described, in possession of the 40 said defendant, and from building any building or

structure thereon at any point on said lands oceanward from the boardwalk now built upon the public street, sixty feet wide, dedicated to public use by deed made by Henry W. Leeds and others, bearing date the thirtieth day of April, A. D. eighteen hundred and ninety-six; and also for making any lateral addition to the pier now built upon the said premises, and known as the Auditorium Pier, the said premises being and lying along the Atlantic Ocean front of the said City of Atlantic City, and the same mentioned and described in the said bill of complaint as in the possession of the said defendant as lessee, and consisting of two parcels of land leased by Mary A. Riddle Company and Joseph A. Brady, as follows, viz.:—The first lease being made by Thomas U. Parker, bearing date the second day of January, A. D. eighteen hundred and ninety-nine, and afterwards assigned to said defendant, being for a strip of land located about sixty-seven feet west of the westerly line of Pennsylvania avenue, and being about ninety feet wide, extending from the southerly line of said dedicated street to the exterior wharf line established by the Riparian Commissioners; the second lease being made to the Auditorium Pier Company, and afterwards assigned to said defendant, and bearing date the second day of January, A. D. nineteen hundred, and being for a strip of land adjoining on the west side of Pennsylvania avenue, and being about sixty feet wide, extending from said southerly line of said street to said exterior wharf line; and further appeals from said decree, as ordered and adjudged, that the defendant New Auditorium Pier Company shall pay the complainant's costs of the suit to be taxed, and have execution thereof, according to the practice of this Court.

And your petitioner humbly appeals from the provisions of said decree, which was decreed as aforesaid upon the ground that the same is erroneous, and

that the said court should not have granted said injunction against driving any piling or erecting any building or structure upon the lands described in said decree, or making any lateral addition to the pier now bult upon the said premises and known as the Auditorium Pier, but the said injunction should have been denied, and the bill dis-
10 missed.

Your petitioner further prays that the said decree in the said particulars aforesaid be reversed, and that your petitioner may have such relief of the premises as to your Honorable Court shall seem mete.

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EXHIBIT C—1.

CHARLES EVANS, et ux,	)	Deed.
to	)	
RICHARD F. LOPER.	)	July 22nd, 1895.

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This Indenture made the twenty-second day of July in the year of Our Lord one thousand eight hundred and ninety-five, between Charles Evans and Anna B., his wife, of the City of Atlantic City, in the County of Atlantic and State of New Jersey, of the first part, and Richard F. Loper of the City and County of Philadelphia, and State of Pennsylvania of the second part, WITNESSETH, that the said party of the first part, for and in consideration of the sum of Ten Thousand Dollars and other good and valuable considera- 20 tions, lawful money of the United States of America, well and truly paid by the said party of the second part to the said party of the first part, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have ganted, bargained, sold aliened, enfeoffed, released, conveyed and confirmed and by these presents do grant, bargain, sell, alien, enfeoff, release, convey and confirm unto the party of the second part, his heirs and assigns, all that certain tract or piece of land situate in 30 the City of Atlantic City, in the County of Atlantic and State of New Jersey, bounded and described as follows: Beginning at a point in the westerly line of Pennsylvania avenue, nine hundred and seventy-two feet south of the southerly line of Pacific avenue as now located, and in the south line of lands belonging to Mary K. Loper, and runs thence (1) westwardly parallel with Pacific avenue, along said Loper's line one hundred and fifty feet to the easterly line of a twenty feet wide alley; thence (2) southwardly in 40

said easterly line of said alley, and parallel with Pennsylvania avenue six hundred feet more or less to ordinary high water line of the Atlantic Ocean; thence (3) eastwardly along said ordinary high water line of the Atlantic Ocean one hundred and fifty feet more or less to the westerly line of Pennsylvania avenue, thence (4) Northwardly in said westerly line of Pennsylvania avenue six hundred feet more or
10 less to the place of beginning. Subject, nevertheless, and this conveyance is granted and accepted accordingly, to the following covenant and condition, viz., the said grantee for himself, his heirs, executors, administrators and assigns, covenants and agrees to and with the said grantors, their heirs and assigns, that he, the said grantee, his heirs and assigns, shall never erect upon the said premises any house or other building nearer the line of the above mentioned Pennsylvania avenue than twenty-seven
20 feet of the property line. Subject also to the easement or right of way over sixty feet of the above described land granted by the said Charles Evans and wife to the City of Atlantic City, by indenture dated January 2, 1890, and recorded in the Clerk's Office of said Atlantic County, in Book No. 2 of Agreements, page 237, etc., and in book No. 173 of deed, page 11, etc. The above described land and premises being the result of gradual and imperceptible growth or accretion in front of lands conveyed to the said
30 Charles Evans and Casper W. Haines, by David Scattergood and Margaret B. Scattergood, by deed dated March 25, 1867, and recorded in the said Clerk's office at May's Landing, N. J., in book No. 39 of Deeds, folio 632, and Isaac W. Stokes and Charles Stokes, executors, of the last will and testament of the said Casper W. Haines, by virtue of the power on them conferred by the will of said deceased, by their deed dated November 14, 1876, and recorded in the Clerk's Office aforesaid, in Book No. 54 of
40 Deeds, page 608, etc., conveyed in fee simple to said

Charles Evans, the one equal undivided moiety or half part of the lands last above referred to; and the lands and premises above described having been confirmed to the said Charles Evans by deed of confirmation from the Camden and Atlantic Land Company, dated April 29, 1886, and of recorded in the said Clerk's Office, in Book No. 111 of Deeds, page 58, etc., together with all and singular the buildings, improvements, woods, ways, rights, liberties, privileges, here- 10 ditaments and appurtenances, to the same belonging or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof; and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity of the said party of the first part of, in and to the premises with the appurtenances. To have and to hold the said premises, with all and singular the appurtenances unto the party of 20 the second part, his heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, his heirs and assigns, forever. And the said Charles Evans, for himself, his heirs, executors and administrators, does by these presents covenant, grant and agree to and with the said party of the second part, his heirs and assigns, that he, the said Charles Evans, his heirs, all and singular the hereditaments and premises hereinabove described and granted or mentioned and intended to be so, with 30 the appurtenances unto the said party of the second part, his heirs and assigns, against him the said Charles Evans, his heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same or any part thereof, by through, from or under him, them or any of them, shall and will, warrant and forever defend. In Witness Whereof, the said party of the first part to these presents have hereunto set their hands and seals. Dated the day and year first above written. 40

Signed, sealed and delivered in the presence of S. D. Hoffman.

CHARLES EVANS, (Seal.)
ANNA B. EVANS, (Seal.)

Regularly acknowledged same day before S. E.
10 Hoffman, Master in Chancery of New Jersey.

Recorded July 23rd, 1895, Liber. 192, p. 384.

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EXHIBIT C—2 AND D—2.

DEED. Loper to Riddle Co. & Brady,
dated June 6th, 1896.
Recorded June 10th, 1896. Lib. 203, p. 381.

THIS INDENTURE, made the Sixth day of June, in the year of Our Lord one thousand eight hundred and ninety-six (1896), BETWEEN Richard F. Loper and Mary K., his wife, of the City and 10 County of Philadelphia, and State of Pennsylvania, of the first part, and "Mary A. Riddle Company," a corporation of New Jersey, and Joseph A. Brady, of Atlantic City, Atlantic County, State of New Jersey, of the second part:

WITNESSETH, That the said party of the first part, for and in consideration of the sum of One hundred and forty thousand dollars, lawful money of the United States of America, well and truly paid by the said party of the second part to the said party of the 20 first part, at and before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, convey and confirm, unto the said party of the second part, their successors, heirs and assigns: All that certain tract or piece of land situate in the City of Atlantic City, in the County of Atlantic and State of New Jersey. 30

Beginning in the west line of Pennsylvania avenue one thousand two hundred and ten feet southward from the south line of Pacific avenue, and two hundred and fifty feet northward from the interior line of the new boardwalk, and extending thence westwardly parallel with Pacific avenue, one hundred and fifty feet to the easterly line of a twenty feet wide alley; thence southwardly, parallel with Pennsylvania avenue, three hundred and sixty two feet more 40

or less to the line of high water mark of the Atlantic Ocean; thence eastwardly along the line of said high water mark, one hundred and fifty feet more or less to the westerly line of Pennsylvania avenue,; thence northwardly along the westerly line of Pennsylvania avenue, three hundred and sixty-two feet more or less to the place of beginning.

10 Being part of the same premises which Charles Evans and Anna V., his wife, by deed dated July 22d, 1895, of record in the Clerk's Office of Atlantic County, in Book No. 192 of Deeds, Folio 384, etc., granted and conveyed to the said Richard F. Loper, in fee.

Subject nevertheless to the condition that there shall not be erected upon the said premises any house or other building nearer the line of Pennsylvania avenue than twenty-seven feet of the property line 20 as set forth in the deed above recited. Under and subject also to the easement or right of way of the City of Atlantic City over the portion of said property granted to said City of Atlantic City, for the boardwalk as granted by Charles Evans and wife by Indenture, dated January 2d, 1890, and recorded in the Clerk's Office of Atlantic County aforesaid, in Book 2 of Agreements, page 237, etc., and in Book 173 of Deeds, page 11, etc.

30 TOGETHER with all and singular the buildings, improvements, woods, ways, rights, liberties, privileges, hereditaments and appurtenances to the same belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof, and of every part and parcel thereof; AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, of the said party of the first part, of, in and to the said premises, with the ap-40 purtenances.

TO HAVE AND TO HOLD the said premises, with all and singular the appurtenances, unto the said party of the second part, their successors, heirs and assigns, to the only proper use, benefit and behoof of the said party of the second part, their successors, heirs and assigns forever, as tenants in common in equal shares.

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Under and subject to the payment of a certain mortgage made by said Richard F. Loper and wife, to Charles Evans, dated July 22d, 1895, to secure the payment of Seventy thousand dollars, with interest thereon at the rate of five per cent. per annum, of record in Book 39 of Mortgages, page 439, in said Clerk's Office, the whole of which said parties of the second part hereto agree and assume to pay as part of the consideration money hereof.

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AND THE SAID Richard F. Loper, for himself, his heirs, executors and administrators, doth by these presents, covenant, grant and agree to and with the said party of the second part, their successors, heirs and assigns, that he, the said Richard F. Loper and his heirs, all and singular the hereditaments and premises hereinabove described and granted, or mentioned and intended so to be, with the appurtenances, unto the said party of the second part, their successors, heirs and assigns, against him, the said Richard F. Loper and his heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same or any part thereof, 30

SHALL and WILL WARRANT and forever DEFEND.

IN WITNESS WHEREOF, the said parties of the first part to these presents have hereunto set their 40

hands and seals dated the day and year first above written.

Signed, Sealed and Delivered in the presence of CHAS C. BABCOCK.

RICH. F. LOPER, (Seal.)
10 MARY K. LOPER. (Seal.)

Regularly acknowledged June 6th, 1896, before Chas. C. Babcock, M. C. C. of New Jersey.

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EXHIBIT D—3.

DEED. Loper to Riddle Co. & Brady.
Dated June 6th, 1896. Acknowledged same day.
Recorded June 10th, 1896. Lib. 203, p. 383

THIS INDENTURE, made the sixth day of June, in the year of our Lord one thousand eight hundred and ninety-six (1896) BETWEEN Richard F. Loper and Mary K., his wife, of the City and County of Philadelphia, State of Pennsylvania, of the first part, and "Mary A. Riddle Company," a corporation of New Jersey, and Joseph A. Brady, of Atlantic City, Atlantic County, State of New Jersey, of the second part: 10

WITNESSETH, That the said party of the first part, for and in consideration of the sum of Seven Hundred and Fifty Dollars, lawful money of the United States of America, well and truly paid by the said party of the second part to the said party of the first part, at and before the ensealing and delivering of these presents, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, enfeoffed, released, conveyed and confirmed, and by these presents do grant, bargain, sell, alien, enfeoff, release, convey and confirm unto the said party of the second part, their successors, heirs and assigns: All that piece or parcel of land flowed by tide water lying at Atlantic City in the County of Atlantic and State of New Jersey, described as follows:— 20 30

Beginning at a point in the high water line of the Atlantic Ocean, where the same is intersected by the westerly line of Pennsylvania avenue, and from thence south along the westerly line of Pennsylvania avenue, extended in a straight line four hundred and twenty-eight feet more or less to the exterior line established by the Commissioners appointed under the authority of the act entitled "An Act to ascer- 40

tain 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 the State," approved April 11th, 1864, and the supplements thereto; thence westerly along said exterior line parallel with Pacific avenue and distant two thousand feet southerly at right angles from the southerly side of the same, one
10 hundred and fifty feet; thence northerly parallel with Pennsylvania avenue four hundred and twenty-eight feet more or less to the high water line of the Atlantic Ocean, where the same is intersected by the easterly line of a twenty feet wide alley; thence easterly along said high water line to the place of beginning.

Being the same premises granted to the said Richard F. Loper by the State of New Jersey, pursuant to an act of the Legislature approved March 21st, 1871, by a grant of the Riparian Commissioners of
20 such State under the great seal of the said State, signed by the Governor of said State and a majority of the said Riparian Commissioners, and attested by the Secretary of State, bearing date the twenty-ninth day of August, 1895, and of record in the Clerk's Office of Atlantic County, in Book 195 of Deeds, p. 199, etc. TOGETHER with all and singular, the buildings, improvements, woods, ways, rights liberties, privileges, hereditaments and appurtenances to the same belonging, or in any wise appertaining, and
30 the reversion and reversions, remainder and remainders ,rents, issues and profits thereof, and of every part and parcel thereof; AND ALSO, all the estate, right, title, interest, property, possession, claim and demand whatsoever, both in law and equity, of the said party of the first part, of, in and to the said premises, with the appurtenances.

TO HAVE AND TO HOLD the said premises, with all and singular the appurtenances, unto the said
40 party of the second part, their successors, heirs and

assigns, to the only proper use, benefit and behoof of the said party of the second part, their successors, heirs and assigns forever, as tenants in common in equal shares. Subject, however, to the provisoes limitations and conditions particularly set forth in and by the said recited deed from the said Riparian Commissioners, AND the said Richard F. Loper, for himself, his heirs, executors and administrators, 10 doth by these presents covenant, grant and agree to and with the said party of the second part, their successors, heirs and assigns, that he, the said Richard F. Loper and his heirs, all and singular the hereditaments and premises hereinabove described and granted, or mentioned and intended so to be, with the appurtenances, unto the said party of the second part, their successors, heirs and assigns, against him, the said Richard F. Loper and his heirs, and against all and every other person or persons whomsoever lawfully claiming or to claim the same or any part there- 20 of, shall and will warrant and forever defend.

IN WITNESS WHEREOF, the said parties of the first part to these presents have hereunto set their hands and seals, dated the day and year first above written.

Signed, Sealed and Delivered in the presence of
CHAS. C. BABCOCK.

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RICH. F. LOPER, (Seal.)
MARY K. LOPER. (Seal.)

Duly acknowledged June 6th, before Chas. C. Babcock, M. C. C. of New Jersey.

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EXHIBIT C—3.

CHARLES EVANS, et al., to ATLANTIC CITY.	Deed and Agreement.

This agreement, made the second day of January, in the year of our Lord one thousand eight hundred and ninety, between Charles Evans, Elisha Roberts, John Wiedemer, Frank Applegate, John W. Donnelly, Louis H. Donnelly and Louis A. Haines, parties of the first part, and Atlantic City, party of the second part, Whereas, the City Council of Atlantic City by ordinance, have decided to lay out and open a sixty feet wide street between high and low water mark along and upon the ocean front within the limits of Atlantic City, in conformity with an act of the Legislature of the State of New Jersey, approved April 6, 1889, upon and over which there shall be constructed a public board or plank walk, twenty-four feet in width, of a permanent and substantial character, and elevated on piles or posts. And, whereas, the said Atlantic City is willing to accept, and the grantors hereto prefer to give to the said City an easement and Right of Way, over the lands owned by the said grantors, with an Agreement to put no building or buildings of any kind or description on the lands hereinafter described, or on the ocean side thereof, to the end that there shall be an unobstructed prospect from the board or plank walk to be erected on said lands oceanward, except such

open pavilions as City Council may upon application allow. Now, therefore, this Indenture Witnesseth, that the said parties of the first part, for and in consideration 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 10 advantage to be derived by the parties of the first part by the laying out of said street and the construction of said boardwalk thereon, and in consideration also that the lands of the said parties of the first part, will not be condemned as is provided for 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 grant with and to 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 as- 20 signs, and its agents and servants, and for any other person or persons, 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 public board or plank walk. All that sixty feet wide strip of land, being thirty feet on either side of the following described line (which line is the centre of said sixty feet wide strip of land), viz.: 30

Beginning at a point in the southerly line of Caspian avenue, distant 330 feet easterly from the westerly line of Maine avenue, and near the high water line of the Absecon Inlet; thence southeastwardly and southwestewardly along said Absecon Inlet to the Atlantic Ocean; thence souhwestwardly along the Atlantic Ocean, the general courses and distances, being as follows: Beginning at a point in the southerly line of Caspian avenue, distant 330 feet easterly from the westerly line of Maine avenue; 1st, south 40

sixteen degrees and twenty minutes east twenty-one hundred and ten feet; 2nd, south seven degrees and fifty-five minutes east six hundred and fifty feet; 3rd, south fifteen degrees and thirty minutes west seven hundred and sixty feet; 4th, south thirty degrees and fifteen minutes west nine hundred and eight feet; 5th, south twenty-four degrees and thirty minutes west six hundred and twenty feet; 6th, south thirty-three degrees west eight hundred and fifty feet; 7th, south
10 sixty-six degrees west five hundred and five feet; 8th, south seventy-six degrees west nine hundred and sixty feet; 9th, south fifty-five degrees and thirty minutes west nine hundred and twenty feet; 10th, south eighty-four degrees west nineteen hundred and five feet; 11th, south eighty-two degrees and thirty-five minutes west twelve hundred and ten feet; 12th, south seventy-five degrees and thirty minutes west nineteen hundred and sixty feet; 13th, south seventy-two degrees west forty hundred and forty feet to
20 the west side of Albany avenue at a point five hundred feet south of the centre of Atlantic avenue, owned by us; which 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 public board or plank walk, and when the party of the second part, shall cease or neglect to use the same for that pur-
30 pose, it shall revert absolutely and without any condition as qualified 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 public boardwalk; And that the grantors hereto, shall have at all times, the right to connect their and each of their buildings with the said boardwalk, 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
40 remove any sand from said sixty foot wide street;

And that the boardwalk to be built on said sixty feet wide strip shall be elevated where it crosses the streets and avenues of 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 nothing in this Agreement shall be construed as preventing the grantors from sinking such piling or placing such sea walls on the 10 ocean front as may be necessary for the protection of his, her or their property from the encroachments of the ocean. 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 its 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 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 20 may agree upon. And the said parties of the first part, for themselves, their heirs, executors, administrators and assigns, do hereby covenant and agree, to and with the said party of the second part, its successors and assigns, that they and each of them, the said parties of the first part, 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 provided, 30 and that this covenant 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 public 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 or assigns. In Witness Whereof, the said parties of the first part have hereunto set and affixed their hands and seals, and the 40

said party of the second part hath caused to be hereunto affixed its common or corporate seal, attested by its proper officers.

Signed, Sealed and Delived in the presence of:

S. D. HOFFMAN, (Seal.)
Mayor.

ATLANTIC CITY, NEW JERSEY, (Seal.)
10 CHAS. EVANS, (Seal.)
ELISHA ROBERTS, (Seal.)
JOHN WIEDEMER, (Seal.)
FRANK APPLEGATE, (Seal.)
JOHN W. DONNELLY, (Seal.)
LOUIS H. DONNELLY, (Seal.)
LOUIS A. HAINES, (Seal.)

Attest:

H. R. ALBERSON, (Corporate Seal.)
20 City Clerk.

CLIFTON SHINN as to F. Applegate.
ALLEN B. ENDICOTT as to others.

State of New Jersey,)
) ss.:
County of Atlantic.)

Be it remembered, that on this second day of
30 January, eighteen hundred and ninety, before me, the subscriber, a Master in Chancery of said State, personally appeared Frank Applegate, who, I am satisfied, is one of grantors named in the above deed, and I having first made known to him the contents thereof, he did acknowledge that he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

CLIFTON C. SHINN,
40 M. C. C.

State of New Jersey,)
) ss.:
Atlantic County.)

Be it remembered, that on this second day of January, in the year of our Lord one thousand eight hundred and ninety, before me, the subscriber, a Master in Chancery of said State, personally appears Henry R. Albertson, who, being by me duly sworn, 10 doth depose and make proof to my satisfaction, that he well knows the corporate seal of Atlantic City, the second party named in the foregoing deed, that the seal thereto affixed is the proper Corporate Seal of the said Atlantic City, that the same was so affixed thereto, and the said deed signed and delivered by Samuel D. Hoffman, who was at the date and execution thereof, the Mayor of said Atlantic City, in the presence of the said deponent as the voluntary act and deed of the said Atlantic City, and that the said 20 deponent thereupon signed the same as subscribing witness.

Sworn and subscribed before me this second day of January, A. D. 1890.

HENRY R. ALBERTSON,
City Clerk.

ALLEN B. ENDICOTT, 30
M. C. C.

State of New Jersey,)
) ss.:
County of Atlantic.)

Be it remembered, that on this fifth day of February, in the year of our Lord one thousand eight hundred and ninety, before me, a Master in Chancery of New Jersey, personally appeared Charles Evans, 40

Elisha Roberts, John Wiedemer, John W. Donnelly, Louis H. Donnelly and Louis A. Haines, 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.

10 ALLEN B. ENDICOTT,
M. C. C.

Received and recorded March 28th, A. D., 1893.

LEWIS EVANS,
Clerk.

(Certificate of County Clerk of Atlantic County as to the correctness of tne above copy of a certain Deed
20 and Agreement recorded in his office in Book 173, folio 11, etc.)

The Exhibits C—7 to C—18 (inclusive) were all made upon printed forms, of which the following is a copy, and by agreement this form is printed in place of these exhibits.

C—7 to C—18.

30 THIS AGREEMENT, made the day of April, in the year of our Lord One Thousand Eight Hundred and Ninety-six

Between

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
40 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 an elevated 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 property on the line of the said street as there located granted to said city for the purpose aforesaid the lands and rights necessary therefore and entered into certain covenants with said city in relation thereto. 10

AND WHEREAS, since the making of the said conveyances and opening the said street, and the construction of the said walk, it has been found advisable and for the interest of the said city, as well as the owners of 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 steel walk. 20

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 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 said park and building said steel 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 Legislature above referred to, the said parties of the first part themselves, their and each of their heirs and assigns, do hereby covenant and agree with and to the said party of the second part, its successors and assigns, that it shall and 40

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 persons, 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
10 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, 1st, southwardly to a point distant two hundred and ninety (290) feet southwardly from the south line of Atlantic avenue and twenty-seven and
20 six-tenths (27 6-10) feet eastwardly from the west line of Maine avenue; 2d, southwardly to the middle line of Massachusetts avenue at a point distant one thousand and seventy-three (1,073) feet southwardly from the south line of Pacific avenue; 3d, southwestwardly to the middle line of Connecticut avenue at a point distant one thousand three hundred and thirty-five (1,335) feet southwardly from the south line of Pacific avenue; 4th, westwardly to the middle line of St. Charles place at a point distant one thousand four
30 hundred and thirty (1,430) feet southwardly from the south line of Pacific avenue; 5th, 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; 6th, westwardly parallel with Pacific avenue to the middle line of North Carolina avenue; 7th, westwardly to a point distant one thousand three hundred and eighty-five (1,385) feet southwardly from the south line of Pacific ave-
40 nue and one hundred and twenty-five (125) feet west-

wardly from the middle line of Tennessee avenue: 8th, 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; 9th, westwardly to a point distant ninety-five (95) feet eastwardly from the middle line of Illinois avenue one thousand one hundred and fifty-three (1,153) feet southwardly from the south line of Pacific avenue; 10th, 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; 11th, 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; 12th, westwardly to the middle line of Mississippi avenue at a point distant six hundred and eighty (680) feet southwardly from south line of Pacific avenue; 13th, 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; 14th, 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 inlaid 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 sixty feet wide strip of land is designated on the map hereunto atached 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 the said boardwalk 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 street; and that the boardwalk to be built on said sixty feet wide strip shall be elevated where it crosses the streets and avenues of 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 or 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, the said parties of the first part, 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 provided by ordinance, and the 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 structure 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. 10

It is further hereby covenanted and agreed that the present elevated boardwalk may remain until the new steel walk is built by the said City on the line of the new street as hereby located and described, and until such new walk is built that no structure and improvements will be made between the said walk as now located, and the westerly and northerly line of said street. AND it is further covenanted and agreed by and between said parties except for the purpose of maintaining the said board walk now constructed 20 as herein provided that when ever 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 the said street as herein de- 30 scribed and located shall immediately cease and determine and revert to the grantors of said lands, their heirs and assigns. 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 hereby covenanting and agreeing to waive all allowance for damages (if any accrued by such vacation).

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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
10 only an entrance fee; and provided further that the City Council of Atlantic City 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.

IN WITNESS WHEREOF, the said parties of the first part have hereunto set and affixed their hands and seals, and the said party of the second part hath caused to be hereunto affixed its common or
20 corporate seal, attested by its proper officers.

SIGNED, SEALED AND DELIVERED }
In the presence of }

(Endorsed on Back.)
RIGHT OF WAY
TO
ATLANTIC CITY.

30

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IN CHANCERY OF NEW JERSEY.

Between ATLANTIC CITY, vs. THE NEW AUDITORIUM PIER COMPANY.	)	Syllabus.

10

1. Many owners of beach front lands covenanted under seal, that Atlantic City might locate a Boardwalk across their several ownerships at the ocean edge, with aiding covenants against the erection of buildings on its ocean side in order to secure light, air and view from the Boardwalk. Possession of the locus was given to the City and the Boardwalk was visibly in process of construction in large size and at great expense, when one of the covenantors conveyed his lot on which the Boardwalk had been erected to a grantee, who recorded his deed before the covenant with the City for the way, was recorded. This grantee and his assigns accepted and used the Boardwalk improvement for several years, but afterwards attempted to erect a building on the ocean side of the Boardwalk which was in breach of the aiding covenants of the Boardwalk deed. Held: The open and notorious possession of the way, and the construction thereon of a visible and peculiar improvement, the Boardwalk, was notice to the grantees who first recorded their deed, of the right of the City to the way for a Boardwalk, and of the aid-

20 30 40

ing covenant against building oceanward therefrom; and that the erection of buildings in breach of the latter covenant will be enjoined.

2. If the deed to the City failed to pass an estate in the right of way for want of words of grant, it yet operated as a covenant between the signers and the City, that each owner would surrender to the
10 City his portion of the way, and be bound not to build on the ocean side of the Boardwalk, in consideration that the City would erect the Boardwalk improvement. When, under such a covenant possession of the way has been delivered to the City, and it has erected the Boardwalk improvement, which has been accepted and used by the signers of the covenant, for several years, a grantee of one of the covenantors will be restrained if he attempts to build on the ocean side of the Boardwalk, in breach of one of the covenants securing light, air and view
20 from the Boardwalk.

3. Such a covenant is also, as between the signers thereof, a general scheme of public improvement, by which each surrenders his portion of the way, in consideration of the surrender made by the other signers of their portions, for the benefit of the public, and of themselves as owners of land fronting on the right of way. Any owner who so builds on the ocean
30 side of the Boardwalk as to shut out the view of the sea therefrom, may be restrained at the suit of any other owner who has contributed land to the common purpose, unless the building erected is a pier within the meaning of the proviso to that covenant.

4. That proviso authorizes an owner to erect but one pier. When that has been done no lateral additions thereto can afterwards be made.

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IN CHANCERY OF NEW JERSEY.

Between ATLANTIC CITY, Complainant, and THE NEW AUDITORIUM PIER COMPANY, Defendant.	On Bill, Answer and Proofs on Final Hearing. Opinion.

The bill of complaint in this cause is filed by the City of Atlantic City to restrain the defendant from erecting a lateral wooden addition to its pier, already built oceanward from the Atlantic City Boardwalk. The bill refers to the statutes and ordinances authorizing Atlantic City to reconstruct its Boardwalk, and particularly sets forth what it claims was a dedication to public uses of a boardwalk or promenade, at the edge of the ocean, running along the front of the city of the width of sixty feet, by a deed dated April 30th, 1896, made and executed by numerous owners of land which the route of the Boardwalk crosses (among others, by Richard Loper, an antecedent holder of the lands on which the defendant company is about to construct the lateral addition to its pier), a copy of this deed of dedication is annexed to the bill of complaint and made part thereof.

The defendant's answer with respect to this dedicating covenant is as follows: "It admits that an agreement bearing date April 30th, 1896, was executed by certain of the owners of said beach front property, which said agreement was recorded on June 16th, 1896, as in the bill of complaint set forth; but as to the contents and dates of the execution and acknowledgment of said agreement, and of its delivery, or whether the agreement annexed to said
10 bill, is a true copy thereof, this defendant is not informed and leaves the complainant to make such proof therof as it may be advised."

The defendant denies that by the agreement of April 30th, 1896, the complainant received any dedication of the Boardwalk strip, or that by that agreement the complainant received such a dedication that none of the parties executing it can lawfully erect or place on the Boardwalk strip itself or on the
20 ocean side thereof, any buildings or structures except said Boardwalk and an iron or steel pier at least one thousand feet in length; and insists that no portion of the land in possession of the defendant company has ever been dedicated, and that none of that land is subject to any covenant or agreement that no building other than an iron or steel pier one thousand feet in length shall be placed thereon; and denies that it is the complainant's duty, representing the public, to enforce any of the provisions contained
30 in the agreement of April 30th, 1896, against the defendant's land.

The defendant's answer admits that the defendant's title and possession came from Loper (one of the signers of the covenant of April 30th, 1896,) by the chain of title alleged in the complainant's bill, but, it denies that the complainant's right in the lands described as the Boardwalk strip, had vested at the time when Loper conveyed to the defendant's
40 grantor, and insists that before the covenant of April

30th, 1896, made by Loper and others to and with Atlantic City went into operation Loper had conveyed the premises in question to the defendant's grantor, and that the said agreement of April 30th, 1896, was of no force or effect, because it was not, as to Loper, delivered and accepted until after the deed to the defendant's grantors (under which the defendant now claims) had been made, and for this reason the defendant claims that its grantors "took said lands free and clear of any covenants or restrictions contained or pretended to be contained in said covenant agreement of April 30th, 1896." 10

The answer admits that the Boardwalk mentioned in the agreement of April 30th, 1896, has been constructed, and that it is now in constant use by the public. It denies that at the time of the sale by Loper, to its grantors, the complainant was in possession of the sixty foot strip where the same crosses the premises described in said conveyance, or that it had erected thereon the Boardwalk now used. It admits that by named intermediate conveyances the defendant company has come to be the lessee and in possession of the locus in quo. It admits that it has driven wooden pilings on those premises, and that it intends to erect buildings thereon, and claims the right so to do, and that the place in which it is driving said wooden pilings, is upon lands conveyed to Loper by the State of New Jersey through its riparian commissioners, and claims that said lands are not subject to any of the covenants contained in the agreement of April 30th, 1896. It contends that it has the right to use the property leased by it as it shall see fit. It admits that its auditorium building on its pier has been connected with the Boardwalk by a platform which has been in existence for some years. It denies that the erection of its wooden pilings and the construction of building thereon, on the ocean side of the Boardwalk are any violation of any of the covenants mentioned in the agreement 20 30 40

of April 30th, 1896, or a violation of any general scheme of the holders of beach front land for the improvement of the ocean front, and denies the right of the public to interfere with the use of its premises in any manner it sees fit.

The answer further insists, that it was the intention that the agreement of April 30th, 1896, should be considered as incomplete and of no force until the
10 signatures of all the owners of the beach front property had been obtained, and charges that a large number of the beach front owners have refused to execute it, and that for that reason it cannot be enforced as a general scheme of the owners; and it further insists that under the terms of that agreement, and the clause therein contained regarding the construction of piers, the complainant, Atlantic City, has no right to determine the size or proportions of any pier, or whether or not when a pier is
20 once constructed the same may be widened by lateral additions to the sides thereof; and the defendant insists that it has the right to determine at its discretion, the size and proportions of such pier as it may choose to erect on its lands lying ocean ward of the Boardwalk.

Issue was joined on this answer and the cause came to final hearing:

30 Mr. Harry Wootton and Mr. Burrows C. Godfrey for the complainant.

Mr. C. D. Thompson for the defendant.

Grey, V. C.

The defendant company claims that the grant or covenant of Loper (the defendant's remote grantor), to Atlantic City, dated April 30th, 1896 (called the
40 Boardwalk deed), did not convey any interest in

lands to Atlantic City, first, because the operative words of the covenant will not pass an estate, and at the most grant a mere revocable license which was revoked by Loper's deed to the defndant's grantor; that the original instrument is not produced in evidence that the record thereof is not admissible, and that no sufficient secondary proof of its contents has been offered.

10

The defendant also insists that if the Boardwalk deed did pass any estate or right of possession from Loper, such estate or right is ineffective as against the defendant company for the following reasons:

1. That the Boardwalk deed did not go into operation until it was accepted by the City's ordinance which was not passed until June 8th, 1896, a date subsequent to the making of the two deeds from Loper to the Riddle Company, etc., which were made on June 6th, 1896.

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2. That if the Boardwalk deed operated on the day of its date, April 30th, 1896, or on the day of its execution by Loper, on or before May 9th, 1896, it was still subsequent and subject to Loper's equitable agreement to convey, made with William Riddle on May 4th, 1896.

3. That the Boardwalk deed was not actually executed and delivered by Loper and certainly not recorded, until after his two conveyances of June 6th, 1896, to the Riddle Company, etc., under whom the defendant claims.

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4. That the Boardwalk deed is no part of a general scheme, at least as to Loper, because it is not shown that he attended at and participated in any meeting of the beach front owners to form and perfect such a general plan.

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5. That if that deed is the result of a general scheme of improvement, it became operative only when every owner from one end of the Boardwalk to the other had signed it, and that the refusal of any owner to sign, postponed or deafeated the scheme.

The defendant also claims that if it should be determined that no locus in quo is subject to the re-
10 strictions of the Boardwalk deed the defendant still has the right to construct a steel pier, that the restrictions in that deed cannot limit the size or proportions of such a pier, or prohibit the widening of a pier when once constructed, by making lateral additions to the same.

Almost every point which is raised at this final hearing, was presented and elaborately argued on the motion in this cause for a preliminary injunction.
20 An opinion disposing of many of these questions will be found reported in 18th Dick., 644. The whole case at this final hearing turns in great part upon the same documentary proofs which were submitted and passed upon on the former hearing. The defendant on this hearing called but one witness, Mr. Loper. The opinion given on the first hearing is illustrated by a diagram showing the locus in quo, which may be found in the report of the case. I do not deem it necessary to repeat in extenso the views then ex-
30 pressed and will refer to that opinion as my comments, when the same claims are here again set up by the defendant company, shortly discussing now the new points raised at this final hearing.

First as to the objection that the Boardwalk deed passed no estate, and at most, is but a revocable license. That deed certainly amounts to a covenant with the grantee, and impliedly with all of the cograntors and makers of similar deeds to Atlantic
40 City, that the City should have the possession and

use of an easement of way at the ocean edge, running continuously, and successively across the lands of each grantor, for the purpose of erecting thereon a new steel Boardwalk to be used as a promenade by the public and the co-grantors in such deeds. Which easement of way had attending thereon the aiding covenant that no buildings (save as specified in that deed) should be erected to the oceanward of the granted right of way, in order that the users 10 of the Boardwalk might have an uninterrupted ocean view, and the enjoyment of the unimpeded breezes from the sea.

If the Boardwalk covenant should be held to be a mere license, the overwhelming evidence is that it was fully executed before the making of the deeds of June 6th, 1896, to the defendant grantor. The steel Boardwalk, a most expensive improvement, of great magnitude and of the most visible and notorious character, was in process of construction in 20 the early part of May, 1896. The defendant and its antecedent grantors, have for years accepted the benefit of these improvements and are now enjoying them. Other co-grantors in great numbers have done likewise. The status quo cannot be restored, and the defendants do not offer to restore it.

An inspection of the Boardwalk covenant itself, and the aiding proof given in the cause touching the subject matter with which it dealt, show, that 30 the privilege granted is much more than a mere license, even if judged by the most severe standard. The grantors were many in number, each granted for himself that portion of his lot which the Boardwalk strip crossed at the ocean front. Each grantor who surrendered his portion received as his consideration the benefit to his lot which came from the co-incident surrenders of the other grantors; and the assurance appearing on the deed itself, that the City could and would condemn the necessary lands of 40

those who might refuse to grant, and that it would build the necessary Boardwalk for the benefit of all the grantors and the public, and the strip granted. This much more nearly resembles a covenant that an easement shall be enjoyed for which a valuable consideration has passed, than it resembles a mere license. When accompanied as in this case, by delivery of actual possession and the making of great improvements in accordance with the scheme, it is irrevocable.

This deed though passing a right to a continuous way, contained no agreement that its operation should be postponed until all of the owners of beach fronts should join in it. There is no evidence that there ever was any agreement that its operation should be so postponed. The deed itself shows that each owner knew that the City might by condemnation enforce the right of way. The proven fact is, that the new Boardwalk as fast as built took the place of the old one. The owners, including Loper, permitted the new structure to be continuously erected across their lands,—some before and some after their making of the Boardwalk deed to the City. A few only, have never as yet signed that deed; but the new Boardwalk has been continuously constructed for several miles, of which the Loper property (now possessed by the defendant Company), is about the centre.

The position of the City, thus put into actual possession of the easement of way by the grantors named in the covenant, even if it received no estate in the lands of the Boardwalk deed, was (when Loper signed the deed on May 9th, 1896,) that of a covenantee for an easement of way, who has been put in actual possession of the land over which the way passed, and has made important, substantial and permanent improvements upon it, according to the terms of the covenant. This was the situation which

existed for several weeks before Mr. Loper made the two deeds on June 6th, 1896, to Riddle and Company, etc., the defendant company's grantor.

A short resume of the evidence on this point may throw some light on the situation, of the locus in quo at and before the time of the making of the deed by Loper to the defendant's grantor.

10

The work on the new steel Boardwalk began on April 20th, 1896, and continued until it was completed in July of that year.

The character of the structure was so prominent from its first beginning, in steel columns and girders to carry a plank walk, forty feet wide, that any one who approached it was necessarily notified that the parties erecting it were asserting a permanent right of occupation. The structure was also built at the ocean's edge, and was plainly a continuous Board- 20 walk, intended for promenaders who might in passing to and fro upon it, enjoy the ocean view and breezes. This was erected across the property of Loper between the twentieth of April and the sixth day of May, 1896. At that time Loper, the defendant's grantor, owned not only the title to the land across which the steel Boardwalk was being constructed at the ocean end of Pennsylvania Avenue, but also the State of New Jersey's riparian title to the lands below high water mark, which had been 30 conveyed to him by deed of August 25th, 1895, and which include the exact locus in quo the defendant company is about to erect its lateral addition to its pier. The Loper deed which passed the riparian title, including the locus, to the defendant's grantor, is the second deed made by Loper to the Riddle Company of the date of June 6th, 1896, and is marked Exhibit D. 3 in this cause. It is recorded June 10th, 1896, in Book 203 of Deeds, page 383.

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Mr. Loper's testimony in this cause I think, clearly shows that he knew, when he made the Boardwalk deed to the city, that the new steel Boardwalk was then being gradually substituted for the old Boardwalk across his lands at the ocean end of Pennsylvania Avenue. Both structures were in full view at the same time from his property. He was at this time the owner, both of the land at the ocean's edge, across which the new Boardwalk was being constructed, and he was also the owner of the land which the State had conveyed to him, lying below high water mark, which has since by intermediate conveyances, come into the possession of the defendant, and on which it is presently erecting the structure to which the complainant Atlantic City, objects. Mr. Loper's deed to the City, even if considered to be solely a covenant for a right of way with the aiding covenant against building to the oceanward of the way, affected not only the Boardwalk strip, with the easement of way, but also those lands of Mr. Loper lying oceanward of the Boardwalk strip below high water mark. These lands became bound by the aiding covenants against building to the oceanward of the Boardwalk right of way.

Any grantee from Loper, between the dates of April 20th, 1896, and June of that year, of either the lands lying at the ocean end of Pennsylvania Avenue across which the Boardwalk ran or the lands in front of them below high water mark, took his title with actual notice of the Boardwalk easement along the ocean front, and certainly was put upon warning of its attendant and protective covenants against buildings to be erected on the oceanward side of the Boardwalk.

The Boardwalk itself was then in full view, it was plainly a continuous way along the ocean, not only on Loper's property, but also on the property of all

of the beach front owners; and just as plainly the main purpose and object of that way was manifest to every onlooker, namely, the enjoyment of a view of the sea uninterrupted by buildings or other structures on the oceanward side of the Boardwalk.

The landward side of the Boardwalk was closely built up along its entire length. The oceanward side of it had at that time (1896) no buildings except Young's Pier and the Iron Pier. Those two were the only buildings standing oceanward of the Boardwalk in 1896. This fact would of itself put any one interested upon inquiry, to ascertain why so remarkable a situation should exist. During the whole period from April 20th to June, 1896, the construction of the steel Boardwalk was openly going on under the direction of Atlantic City workmen and superintendence. The slightest inquiry of any one in charge would at once have disclosed the grant or covenant as it may be, of the Boardwalk continuous right of wav at the ocean edge, and its aiding covenants for sea view and sea breeze unobstructed by building on the oceanward side.

While the new steel Boardwalk was in process of construction the old Boardwalk was permitted to stand until the new work supplanted it. The old walk being removed in parcels as the new walk took its place. This was another notorious and remarkable fact which would at once draw the attention to the whole scheme and indicate to an onlooker the purpose of the improvement.

As Loper's deed to the Riddle Company, etc. (under which the defendant claims), was not made until June 6th, 1896, his grantees under that deed, and those claiming under them were unquestionably warned of the City's possession, and put upon inquiry as to the extent and character of its claims.

The contention that the original Boardwalk agreement is not produced, that the record is not admissible, and that accurate secondary proof of the contents of that deed has not been made, is met by the admissions of the third paragraph of the defendant's answer, that "an agreement bearing date April 30th, 1896, was executed by certain beach front owners and recorded as in the bill of complaint set forth," 10 leaving the complainant to prove the date, contents and delivery of that agreement. The complainant has in my judgment sufficiently proved the loss of the original Loper Boardwalk deed, and by secondary evidence has shown its date, contents and delivery. Loper himself, though brought into court to throw doubt on his Boardwalk deed to the City, by questioning the date of its acknowledgment by him, practically admits that he did make that deed. "I have a distinct recollection," he says, "of Judge Endicott and I think, I believe it was Judge Thomp- 20 son, calling at my office in Philadelphia, 713 Chestnut Street, for me to sign that which turned out to be the easement deed, and I so understood it." He admitted that the instrument he signed was a printed form of deed. This corresponds with the complainant's proofs.

There were so many owners of beach front lands, and so many covenants to be prepared, that the Boardwalk deed was printed on a special form, with 30 blanks for the names of the owners. Dozens of them were executed. In some deeds many owners joined in executing the printed form. Others were executed by a single owner. A copy of Mr. Richard F. Loper's deed is annexed to the bill of complaint. It will be seen on examination that many other owners joined with him. The description is of the right of way. Each grantor covenants that the City may have the whole easement, and the effect is that each gives the portion of his lot which it covers.

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The original deed which Mr. Loper signed, having been lost, the defendant's counsel insists that the record of it is not admissible in evidence because he contends the deed is not such a conveyance as the statute enables to be recorded. Mr. Loper, when the copy was exhibited to him, attempted to throw doubt upon it, but his testimony when properly considered, shows that he did in fact execute the covenant on one of the printed forms, which are all alike. 10

The defendant's counsel in the effort to exclude proof of Mr. Loper's deed to the City has also called attention to slight variances in some of the Boardwalk deeds, none of which affect those portions of it which are here under consideration, nor throw serious doubt upon the correctness of that copy of Mr. Loper's deed which is here produced.

Mr. Loper's testimony was not impressive in either its matter or in the manner of its delivery. 20 Nothing in it led me to doubt that Mr. Loper had actually signed and acknowledged the Boardwalk easement deed on or before May 9th, 1896, as Judge Endicott (who took his acknowledgment) testified Mr. Loper had done, or that the copy produced is in fact a copy of that deed.

In my judgment even if it be conceded that the Boardwalk deeds did not convey a legal estate, and that for this reason they were not recordable under 30 the statute, or provable by the record, yet it has been proven in this case that Mr. Evans did in fact execute the deed, copy thereof is annexed to the bill of complaint; its loss has been shown, and secondary proof of its contents has been made.

The right which passed by such a covenant when accompanied by the giving of possession of the premises affected by it, and the expenditure of money upon it in permanent and extensive improvements 40

in accordance with the covenant, is not revocable by the operation of a deed subsequently made to a grantee who takes it with full notice before he took his deed, of the possession and improvements of the covenantee. That, in my view, was the status of the Riddle Company, and Brady, under their deeds of June 6th, 1896, in view of the actual condition of the locus in quo at that time.

10 I am of opinion therefore that Mr. Loper's Boardwalk deed to the City has been sufficiently proved, that the defendant company's grantor had notice and warning of it, and took their deeds subject to the City's right of way in the Boardwalk, and the attending protecting covenants against building to the oceanward thereof.

As to the other contentions of the defendant that the deed did not go into operation until it was ac-
20 cepted by the City's ordinance, no additional proofs have been offered on final hearing and the matter is fully disposed of by the eighth syllabus 18 Dick. 645, to which I respectfully refer.

The defendant's claim that the City is bound by the preliminary equitable agreement for conveyance made between Loper and Riddle on May 4th, 1896, is not supported by any proof whatever, that either the City or any one acting for it, had any notice of
30 this private agreement. The claim is therefore without force.

The contention that the Boardwalk deed was not actually executed and delivered by Loper until after the conveyances of June 6th, 1896, to the Riddle Company, etc., is also fully met in the previous opinion and decided therein.

The City's deed was, it is true, not recorded until
40 after Loper's two deeds to the Riddle Company.

etc., were recorded. This accident is probably the temptation which led the defendant company to claim that it, and the Riddle Company and Brady (the grantees from Loper, who recorded their deeds precedently to that of the City) are free from the restrictive operation of the City's Boardwalk covenants. If they are, they may build to the oceanward of the Boardwalk at their choice, as by their answer in this cause they assert they have a right to do, 10 they can thus to their own great profit, practically destroy the essential character of the Boardwalk, which absolutely requires as an incident to its enjoyment, a free view of the sea. I hold as above stated, that although the City's deed was recorded after the recording of the Riddle Company and Brady's deeds, yet the Riddle Company and Brady had full notice and warning of the City's rights when they accepted their two deeds from Loper.

The contention that the Boardwalk has not been 20 shown to be part of a general scheme, or that it is not binding upon Mr. Loper and his grantees for want of proof of a general conference and agreement between the grantors, in which Mr. Loper participated, is also of no avail in this case. The expressed terms of the Boardwalk deeds, and the many signers thereof, show that there was a common purpose to which all the grantors contributed their portion for the benefit of the public in general and of themselves as owners at the ocean's edge, in particular. These 30 documentary proofs sufficiently show a general scheme, and with Mr. Loper's own testimony in this case they sufficiently indicate that he was a participant in and sharer of its benefits, whether he actually attended the conference or meeting for that purpose, or not.

So also the claim that the general scheme became operative only when every owner from one end to the other of the Boardwalk, had signed the Board- 40

walk deed, and that the failure of any one owner to sign defeated the operation of the scheme, is unsupported by any proof that there was any such agreement. The action of Mr. Loper and the other beach front owners in permitting actual possession to be taken under their own covenants, without waiting to see whether every other beach front owner also signed, is a clear indication that there
10 never was any purpose or agreement that the Boardwalk deed and the easement thereby given, should become operative only when every beach front owner had signed.

These rulings leave as the only questions to be considered, the defendant's claim that notwithstanding the restrictions in the deed it still has the right to construct a steel pier, and that those restrictions cannot limit the size or proportions of the pier or prohibit the widening of it by making lateral addi-
20 tions thereto after it has once been completely constructed.

The defendant's Auditorium Pier was built about a year after the then owners of the land on which it is located, had joined with the other beach front owners in making the Boardwalk easement, deed or covenant. They had completed their pier before they began the improvement which is now challenged. The answer admits that it is a "lateral ad-
30 dition," to an existing pier, and does not claim that it is work about to be done to complete an unfinished one. The Boardwalk covenant limits the right of each owner to the erection of one pier of certain length and character of material. The natural situation requires that such a pier should run out into the ocean. If it does not and should be located parallel with the Boardwalk, it would not be a pier. When the one pier is finished, the owner cannot be held to have the right to make unlimited lateral additions
40 to it; first, because the restrictions prohibit the erec-

tion of all buildings oceanward of the Boardwalk except the one pier, and when that one pier has been erected by any owner he has exhausted his reserved right; secondly, the whole scheme is based upon the preservation of sea view and access of ocean breezes from the Boardwalk. If each owner may make at his choice, lateral additions to his one pier, the Boardwalk will soon be entirely cut off from both ocean view and breezes by sidewise extensions of the piers, 10 parallel to the Boardwalk, and it will be nothing but an enclosed promenade. Again, it is admitted that the proposed lateral addition to the defendant's pier is being constructed of wooden piling. This is directly in breach of the express requirements of the Boardwalk covenant that the pier to be built by an owner shall be made of steel or iron. This is a matter of substance in view of the dangers from fire at the ocean front, where the wind has so clear a sweep that the use there of non-combustible materials is the only safe plan of construction. A discussion of 20 the effect of the restrictions touching the piers may be found in the former opinion in this case, 18 Dick., pp. 672, 673.

The complainant bases its claim of right to restrain the defendant's further construction of the lateral addition to its pier, in part on the effect of the deed of Charles Evans to Atlantic City, dated January 22nd, 1890, granting to the City a right of way for a Boardwalk, and attempting to restrain the 30 erection of building oceanward of the Boardwalk. At the time Evans made that deed he did not own the lands lying below high water mark, where the defendant is proceeding to build. Evans's attempted restriction was inoperative upon the lands lying below high water mark. This phase of the case is more fully discussed and cases cited, on page 662 of the former opinion, to which I refer.

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The Boardwalk easement is not dependent for its integrity upon Evans's deed of 1890, though Evans did not own the lands below high water mark when he made it in 1890. Loper did own those lands when he joined in the Boardwalk covenant in 1896, having as above stated, acquired them by grant from the State by deed of August 29th, 1895.

10 In my view the defendant should be restrained from the erection to the lateral addition to the pier which it proposes to build.

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