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TESTIMONY.

For Complainant.

EXHIBITS.

BILL OF COMPLAINT.

Filed August 8, 1924.

In Chancery of New Jersey

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

The complainant, Blum Building Company, a corporation of the State of New Jersey, having its principal office in the Town of Irvington, says that:

1. On March 10th, 1924, complainant entered into an agreement in writing with the defendants Charles H. Ingersoll and Eleanor B. Ingersoll his wife, whereby the latter agreed to sell and convey to complainant, and complainant agreed to purchase premises in the Village of South Orange, County of Essex and State of New Jersey. A copy of said agreement and a description of the premises by metes and bounds is set forth in the schedule annexed hereto, marked "Schedule A."

2. On April 30th, 1924, said agreement was supplemented by another agreement in writing, a true copy of which is annexed hereto marked "Schedule B."

3. Under the terms of the first mentioned agreement it was provided that in the event of the failure of the complainant to obtain a permit to erect a four-story apartment house upon the said premises, the said agreement should become void and of no effect, and that the deposit of $1,000.00 paid by complainant to defendants should be returned. Complainant made due demand upon the defendants for the repayment of

the same, and the defendants refused to comply with such request.

4. Under the terms of said agreement it was provided that it was to become effective and binding upon complainant, upon the obtaining by him of a permit for the erection of an apartment house upon said premises, and that in the event of his failure to obtain the same by May 1st, 1924, the agreement was to be null and void upon the defendants returning to complainant the above deposit. No such permit was ever obtained and the complainant demanded the return of said deposit and was refused the same.

5. At no time did complainant elect to make the contract effective without a condition as to the issuance of said permit.

6. Complainant has complied with all the terms and conditions of said agreement binding upon him, and became entitled to the return of aforesaid deposit. Under the terms of the agreement set forth in "Schedule B" it was agreed by the parties that the original agreement was to be extended to June 1st, 1924, and that if, by that time, the Court of Errors and Appeals of New Jersey had not rendered its decision affirming the decision of the Supreme Court in respect to Zoning ordinances referred to in said contract, the contract between complainant and defendants should be void, and complainant entitled to the return of its deposit. Within the aforesaid time said decision was not rendered and complainant became entitled to the return of its deposit in accordance with the terms of said last mentioned provision.

7. Complainant has at all times been ready, willing and able to perform and undertake the

agreement provided the terms and conditions upon which he agreed to accept a conveyance were carried out and fulfilled.

8. The said defendants have at no time been ready, willing and able to convey the premises in accordance with the terms and conditions of said contract, and at no time has complainant been able to obtain a permit to erect a four-story apartment house in accordance with said agreement.

9. Complainant further charges that the said defendants Charles H. Ingersoll and Eleanor B. Ingersoll have placed the premises above described on the real estate market for sale and are about to sell the same to some other person or persons.

10. Complainant is informed and believes that defendants are about to depart from the State of New Jersey, and that if they do, a judgment recovered by complainant against defendants in the Law Courts for the breach of said agreement cannot be satisfied.

Complainant is without adequate remedy in the Courts of Law, and therefore prays:

1. That the said Charles H. Ingersoll and Eleanor B. Ingersoll, the defendants in this suit, may answer this bill of complaint, but without oath, and each statement herein made.

2. That a decree may be made directing the defendants to repay the said sum of $1,000.00 paid on account of the purchase price of said property with interest, and that the entire sum be impressed as a lien upon the lands and premises above described, and in the event that the

defendants do not pay the same to complainant, that the property be sold to raise and satisfy the amount thereof.

3. That, in the meantime, the defendants be enjoined and restrained from disposing of or encumbering in any way the said lands and premises.

4. That a writ of subpoena may issue, commanding the said defendants, Charles H. Ingersoll and Eleanor B. Ingersoll, his wife, to answer this bill of complaint, and to abide by such decree as this Court may make in the premises.

5. And that complainant may have such further or other relief in the premises as the nature of the case may require, and as shall be agreeable to equity and good conscience.

And complainant will ever pray, &c.

MILTON M. UNGER,
Solicitor for and of
Counsel with Complainant.

SCHEDULE A.

Memorandum of Agreement this 10th day of March, between Charles H. Ingersoll of the City of Newark, County of Essex and State of New Jersey, and Blum Building Company, a corporation of New Jersey, having its principal office in the City of Newark, witnesseth

WHEREAS, Charles H. Ingersoll, hereinafter called the party of the first part, is the owner in fee simple of premises in the village of South Orange, hereinafter described, which he is willing to sell for twenty-five thousand dollars, upon the terms hereinafter stated; and

WHEREAS, the Blum Building Company aforesaid, hereinafter called the party of the second part, desires to purchase said premises, and is ready and willing to pay twenty-five thousand dollars for the same, upon the terms hereinafter stated, provided it can obtain a permit from the proper local authority of the Village of South Orange for the erection thereon of a four-story apartment house upon plans and specifications submitted by it, which shall in all respects conform to the New Jersey State Tenement House Act, and other state laws and to the building code and local ordinances of the village of South Orange in all matters relating to construction and in all matters whatever, with the possible exception of the zoning ordinance; and

WHEREAS, the party of the first part is willing to enter into a contract for the sale of said premises and give the party of the second part until the first day of May, 1924, to submit its plans to the proper authorities of the Village of South Orange and obtain said permit; and

WHEREAS, the party of the second part is willing to enter into such a conditional agreement with the understanding that time is of the essence of this contract, and that in the event of its failure to obtain such permit on or before the first day of May, next, or in the event of its declining to make this agreement effective without any permission whatever as to building permit on or before the first day of May, next, and that the same become on that day absolutely void and of no effect upon the party of the first part returning to the party of the second part the consideration money hereinafter mentioned,

NOW THEREFORE, in consideration of the premises, the said parties hereby agree—

Bill of Complaint—Schedule A.

ARTICLES OF AGREEMENT

made the tenth day of March in the year of our Lord One Thousand Nine Hundred and Twenty-four, between Charles H. Ingersoll, and Eleanor B. Ingersoll, his wife, of the Town of Montclair, in the County of Essex and State of New Jersey, party of the first part; And Blum Building Company, with its principal office in the Town of Irvington, in the County of Essex and State of New Jersey party of the second part: Witnesseth, That the said party of the first part, for and in consideration of the sum of Twenty-five Thousand ($25,000) Dollars, to be paid and satisfied as hereinafter mentioned, and also in consideration of the covenants and agreements hereinafter mentioned, made and entered into by the said party of the second part, doth agree to and with the said party of the second part, that they the said party of the first part will well and sufficiently convey to the said party of the second part its assigns, by deed of Warranty free of all encumbrances except as hereinafter stated, on or before the 1st day of May, next ensuing the date hereof, All those lots, tracts, or parcels of land and premises, hereinafter particularly described situate, lying and being in the Village of South Orange in the County of Essex, State of New Jersey, at the Southeast corner of Irvington Avenue and Prospect Street, more particularly described as follows:

Beginning at a point formed by the intersection of the southwesterly line of Irvington Avenue with the southeasterly line of Prospect Street; and running thence (1) along said southwesterly line of Irvington avenue south twenty-five degrees forty-five minutes east one hundred and eighty-two feet and forty-five hundredths of

a foot to land now or formerly of E. A. O'Malley; thence (2) south fifty-nine degrees twenty-one minutes west one hundred and fifty feet and three hundredths of a foot to the southerly corner of land herein conveyed; thence (3) north thirty-seven degrees forty-two and one-half minutes west one hundred and sixteen feet and five hundredths of a foot to the aforesaid southeasterly line of Prospect street and thence (4) along said line north thirty-nine degrees one minute east one hundred and ninety-one feet and eighty-one hundredths of a foot to the point or place of BEGINNING.

BEGINNING at a point on the southwesterly side of Irvington Avenue one hundred and eighty-two feet and forty-five hundredths of a foot (182.45) southeasterly from the southerly corner of Irvington Avenue and Prospect Street; thence (1) along said side of Irvington Avenue south twenty-five degrees forty-five minutes east twenty-eight feet and fifteen hundredths of a foot; thence (2) south fifty-nine degrees twenty-one minutes west two hundred and three feet and twelve hundredths of a foot; thence (3) north thirty-seven degrees twenty-eight minutes west seven feet and seventy-eight hundredths of a foot; thence (4) north thirty-nine degrees thirty-three minutes east fifty-nine feet and ninety-five hundredths of a foot; and thence (5) north fifty-nine degrees twenty-one minutes east one hundred and fifty feet and three hundredths of a foot to the point or place of BEGINNING.

Conveyed subject to a first mortgage lien now on said premises hereinafter mentioned in the sum of $5250.00, and conveyed expressly subject also to the assessment for the improvement of Prospect Street which has been recently assessed

or will shortly be assessed upon said premises for said Prospect Street improvement.

And the said party of the second part, for its self successors and assigns, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators and assigns, that it, the said party of the second part, will pay and satisfy or cause to be paid and satisfied, unto the said party of the first part, the said sum of Twenty-five Thousand dollars ($25,000) as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say:

On execution of this agreement for which this is also a receipt, One Thousand Dollars..... $1,000.00

On delivery of deed, cash, Five thousand dollars..... 5,000.00

By assuming the mortgage at present a lien on the premises, and paying the same according to the terms thereof, Five thousand Two hundred fifty dollars, still to run about eight months from the date hereof..... 5,250.00

On Bond and purchase money mortgage, same containing usual interest, tax, assessment, insurance and installment default clauses, and an agreement not to claim credit on the interest payable on bond and mortgage, by reason of any tax assessed, or to be assessed against the premises, with interest at 6% payable..... for one year,..... $13,750.

to contain the proviso, however, that the party of the second part may pay the whole of the principal secured by said mortgage at any time before the expiration of one year.

It is hereby agreed between the parties that this agreement shall become effective and binding forthwith upon the party of the second part obtaining a permit for the erection of an apartment house upon said premises as aforesaid, and that the party of the second part shall have a reasonable time thereafter not to exceed thirty days, for the examination of title and that at the end of thirty days or within such time as may be agreed, the title to said premises shall be closed at the office of the party of the first part at #1 Clinton Street, Newark, New Jersey, between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of said 30th day after said permit is issued or upon such day as shall be agreed upon by mutual consent.

And it is further agreed that in the event of the party of the second part failing to obtain said permit to erect said apartment house on said premises on or before the first day of May, that this agreement shall forthwith be null and void upon the party of the first part returning to the party of the second part the One thousand dollar deposit above stated, except, that the party of the second part may, if it so elect, make this contract effective without any condition as to the issuance of said permit and take title to said premises on the terms as provided herein upon the terms above stated.

It is further agreed between the parties hereto that in the event of the party of the second part failing to file plans and specifications in compliance with the state laws and local ordinances as above stated within 21 days after the handing down of a decision of the Court of Errors and Appeals, in relation to zoning ordinances, and which is popularly known as an appeal from Su-

preme Court decisions in Nutley, Paterson and other places, and which is popularly expected to settle the law in relation to the legality of local zoning ordinances that the party of the first part shall be at liberty to file such plans and specifications for an apartment house, to be erected upon said premises, and that upon the issuance of such permit to him that this contract shall be immediately effective and binding upon the parties hereto, upon the terms herein stated. Thereupon this agreement shall become binding upon the party of the second part to the same effect as if a permit had been issued, the express condition in respect to Zoning Ordinances restriction to be deemed to have been waived by the said party of the second part. The party of the first part expressly agrees to inform Harry Kaplan, Attorney for the party of the second part of the rendering of the decision by the aforesaid Court, at the time of the handing down of such decision, the time above limited not to commence until such notice in writing has been served upon the said attorney.

And the said party of the first part hereby agrees to pay to the licensed, authorized agents George McCormack and Paul Nagel, a commission of 5% on the purchase price aforesaid, said commission to be paid them only upon delivery of deed to the party of the second part in consummation of this agreement.

AND IT IS FURTHER AGREED, by the parties to the presents, that the said party of the second part, its heirs and assigns, may enter into and upon the said land and premises on the day of passing title next ensuing the date hereof, and from thence take the rents, issues and profits to its and their use.

AND IT IS FURTHER AGREED, by the parties hereto, that the said deed shall be delivered and received at office of the party of the first part, #1 Clinton Street, Newark, N. J. between the hours of ten in the forenoon and three o'clock in the afternoon on the said 1st day of May next ensuing the date hereof.

Taxes, and interest on mortgage, if any, shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any proceedings or any Act for the Sale of Land for non-payment of the municipal taxes or assessments, or by adverse possession.

If at any time before the delivery of the deed the premises or any part thereof shall be or shall have been affected by any assessment or assessments which are or may become payable in annual installments of which the first installment is then due or has been paid, then for the purposes of this contract all the unpaid installments of any such assessment, including those which are to become due and payable after the delivery of the deed, shall be deemed to be due and payable and to be liens upon the premises affected thereby and shall be paid and discharged by the seller thereof, upon the delivery of the deed, except as above stated.

IN WITNESS WHEREOF, the said parties have hereunto interchangeably set their hands and seals the day and year first above mentioned.

CHARLES H. INGERSOLL (L. S.)
ELEANOR B. INGERSOLL (L. S.)

BLUM BUILDING COMPANY.

Per ISRAEL BLUM,
President.

Signed, Sealed and Delivered
in the presence of

GEORGE MCCORMACK.

Witnessed.
Harry Kaplan as to C. H. & I. B. & M. B.

Attested by
MORRIS BLUM,
Secretary.

Received in Register's Office, Essex County, Newark, N. J. March 26th, 12:54 P. M., 1924, Book Y 69, pages 356-358.

SCHEDULE B.

AGREEMENT made this 30th day of April, 1924, between Charles Ingersoll and Eleanor B. Ingersoll, his wife of the Town of Montclair, County of Essex and State of New Jersey, of the first part and Blum Building Company, a corporation, with its principal office in the City of Newark, County of Essex and State of New Jersey of the second part, witnesseth that:

WHEREAS the parties hereto have on March 10, 1924, entered into a contract of sale and purchase of premises on the Southeast corner of Irvington Avenue and Prospect Street, in the village and Township of South Orange, said contract being duly filed in the Register's Office of Essex County in Book Y 69 of deeds for said county on pages 357-8.

And WHEREAS among other things it is provided that the contract shall be null and void by May 1, 1924 in the event that the party of the second part herein shall be unable to procure a permit for the erection of an apartment house, or at its election, may take the premises subject to Zoning Ordinances.

And WHEREAS it is the desire of both parties hereto to have the contract remain effective until June 1, 1924,

NOW THEREFORE, both the parties hereto do mutually agree and consent, in modification of the original contract and not in repudiation thereof, that the time of conditional settlement be extended to June 1, 1924; that if the Court of Errors and Appeals has not rendered its decision by said time affirming the decision of the Supreme Court in respect to Zoning Ordinances, then the original contract hereinabove referred to shall be null and void and the parties of the first part shall return to the party of the second part the deposit paid by virtue of and mentioned in said original contract, to the same effect as stated in the provisions contained in the original contract.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands and seals the day and year first above written.

BLUM BUILDING COMPANY,

ISRAEL BLUM,
President.

CHAS. H. INGERSOLL, (L. S.)
ELEANOR B. INGERSOLL (L. S.)

Attest:

J. BLUM,
Secretary.

Answer.

Signed, sealed and delivered
in the presence of

As to C. H. I. & E. B. I.
ALEXANDER T. SWEENY.

ANSWER.

Filed September 18, 1924.

Defendants, Charles H. Ingersoll and Eleanor B. Ingersoll, his wife, residing in the Town of Montclair, County of Essex and State of New Jersey, answering say:—

1. Defendants admit Paragraph 1 of the Bill of Complaint.

2. Defendants admit Paragraph 2 of the Bill of Complaint.

3. Defendants admit Paragraph 3 of the Bill of Complaint.

4. Defendants admit Paragraph 4 of the Bill of Complaint.

5. Defendants deny Paragraph 5.

6. Defendants deny Paragraph 6 excepting the reference to the provisions in Schedule B relating to the decision in the Nutley Zoning case; and allege that the said decision was rendered before June 1, 1924, to wit, on May 19, 1924.

7. Defendants deny Paragraph 7.

8. Defendants deny Paragraph 8.

9. Defendants deny Paragraph 9.

10. Defendants deny Paragraph 10.

Answer.

11. Defendants allege that with the full knowledge and consent of the complainant and under the terms of Schedules A and B defendants had prepared plans and specifications in conformity with the State and Municipal laws and ordinances and presented them to the Building Inspector of the South Orange Village and demanded a permit for the apartment house described and shown in and on said plans and specifications; that the Building Inspector refused a permit, and that defendants began in the New Jersey Supreme Court proceedings in mandamus to compel the awarding of a permit for the building of said apartment house by the said Building Inspector of South Orange Village; that said proceedings were begun with the full knowledge and at the request of and with the consent of the complainant on the 27th of March 1924, and that said mandamus was argued at the May term of the New Jersey Supreme Court and decision is expected at the opening of the New Jersey Supreme Court on the first Tuesday of October, 1924; and that all of this was done in pursuance of the terms of the said Schedules A and B and with the full knowledge by the complainant that said decision on said mandamus could not be secured before June 1, 1924, and that the complainant waived the provision in the said original contract regarding the time for the performance thereof.

12. Defendants claim that complainant must wait for and abide by the decision of the New Jersey Supreme Court in the said mandamus proceedings so begun by defendants at the complainant's request, and are not entitled to the return of the said $1,000. unless an adverse decision is rendered in said mandamus suit.

Replication.

13. Defendants claim that complainant has full and adequate remedy at law in said Schedules A and B, and that this court is without jurisdiction to hear and determine this cause, and that application will be made on the day appointed for the hearing hereof to dismiss the Bill of Complaint for lack of jurisdiction by this Honorable Court in the subject matter hereof, and that the courts of law have full and complete jurisdiction herein.

14. Defendants pray to be hence dismissed with their reasonable costs and charges herein sustained.

HOWE & DAVIS,
Solicitors for Defendants.

REPLICATION.

Filed September 23, 1924.

The complainant, replying to the Answer, says that:—

1. It denies the matters and things set forth in the Answer, and alleges that it is not bound to await the determination of the New Jersey Supreme Court in the suit therein referred to.

2. The complainant joins issue on the remainder of said Answer.

MILTON M. UNGER,
Solicitor of Complainant.

Notice.

NOTICE.

Filed May 12, 1925.

To: Messrs. Howe and Davis,
Solicitors of Defendants.

PLEASE TAKE NOTICE that I will apply to the Chancellor, at the Chancery Chambers, Prudential Building, Newark, New Jersey, on Tuesday, May 5th, 1925, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard for an Order permitting the complainant to amend the Bill of Complaint by adding a prayer for the specific performance of the agreement referred to in the Complaint and for such other and further relief as may be equitable and just, eliminating from said Bill so much thereof as prays for the return of any moneys to complainant or any relief incidental thereto.

Yours respectfully,

MILTON M. UNGER,
Solicitor of Complainant.

NOTICE.

Filed May 12, 1925.

To: Milton M. Unger, Esq.,
Solicitor for Complainant.

TAKE NOTICE that on Tuesday, May 5, 1925, at ten o'clock in the forenoon or as soon thereafter as counsel can be heard, we shall apply to the Chancellor or to his Honor John H. Backes, one of the Vice-Chancellors, at Chancery Chambers, Newark, New Jersey, for an order permitting the defendants to withdraw their answers filed in the above stated cause.

HOWE & DAVIS,
Solicitors for Defendants.

Dated: April 29, 1925.

ORDER WITHDRAWING ANSWER

Filed May 5, 1925.

Application having been made to the court for that purpose by Messrs. Howe & Davis, solicitors for the complainant, it is on this 5th day of May, 1925, Ordered that said defendants have leave to withdraw the answer heretofore filed by them in said cause.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

Order.

ORDER.

Filed May 7, 1925.

Notice having been given by the complainant to the defendants of an application before the Chancellor, at the Chancery Chambers, Prudential Building Newark, New Jersey, on Tuesday, May 5th, 1925, at ten o'clock in the forenoon, or as soon thereafter as counsel could be heard, for an order permitting the complainant to amend the complaint; and said motion coming on to be heard in the presence of Milton M. Unger, Solicitor of the Complainant, and Messrs. Howe & Davis, Solicitors of the Defendants, and the Court being of the opinion that complainant is entitled to relief,

It is on this 7th day of May, 1925, ORDERED, that the complainant have leave to file a supplemental bill of complaint; and

It is further ORDERED, that a copy thereof be served upon the solicitors of the defendants within ten days from the date hereof.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

SUPPLEMENTAL BILL OF COMPLAINT.

Filed May 12, 1925.

The complainant, BLUM BUILDING COMPANY, a corporation of the State of New Jersey, respectfully shows,

1. That on or about August 8, 1924, complainant filed its original bill in this Court against Charles H. Ingersoll and Eleanor B. Ingersoll, his wife, praying that a decree be made directing the defendants to repay to complainant the sum of $1,000 paid on account of the purchase price on property in said bill of complaint particularly described, and that the said sum be impressed as a lien upon the lands and that complainant might have further or other relief.

2. Said defendants being duly served with process answered complainant's bill and alleged that the defendants with full knowledge and consent of the complainant, and under the terms of the said agreement in the complaint referred to, had prepared plans and specifications in conformity with the State and Municipal laws and ordinances and presented them to the Building Inspector of the South Orange Village and demanded a permit for the apartment house described and shown in and on said plans and specifications; that the Building Inspector refused a permit, and that defendants began in the New Jersey Supreme Court proceedings in mandamus to compel the awarding of a permit for the building of said apartment house by the said Building Inspector of South Orange Village; that said proceedings were begun with the full knowledge and at the request of and with the consent of the complainant on the day of March, 1924, and

that said mandamus was argued at the May term of the New Jersey Supreme Court and decision was expected at the opening of the New Jersey Supreme Court on the first Tuesday of October, 1924; and that all of this was done in pursuance of the terms of the said Schedules A and B and with the full knowledge by the complainant that said decision on said mandamus could not be secured before June 1, 1924, and that the complainant waived the provision in the said original contract regarding the time for the performance thereof, and that defendants claim that complainant must wait for and abide by the decision of the New Jersey Supreme Court in the said mandamus proceedings so begun by defendants at the complainant's request, and are not entitled to the return of the said $1,000, unless an adverse decision is rendered in said mandamus suit.

3. Complainant replied to said answer and the said suit was referred to his Honor, John H. Backes, one of the Vice-Chancellors, for hearing.

4. By way of supplement to its said bill of complaint, this complainant by leave of this Court first obtained, respectfully shows that,

1. Since the date of the filing of the aforesaid answer, the Supreme Court of the State of New Jersey, decided the proceedings referred to in the answer of the defendants, and did direct that a writ of mandamus issue to the Building Inspector of the Village of South Orange, to grant the permit for the apartment house aforesaid, and the order of the said Supreme Court has since been appealed by the Village of South Orange to the New Jersey Court of Errors and Appeals.

2. Complainant acquiesced in the said proceedings in the New Jersey Supreme Court, and the said Supreme Court not having determined the said writ of mandamus at the time when the said suit was set down for hearing, to wit, January 14, 1925, the complainant agreed with the defendants that the hearing of said cause should be postponed and delayed in order that in case the said Supreme Court did order the writ of mandamus aforesaid, to issue, that then and in that event complainant would accept a conveyance of said real estate in accordance with the terms of said contract.

3. The said Supreme Court having granted said relief, complainant is now ready, willing and able to accept a conveyance of said lands and premises pursuant to the terms of said agreement set forth in the complaint, and complainant says that inasmuch as the decision of the New Jersey Supreme Court in said mandamus proceedings were not adverse to, but were in favor of the defendants, complainant is not now entitled to the return of the aforesaid $1,000, but is instead thereof, entitled to the specific performance of said contract, and complainant hereby tenders itself as ready, willing and able to specifically perform the same. Complainant is entitled to have the said contract specifically performed by the defendants, and is without adequate remedy in the courts of law and, therefore, prays,

1. That Charles H. Ingersoll and Eleanor B. Ingersoll, his wife, who are the defendants to this supplemental bill may answer this supplemental bill and each statement therein made.

2. That the defendants may be ordered and directed by the decree of this Honorable Court, to convey said lands and premises to complainant, upon complainant complying with the terms of said sale.

3. That complainant may have the same relief against the said defendants as it might have had if the facts hereinbefore stated by way of supplement had been stated in complainant's original bill of complaint.

4. That complainant may have such other and further relief as shall be agreeable to equity and good conscience.

MILTON M. UNGER,
Solicitor for and of Counsel with Complainant.

ANSWER TO SUPPLEMENTAL BILL OF COMPLAINT.

Filed May 29, 1925.

The defendants, Charles H. Ingersoll and Eleanor B. Ingersoll, his wife, residing in Montclair, Essex County, New Jersey, answering say:—

1. They admit Paragraphs 1, 2 and 3 of said Supplemental Bill.

2. They admit Paragraph 1 of the supplemental matter of said bill.

3. They deny Paragraphs 2 and 3 of the supplemental matter of said bill.

4. Defendants further say that in filing the replication to defendant's answer to the original

bill, the complainant denied the matters and things set forth in defendant's answer and alleged that it was not bound to await the determination of the New Jersey Supreme Court in a suit therein referred to and joined issue with the defendants on the remainder of their said answer.

5. Defendants on April 29, 1925, served on complainant a notice that on May 5, 1925, they would apply to this Court for an order permitting defendants to withdraw their answers filed to the original bill in said cause, and a few days later, to wit, on or about May 1, 1925, complainant served on defendants a notice that on the said May 5, 1925, complainant would apply to this Court for an order permitting complainant to amend its bill of complaint by adding a prayer for specific performance of the said agreement; both of which orders were made by this Honorable Court.

6. Defendants further say that at no time excepting in the supplemental bill of complaint has the complainant ever stated its willingness to take title, and at no time has it made anything that would be considered a tender of performance under said agreement.

7. Defendants have tendered to the complainant the said sum of $1,000. with interest and costs and such tender has been refused. Defendants are willing at any time to pay to the complainant the said $1,000. with interest and any costs that may be properly chargeable to them.

8. Defendants further say that neither the said agreement of March 10, 1924, nor the supplemental agreement of April 30, 1924, was ack-

nowledged by the defendant, Eleanor B. Ingersoll.

9. Defendants deny that complainant was entitled to any of the relief prayed for in the Supplemental Bill.

10. Defendants reserve the right to move at or before the hearing to dismiss the Supplemental Bill on the ground that the same sets up no cause of action entitling complainant to relief in this Court.

11. These defendants pray to be hence dismissed with their reasonable costs and charges sustained.

HOWE & DAVIS,
Solicitors for Defendants.

REPLICATION.

Filed June 2, 1925.

The complainant, replying to the answer of defendants, says that:—

1. It admits the allegations contained in paragraph 4 of the answer, but alleges that the matters and things therein set forth do not preclude complainant from relying upon the allegations contained in its supplemental bill.

2. Replying to paragraph 5, this complainant says it admits the allegations thereof, but avers that long prior to the time when the defendants asked for leave to withdraw their answer, complainant had indicated its willingness to accept a conveyance of the premises.

Rejoinder.

3. Complainant, replying to paragraph 6 of the answer, says that it denies the same.

4. Complainant, replying to paragraph 7, says that it admits that a tender was made, but that it took place after the filing of the supplemental bill of complaint, and that complainant was at that time under no obligation to accept the same.

5. Complainant denies paragraph 8 of the answer.

MILTON M. UNGER,
Solicitor for Complainant.

REJOINDER.

Filed December 21, 1925.

The defendants deny every allegation of the replication except the allegation of fact contained in paragraph 4.

HOWE & DAVIS,
Solicitors of Defendants.

IN CHANCERY OF NEW JERSEY.

December 21, 1925.

Transcript of shorthand notes of testimony taken in the above-entitled cause before his Honor, John H. Backes, Vice-Chancellor, at the Chancery Chambers, in the City of Newark, New Jersey, in the presence of Milton M. Unger, for complainant, and Howe & Davis (Thomas A. Davis and Edward L. Davis) for defendants.

Mr. Unger: I offer in evidence the contract of sale between Charles H. Ingersoll and wife and the Blum Building Company.

(Paper marked Exhibit C-1.)

Mr. Unger: I also offer in evidence supplemental agreement dated April 30th, 1924.

(Paper marked Exhibit C-2.)

GEORGE McCORMACK, sworn for complainant.

Direct examination by Mr. Unger.

Q Mr. McCormack, I call your attention to Exhibit C-1, being the agreement between the Ingersolls and the Blum Building Company, and ask if you witnessed the signature of Mrs. Ingersoll? A Yes, sir; I did.

Q Where did she sign it? A At her home in Upper Montclair.

Q Before this contract was signed did she make any statement as to whether or not she was willing to sign it and under what circumstances she would be willing to sign it?

Mr. Davis: I object as attempting to vary the contents of a written agreement.

The Court: Objection overruled.

A Yes, sir; she did make such a statement.

Q What did she say? A She said the one reason why she would sign the contract was that she was to get a part of the money from the sale of the property. It seemed in the sale of other property she did not get any money from them.

Q Did she say that? A She told me that.

Q And was her husband there? A Yes, sir.

Q What did he say? A Mr. Ingersoll didn't say anything.

Q Did he say anything on that occasion as to whether or not she was to get any part of this money? A Yes, sir; Mr. Ingersoll agreed that she was to get some money from this sale.

Q When this check was handed to her it was made out as it is now payable to both Mr. and Mrs. Ingersoll? A Yes, sir.

Q Did you deliver it? A Yes, sir.

Q To whom? A Mrs. Ingersoll.

Q And did she keep it? A While I was there she kept it.

Mr. Unger: I offer the check.

(Paper marked Exhibit C. 3.)

Q And then she signed the contract? A She signed the contract.

Q Who else was with you? A Mr. Clauer.

Q What did Mr. Clauer go along for? A Mr. Clauer is the notary public. He came with me to take—to witness Mrs. Ingersoll's signature.

Q Did he do anything more than that? A He talked with Mrs. Ingersoll.

Q Did he ask her anything about the execution of the contract? A I couldn't say. He talked with her and I was talking with Mr. Ingersoll.

Q You could not hear him? A I could not say just what passed between them.

JOHN H. CLAUER, sworn for complainant.

Direct examination by Mr. Unger.

Q Did you accompany Mr. McCormack to Mr. Ingersoll's home at the time this agreement, C. 1, was signed? A Yes, sir, I did.

Q Did you see Mrs. Ingersoll sign it? A Yes, sir, I did.

Q Did you take her acknowledgment? A I did take her acknowledgment verbally.

Q In what form—how did you do it? A I asked her whether she knew what she was signing—whether she knew what it was all about—and she said she did, and she signed the contract.

Q Did you ask her whether or not she was willing to sign it? A Yes, sir.

Q What did she say? A She said she was willing.

The Court: I thought you said to me she did not either sign or acknowledge.

Mr. Unger: No. I said both parties acknowledged the certificate of acknowledgment, but that the certificate of only one was annexed to the agreement.

The Court: Both signed.

Mr. Unger: Both signed and both acknowledged.

Witness: I will explain, because there was no acknowledgment certificate on that contract, and for that reason I did not fill it out at the time, and then it was overlooked and it was never done.

Q When you presented this contract, or when this contract was presented to her and you asked her what you testified to, was this certificate on the back of it dated March 10 already on? A That was on the back and that is why I did not fill out hers, because there wasn't another one on there to fill out.

Q You have never signed any certificate? A No.

Q And you are willing to put a certificate on at any time? A Yes, sir.

Q Before this contract was signed by Mrs. Ingersoll was anything said to her about her signing it—did she say whether or not she would be willing, and under what circumstances, if any? A Yes, sir, the conversation Mr. McCormack illustrated here. I was present.

Q What was said? A That she would like to get some money out of the transaction and that was—she would sign it under those conditions, and Mr. Ingersoll agreed that she would get her due consideration out of this transaction, and under those conditions she was willing to sign and did sign.

Q And did you deliver this check made out to both Charles H. Ingersoll and his wife? A Yes, sir. I delivered it back to Mr. Kaplan, I believe.

Q Not the contract, the check. A Oh, I was there when the check was delivered to Mr. and Mrs. Ingersoll; yes, sir.

Q Who got the check? A Well, I think it was handed to Mr. Ingersoll, but Mrs. Ingersoll was there.

Q Was there any objection of any kind on the part of Mrs. Ingersoll to signing this contract after the money arrangement had been discussed? A No.

Mr. Unger: Now, I tender the notary's certificate of acknowledgment so far as it concerns the wife, which will be as of March 10, 1924.

Mr. Davis: I object.

Q What date was it that you were there? A I cannot recall the date; it is so long ago.

Q Is it the date on which the agreement was dated? A Yes, sir; it was the same evening.

The Court: It was the day of the date of your acknowledgment—certificate of acknowledgment?

Witness Yes, sir.

The Court: It does not appear on this record that the matter was taken to the Supreme Court or the Court of Errors. Let it go on our record.

Mr. Unger: Mandamus proceedings were started in March, 1924, by Charles H. Ingersoll, to compel the issuance of a permit by the building inspector of South Orange covering the apartment house contemplated. On September 24, 1924, the Supreme Court directed the issuance of an alternative writ.

Mr. Davis: A peremptory writ was granted April 2, 1925, and on October 10, 1925, the Court of Errors granted a commission of affirmance of the Supreme Court.

The Court: Who took the appeal?

Mr. Davis: South Orange. They took it almost immediately.

ISRAEL BLUM, sworn for complainant.

Direct examination by Mr. Unger.

Q You are one of the officers in the Blum Building Company? A Yes, sir.

Q And after this suit was started and before it was reached for hearing the first time, did you give me any instructions? A Yes, sir.

Q And do you know whether or not after you gave me instructions about the case you went to see Judge Davis? A I was over on Judge Davis' office in regard to another matter—transaction there—(interrupted).

Q When was this? A Well, it was around April.

Q 1925? A 1925.

Q Did you and Judge Davis discuss this Ingersoll case at that time? A I spoke about the case. I asked the judge how long it would take before they got through with the Court of Errors and Appeals; he said it would take about two months probably, and told me Mr. Ingersoll was tired of paying money, and I offered that we should stand the expense of the—the expense of the Court of Errors and Appeals.

Q And did you tell him whether or not you wanted him to proceed with that appeal at that

time? A Yes, sir; I told him we ordered our lawyer to tell him about it—he should proceed with the case and we would stand for the cost.

Q Did he say anything to you on that occasion about your getting or not getting the property? A He said there is no doubt you will get the property, of course, it will take time—all the courts were in favor for granting the permit.

Q And then did you tell me to communicate with Judge Davis—write him a letter? A Yes, sir.

Q Since the matter got into the courts on the granting or not granting of the permit, has your company been willing to take this property? A Always has been willing to take it. After the Supreme Court had the decision we were willing to take the property.

Q All you wanted was protection in your building permit? A Yes, sir.

Cross examination by Mr. Edward L. Davis.

Q When you came to Judge Davis' office, what was it about—why did you come there? A We came there about a transaction—we bought some property from a different party—was sitting in the office before the other agreement was ready and so I asked the judge about that case.

Q You were there for some other reason and you took advantage of the opportunity to speak to him about it? A Yes, sir.

Q And did you tell him that you were willing to take the property at that time without first getting the permit? A I told him we are willing to take the property.

Q Without getting the permit? A Well, it wasn't mentioned anything about getting the permit.

Q Were you willing to take the property without first getting the permit from the Supreme Court or the Court of Errors? A At that time the Supreme Court had had—(interrupted).

The Court: Answer. Did you want the property without the permit?

Witness: Yes, sir.

Q Did you say so? A I didn't say. He didn't ask me about it.

Q Didn't you say you were willing to pay the expenses of the Court of Errors and Appeals? A Yes, sir.

Q Would you have been willing to take the property without going to the Court of Errors and Appeals? A Yes, sir.

Q Did you say so? A I didn't say.

Q You didn't say? A No.

Mr. Unger: I offer three letters: one from Thomas A. Davis to Milton M. Unger, dated April 14, 1925; letter from Milton M. Unger to Howe & Davis, dated April 16, 1925; letter from Howe & Davis to Milton M. Unger, dated April 17, 1925.

The Court: Let the stenographer incorporate them in the record.

"April 14, 1925.

Milton M. Unger, Esq.,
Prudential Building,
Newark, N. J.

My dear Mr. Unger:

I have a letter from Mr. Ingersoll this morning in which he states he will pay back

the deposit of your client, Blum Building Company, of $1,000, which they paid on the contract for South Orange. Will you please let me have a statement of your costs, etc., and I will submit the same to Mr. Ingersoll.

Yours truly,

Thomas A. Davis."

"April 16, 1925.

Howe & Davis, Esqs.,
282 Main St.,
Orange, N. J.

Gentlemen: Re: Blum vs. Ingersoll.

I have your letter of the 14th inst.

Mr. Blum called her yesterday and told me that he had practically concluded arrangements whereby he was to defray the cost of the appeal, if the city took one in the zoning case, and that he was then to take the title.

Is there any misunderstanding about this?

Yours very truly,"

"April 17, 1925.

Milton M. Unger, Esq.,
763 Broad Street,
Newark, N. J.

Dear Sir: Re: Blum vs. Ingersoll.

Your letter of the 16th instant is received in the above matter. We submitted to Mr. Ingersoll your client's offer to pay for the expenses on the appeal, but he is not willing to accept this proposition. If you will advise us as to your costs, etc., we shall secure a check.

Yours truly,

Howe & Davis."

(Letters marked Exhibits C. 4, 5 and 6.)

Morris Blum, direct.

MORRIS BLUM, sworn for complainant.

Direct examination by Mr. Unger.

Q Were you with the agents when they went up to have this contract signed by Mrs. Ingersoll? A No.

Q You were not there. Were you with your brother when some arrangement was made in Judge Davis' office? A Yes, sir.

Q Can you tell us the time? A On April 13th.

Q 1925? A 1925.

Q Will you just tell us what was said between you and Judge Davis on that occasion? A A day or two before we were informed from Mr. Unger that Mr. Ingersoll would not go ahead with his appeal in the Court of Errors and Appeals because he didn't want to spend any more money. He is willing to give us the land as it is—informed us he is willing to take it if we want to go after the appeal—we will pay—I told Mr. Davis we are willing to pay—we will pay the expenses he can meet with to appeal.

Q And was that said in Judge Davis' presence? A Yes, sir.

Q What did he say to that? A He said it will take a matter of two months—there is no question we will get the property.

Q Was there anything said about your not taking the property? A No; never mentioned it.

Q Were you willing to take it? A Yes, sir.

Q Why had you refused to take it before that time? A We were never asked to take it.

Q You wanted to build an apartment house? A Yes, sir.

Morris Blum, cross.

Q Has this property increased in value? A Yes, sir.

Q What is your business? A Building.

Q How much is it worth? A I judge about forty to forty-five thousand.

The Court: What was it sold for?

Mr. Unger: Twenty-five thousand.

Q Has there been any change in building values in South Orange since it has been found out you can get permits for apartment houses there? A Oh, yes.

Q Have they gone up or down? A Up.

Q Is this a corner? A Corner.

Q How many feet? A A hundred and ninety by two hundred.

Q What kind of streets are Prospect street and Irvington avenue, South Orange? A They are just about a block away from the center of the city.

Cross examination by Judge Davis.

Q Before you came to Howe & Davis' office, Mr. Unger told you that he had received word from Howe & Davis that Mr. Ingersoll was ready to convey the property? A No; Mr. Unger told me Mr. Ingersoll was not ready to spend any more money for the appeal.

Q For the appeal? A Yes, sir.

Q And your statement was that you were willing to pay for the appeal and that when the appeal was decided you would take the property, is that the idea? A Yes, sir.

Q Is that what you said? A The way I understood it was that if he would insist that I take it as it is that we would take it anyway.

HARRY KAPLAN, sworn for complainant.

Direct examination by Mr. Unger.

Q Are you a member of the Bar? A I am, sir.

Q And did you represent the Blum Building Company in any way in connection with this property? A On the execution of the contract in the office of Mr. Ingersoll.

Q And did you take his acknowledgment to the contract? A Took the acknowledgment of Mr. Ingersoll to the contract and certified to the acknowledgment immediately.

Q And your certificate appears on the original agreement? A It does, sir.

Q Did you have any talk with anybody representing the Ingersolls after these proceedings had been commenced in the Court of Chancery? A With Mr. Davis, over the telephone.

Q Can you fix the time? A I think it was immediately subsequent to the Supreme Court decision and prior to the appealing to the Court of Errors and Appeals. I called up Howe & Davis. I recall the phone number very distinctly. I think it would be Orange 332. And spoke to Judge Davis over the wire and asked him whether he would prosecute the appeal on behalf of the Blum Building Company. He said he would do that if they paid him.

Q Do you know whether or not you communicated with me and asked me if I was satisfied? A I spoke to you as to whether or not you would advise the Blum Building Company to take the title upon the decision of the Supreme Court and you advised the taking and they were prepared to take.

Harry Kaplan, cross.

Q Do you whether or not I suggested to you that Judge Davis would be the best person to prosecute the appeal in case the city took it? A You did suggest that, and that Judge Davis was familiar with the facts in the matter, having attended to the application for the writ of mandamus for the issuance of the permit by the Supreme Court.

Q Do you know whether or not I suggested to you that Blum should go to Judge Davis' office and arrange upon the terms of it—or arrange terms upon which Judge Davis would represent the appeal? A It was because of your suggestion that Judge Davis take charge of the appeal that I called up Judge Davis.

The Court: What interest had you in the matter? Who did you represent?

Witness: The Blum Building Company originally, upon the execution of the original contract of March 10, 1924.

The Court: How did Mr. Unger become associated?

Witness: I turned the matter over to him.

The Court: When?

Witness: For the purpose of obtaining the refund of the $1,000 deposit, but Mr. Ingersoll refused to repay.

The Court: Is that the first connection Mr. Unger had with it?

Witness: That was the first connection Mr. Unger had with it.

Cross examination by Judge Davis.

Q Are you associated with Mr. Unger? A Not in anywise.

Harry Kaplan, cross.

Q And at the time you say you had this conversation with Mr. Davis did you make an offer then to take the property at that time? A I think an offer was made upon the promise of Judge Davis to prosecute the appeal.

The Court: Won't you answer the question?

Q Was there an offer made at that time to take the property at that time? A I am trying to recall exactly what was said. I think an offer was made to take the property as is.

Q At that time? A At that particular time.

The Court: You were willing to take the property, but you thought it better to go to the Court of Appeals to be sure of the right to build.

Witness: That was the exact situation—an apartment house.

The Court: Whether an offer was made or not to take the property, is that right?

Witness: That is correct.

Q Weren't you making an effort at that time to arrange to pay the expenses of the appeal and take the property after the appeal was concluded? A No; the Blums were willing upon the advice of Mr. Unger and upon their own initiative to take the property merely upon the decision of the Supreme Court.

The Court: Was that stated at the time to Judge Davis?

Witness: I believe it was stated to Judge Davis at the time.

Q Stated by you, Mr. Kaplan? A I believe it was.

Q At that telephone talk? A During that telephone conversation.

MILTON M. UNGER, sworn.

Witness: This case was set down for hearing before Vice-Chancellor Backes on January 14, 1925, as I recall it. A couple of days prior to that time I telephoned to Judge Davis and told him that I understood that the matter was pending in the courts on the particular application of Ingersoll to obtain a mandamus—mandamus directed to the building inspector of South Orange to issue a permit for this building; although I did not in my talk with Judge Davis make a statement as broad as that, because he understood what I was talking about. He said, "Yes," and I said to him words to this effect, "So long as it is pending in court and we are going to take the property if it is in our favor, let us call the hearing off," to which he agreed. I came before your Honor, Vice-Chancellor Backes, here, and made practically that same statement, and Vice-Chancellor Backes ordered—marked it off his list without fixing any other day. I then learned from Mr. Kaplan three or four months later that he had talked with his client and I learned from Mr. Kaplan that the Blums had been to Judge Davis, and I had a talk with you as to what I thought ought to be done.

The Court: With who?

Witness: I had a talk with Mr. Kaplan as to what I thought the Blums ought to do with respect to the appeal, and then about that time I received Exhibit C. 4 from Judge Davis in which he offered to return the $1,000, and I followed that up by answering it with my letter of April 16, 1925, in which I informed him that Mr. Blum had called on me and had told me that he had concluded arrangements whereby he was to defray the cost of the appeal and that he was to take title. I received Judge Davis' answering reply on the 17th of April, 1925, which is in evidence. I do not recall that I ever spoke to Judge Davis after that about this case.

Cross examination by Mr. Davis.

Q Had you ever, Mr. Unger, at any time, previous to receiving the letter of April 14th, in which it was stated that Mr. Ingersoll would be willing to return the $1,000 and costs, etc.—had you ever notified Judge Davis or Mr. Ingersoll that your client would be willing to take the property without waiting the result of the court action? A No, sir. You see, Mr. Kaplan was talking with the other side more or less.

Q You personally did not? A No, sir.

Q Do you know of your own knowledge of any such offer being made? A Only such as Blum had told me and Kaplan has related it.

Q Subsequent to the receipt of that letter—the exchange of these three letters—did you previous to the receipt of the notice from Howe & Davis stating that they would apply for a withdrawal of the answer, ever inform Judge Davis that your client was willing to take the

property without awaiting the action of the court? A Previous to these three letters?

Q Subsequent to the exchange of these three letters and prior to the service of the notice of withdrawal of the answer, did you ever tell Judge Davis that your client would be willing to take the property without awaiting the result of the court action? A No; only as I talked with him in January, 1925, and as that it may have appeared inferentially from what I said or he said at that time.

Q But you never directly told him that? A I don't think I did.

COMPLAINANT RESTS.

THOMAS A. DAVIS, sworn for the defendants.

Witness: I am a member of the law firm of Howe & Davis of Orange, New Jersey, and have been the solicitor for Charles H. Ingersoll in this Chancery case. The statements made by Mr. Unger on the stand relative to the conversation between him and me regarding the proposed adjournment of the hearing from January 14, 1925, to some future day is, I think, substantially correct. After the Supreme Court had decided that Mr. Ingersoll was entitled to a building permit, that is, to a writ of mandamus for a building permit on the South Orange authorities to build an apartment house at the corner of Irvington avenue and Prospect street on this property described in the bill of complaint, I talked with either Mr. Unger or Mr. Kaplan upon the telephone—appar-

ently it was Mr. Kaplan—and whether he called me up or I called him up, I am unable to say, but in the conversation I told him that the Supreme Court had granted us a judgment for a writ of mandamus and that Mr. Ingersoll felt now that either his client should take the property without having Mr. Ingersoll go to any additional expense regarding the appeal which South Orange had given us notice of, or that we would return the $1,000. Either at that conversation or a subsequent one, Mr. Kaplan made the suggestion that they would pay the expenses of the appeal to the Court of Errors and Appeals and I told Mr. Kaplan that that was not satisfactory to Mr. Ingersoll. My recollection had been that the talk I had that I have just related, was with Mr. Unger, but Mr. Kaplan probably did the talking and therefore the talks were probably with Mr. Kaplan. Shortly after that last talk Mr. Blum came to our office on some other matters, and this was in the month of April, 1925, and while there he made a statement. He says, "I am glad that you and Mr. Unger have arrived at a settlement in the Ingersoll case." I said, "Mr. Blum, we have arrived at no settlement. The proposition that was put up to us about your paying the expenses of the appeal is not satisfactory." Within a day or two after that I wrote Mr. Unger, I think it was—I wrote Mr. Unger a letter on April 14, 1925, stating, "I have a letter from Mr. Ingersoll this morning in which he states he will pay back the deposit of your clients, Blum Building Company, of $1,000 which

they paid on the contract for South Orange. Will you please let me have a statement of your costs, etc., and I will submit the same to Mr. Ingersoll." That is Exhibit C. 4. On April 17th I received a letter from Mr. Unger, dated April 16th, entitled, "In the case of Blum *v.* Ingersoll," and he says, "I have your letter of the 14th instant. Mr. Blum called here yesterday and told me that he had practically concluded arrangements whereby he was to defray the cost of the appeal, if the city took one in the zoning case, and that he was then to take the title. Is there any misunderstanding about this?" That is Exhibit C. 5. Immediately upon receipt of the April 16th letter I wrote to Mr. Unger on April 17th, entitled "In the case of Blum *v.* Ingersoll," "Your letter of the 16th instant is received in the above matter. We submitted to Mr. Ingersoll your client's offer to pay for the expenses on the appeal, but he is not willing to accept this proposition. If you will advise us as to your costs, etc., we shall secure a check." That was the end, and at no time after that was there any written or verbal offer to do anything, either to take the property or to take our money. On April 29th we served on Mr. Unger a notice to withdraw the answer that we filed for the defendant.

The Court: Notice of motion?

Witness: Notice of motion for an order permitting the defendants to withdraw their answers filed in this case. It was acknowledged by Mr. Unger on April 29, 1925, and on May 1, 1925, Mr. Unger served on us a notice of a motion to permit the complainant

to file a supplemental bill in this case. Both notices were for May 5, before your Honor, in this Court. I offer in evidence the notice that was served on us by Mr. Unger.

The Court: And both motions were granted?

Witness: Both motions, I understood, were granted. I was not here.

(Paper marked Exhibit D. 1.)

The Court: Were orders entered accordingly?

Witness: Yes, sir. Neither Mr. Kaplan nor Mr. Blum at any time made any statement to me that they were willing to take a conveyance of the Ingersoll property before the Court of Errors and Appeals had given its decision.

Cross examination by Mr. Unger.

Q When you and I talked about this matter, judge, in January, 1925, wasn't there a sort of tacit understanding between us that that was what the parties were going to do? A What is that?

Q Wasn't it sort of tacitly understood between us that when the courts had passed upon the granting of this permit, and if it was favorable to us, that we were going to go through with it and so were you? A My understanding of that talk was that after the Supreme Court had passed favorably upon it that we would carry out the contract, and that was why, after the Supreme Court did pass on it, that I made the statement that we should either—your client should either now take the property or take the money.

The Court: You prosecuted the appeal?

Witness: Yes, sir; we defended the appeal of South Orange.

The Court: You prosecuted the appeal?

Witness: No; the appeal—the Supreme Court decision was favorable to Ingersoll, and Riker & Riker for South Orange took the appeal to the Court of Errors and Appeals from the Supreme Court and, of course, we defended the appeal for Ingersoll, because in that appeal Ingersoll was a sort of a defendant. I do not care whether we prosecuted—I don't want to mince words.

The Court: It was for the purpose of reversing?

Witness: They sought to reverse the Supreme Court.

The Court: Did you pay them?

Witness: No; we were against them. You see, Riker & Riker are counsel for South Orange.

The Court: You were not?

Witness: No.

The Court: I got the impression you were.

Witness: No; we were for Ingersoll.

The Court: When Blum said they were ready to put up the expense money, was that to Riker & Riker?

Witness: That was to us.

The Court: You were then counsel representing Orange, to take the appeal?

Witness: No; we represented Ingersoll, had secured a favorable decision against South Orange, represented by Riker & Riker on this peremptory writ of mandamus. South

Orange was bitterly contesting every effort to build apartment houses in South Orange, and after we received the favorable decision of the Supreme Court, South Orange ordered Riker & Riker, their counsel to take an appeal from the Supreme Court decision.

The Court: Not at the solicitation of Ingersoll?

Witness: No.

The Court: The offer to pay expenses by Blum—(interrupted).

Witness: Was to pay our fee for representing Ingersoll.

The Court: You using it to maintain the Supreme Court decision?

Witness: Yes, sir, because I had told Mr. Kaplan or Mr. Blum that it didn't seem fair for Mr. Ingersoll to go on and continue to pay these expenses.

Q Was that the only obstacle in the way of you defending the appeal for Mr. Ingersoll the payment of the expense of it? A No, there was no obstacle. As a matter of fact, we went right on and defended the case for Ingersoll.

Q You do agree that Mr. Blum was willing to pay the expense of that? A Yes, sir.

The Court: Did he pay?

Witness: No.

Q You wouldn't accept it? A Why, I said the offer was not satisfactory.

The Court: Did he offer at all to pay you the money?

Witness: No, sir.

The Court: Did they make any offer to pay the expense money?

Witness: Not since that telephone talk.

The Court: I mean did they ever tender you the money?

Witness: No, they never did.

Q My letter—or the offer contained in my letter was refused. Your letter was a statement to Mr. Blum that you understood such an arrangement had already been made, and I wrote you back immediately that that proposition was refused by Mr. Ingersoll.

Q Now, do you know why it was that Mr. Ingersoll was ready to give the property upon the granting of the peremptory writ of mandamus by the Supreme Court, but was not willing to when that order was affirmed by the Court of Errors and Appeals? A Why, I suppose the real reason both that he didn't want to give it after that and that you were willing to take it after that, was the great increase in value.

The Court: Because of the ability to erect an apartment house?

Witness: An apartment house. In fact, the moment the Supreme Court had given its decision favorable to erecting an apartment house, the property went up in value, and we then offered to give the property.

The Court: As all property did in Orange?

Witness: No. South Orange was contesting every permit, and even though a decision came down favoring Mr. Ingersoll, if the next door neighbor asked for a similar permit, South Orange would not give it to

them unless the Supreme Court made them. That has been their attitude right along.

Q You had commenced your proceedings in the Supreme Court to compel a mandamus on behalf of Mr. Ingersoll before I had started this suit, did you not? A Oh, yes; considerable time before.

Q So that that was at the instigation of Mr. Ingersoll? A Yes, sir.

The Court: Was that suit brought for the purpose of facilitating the execution of this real estate contract?

Witness: Yes, sir.

The Court: Was there any tender made by the complainant?

Mr. Unger: In the bill?

The Court: In the supplemental bill. Never before. No offer at any time to take the property except by the bill?

Mr. Unger: No.

The Court: And the testimony as already offered.

Mr. Unger: And there couldn't be necessarily.

The Court: I say there was no offer made by the complainant to take the property and pay the consideration price until the filing of the supplemental bill, except so far as appears by the testimony already in, if that discloses any.

Mr. Unger: I think that is right.

Mr. Davis: I would like to offer in evidence a letter from Mr. Unger, dated July 7, 1924, to Howe & Davis.

(Paper marked Exhibit D. 2.)

Mr. Davis: I offer in evidence notice from Mr. Unger to Howe & Davis referred to in the testimony of Thomas A. Davis, as having been served on May 1, 1925, for permission to file a supplemental bill.

(Paper marked Exhibit D. 3.)

Mr. Davis: I think it might be admitted that on May 26th Mr. Berstecker of Howe & Davis' office tendered to you the sum of $1,085 in cash representing the deposit and interest and costs and that Mr. Unger refused to accept the tender. That was the money that had been paid to the Ingersolls by the complainant as the first payment on the signing of the contract.

Mr. Unger: That is admitted.

Mr. Davis: This is the original suit so that all the papers in the original suit down to the present time are before your Honor. The supplemental bill did not start any new suit.

Mr. Unger: No; it is all one suit.

Mr. Davis: We discovered on Friday we had never put in any rejoinder to Mr. Unger's replication. It was merely a formal one.

The Court: Do you have to have a rejoinder in this Court?

Mr. Davis: I don't know what you call it—reply to the replication.

The Court: The replication was affirmative?

Mr. Davis: It was.

Mr. Unger: It is what might be called a bill in avoidance.

The Court: All right, let it in.

Mr. Davis: And the notice which Mr. Unger acknowledged back last week when we made our motion to withdraw, I suppose should be filed rather than put in as an exhibit.

The Court: We do not go further than the replication so that if there is any matter to be set up, you must refer back to your answer or bill.

Mr. Davis: There is some new matter set up in the replication.

The Court: I think you must go back and anticipate it by your answer, must you not? All right.

DEFENDANT RESTS.

Mr. Unger: I want to prove that Mrs. Ingersoll got the deposit and it went into her bank account, the thousand dollars.

Mr. Davis: I would be glad to ascertain who it was credited to and we will agree on it.

Mr. Davis: I offer in evidence my letter dated June 24, 1924, to Mr. Harry Kaplan.

(Paper marked Exhibit C. 8.)

Mr. Unger: Also letter from Howe & Davis to Milton M. Unger of July 2, 1924.

(Paper marked Exhibit C. 9.)

TESTIMONY CLOSED.

OPINION.

Filed August 4, 1926.

BACKES, *V.-C.*

The bill, as supplemented, is by the vendee against the vendors to compel them to convey a parcel of land in South Orange as they had contracted to do.

In the preface to the contract, dated March 10, 1924, it is recited that the complainant was willing to buy if it could obtain a permit from the Village of South Orange to erect on the land a four-story apartment house, and that the defendants were willing to enter into a contract of sale and to give to the complainants until May 1, 1924, to obtain the permit, and that the complainant was willing to enter into such a "conditional agreement," with the understanding that time was of the essence of the contract, and that in the event that the complainant failed to obtain a permit, or declined to take the property without a permit, on or before May 1, the contract should be void upon the return to the complainant of its deposit of $1,000. In the body of the agreement the defendants bound themselves to convey the land to the complainant on May 1, 1924, for the consideration therein stated, the contract, however, to be binding upon the complainant forthwith upon obtaining the permit by May 1st, and that title should be closed within thirty days after obtaining it, or such longer time as might be agreed upon; and if the complainant failed to obtain the permit before May 1st, the agreement should be null and void upon the return of the deposit. It was further agreed that if the complainant failed to apply for the permit within twenty-one days after the Court

of Appeals handed down a favorable decision in the Nutley zoning case (*Ignaciunas* v. *Nutley*, 125 Atl. Rep. 121), and which time was not to run until notice in writing of the decision was given by defendants to the attorney of the complainant, then the defendants could apply for the permit, and if granted the contract should be binding on the complainant. Before the time expired, on April 30, a further agreement was entered into which recites that the parties desired the contract to remain effective until June 1, 1924, and it was stipulated "that the time of conditional settlement be extended to June 1, 1924; that if the Court of Errors and Appeals have not rendered its decision by said time, affirming the decision of the Supreme Court in respect to zoning ordinances, then the original contract hereinbefore referred to shall be null and void and the parties of the first part shall return to the party of the second part the deposit paid by virtue of and mentioned in said original contract, to the same effect as stated in the provisions contained in the original contract." The decision was handed down May 19, 1924, but was not regarded as controlling the situation in South Orange. The complainant did not apply for a permit nor elect to take without the permit by June 1st. On August 8th the complainant filed its bill setting up the contract and the extension agreement; its failure to obtain the permit and its refusal to take the property without the permit by June 1st, and that the Court of Appeals had not rendered its decision before that time (which was not so), and that it had been ready and willing, but that the defendants had not been able to perform, and that it was entitled to the return of its deposit, and prayed for relief

accordingly and a lien on the property. The defendants answered that with the knowledge and consent of the complainant they, the defendants, demanded a permit from South Orange; that upon refusal, at the request and upon the consent of the complainant, they, in March, 1924, applied to the Supreme Court for a mandamus; that it was argued at the May term; that a decision was expected at the October term; that all was done in pursuance of the contract of sale and the extension agreement, and with the knowledge of the complainant that the decision would not be secured before June 1st; that the complainant waived the provisions of the contract for the performance and that it must wait until the coming down of the decision, and was not entitled to the $1,000 deposit unless an adverse decree be rendered in the suit. In reply the complainant denied the waiver and the facts alleged and insisted that it was not required to wait. The cause was set down for hearing January 14, 1925. At that time the Supreme Court had granted an alternative writ of mandamus (Ingersoll *v.* South Orange, 126 Atl. Rep. 213, September 13, 1924), and the suit for a peremptory writ was pending, and the hearing was adjourned without day at the request of complainant's counsel and upon his representations to defendants' counsel, to use his own language, that "So long as it is pending in court (the mandamus suit), and we are going to take the property if it is in our favor, let us call the hearing off," to which defendants' counsel agreed. On March 26, 1925, a peremptory writ was ordered (128 Atl. Rep. 393) and South Orange took an appeal. Shortly thereafter defendants' counsel, Davis, notified complainant's solicitor, Kaplan, that his

clients felt that the complainant should take the property without their having to go to any additional expense of the appeal, or that they would return the deposit. The complainant thereupon offered to pay the expenses, which was unacceptable and declined. Kaplan and the Blums now say that they were then willing to take the title, and Kaplan ventured so far as to say that he told Davis so, but it is more in harmony with the situation to believe the Blums and their counsel, Unger and Davis, that the proposition to take the title was neither accepted nor declined, and also to believe that the complainant's inclination was not to take the title pending the appeal. On April 14th Davis wrote Unger offering to pay back the $1,000 and the costs, to which the latter replied, two days later, that his client (one of the Blums) had informed him that he had practically arranged whereby he was to defray the expenses of the appeal "and that he was then (after the decision) to take the title," and asked if there was any misunderstanding. The next day Davis answered that the offer to defray the expenses was not acceptable to his clients and renewed the offer to return the deposit. There the matter stood until April 29, when notice was served by the defendants of a motion for leave to withdraw their answer, which was followed by complainant's notice of motion for leave to amend the bill. Both motions were granted at the same time; the complainant being permitted, generally, to file a supplemental bill. In the supplemental bill the complainant completely reverses its position to recover the deposit, and, after recounting the allegations and prayers of the original bill, the answer thereto, and the replication, it alleges that it was true,

as the defendants had set up in their answer to the original bill that the time for the performance of the contract had been extended until the coming down of the decision of the Supreme Court; that it had acquiesced in the mandamus suit, and that it had been agreed that the hearing of the cause should be delayed to await the decision, and that the complainant would take the title if the court ordered a permit; that the Supreme Court had since so ordered, that an appeal had been taken, and that complainant was ready and willing to perform in accordance with the terms of the contract, and it prays for a specific performance of the contract. The answer admits the state of the original pleadings, denies all the allegations (except the fact of the final judgment in the mandamus suit), and points out that the complainant, in its replication to the answer to the original bill, had denied the waiver of time of performance and had claimed that it was not bound to wait the judgment of the Supreme Court; that the complainant never, except by the supplemental bill, expressed its willingness to take title, or tendered performance; that defendants have tendered the deposit with interest and costs, and that it was refused, and concludes with a denial, that the complainant is entitled to the relief prayed by the supplemental bill. The prior election of the complainant to treat the contract as at an end is not specifically pleaded as a defense, and attention to this is called in complainant's brief, but the face-about of both litigants appearing in the record it may be considered under the denial of the complainant's right to relief. If necessary it may be formally set up; for the present it will be regarded as correctly pleaded.

A word as to the practice. Setting up a maintainable, new and inconsistent cause of action is not allowable after issue. The course is to take a dismissal without prejudice and start anew. Coddington *v.* Mott, 14 N. J. Eq. 430. Here the defendants withdrew their answer; there was no issue when the amendment was allowed and made.

The complainant having by its original bill elected to be no longer bound by the contract is not privileged to again chose to be bound. Having committed itself to a recovery of the deposit, its right to have the property is forever gone. The election is irrevocable. Claron *v.* Thommessen, 2 Adv. Rep. 1509; Heller *v.* Elliott, 44 N. J. L. 467. The commencement of an action, where all the facts are known, is conclusive evidence of an election. Conrow *v.* Little, 115 N. Y. 387. "A party," says Bigelow, "cannot, either in the course of litigation or in dealings *in pais,* occupy inconsistent positions. Upon that rule election is founded. A man shall not be allowed to approbate and reprobate. And where a man has an election between several inconsistent causes of action he will be confined to that which he first adopts. The election, if made with knowledge of the facts, is in itself binding. It cannot be withdrawn without due consent. It cannot be withdrawn though it has not been acted upon by another by any change of position." Bigelow on Estoppel 732, 16th Ed. A comprehensive statement of the effect of an election is given in 20 Corpus Juris, p. 38, thus: "An election once made between co-existing remedial rights which are inconsistent is not only irrevocable and cannot be withdrawn without due consent even though it has not been acted upon by another to his detriment, but it is also con-

clusive and constitutes an absolute bar to any action, suit or proceedings based upon a remedial right inconsistent with that asserted by the election or to the maintenance of a defense founded on such inconsistent rights." Chancellor Kent in Sanger *v.* Wood, 3 John. Ch. 416, put it in this way: "Any decisive act of the party, with knowledge of his rights, and of the fact, determines his election in the case of conflicting and inconsistent remedies." In Connihan *v.* Thompson, 111 Mass. 270, it is said that "The defense of waiver by election arises when the remedies are inconsistent; as where one action is founded on an affirmance, and the other upon the disaffirmance of a voidable contract, or sale of property. In such cases any decisive act of affirmance or disaffirmance, if done with the knowledge of the fact, determines the legal rights of the parties once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon. In Thompson *v.* Howard, 31 Mich. 312, this language is used: "A man may not take two contradictory positions, and where he has a right to chose one of two modes of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge or means of knowledge of such facts as would authorize a resort to each, will preclude him thereafter from going back and electing again." In Rodermund *v.* Clark, 46 N. Y. 354, the principle is stated in this manner: "Where there

exists an election between inconsistent remedies the party is confined to the remedy which he first prefers and adopts. The remedies are not concurrent, and the choice between them being once made, the right to follow the other is forever gone." It is not helpful to multiply these citations, but for outstanding cases expressing the doctrine see Livingston *v.* Kane, 3 Johns. Ch. 224; Kennedy *v.* Thorp, 51 N. Y. 174; Acer *v.* Hotchkiss, 97 N. Y. 395; Terry *v.* Munger, 121 N. Y. 161; Miller *v.* Parkhurst, 126 N. Y. 89; Washburn *v.* Insurance Co., 114 Mass. 175; Metcalf *v.* Williams, 144 Mass. 452; Elevator Co. *v.* U. P. Ry. Co., 97 Iowa 719; Thompson *v.* Howard, *supra;* Farwell *v.* Myers, 59 Mich. 179. A collection of many of the cases is to be found in the note to Crossman *v.* Universal Rubber Co., 13 L. R. A. 91. The principle is so fundamental and universal of application that our Court of Appeals in the Claron case simply applied it without discussion.

It is the contention of the complainant that the subsequent conduct of the defendants, and the dealings of the parties, released it of its election, or, if not released, that the defendants are estopped from setting up the election. An election once made, being irrevocable, nothing short of a contract reviving the lost remedy will restore it. In Moller *v.* Luska, 87 N. Y. 166, the plaintiffs brought an action in replevin to recover property procured by fraud in the sale. Afterwards the vendee was declared a bankrupt and the plaintiffs filed their claim with the assignee in bankruptcy and received a dividend which they later returned on demand and their claim was expunged. The filing of the claim and acceptance of the dividend was held by the court

below as an affirmance of the contract, a second election, and a bar to the recovery of the property. In reversing the judgment of dismissal the Court of Appeals, speaking through Judge Danforth, said "The plaintiffs manifested their election by bringing this action. After that, the other way of redress was not open to them; for, according to Comyn (Dig. Elect. C., 2), if a man once determines his election it shall be determined forever. Hence, they could never successfully assert a claim against the purchaser under the contract, for the election to disaffirm it had been manifested, and to revoke it was not in their power" and "We are of opinion that by the election made to disaffirm the contract of sale and resume their property, the rights of the plaintiffs to maintain this action became fixed, and could only be extinguished by release or actual payment, or the making of a new engagement.

While a contract of release, or a counter estoppel, is not deemed available to the complainant, nevertheless the reasons upon which it seeks to avoid the effect of its election will be considered and disposed of.

It cannot be said that the answer to the suit for the deposit, that it was not due because the time of performance had been extended until the decision in the mandamus suit, waived the election. The answer amounted to a denial of liability at that time, and the allegations therein of an agreement to extend the time was expressly denied by the complainant in its replication and its right to recover the money was reasserted. The replication constituted a renewal of the disaffirmance of the contract. Nor can the complainant's choice of remedy be considered as

falling within the class of cases where relief is given because of mistake of fact or law, for, if there was in fact an extension of the time of performance, as the defendants alleged and the complainant denied, and which denial the complainant by its supplemental bill retracts and wherein it affirms the contract, the complainant cannot escape the indictment that it brought its suit in bad faith and that it made its election with full knowledge of the agreement to which it was a party, if it be true, as it now claims, that there was such an agreement.

The representation of the complainant's counsel at the time he sought an adjournment of the hearing in January, 1925, that his client intended to take the property if the mandamus suit resulted favorably to his client, was merely by way of inducement to a consent to the postponement of the trial of the issue then before the court. There was no retreat by the complainant, or withdrawal of its repudiation of the contract; it was simply a self-serving assurance that it would take if the outcome of the suit at law, and the taking, would be advantageous, but otherwise it would adhere to its disaffirmance.

The willingness and the offer of the defendants to perform the contract after the Supreme Court ordered a permit was purely voluntary, without consideration, unaccepted until after withdrawal, and unexecuted, and it was only after a sharp rise in the value of the property (nearly double the contract price) pricked the cupidity of the complainant that the supplemental bill was filed.

The complainant must be held to its election and the bill will be dismissed.

FINAL DECREE.

Filed September 20, 1926.

IN CHANCERY OF NEW JERSEY.

Between

BLUM BUILDING CO.,
Complainant,

and

CHARLES H. INGERSOLL and ELEANOR B. INGERSOLL,
Defendants.

Final Decree.

This matter being opened to the Court by Milton M. Unger, solicitor of the complainant, Blum Building Co., in the presence of Messrs. Howe & Davis, solicitors for the defendants, Charles H. Ingersoll and Eleanor B. Ingersoll, and hearing having been had upon amended bill of complaint, answer thereto, and replication;

IT IS, on this 14th day of August, 1926, ORDERED that the amended bill of complaint filed herein be and the same hereby is dismissed.

E. R. WALKER,
C.

Respectfully advised,

JOHN H. BACKES,
V.-C.

ORDER AMENDING FINAL DECREE.

Filed October 18, 1926.

It Is, on this 11th day of October, 1926, on motion of Howe & Davis, solicitors for defendant, Ordered that the final decree heretofore entered in the above-entitled cause be and the same hereby is amended so as to read as follows:

This matter being opened to the Court by Milton M. Unger, solicitor of the complainant, Blum Building Co., in the presence of Messrs. Howe & Davis, solicitors for the defendants, Charles H. Ingersoll and Eleanor B. Ingersoll; and hearing having been had upon amended bill of complaint, answered thereto, and replication;

It Is, on this 11th day of October, 1926, Ordered that the amended bill of complaint filed herein be and the same hereby is dismissed, without costs to either side as against the other.

And It Is Further Ordered that the defendants do pay to the complainant the sum of one thousand dollars ($1,000), the deposit made by the plaintiff to the defendants in the above-entitled cause, with interest thereon from the 10th day of March, 1924, to the 26th day of May, 1925.

E. R. WALKER,
C.

Respectfully advised,

John H. Backes,
V.-C.

Notice of Appeal.

NOTICE OF APPEAL.

Filed October 22, 1926.

To Howe & Davis, Esqs., National Bank Building, Orange, N. J., solicitors for defendants.

SIRS:

PLEASE TAKE NOTICE that Blum Building Company, the complainant in the above-entitled cause, hereby appeals from the final decree made in this Court by the Chancellor on the advice of Vice-Chancellor John H. Backes, in the above-stated cause, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort of all causes.

MILTON M. UNGER,
Solicitor of Complainant.

I consider that there is a good cause for appeal in the above suit.

MILTON M. UNGER,
Of Counsel with Complainant.

PETITION OF APPEAL.

Filed December 12, 1926.

To the Honorable Court of Errors and Appeals in the Last Resort in All Causes:

The petition of Blum Building Company, a corporation, the appellant in the above-entitled cause, respectfully shows that:

1. The petitioner finds himself aggrieved by a certain final decree made in the Court of Chancery by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on September 20, 1926, which decree was amended by an order made by his Honor Edwin Robert Walker, Chancellor of the State of New Jersey, on the 11th day of October, 1926, in a certain cause in said Court of Chancery wherein Blum Building Company was complainant and Charles H. Ingersoll and Eleanor B. Ingersoll were defendants.

2. The said decree, as amended, orders and decrees that the amended bill of complaint filed in the cause be dismissed without costs to either side as against the other.

3. The petitioner appeals from the decree of the Chancellor upon the grounds that the same is erroneous in the following respects:

a. The Court below erred in dismissing the bill of complaint.

b. The Court below erred in finding that the complainant had made an election of a right and remedy in disaffirmance of the contract which was the subject of the suit which barred subsequent action based on an affirmance of the contract.

c. The Court below erred in finding that the institution of a suit without more determines the election of a right and remedy.

d. The Court below erred in failing to find that the defendants-appellees made an election by which they were bound before the complainant-appellant made an election, if it made any.

e. The Court below erred in failing to find defendants-appellees waived their rights to hold the complainant-appellant by any election it made.

f. The Court below erred in failing to find that the defendants-appellees were estopped from setting up any election made by the complainant-appellant.

MILTON M. UNGER,
Solicitor for and of Counsel with
Complainant-Appellant.

[Service acknowledged December 10, 1926, by Howe & Davis, solicitors for defendants-appellees.]

Complainant's Exhibits.

Exhibit C. 1.

The same as Schedule A annexed to the bill of complaint, ante page 4.

Exhibit C. 2.

Same as Schedule B annexed to the bill of complaint, ante page 12.

Exhibit C. 3.

BLUM BUILDING CO. No. 558

Newark, New Jersey, March 10, 1924.

Pay to the order of CHARLES H. INGERSOLL & ELEANOR B. INGERSOLL, $1,000.00

One thousand .....00/100 Dollars

To Springfield Avenue Trust Company
Newark, New Jersey.

ISRAEL BLUM
MORRIS BLUM

Endorsements:
Pay to the Order of
ANY BANK, BANKER OR TRUST CO.
Prior Endorsements Guaranteed
Mar 13 1924
MONTCLAIR ESSEX TRUST COMPANY
55-186 Montclair, N. J. 55-186
R. K. Seveille, Treas.

* * * * * * * * * * *

Complainant's Exhibits.

PAY ANY BANK, BANKER OR TRUST
CO. OR ORDER
FEDERAL RESERVE BANK
Mar 14 1924
1-120 OF NEW YORK 1-120
Prior Endorsements Guaranteed
* * * * * * * * * * *
C. H. INGERSOLL
* * * * * * * * * * *
ELEANOR B. INGERSOLL
* * * * * * * * * * *
PAID

Exhibit C. 4.

April 14, 1925.

Milton M. Unger, Esq.,
Prudential Building, Newark, N. J.

My dear Mr. Unger:—

I have a letter from Mr. Ingersoll this morning in which he states he will pay back the deposit of your clients, Blum Building Company, of $1,000. which they paid on the contract for South Orange. Will you please let me have a statement of your costs etc. and I will submit the same to Mr. Ingersoll.

Yours truly

THOMAS A. DAVIS.

Complainant's Exhibits.

Exhibit C. 5.

April 16, 1925.

Howe & Davis, Esqs.,
282 Main St., Orange, N. J.

Re: Blum vs Ingersoll

Gentlemen:

I have your letter of the 14th inst.

Mr. Blum called her yesterday and told me that he had practically concluded arrangements whereby he was to defray the cost of the appeal, if the city took one in the zoning case, and that he was then to take the title.

Is there any misunderstanding about this?

Yours very truly,
MILTON M. UNGER.

Exhibit C. 6.

April 17, 1925.

Milton M. Unger, Esq.,
763 Broad Street, Newark, N. J.

Re: Blum vs. Ingersoll.

Dear Sir:—

Your letter of the 16th instant is received in the above matter. We submitted to Mr. Ingersoll your client's offer to pay for the expenses on the appeal but he is not willing to accept this proposition. If you will advise me as to your costs etc., we shall secure a check.

Yours truly,
HOWE & DAVIS.

Complainant's Exhibits.

Exhibit C. 8.

June 24, 1924.

Harry Kaplan, Esq.,
116 Market Street, Newark, New Jersey.

Dear Sir:—

We represent Charles H. Ingersoll in the matter of his contract with Blum Building Co. for property corner of Prospect and Irvington Avenues in South Orange Village. Under the terms of the supplemental agreement of April 30, 1924, the settlement was extended to June 1, 1924 and the closing appeared to be conditioned on the Court of Appeals affirming the Nutley case, which has been done. Mr. Ingersoll is ready to convey these premises to your client in accordance wtih the terms of the contract, if you will name a time and place for the delivery of the deed,

Yours truly,
HOWE & DAVIS.

Complainant's Exhibits.

Exhibit C. 9.

July 2, 1924.

Milton M. Unger, Esq.,
913 Prudential Bldg.,
Newark, New Jersey.

Dear Sir:—

Your letter of June 28th is received regarding the Blum Building Co. and Charles H. Ingersoll. The last written extension of this contract appears to have been upon the understanding that if the Nutley zoning case was affirmed by the Court of Errors and Appeals, your client would then take title. This has been done and it would appear that the title should be taken now by the Blum Building Co. The decision was handed down before the extended period of the contract was reached.

Yours truly,
HOWE & DAVIS.

Exhibit D. 1.

Same as notice ante page 18.

Defendants' Exhibits.

Exhibit D. 2

July 7, 1924.

Messrs. Howe & Davis,
282 Main Street,
Orange, N. J.

Re: Blum Building Co. vs. Ingersoll.

Gentlemen:—

I have your letter regarding the contract in question.

I construe the extension of time in the light of the original contract.

The former recites that it is made in modification of the original contract, and not in repudiation thereof, and this extension makes the original contract null and void if the Court of Errors has not rendered decision by June 1st, 1924, but continues in force the original provisions to the effect that the premises are to be purchased provided a permit can be obtained.

It seems to me that the only theory upon which Mr. Ingersoll can obtain the money is upon affirmance of the decision of the Supreme Court in the Nutley case, plus the granting of a permit by the local authorities.

Both of these things did not happen, and I think Mr. Ingersoll must return the deposit. Please advise me whether he will do so or not, as my instructions are to commence suit if he declines.

Yours very truly,
M. M. UNGER.

Exhibit D. 3.

Same as notice ante page 17.

In Chancery of New Jersey

3550

Between

BLUM BUILDING COMPANY, a corporation,
Complainant-Appellant,

and

CHARLES H. INGERSOLL and ELEANOR B. INGERSOLL, his wife,
Defendants-Respondents.

On Appeal from Decree in Chancery.

BRIEF OF COMPLAINANT-APPELLANT.

This appeal presents for consideration a decree made in the Court of Chancery, dismissing the appellant's bill of complaint. The bill prayed that a contract for the sale of lands in South Orange, New Jersey, entered into by the parties to this cause, be specifically performed by the respondents, the vendors.

Among the questions of law to be submitted for appellate review is included one concerning an election of a remedy inconsistent with the relief sought in the bill, and therefore a statement of the facts in the chronological order of their occurrence may be helpful.

March 10, 1924.

The appellant and the respondents entered into a written agreement, duly acknowledged, whereby the respondents, for the consideration of $25,000.00, agreed to convey to the appellant premises in the Village of South Orange, New Jersey. It was stipulated that the vendors were

willing to give the vendee until May 1, 1924, to submit plans to the proper authorities to secure a permit to build an apartment house on the premises, upon the obtaining of which, by that date, the contract was conditional, and in this respect time was made of the essence.

Upon failure to obtain the permit in the manner set forth above, the contract was to become void upon payment by vendors to the vendee of the deposit of $1,000.00. The vendee was privileged to take the title on or before May 1, 1924, without a building permit. The contract further recited that if the vendee failed to file plans and specifications within twenty-one days after the handing down of a decision in the New Jersey Court of Errors and Appeals, in relation to zoning ordinances in the popularly known Nutley case, which was then on appeal from the Supreme Court to the Court of Errors and Appeals, and which the contract stated, "is popularly expected to settle the law in relation to the legality of local zoning ordinances," then the respondents were to be at liberty to file such plans and specifications for an apartment house to be erected upon the premises. Upon the issuance of such permit to the respondents, the contract was to become immediately effective and binding upon all of the parties thereto.

The respondent agreed to inform the attorney of the appellant of the rendering of the decision by the Court of Errors and Appeals, until which notification the period of twenty-one days was not to commence to run.

March 24, 1924.

The respondent, Charles H. Ingersoll, upon notice and petition for an alternative writ of mandamus to issue the building permit, to be directed to the Village of South Orange and Ira

T. Redfern, its building inspector, obtained a rule to show cause which eventually culminated in the granting of an alternative writ, and subsequently a peremptory writ, all of which will later appear. All statements herein, relating to the mandamus, suit, are made from a true copy of the docket entries in the Supreme Court.

April 30, 1924.

The parties signed a memorandum of agreement which recited that the contract hereinabove referred to should be effective and extended until June 1, 1924, and that if by that date the Court of Errors and Appeals had not rendered a decision in the Nutley case, confirming the decision of the Supreme Court, then the original contract was to become null and void.

May 19, 1924.

The decision of the Court of Errors and Appeals in the Nutley case was handed down.

June 24, 1924.

The solicitors of the respondents wrote the following letter to the then solicitor of the complainant:

"June 24, 1924.

Harry Kaplan, Esq.,
116 Market Street,
Newark, New Jersey.

Dear Sir:—

We represent Charles H. Ingersoll in the matter of his contract with Blum Building Co. for property corner of Prospect and Irvington Avenues in South Orange Village. Under the terms of the supplemental agreement of April 30, 1924, the settlement was extended to June 1, 1924, and the closing appeared to be conditioned on the Court of Appeals affirming the Nutley case, which has been done. Mr. Ingersoll is ready to convey these premises to your client in accordance with the terms of the contract, if

you will name a time and place for the delivery of the deed.

Yours truly,
HOWE & DAVIS."

July 2, 1924.

The solicitors of the respondents wrote the following letter to the solicitor of the complainant:

"July 2, 1924.

Milton M. Unger, Esq.,
913 Prudential Bldg.,
Newark, New Jersey.

Dear Sir:—

Your letter of June 28th is received regarding the Blum Building Co. and Charles H. Ingersoll. The last written extension of this contract appears to have been upon the understanding that if the Nutley zoning case was affirmed by the Court of Errors and Appeals, your client would then take title. This has been done and it would appear that the title should be taken now by the Blum Building Co. The decision was handed down before the extended period of the contract was reached.

Yours truly,
HOWE & DAVIS."

July 7, 1924.

The solicitor of the complainant wrote the following letter to the solicitors of the respondents:

"July 7, 1924.

Messrs. Howe & Davis,
282 Main Street,
Orange, N. J.

Gentlemen:

Re: Blum Building Company *v.* Ingersoll.

I have your letter regarding the contract in question.

I construe the extension of time in the light of the original contract.

The former recites that it is made in modification of the original contract, and not in repudiation thereof, and this extension makes the original contract null and void if the Court of Errors has not rendered decision by June 1st, 1924, but continues in force the original provisions to the effect that the premises are to be purchased provided a permit can be obtained.

It seems to me that the only theory upon which Mr. Ingersoll can retain the money is upon affirmance of the decision of the Supreme Court in the Nutley case, plus the granting of a permit by the local authorities.

Both of these things did not happen, and I think Mr. Ingersoll must return the deposit. Please advise me whether he will do so or not, as my instructions are to commence suit if he declines.

Yours very truly,

M. M. UNGER."

August 8, 1924.

The complainant filed a bill in the Court of Chancery, in which, after setting up the original contract and the extension agreement, it was alleged that the complainant had been unable to obtain a permit; and that the defendants had been at no time ready, willing and able to convey the premises in accordance with the terms of the contract. It is further set forth that the defendants placed the premises on the real estate market for sale and were about to sell the same to some other person, and prayed, among other things, that the defendants might be directed by the decree of the Court to repay to the complainant his deposit of $1,000.00, and that the entire sum be impressed as a lien upon the lands, and that respondents be enjoined from selling.

September 18, 1924.

The defendants-respondents filed an answer to the bill of complaint mentioned above, in which

they set forth that they, with the full knowledge and consent of the complainant, and under the terms of the contract, prepared plans and specifications and presented them to the Building Inspector of the Village of South Orange, and demanded a permit for an apartment house. Upon the refusal of the Inspector to issue a permit, the answer goes on, the defendants instituted a suit in the New Jersey Supreme Court, in mandamus, to compel the awarding of a permit. The answer further stated that the complainant waived the provisions in the contract which stated that June 1, 1924, was to be regarded as the time for the performance thereof, and the defendants claimed that the plaintiff was bound to await the coming in of the decision of the Supreme Court in the mandamus proceedings, so taken by the defendants, and for that reason were not entitled to the return of the $1,000.00 deposit unless the decision rendered was adverse to the relator.

September 23, 1924.

The respondent filed a replication to the answer mentioned above, denying that it was bound to await the decision of the Supreme Court.

October 1, 1924.

An order was made that an alternative writ of mandamus issue in the cause, wherein Charles H. Ingersoll, respondent, was relator, and the Village of South Orange and Ira T. Redfern were defendants.

November 6, 1924.

An order of designation was made in the suit in Chancery, setting down the cause for hearing on January 14, 1925.

January 14, 1925.

The Court of Chancery, at the request of complainant's counsel, and the defendant agreeing, adjourned the hearing without day, because the alternative writ of mandamus had been granted, and the suit for a peremptory writ was pending, and complainant's counsel stated that "so long as it is pending in court and we are going to take the property if it is in our favor, let us call the hearing off." (Opinion S. C., page 55.)

April 2, 1925.

A rule for a peremptory writ of mandamus was granted in the Supreme Court suit.

April 14, 1925.

The solicitor for the respondents wrote to the solicitor for the complainant the following letter:

"April 14, 1925.

Milton M. Unger, Esq.,
Prudential Building,
Newark, N. J.

My dear Mr. Unger:—

I have a letter from Mr. Ingersoll this morning in which he states he will pay back the deposit of your clients, Blum Building Company, of $1,000. which they paid on the contract for South Orange. Will you please let me have a statement of your costs etc. and I will submit the same to Mr. Ingersoll.

Yours truly,

THOMAS A. DAVIS."

April 16, 1925.

The solicitor for the complainant wrote the following letter to the solicitors for the respondents:

"April 16, 1925.

Howe & Davis, Esqs.,
282 Main Street,
Orange, N. J.

Gentlemen: Re: Blum *v.* Ingersoll.

I have your letter of the 14th inst.

Mr. Blum called here yesterday and told me that he had practically concluded arrangements whereby he was to defray the cost of the appeal, if the city took one in the zoning case, and that he was then to take the title.

Is there any misunderstanding about this?

Yours very truly,
MILTON M. UNGER."

A demurrer to the return to the writ of mandamus was filed, on which day was also filed a rejoinder and an order for judgment.

April 17, 1925.

The solicitors of the respondents wrote the following letter to the solicitor of the complainant:

"April 17, 1925.

Milton M. Unger, Esq.,
763 Broad Street,
Newark, N. J.

Dear Sir: Re Blum *v.* Ingersoll.

Your letter of the 16th instant is received in the above matter. We submitted to Mr. Ingersoll your client's offer to pay for the expenses on the appeal but he is not willing to accept this proposition. If you will advise me as to your costs etc., we shall secure a check.

Yours truly,
HOWE & DAVIS."

May 5, 1925.

The Court of Chancery made an order allowing the withdrawal of the answer filed by the defendants to the original bill of complaint.

May 7, 1925.

The Court of Chancery made an order allowing the complainant to file a supplemental bill of complaint. Both the application to withdraw the answer and the application for leave to file a supplemental bill were made on notice given by the solicitors for the defendant and the complainant, respectively.

May 12, 1925.

The complainant filed a supplemental bill in which it prayed, among other things, that the defendants be directed to convey the lands and premises in question to the complainant, upon complainant's compliance with the terms of the contract. This relief was asked *by way of supplement* to the relief asked in the original bill of complaint filed.

Thereafter, answer, replication, rejoinder and order of designation were made, and after the making of the order of designation and on November 10, 1925, proof of service was filed in the mandamus suit. On March 8, 1926, an affidavit of costs in the mandamus suit was filed, and costs were taxed on March 10, 1926.

The Chancery suit came on to be heard and an opinion was rendered on August 4, 1926. Subsequently, a final decree and order amending it were entered.

The question on this appeal is whether the Court of Chancery erred in dismissing the supplemental bill of complaint, and more particularly:

A. Whether the complainant made a valid, binding election of a right and remedy in disaffirmance of the contract, which barred it from suing for specific performance.

B. Whether the defendants-respondents were disqualified or estopped from setting up as against the complainant-appellant any election it might have made.

Two points will be made in this brief:

1. The appellant made no election of a right or remedy which is sufficient to bar it from relief in the nature of specific performance of the contract.

2. The respondents are disqualified and estopped to set up as a defense to the bill for the specific performance of the contract any election which it may be found the appellant made.

POINT ONE.

The appellant made no election of a right or remedy which is sufficient to bar it from relief in the nature of specific performance of the contract.

A discussion of the law of the election of remedies automatically raises, when applied to a specific set of facts, three questions subordinate to the main problem under consideration:

A. Was the alleged election made with full knowledge of the facts?

B. If the election was made with full knowledge of the facts, was the remedy first turned to inconsistent with the remedy presently sought?

C. If there was full knowledge of the facts, and if the remedies were inconsistent, did the party who had the election proceed so far in the pursuit of one of the remedies as to constitute an election?

Point One will be discussed in the light of these three subdivisions.

The grand underlying principle of the doctrine of election is well stated in 20 C. J. 35, as follows:

> "In order to constitute a binding election the party must, at the time the election is alleged to have been made, have had knowledge of the facts from which the coexisting, inconsistent remedial rights arise, since any position taken by a party before knowing all the facts should be classed as a mistake and not as an election. If a party acts in ignorance of material facts, he may, when informed, adopt a different remedy, even though inconsistent, unless of course, the rights of innocent persons have intervened."

This doctrine is universally recognized, and, of course, does not require the citation of authority to support it. Applying it to the present controversy, it is evident that when the respondent filed its original bill in the Court of Chancery, praying for a return of its deposit moneys, and a restraint directed to the respondents enjoining them from dealing with the property in question, the complainant was without the knowledge that the property could safely be taken in accordance with the terms of the contract. *It was not then known* whether a building permit could be obtained or not, for the mandamus proceedings were still pending in the Supreme Court.

On August 8, 1924, when the original bill of complaint was filed, a rule to show cause why an alternative writ of mandamus should not issue was extant. This rule, which was obtained *at the suit of the respondents*, culminated later on in an order for an alternative writ, and for a peremptory writ of mandamus. It was only the developments in the mandamus suit which arose *subsequent* to the filing of the original bill in Chancery, which afforded a solution to the

problem of obtaining a building permit. In the original answer, filed by the respondents, it was specifically alleged that the present appellant was bound to await the action of the Supreme Court in the mandamus proceedings. The complainant was, at the date of the filing of the first bill, ignorant of the existence of two remedies, for it had no knowledge and could have none, of what would be the outcome of the Supreme Court suit.

In *Naugle* v. *Bauman,* 3 N. J. A. R. 111, a decision of Vice-Chancellor Buchanan, it appeared that the complainant, as vendee, sued the vendor for specific performance of a contract to sell lands. Finding that the vendor could not give title because of litigation, the complainant brought suit at law for his deposit and a verdict in his favor was set aside, and at a second trial a judgment of no cause of action was entered. It was contended in defense of the specific performance action that the action at law was not an election of remedies, because of the pending appeal in the suit at law. The Court said:

> "But conceding, for the sake of argument, the correctness of Naugle's contention in this behalf, it is evident that it was open to him in June or July, 1922, to offer his money to McVoy and obtain or seek to obtain conveyance, and if such conveyance was refused, to have filed bill for specific performance, *abandoning his suit at law for the return of his money, in which his appeal was then pending and undetermined. This he did not do.*"

It will be noted that although specific performance was refused the Court recognized the right of the complainant to abandon his suit at law, while the appeal was pending and undetermined.

Similarly, in this case, the appellant was privileged to institute a suit commenced by the original bill while the writ of mandamus was being sought, and to later seek relief by way of specific performance when full knowledge of facts *for which the contract provided, was later available.*

In *Titus* v. *Phillips,* 18 N. J. E. 541, a decision of the Court of Errors and Appeals, it appeared that a grantor placed a deed with a due bill in the hands of a third party, to be delivered to the grantee when he signed the bill. The deed was delivered without the signature of the bill, and accepted under the honest belief that the amount of encumbrances which he thereby agreed to assume was the whole consideration. The grantor brought an action at law for the amount of the due bill, being a part of the consideration of the deed. The grantor later sought to set up in the Court of Chancery that by virtue of the wrongful delivery, the deed was not his. Justice Dalrimple said:

> "It is said that the complainant, having brought an action at law for the consideration money, has thereby affirmed the delivery, and is now estopped from setting up, in a court of equity, that the deed is not his, I do not think so. The action at law was predicated on the facts respecting the consideration, as complainant understood them. He had a right to presume that these facts had been communicated by Andrew, his agent in that behalf, to the defendant. On the trial of that cause, the complainant was surprised to learn that Andrew had not advised the defendant of the condition on which the deed was to be delivered."

Many courts, including those of this State, have gone even farther and have held that where a party, through mistake of law or fact, pursued

one remedy instead of another, equity will permit the withdrawal of the first claim asserted, and will allow the pursuit of an appropriate remedy, adequate under the circumstances.

In *Standard Oil Company of Kentucky* v. *Hawkins,* 74 Federal 395, a decision of the Circuit Court of Appeals of the Seventh Circuit, the Court said,

> "If the appellant, in ignorance of its legal rights, believed that no other course was available than to prove its debt as a general creditor; that it had no right, because of the fraud of the bank, to retake from the receiver the proceeds of the paper tortiously obtained by the bank, the avails of which had come into possession of the receiver; and in such belief proved its claim as a general creditor,—*equity ought to permit the withdrawal of such claim,* and the pursuit of an appropriate remedy, adequate under the circumstances, to restore its property, unless the action of the appellant has wrought a change in the position of affairs, working legal detriment that would render it inequitable for the appellant to pursue now a different course. We understand this to be the rule established, whether the mistake may be deemed a mistake of law or a mistake of fact. Pom. Eq. Jr. #512; Wells F. & Co. *v.* Robinson, 13 Cal. 134; Ward *v.* Ward, 134 Ill. 417; Becker *v.* Walworth, 45 Ohio St. 173; Johnson-Brinkman Commission Co. *v.* Central Bank, 116 Mo. 558; Nysewander *v.* Lowman, 124 Ind. 584; Woodburn's Estate, McMannis's Appeal, 138 Pa. 606; Macknet *v.* Macknet, 29 N. J. Eq. 54; Dunham *v.* Ewen (N. J.), 13 Cent. Rep. 349."

In *Macknet* v. *Macknet*, 29 N. J. E. 54, it appeared that a widow elected to take her dower instead of a legacy in lieu thereof. This election

was made under a mistake as to her rights. Chancellor Runyon said:

> "Though mistake in matter of law cannot, in general, be admitted as a ground of relief in equity, the rule has its exceptions. Hunt *v.* Rousmaniere's adm'r, 1 Pet. 1; Green *v.* M. & E. R. R. Co., 1 Beas. 165. 'The maxim *juris ignorantia non excusat,'* says Kerr, 'is not universally applicable in equity. If the word *Jus* be used in the sense of denoting general law, the ordinary law of the country, no exception can be admitted to the general application of the maxim; but it is otherwise when the word is used in the sense of denoting a private right. If a man, through misapprehension or mistake of the law, parts with or gives up a private right of property, or assumes obligations upon grounds on which he would not have acted but for such misapprehension, a court of equity may grant relief, if, under the general circumstances of the case, it is satisfied that the party benefited by the mistake cannot, in conscience, retain the benefit or advantage so acquired.' Kerr on F. & M. 398. The complainant's mistake, however, was rather a mistake of fact than of law."

The Court held that the election made might be revoked *nunc pro tunc* and the widow placed in *statu quo.*

In *Matheson* v. *Matheson,* 18 L. R. A. N. S. 1167, a decision of the Iowa Supreme Court, it appeared that a widow claimed a destributive share in certain lands, believing the destruction of a deed to her from her husband, which he destroyed prior to his death, affected her rights in other lands. She later discovered that her rights were not lost by the destruction of the deed, and amended her petition. The Court said:

> "Neither can the fact that, at the beginning of this proceeding, plaintiff claimed but a distributive share in the land, be held such

> an election as to estop her from amending her pleading and enlarging her claim to include the entire estate therein. She came into court asking to have her rights as widow established in all of the lands of which her husband died seized, and at first included this land with others in her petition. Later, when, as the evidence tends to show, she, for the first time, discovered that her rights under the deed were not lost by its destruction, she amended her petition by limiting her claim for distributive share to those lands not included in said deed, and asked that her title to this particular tract be quieted against the claims of the heirs. * * * While she had two rights of action,—one, for the establishment of her rights as grantee in the deed, and another, for the establishment of her rights as widow in lands of which her husband died seized,—the two rights were based upon different states of fact, and pertained to different tracts of land. Her right of dower or distributive share could attach to no land other than that of which Matheson died seized; and if, after beginning her action, she discovered and asserted her right to the entire fee in one tract, there is nothing to preclude her from pursuing such course, in the absence of any sufficient plea and proof of matter amounting to an estoppel."

Similarly, in 9 R. C. L. 963, it is said:

> "Even where a party has pursued a remedy which would have entitled him to some relief, and later has discovered facts which disclose a better remedy, he may follow the better remedy if no such conditions of injury amounting to an estoppel have resulted to the other party."

Thus it will be seen that the courts have gone much farther than is necessary in the present case to warrant the maintaining of a bill for specific performance, after a suit is also brought in the Court of Chancery to recover deposit

moneys, when there is no complete knowledge, and can be none, of facts required by the contract to be known when the first suit was started.

Taking up the second subdivision in Point One, it is apparent that since the ability to secure a permit was uncertain up to the time the supplemental bill was filed by the appellant, *the two remedies sought by the appellant were not inconsistent with the situation which existed at the respective times at which each was sought.*

Farther than this, it is evident that in any event the remedies are both based on the contract and are not in the least inconsistent.

In *Balleisen* v. *Schiff*, 105 N. Y. S. 692, 121 App. Div. 285, the Court said:

> "The respondent contends that upon the breach by the defendant the plaintiff had his election of two inconsistent remedies, to wit, (a) an action at law for damages for the breach of contract; (b) an action in equity for specific performance; and that the election once made was irrevocable and waived the defendant's default. The difficulty with this argument arises from the fact that the action for specific performance and the action for damages are both based on the contract and the defendant's default. They are, therefore, not inconsistent. If one stood on the affirmance of the contract and the other on a disaffirmance, the situation might be different, but the action for damages for the breach is on the contract. * * * and the plaintiff might have asked in the same complaint in the alternative for specific performance or for damages."

Under the circumstances as set forth above, the remedies pursued in this case were concurrent and consistent, and only the satisfaction of the moving party operates as a bar.

In 20 C. J. 15, it is said:

> "But there is no inconsistency between different remedies all of which are based upon the affirmance or disaffirmance of the contract, and a distinction is to be observed between abandonment of performance, which recognizes the existence of a valid contract, and rescission *ad initio.*"

The situation now before the Court is somewhat analogous to that of a mortgagee exercising both legal and equitable remedial rights in case of a breach. There is no inconsistency in exercising them all at the same time.

In *Logan* v. *Smith,* 9 Ala. A. 439, 63 S. 766, the Court held that though a mortgagee sued the mortgagor at law on the mortgage debt, and levied on the mortgagor's interest in the property, but without satisfaction of the debt, this did not constitute a waiver of the mortgage lien so as to preclude the mortgagee from recovering the chattels in an action of detinue.

It is a familiar principle that an action on an express contract is not inconsistent with a subsequent or concurrent action upon a *quantum meruit,* so as to require an election between them or so as to constitute one a bar to another. *Kirkpatrick* v. *McElroy,* 41 N. J. E. 539; *Davenport* v. *Allen,* 120 Fed. 172; *Water Co.* v. *Hutchinson,* 19 L. R. A. N. S. 219.

In *Kelsey* v. *Agricultural Insurance Co.,* 78 N. J. E. 378, it appeared that an unsuccessful suit was brought at law on a contract, and later an attempt was made to have the contract reformed in equity. Vice-Chancellor Garrison said,

> "It is true that Kelsey mistakenly supposed that the law court would hold that he was a party to the contract because his name appeared at the bottom thereof and

> not in its proper place, and that the law court would find from the writing that his name was intended to be at such place in the contract as would make him a party to it. But this was entirely consistent with the position that he takes in this court; and the fact that be began his suit at law upon the unreformed contract and subsequently had to come to this court to prevent what would be an injustice if his case is proven, does not invoke the doctrine of election of remedies, as I understand that doctrine."

It may also be said of the instant case that the doctrine of election of remedies is not invoked because the existing sets of facts when each of the two actions were brought by the complainant were entirely consistent with the relief sought at the time each was brought. It is certain that the appellant is not required to hazard what the future holds.

Finally we come to the third question under Point One, namely, if there was full knowledge of the facts, and if the remedies were inconsistent, did the party who had the election proceed so far in the pursuit of one of the remedies as to constitute an election?

The learned Vice-Chancellor proceeded upon the theory that the bringing of a suit, without more, and where all the facts are known, is conclusive evidence of election. Without looking to the other factors involved, relating to the extent of the complainant's knowledge of the facts and the consistency of the two remedies under consideration, this point will be discussed.

In *Claron* v. *Thommessen,* 96 N. J. E. 650, this Court had before it a situation where a purchaser of real property sued to recover a deposit made under an agreement to purchase lands, in a court of law. He thereafter, in the Court of

Chancery, filed a bill for the specific performance of the contract. This Court said, through Justice Lloyd,

> "When, on March 7, 1922, following the long lapse of time in which he made no effort to complete the purchase, he instituted suit against Claron to recover the deposit money of $1,000, he irrevocably committed himself in solemn form to a repudiation of all obligation under the agreement. Having taken this step in rescission of the contract, he will not now be permitted to seek its enforcement in a court of conscience."

A similar situation arose in *Maturi* v. *Fay*, 98 N. J. E. 377, where this Court reiterated the doctrine set forth in *Claron* v. *Thommessen*.

It will be noted that in both these cases the first suits brought were in a court of law and they were later abandoned and the suit in Chancery was brought. In the later case, Vice-Chancellor Lewis said that in the absence of the Claron case he "inclined to the view that the institution of the suit to recover the deposit money and other damages, which was afterwards abandoned, did not bind the complainants to a repudiation of the contract, nothing being shown in the facts submitted, making it unjust to the opposite party."

Whatever the rule may be as laid down by these cases, where a prior suit is instituted at law, these cases are not applicable to the present situation. *Here the first suit was brought in the Court of Chancery; that court had control of the situation from beginning to end.* The complainant *commenced* his request for relief there and *continued* it there and *was allowed to continue* it there. The Court took jurisdiction of the first cause of action and subsequently allowed the joining of issue in the second one.

There is nothing inconsistent with the Claron and Maturi cases here; and they, of course, are also inapplicable for the reasons stated above under subdivisions A and B of Point One.

The learned Vice-Chancellor, in his opinion in the lower court, cited many authorities in support of the principle that the bringing of a suit, without more, and where all the facts are known, is conclusive evidence of an election. These will be briefly reviewed.

Heller v. *Elliott,* 44 N. J. L. 467, does not sustain the contentions of the learned Vice-Chancellor. There it appeared that goods were sold and delivered to the vendee. The latter failed to pay the purchase price and the vendor attached the goods. The Court held he could not thereafter sue in trover. The case bears no analogy to the present one.

In *Conroe* v. *Little,* 115 N. Y. 387, the plaintiff sued on a contract and attached certain goods, and later sought to sue in repudiation of the contract. The Court, in holding that the latter suit could not be brought, made statements which support the view of the lower court. Such statements were, however, dicta. The case, involving two suits brought at law, throws no light upon the present controversy.

In *Sanger* v. *Wood,* 3 Johns. Ch. 416, it appeared that the plaintiffs first *recovered a judgment at law,* with knowledge of their equitable rights, and the other statements contained in the case are, of course, dicta.

In *Connihan* v. *Thompson,* 111 Mass. 270, the Court rendered a decision which is more favorable to the contention of the appellant than to the contrary. There it was held that a purchaser of land is not estopped to sue for specific

performance against a seller and a third person who has taken a conveyance with notice, by reason of having sued the seller at law for a breach of the contract, and having *attached the land* as property of the seller.

In *Rodermund* v. *Clark,* 46 N. Y. 354, the plaintiff's assignor, a joint owner with the defendant of a ship, refused to recognize a sale by the defendant. The Court held that the plaintiff could not later sue the defendant in conversion. The case bears no analogy to the instant one.

In *Livingston* v. *Kane,* 3 Johns. Ch. 224, the decision of the Court favors the contention made by the appellant. A creditor filed a bill to set aside a judgment confessed by his debtor in the Supreme Court. Pending the suit in Chancery, he recovered judgment at law against his debtor and issued execution. The Court of Chancery refused to dismiss his bill and ordered him to elect to stay his execution at law or dissolve the injunction which issued out of the Court of Chancery staying proceedings on the creditor's judgment.

In *Kennedy* v. *Thorpe,* 51 N. Y. 174, a vendor of goods *recovered judgment* at law and was later denied relief in equity to defeat an assignment for the benefit of creditors.

In *Acer* v. *Hotchkiss,* 97 N. Y. 395, a bill to foreclose a mortgage was filed and the premises were sold, the complainant buying in. The plaintiff later sought to rescind a contract under which he foreclosed the mortgage, and this relief was denied. The case is not an authority for the proposition for which the lower court cites it.

In *Terry* v. *Munger,* 121 N. Y. 161, the plaintiff waived his right to bring a tort action, and sued for the value of goods converted on an implied contract, *and recovered judgment.* It was held that he could not later sue another person in conversion arising out of the same transaction. The first suit, it will be noted, went to judgment and was not abandoned as here.

In *Washburn* v. *Insurance Co.,* 114 Mass. 175, a suit at law on an insurance policy resulted in a judgment against the plaintiff. A subsequent bill in equity to reform the insurance policy was dismissed upon the ground that the plaintiff had elected. This, it will be noted, is exactly contrary to our own New Jersey decision in *Kelsey* v. *Agricultural Insurance Co.,* 78 N. J. E. 378, quoted above.

In *Metcalf* v. *Williams,* 144 Mass. 152, an attempt to repudiate a previous order to sell shares of stock was made by suing in conversion on account of their sale. The Court held that the plaintiff was assumed to know what she did in ordering the sale, and denied the right to bring the suit.

In *Elevator Co.* v. *Union Pacific Railway Company,* 97 Iowa 719, a seller of grain elected to rescind and take possession because of the insolvency of the buyer. He exercised his right of stoppage in transit and the Court held that he did not thereby acquire a lien for the price as against one who took bills of lading covering the goods as collateral. The case contains dicta in support of the contention opposed by the appellant.

In *Farwell* v. *Meyers,* 59 Mich. 179, the plaintiff rescinded the sale of goods and *recovered judgment* in replevin. The Court held that he

had elected so as to preclude a suit based on the affirmance of the contract.

In *Moller* v. *Luska,* 87 N. Y. 166, the plaintiff brought suit at law and later filed a claim in bankruptcy. The Court had before it a situation throwing no light on the present controversy, because no equitable considerations were involved.

Crossman v. *Universal Rubber Company,* 15 L. R. A. 91, supports the contention of the appellant. There it was held that election of remedies is not made by attachment and a bill in chancery based on fraud in procuring credit, so as to defeat an action on subsequently maturing purchase money notes, the remedies not being inconsistent, and being each for the recovery of the price.

Finally, the quotation from Comyn is qualified by what appears immediately after it. In his digest on the subject of election it is said,

> "If a man once determines his election it shall be determined forever, as, if an obligation delivered to the use of A be refused when he is first informed of it, he cannot afterwards accept it. But where an election is of several remedies, *if he chooses one he may afterwards have the other in personal cases, as where he has election of several actions.*"

Here, also, it is worthy of note, a decree *in personam* is sought.

It will thus be seen that there is no overwhelming mass of authority supporting the view of the learned Vice-Chancellor.

On the contrary, the view most in favor is that now contended for by the appellant. In 9 R. C. L. 961, it is said:

> "But the more reasonable rule is that the mere bringing of an action which has been

> dismissed before judgment, and in which no element of estoppel *in pais* has arisen, that is, where no advantage has been gained or no detriment has been occasioned, is not an election."

To the same effect are the following cases: *Standard Oil Company* v. *Hawkins*, 74 Fed. 395, 33 L. R. A. 739; *Register* v. *Carmichael*, 169 Ala. 588; *Johnson* v. *Missouri Pac. Rwy. Co.*, 126 Mo. 344.

In *Hope* v. *McWilliams*, 21 Penn. Sup. 137, the Court said:

> "The fact that a purchaser of land has brought suit to recover a portion of the purchase money paid by him before a deed to him has been refused will not prevent him from filing a bill in equity against the vendor for specific performance, and this is especially the case where he has discontinued the suit at law and paid the costs."

The appellant in the instant case selected by its original bill no right or title, but only a remedy, and until judgment there could be no bar to a change under the circumstances already set forth above. Recognizing this kind of a situation, R. C. L. has the following to say (9 R. C. L. 961):

> "In that class of cases in which the remedies are not inconsistent but are alternative and concurrent, there is no election until one of them has been prosecuted to judgment, unless the plaintiff has gained an advantage or the defendant has suffered a disadvantage. In some of the cases in this class it has been determined that there is no estoppel until satisfaction has been obtained."

The Court is also respectfully referred to the following cases: *Wood* v. *Claiborne*, 82 Ark. 514; *Wells* v. *Western Union Telegraph Co.*, 144 Iowa 605; *Bernhard* v. *Idaho Bank, etc. Co.*,

21 Idaho 598; *Rowell* v. *Smith*, 123 Wis. 510; *Bolton Miles Co.* v. *Stokes*, 82 Maryland 50.

On page 965 of the same volume, it is said:

> "Generally speaking, to amount to an election, the plaintiff must have prosecuted one of his actions to a final judgment or decree which has not been disturbed on appeal; and if the plaintiff has obtained a judgment at law, he may be required to proceed at law under the judgment or to proceed in equity."

The Legislature of this State has adopted the principle that the mere institution of suit does not constitute a binding election. In enacting the Uniform Sales Act, P. L. 1907, it provided in section 69 the several remedies which the buyer of goods might pursue for a breach of warranty by the seller, and then included this language:

> "When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted."

Attention is called to the fact that the words used indicate that merely claiming a remedy is not sufficient, but that it must also be granted.

In *Campbell Mfg. Co.* v. *Rockaway Pub. Co.*, 56 N. J. L. 676, a decision of the New Jersey Court of Errors and Appeals, it appeared that goods were sold under an agreement whereby the vendee gave notes for the purchase price and title was reserved in the vendor. The vendee failed to give a mortgage on the goods, which he had agreed to execute, and the vendor brought suit on the notes and recovered judgment. The Court went to the extent of holding that the vendor might thereafter retain the goods by an action in replevin.

The Court distinguished the case of *Heller* v. *Elliot, supra,* cited by the learned Vice-Chancel-

lor in his opinion, and Justice Van Syckel said this of that decision:

> "This case, we think, was correctly decided, because the levying on the property by the vendor under the attachment as the property of his vendee, was necessarily a recognition of the fact that the property did not remain in himself, but had passed to the purchaser from him."

In the case of *Storch* v. *Tepperman,* 4 N. J. A. R. 147, Vice-Chancellor Backes decreed specific performance of a contract for real estate on a bill filed by the purchaser. The defendant claimed that the complainant had waived specific performance and elected to secure damages for breach of contract, and that the owner, relying on the election, sold to another.

This latter element is not present in the case under consideration. There, as here, the Vice-Chancellor found that offers and counter-offers of settlement were going back and forth, but, as was said on page 149:

> "And it is plain that it (offer to return deposit of $500.00 down), was not made, or looked upon, or understood by the defendants as a waiver of the right to the land, for within a few days after the meeting a demand was made by the complainant's solicitor for a performance of the agreement, and on February 10th, following, the solicitor of defendant by letter communication, tendered his client's readiness to carry out its terms, and his willingness to resume negotiations. The matter was thereafter left entirely to the lawyers. * * *
>
> There was never any mistaken belief upon the part of the defendants that the complainant's husband had forsaken her right to the performance of the contract, nor that, having expressed a willingness to take money damage, he was constant in his efforts to have its terms carried into effect.

> * * * The defendants have not sustained, by the weight of the evidence, the alleged facts upon which they rest the defense of waiver, * * * there was no lack of diligence."

In *Cohen* v. *Miller,* 3 N. J. A. R. 894, Vice-Chancellor Church advised a decree refusing specific performance to a vendor who refused to take title on account of some trifling encroachments, and who, *after a delay of a considerable time, and for which no excuse was shown,* and after the property had greatly increased in value, decided to take the property. The Vice-Chancellor said:

> "It seems to me that it is unfair to the defendants to permit the complainant to delay a considerable time after his refusal to take title, defects and all, and then decide, in view of the increase in value of the property, that he will take it."

This was the guiding factor in the case which determined the Vice-Chancellor in advising the decree dismissing the bill, and the decision is therefore without control on the present controversy.

A summary of the matters advanced for the attention of the Court under Point One will disclose that the first bill of complaint was filed at a time when the information relating to a building permit, which the contract required to be known, was "unknowable," for it was non-existent.

The first bill prayed for the imposing of a lien upon the property in question to the extent of the deposit moneys paid, and for a restraint directed to the respondents, enjoining them from disposing of the property and, incidental to this relief, for a return of the deposit monies. The full development of the situation, subsequent to

that time, and the required knowledge being for the first time in existence, namely, the fact that the Supreme Court had directed a writ of mandamus to the authorities of the Village of South Orange, directing them to issue a building permit, the second bill was filed, which was supplementary to the original bill. The relief prayed for was asked as a supplement to the relief sought in the first bill.

The appellant, at the respective times of filing each of these bills of complaint, was in different mental zones, not mutually exclusive in the light of the status of the proceedings at the respective times each of the remedies was sought. Therefore they were not inconsistent, and there was no binding and complete election to warrant the dismissal of the supplemental bill for specific performance, if it can at all be said that any election was made.

The spectacle of a man carrying on an inconsistent course of action is without doubt out of harmony with good moral conduct. However grating upon the humon sense of fairness and correct dealing vacillating and inconsistent conduct may be, to embody in a strict rule of law a principle which, when applied to a set of facts such as the present, would stamp it as inconsistent and beyond the legal pale, would be to adopt a rule which would work great hardship and injustice.

POINT TWO.

The respondents are disqualified and estopped to set up as a defense to the bill for the specific performance of the contract any election which it may be found the appellant made.

The contract between the parties, it will be recalled, provided that if the appellant failed to submit plans to the proper authorities to secure a building permit within twenty-one days after the handing down of a decision in the Nutley case in this Court, then the respondents were to be at liberty to file such plans and specifications and seek a building permit. Contrary to the provisions of the contract, and before the decision in the Nutley case was handed down, the respondents, on March 24, 1924, before the date stated in the contract for the passing of title, brought suit in the Supreme Court for an alternative writ of mandamus and obtained a rule to show cause why such a writ should not issue. The Village of South Orange and its Building Inspector were made defendants, and the object of the suit was to secure a permit in accordance with the terms of the contract.

This suit continued in its developments from that time on, and the latest entry on the docket of the clerk of the Supreme Court is that of March 10, 1926, when costs were taxed after an affidavit of costs was filed on March 8, 1926.

Throughout the negotiations between the parties, and during the proceedings in the Court of Chancery, steps were taken in the mandamus suit. Subsequent to the filing of the first bill in chancery by the appellant an order for an alternative writ was made and proof of service of the writ was filed with the clerk of the Supreme Court.

Subsequent to the adjournment of the chancery suit without day, on January 14, 1925, when complainant's counsel stated in open court that the appellant would take the property if the mandamus suit was successful, a rule for a peremptory writ of mandamus was granted and filed with the clerk of the supreme Court.

Subsequent to the sending of a letter by the solicitors of the respondent to the solicitor of the appellant, in which it was stated that the respondent was unwilling to have the appellant pay the expenses of contesting an appeal, which it was claimed that the Village of South Orange had taken in the mandamus case, and offering to return the deposit moneys, the proof of service was filed in the mandamus suit, and costs were taxed as already noted. *The proof of service and taxing of costs referred to also occurred subsequent to the filing of the supplemental bill and answer.*

It will thus be seen that wherever in the course of the chancery suit it may be contended that the appellant made a binding election, the respondents, subsequent thereto, prosecuted the mandamus suit.

It is very obvious that the only reason for the continued prosecution of that suit by the respondents, was to procure a building permit so that the contract provisions might be carried out and the premises taken over by the appellant. If, as late as March 10, 1926, the respondents took a step in the mandamus suit and did not at any time discontinue it or abandon it, or in any other way withdraw from it (and nothing of that character appears on the record), then they are to be taken as (by their latest action) committing themselves to an endeavor to have

the appellant take the property, and as waiving all right to hold it to any election it might have made.

In *Quick* v. *Corlies,* 39 N. J. L. 11, the Court said:

> "The general rule is that no contract or agreement can modify a law, but the exception is, that where no principle of public policy is violated, parties are at liberty to forego the protection of the law. Statutory provisions designed for the benefit of individuals may be waived, but where the enactment is to secure general object of policy or morals, no consent will render a non-compliance with the statute effective."

If statutory provisions not designed to carry out public policy or promote public morals may be thus waived, certainly a rule embodied in the decisions of the Court of Chancery may also be waived by a party.

In *Freeman* v. *Conover,* 95 N. J. L. 89, Chief Justice Gummere said:

> "By 'waiver' is meant the act of intentionally relinquishing or abandoning some known right, claim or privilege."

In 40 Cyc. 265, it is said:

> "The more usual manner of waiving a right is by conduct or acts which indicate an intention to relinquish the right, or by such failure to insist upon it that the party is estopped to afterward set it up against his adversary."

It may be that the conduct of the respondents in this cause may more properly be termed an estoppel. The Chief Justice, in *Freeman* v. *Conover, supra,* distinguished estoppel from waiver as follows:

> "The doctrine of estoppel *in pais* rests * * * upon the principle that where anyone has done an act, or made a statement,

> which it would be a fraud on his part to controvert or impair, because the other party has acted upon it in the belief that what was done or said was true, conscience and honest dealing require that he be not permitted to repudiate his act or gainsay his statement."

Whatever the ground upon which the respondents are to be disqualified from setting up any election which it might be found the complainant made, there is ample in the case to constitute both waiver and estoppel. It is also particularly worthy to note that the Court of Chancery had complete control over this cause from beginning to end.

At this point it is well to notice the testimony of Judge Davis (S. C. p. 47), relating to the appeal from the mandamus case:

> "The Court: You prosecuted the appeal?
>
> Witness: Yes, sir; we defended the appeal of South Orange.
>
> The Court: You prosecuted the appeal?
>
> Witness: No; the appeal—the Supreme Court decision was favorable to Ingersoll, and Riker & Riker for South Orange took the appeal to the Court of Errors and Appeals from the Supreme Court and, of course, we defended the appeal for Ingersoll, because in that appeal Ingersoll was a sort of a defendant. I do not care whether we prosecuted—I don't want to mince words.
>
> The Court: It was for the purpose of reversing?
>
> Witness: They sought to reverse the Supreme Court.
>
> The Court: Did you pay them?
>
> Witness: No; we were against them. You see, Riker & Riker are counsel for South Orange.

The Court: You were not?

Witness: No.

The Court: I got the impression you were.

Witness: No; were were for Ingersoll.

The Court: When Blum said they were ready to put up the expense money, was that to Riker & Riker?

Witness: That was to us.

The Court: You were then counsel representing Orange, to take the appeal?

Witness: No; we represented Ingersoll, had secured a favorable decision against South Orange, represented by Riker & Riker on this peremptory writ of mandamus. South Orange was bitterly contesting every effort to build apartment houses in South Orange, and after we received the favorable decision of the Supreme Court, South Orange ordered Riker & Riker, their counsel, to take an appeal from the Supreme Court decision.

The Court: Not at the solicitation of Ingersoll?

Witness: No.

The Court: The offer to pay expenses by Blum—(interrupted).

Witness: Was to pay our fee for representing Ingersoll.

The Court: You using it to maintain the Supreme Court decision?

The Witness: Yes, sir, because I had told Mr. Kaplan or Mr. Blum that it didn't seem fair for Mr. Ingersoll to go on and continue to pay these expenses.

Q Was that the only obstacle in the way of you defending the appeal of Mr. Ingersoll the payment of the expense of it? A No, there was no obstacle. As a matter of fact, we went right on and defended the case for Ingersoll.

Q You do agree that Mr. Blum was willing to pay the expense of that? A Yes, sir."

This factor is brought to the attention of the Court for the reason that the rights of the appellant were greatly influenced by it. The solicitor for the respondents, by letter dated April 17, 1925 (Exhibit C. 6, p. 70, S. C.), advised the solicitor of the appellant that the appellant's offer to defray the expenses of an appeal in the mandamus suit was not acceptable. The misleading refusal of the respondents to finish what they had started and to continue the course to which they had committed themselves, would certainly warrant, in the light of their subsequent change of conduct, the entertaining of the bill for specific performance, especially since the appellant offered to defray the costs.

The Court, *with full knowledge of the facts,* entered an order *allowing the respondents to withdraw their answer to the first bill filed,* and entered an order *allowing the filing of a supplemental bill in which the relief to be sought would be that of specific performance.* If the Court did not, when it authorized the filing of such a supplemental bill, think, that the bill was bad, its subsequent reversal of its former action in allowing the bill was highly prejudicial to the rights of the appellant.

While it is not sought to technically raise an estoppel against the Court of Chancery, it would seem that that Court should not render nugatory a proceeding which it itself authorized and on which litigants relied.

The statement of the learned Vice-Chancellor that when the final hearing was continued without day there was no retreat by the complainant or withdrawal of its repudiation, is erroneous. The assurance of the complainant that the property would be taken if the mandamus suit were successful was not self-serving but was an agree-

ment between counsel which *made possible* the adjournment and was the condition upon which the adjournment was made.

We think that the learned Vice-Chancellor was very much in error when he said in his opinion (S. C. p. 62) that the "willingness and offer of the defendants to perform the contract after the Supreme Court ordered a permit was purely voluntary, without consideration, unaccepted until after withdrawal, and unexecuted, and it was only after a sharp rise in the value of the property (nearly double the contract price) pricked the cupidity of the complainant that the supplemental bill was filed."

The notice set forth on page 18 of the state of the case, wherein the solicitors for the respondents notified the solicitor for the appellant that application for an order permitting the withdrawal of the answer would be made, was served upon the appellant's solicitor *before the appellant served a notice of application for an order allowing a supplemental bill.* The notice served by Messrs. Howe & Davis was dated April 29, 1925, and the notice served by the appellant's solicitor relating to the order allowing a supplemental bill, which was received in evidence by the learned Vice-Chancellor, bears on it the date May 1. It is also to be noted that the order allowing the withdrawal of the answer was entered on May 5, 1925, while the order allowing the filing of a supplemental bill was entered on May 7, 1925. It will thus be seen that the appellant did not trim its sails to fit the prevailing tide in real estate values, but rather that the respondents' action is more indicative of an attempt to recede from their bargain.

Finally, it is to be noted, the statement of the learned Vice-Chancellor to the effect that "elec-

tion once made being irrevocable, nothing short of a contract reviving the lost remedy will restore it," is not supported by the authorities which he cites, which have already been criticised above, and is not supported by our own decisions and by the great weight of authority, quoted in 40 Cyc. 265.

The contract, it will be noted, was conditional upon two facts, namely, the affirmance of the decision of the Supreme Court in the Nutley case, *plus* the granting of a permit for the erection of an apartment house on the premises by the local authorities. The proceedings taken by the appellant, as pointed out in Point One, were not mutually inconsistent, and if they contain any elements of inconsistency, the conduct of the respondents abounds with waivers of whatever steps taken by the appellant can be held against it.

It is therefore respectfully submitted that the Court of Chancery was in error in dismissing the bill of complaint which prayed for specific performance of the contract in question, and the decree of that Court should be reversed.

Respectfully submitted,

MILTON M. UNGER,
Solicitor for and of Counsel with
Complainant-Appellant.

The Chronicle Press, Printers, Orange, N. J.

New Jersey Court of Errors and Appe

In Chancery of New Jersey

Between

THE BLUM BUILDING COMPANY,

Complainant,

and

CHARLES H. INGERSOLL, *et ux.*,

Defendants.

MEMORANDUM FOR DEFENDANT.

Facts.

This suit was originally commenced by the complainant for the return of a deposit paid by it under agreement to purchase property from the defendants, and which they alleged they were entitled to have back. It was thus in all respects equivalent to an action at law to secure the return of the money, and might easily have been disposed of in such an action. The only element present that gave a court of equity jurisdiction was the allegation of the original bill that the defendants were about to sell the premises and to depart from the State, and the prayer to have the amount of the deposit impressed as a lien upon the premises. No evidence in support of these allegations was produced and the fact that the defendants a year and a half later were still residing in the State of New Jersey renders it unlikely that such evidence could have been produced. This essential element necessary to give equity jurisdiction failing, the retention of the case in this Court must have it rest upon the fact that equity having once assumed jurisdiction might retain it.

However, we respectfully urge that, no exclusive principle of equity jurisdiction being involved, the case must rest upon the same principles as though the case had been begun at law.

It appears that the defendant, Charles H. Ingersoll, is the owner of a piece of land in South Orange suitable for apartment house purposes; that the complainant, Blum Building Company, was interested in the purchase of said premises, provided it could erect an apartment house thereon; that accordingly a contract was entered into for the purchase of that property, and a deposit of $1,000 paid by the complainant. In order to insure the erection of an apartment house, a provision was included in the contract reciting that "this agreement shall become effective and binding forthwith upon the party of the second part (complainant) obtaining a permit for the erection of an apartment house upon said premises." It was also agreed that in the event "of the party of the second part failing to obtain said permit to erect said apartment house on said premises on or before the first day of May, that this agreement shall forthwith be null and void upon the party of the first part returning to the party of the second part the One Thousand Dollar deposit above stated, except, that the party of the second part may, *if it so elect,* make this contract effective without any condition as to the issuance of said permit and take title to said premises on the terms as provided herein."

Thereupon the defendant instituted proceedings in the New Jersey Supreme Court to mandamus the authorities of the Village of South Orange to issue a building permit for an apartment house. These proceedings were commenced in the month of March, 1924. They were not, of

course, concluded by May 1, 1924, as provided by the contract. However, a supplemental agreement was made on April 30, 1924, in which it was agreed to extend the time of conditional settlement to June 1, 1924; "that if the Court of Errors and Appeals has not rendered its decision by said time affirming the decision of the Supreme Court in respect to Zoning Ordinances, then the original contract hereinabove referred to shall be null and void and the parties of the first part shall return to the party of the second part the deposit paid by virtue of and mentioned in said contract, to the same effect as stated in the provisions contained in the original contract."

The Court of Errors opinion in the Nutley zoning case (which was the one referred to in the contract), was handed down on May 19, 1924. The defendant's application to the Supreme Court (*Ingersoll* v. *South Orange,* 3 Misc. Rpts. 335 and 130 Atl., p. 721), was not decided until September 24, 1924. Because of a new question raised, the Supreme Court did not grant a peremptory writ of mandamus but an alternative one.

But in the meantime, and in August, 1924, the complainant had filed his original bill of complaint. The defendant proceeded with his application before the Supreme Court. Defendant denied the rights of complainant to relief, alleging that the complainant was obliged to await the final action of the Supreme Court. A replication was filed again denying the obligation of the complainant to await the action of the Supreme Court.

A hearing was fixed for January, 1925. As testified to by Mr. Unger, the complainant's solicitor, prior to the date fixed for the hearing he

telephoned to Judge Davis, solicitor for the defendant and suggested a postponement to an indefinite date because the final decision was expected at any time, which postponement was consented to.

A peremptory writ of mandamus was granted by the Court either in March or April, 1925 (the peremptory writ is dated April 6, 1925). South Orange, however, was not satisfied with this decision and served notice of an appeal to the Court of Errors, which would, in normal course, have the effect of delaying final decision until the fall of 1925.

It will be noted that there is nothing in the contract requiring the defendant to wait more than a very limited time after the action of the Court of Errors in the Nutley case or after the action of the Supreme Court on his own.

Up to this point there is no dispute as to the facts. Here there begins a divergence. There is nothing in writing to show a willingness on the part of the complainant to take the property pending the action of the Court of Errors. Mr. Unger, complainant's solicitor, states having a discussion with Judge Davis, the defendant's solicitor, but does not recollect offering to take the property prior to the result of the action of the Court of Errors.

Mr. Blum, the president of the complainant, testified that he was in Judge Davis's office about another matter and spoke to the Judge and said he was glad that things were being settled. He does not recollect, however, stating that he would take the property without waiting for final action. The other Mr. Blum thinks he does remember such an offer. However, this testimony was not forthcoming until it became

apparent that it was advisable that some such testimony should be produced.

Mr. Kaplan, originally the Blum lawyer, also testified to a conversation with Judge Davis, in which he claimed to have stated that his clients were willing to take the property right away. But his testimony on that point began with doubt and much hesitation, and only became positive under the urgent necessity of the case.

Judge Davis, on the other hand, was very clear that while there was some discussion about paying the expenses on further appeal, that at no time did the Blums or their attorney ever offer to take the property before the Court of Errors should decide the appeal. Certainly no tender was ever made.

The correspondence would tend to show that the alleged offer by the complainants to take the property was never made. On April 14, 1925, Judge Davis wrote to Mr. Unger:

> "I have a letter from Mr. Ingersoll this morning in which he states he will pay back the deposit of your clients, Blum Building Company, of $1,000 which they paid on the contract for South Orange. Will you please let me have a statement of your costs etc., and I will submit the same to Mr. Ingersoll."

To this, Mr. Unger replied under date of April 16th, that he understood that an agreement had been made between his client and ours regarding the matter.

Judge Davis answered this letter as follows:

> "Your letter of the 16th instant is received in the above matter. We submitted to Mr. Ingersoll your client's offer to pay for the expenses on the appeal but he is not willing to accept this proposition. If you will advise us as to your costs, etc., we shall secure a check."

It is extremely unlikely that this exchange of letters would have taken place if the Blums were, at that time, willing to take the property under all circumstances.

Everything being accomplished that the agreement contemplated, viz., the Nutley decision having been affirmed by the Court of Errors, and the Supreme Court having awarded a peremptory writ in the South Orange case, Mr. Ingersoll was justified in bringing the matter to a conclusion. Seeing no termination of the matter for six months, so far as any actions of the complainant were concerned, he was not unreasonable in changing his mind, and accepting the complainant's election. Nothing having occurred to signify that the complainant was willing to go ahead without further delay, he thereupon caused a notice to be served that he would withdraw his answer, which notice was served on complainant's solicitor April 29, 1925. It was not until this notice was served, and two days later that a notice was served upon the defendant of a motion to amend the original bill so as to ask for the contradictory relief of specific performance.

All indications point to the fact that it was not until the defendant acceded to the complainant's demand and offered to return the money that the complainant changed its mind and decided to take the property. There is no evidence except the vague statements of two witnesses that they were willing to accept it until the permit had acually been granted.

LAW.

We respectfully urge that the complainant has made an election as to which course it would pursue, that it has at no time signified a withdrawal from that course prior to the defendant's acceptance of it, and that it is bound by that election, and cannot now seek an inconsistent remedy.

The legal questions therefore, are:

Did the complainant make an election?

Is it bound by that election?

I.

Did the complainant make an election?

On June 1, 1924, the complainant undoubtedly had the right to do one of two things; it had the right to take the property and perform the contract, or, it had the right to consider the contract at an end and demand back its deposit. These two were inconsistent things; it was impossible to do both. One was in affirmance, and the other was in disaffirmance. It chose to disaffirm. This it did by unmistakable language in both letter and the bill of complaint filed herein, and replication to answer. It is difficult to see how the complainant could have signified its intention in stronger language. Had the defendant chosen to accept that disaffirmance and return the money, or had he sold the premises to any one else, relying upon that action, this action could not now be sustained. There is no question as to its having made its choice.

II.

Is the complainant bound by that election?

On this point the authorities are not in agreement. However, until some action appeared revoking that election, under any of the authorities he would be bound.

20 C. J., Section 6, page 5.

> Whenever the law supplies a person with two or more remedies for the redress of a given wrong or the enforcement of a given right, and these remedies are based upon inconsistent theories, however these remedies may differ either in the form or the forum of procedure or in the personality of the parties to the several proceedings, such person is put to his election. In other words, a suitor is not permitted to invoke the aid of the courts upon contradictory principles or theories based upon one and the same set of facts. The doctrine of elections is not restricted to any class of remedies. Thus a party may be required to elect between two or more actions *ex contractu,* or two or more *ex delicto,* or between remedies one or more of which belong to one class and one or more to the other or between remedies all equitable, or remedies one or more of which are equitable and the residue of legal cognizance. The fact that the distinctions between actions at law and suits in equity have been abolished, and that plaintiff may have either legal or equitable relief, or both, in the same suit, does not affect the rule requiring election between inconsistent remedies. But before an election can be required it must appear that the party has in fact more than one remedy, and that they are inconsistent, and not analogous, consistent, and concurrent.
>
> When conditions arise which authorize a party to rescind a contract he must elect whether he will rescind or whether he will pursue his remedies under the contract,

since he cannot do both, the remedies being inconsistent; and the pursuit of either of those remedies is an election which prevents resort to the other.

Weeks *v.* Reeve, 65 Fla. 374, 61 S. 749; Bowen *v.* Mandeville, 95 N. Y. 237 (Aff. 29 Hun. 42); Genet *v.* Delaware, etc., Canal Co., 28 App. Div. 328, 51 N. Y. S. 377; Fields *v.* Brown, 160 N. C. 295, 76 Se 8; Stinson *v.* Sneed, (Tex. Civ. A.) 163 S. W. 989. CASES ILLUSTRATIVE OF THIS PRINCIPLE are those where property has been obtained by reason of fraudulent representations. The party may elect to sue upon the ground of fraud, or upon the implied contract to pay the value of the property obtained * * * and the pursuit of either of these remedies is an election which prevents resort to the other. A similar rule prevails in those cases where a party has the right to rescind a contract because of fraud. He may, after knowledge of the fraud, rescind and recover back that with which he has parted, or he may continue to perform on his part and, unless he has waived the fraud, maintain an action for the damages sustained. If he rescinds, he must do so immediately on discovering the fraud, and if he continues to perform under the contract, he will be considered to have elected to affirm it." Genet *v.* Delaware, etc., Canal Co., 28 App. Div. 328, 332, 51 N. Y. S. 377.

Weeks v. *Reeve,* 65 Fla. 374, 61 S. 749; *Genet* v. *Delaware, etc., Canal Co.,* 28 App. Div. 328, 51 N. Y. S. 377; *Van de Wiele* v. *Garbare,* 60 Or. 585, 120 P. 752; *Hold Mfg. Co.* v. *Strachan,* 77 Wash. 380, 137 P. 1006.

When circumstances arise which give one a right to sue for breach of contract or for specific performance he cannot do both and should be put to his election.

Otto v. *Young,* 227 Mo. 193, 127 S. W. 9.

20 C. J., Section 10, page 13. A remedy based on the theory of the affirmance of a contract or other transaction is inconsistent with a remedy arising out of the same facts and based on the theory of its disaffirmance, or rescission, so that the election of either is an abandonment of the other. Where a party rescinds a contract the law does not permit him thereafter to make use of it as subsisting for the purpose of claiming damages, or for the purpose of recovery thereon. *Stinson* v. *Sneed,* (Tex. Civ. A.) 163 S. W. 989.

While the decisions are not harmonious as to the effect of commencing an action to enforce one or two or more remedial rights arising out of the same facts, in the absence of mistake, or some other legal excuse, according to the weight of authority the mere commencement of any proceeding to enforce one remedial right, in a court having jurisdiction to entertain such proceeding, is such a decisive act as constitutes a conclusive election, barring the subsequent prosecution of inconsistent remedial rights.

> "The great weight of authority is to the effect that, where the duty to elect applies, then the bringing of an action based upon one of the remedies or rights constitutes an election which is irrevocable except in case of mistake of fact or some other good and sufficient legal excuse." Howard *v.* J. P. Paulson Co., 41 Utah 490, 495, 127 P. 284.

> "It is not, however, the judgment which may be obtained, but the commencement of a suit to enforce a coexisting remedy in a court having jurisdiction, which constitutes the decisive act and makes the election binding." *Frisch* v. *Wells,* 200 Mass. 429, 431, 86 N. E. 775, 23 L. R. A. N. S. 144.

> "The conclusiveness of her election does not depend upon the chances of success that may attend her suit, but upon the fact that

she has resorted to a remedy which is inconsistent with the one she now seeks to maintain, and has made such election with full knowledge of the facts in each case."

Robinson v. *Robertson,* (Nev.) 180 P. 122, 124.

"The suit first commenced, in point of time, controls, and, when the remedies are inconsistent, such prior suit is an election of remedy and prevails. A subsequently commenced action between the same parties, for the same cause of action, seeking a different relief, will abate even though the prior action has been dismissed, because the plaintiff elected his remedy and cannot have two remedies for the same wrong."

Dowdy v. *Calvi,* 14 Ariz. 148, 154 125 P. 873.

In *Bush* v. *Barksdale,* 122 Ark. 262, 265, L. R. A. 1917A, 111, 183 S. W. 173, we said:

"The principle that an election of remedies is irrevocable seems too plain for argument to the contrary, and its application to the proceeding now under discussion is obviously proper."

In 20 C. J., at page 38, the authors make this statement:

"An election, once made, between coexisting remedial rights which are inconsistent, is not only irrevocable and cannot be withdrawn without due consent, even though it has not been acted upon by another to his detriment, but it is also conclusive and constitutes an absolute bar."

Among numerous authorities cited to support the text is the case of *Bush* v. *Barksdale, supra.*

Elliot, in his work on Contracts (Vol. 3, Section 2097), says:

"It is the doctrine of election of remedies that one having the choice of two or more inconsistent remedies for his relief is bound

> by his selection of the remedy he will pursue, and he cannot thereafter avail himself of the other remedies * * * So, where the party brings an action at law for damages for the breach, he cannot thereafter maintain a suit in equity to enforce specific performance * * * It should be observed, however, that the mere fact that a party mistakes his remedy, and pursues the wrong one at first, may not prevent him from afterwards pursuing another remedy."

In *Zutterling* v. *Drake* (1907) 30 Ohio C. C. 561, it was held that the bringing of a suit by vendees against vendor for the specific performance of a contract is an election of remedies which will bar a subsequent action for damages for breach of the contract, although the first suit is dismissed "without prejudice" during the pendency of the second action; and that such dismissal does not preclude the institution of a new suit for specific performance within a reasonable time.

Where plaintiffs brought first a suit to compel the specific performance by the defendant of his contract for the execution of a lease for four years, and later brought an action for damages suffered by reason of defendant's failure to carry out his contract, and it appeared that, after beginning such action for damages, the first suit was "dismissed without prejudice, at plaintiff's costs," it was held that the "plaintiffs elected, in filing their first suit, to compel specific performance, and, having made their election, they must rely upon that, and cannot now abandon that suit or bring an action for damages for breach of the same contract." *Lee* v. *Thoma* (Ohio) *supra*—citing *Zutterling* v. *Drake*.

It may be noted that it was held in *Stanton* v. *Driffkorn* (1908) 83 Neb. 36, 118 N. W. 1092, that

the Court in its discretion should deny specific performance where the assignees of the vendee in concurrent contracts for the sale of land and personal property had first brought an action at law asking for the return of the money paid when the contracts were made, and also for damages for refusal of the defendants to carry out the contracts, and later had dismissed such action without prejudice and brought the present suit for specific performance. The Court said (the plaintiff having commenced said action at law):

> "We think defendants had a right to assume that plaintiffs no longer intended to insist upon a performance of the terms of the written contract by defendants, and that defendants then had a right to make such disposition of the personal property set out in the bill of sale as they might deem proper. This defendants proceeded to do, and thereby materially changed their situation to their disadvantage, if plaintiffs should subsequently attempt to specifically enforce the contract * * * The defendants were entitled to know what course plaintiffs were going to take, and having elected to proceed at law, they should not be permitted to subsequently abandon that proceeding and proceed in equity, simply because it then appeared that that would be more advantageous to them; this, too, regardless of the fact as to whether or not plaintiffs had two distinct remedies, the one inconsistent with the other."

The case of *Belding* v. *Whittington,* 154 Ark. 561, 243 S. W. 808, hold that an action for damages for breach of contract to convey real estate is dismissed without prejudice does not destroy its effect as an election of remedies, so as to bar an action for specific performance of the contract.

> "The first question for our consideration is whether or not the appellants are barred

> from maintaining the present action for specific performance because they had instituted an action in the circuit court of Garland County for damages for an alleged breach of the contract on the part of H. A. Whittington and the Woottona, in failing to execute and deliver to the appellants a warranty deed to the land in controversy. An action at law for damages growing out of an alleged breach of contract for failure to execute a deed is inconsistent with an action in equity seeking to have the contract specifically performed by having the deed executed. One cannot maintain an action at law for damages growing out of an alleged breach of contract in failing to execute a deed, and at the same time maintain an independent action in equity to require the same party to perform the contract by executing the deed. Where a vendor fails to comply with his contract to execute a deed, unquestionably, the vendee may stand on the contract and sue the vendor for damages for his failure to comply therewith; but when the vendee elects to do this, he necessarily abandons his right to require the vendor to specifically perform the contract by executing the deed."

The syllabus to *Storch* v. *Tepperman,* IV N. J. Adv. Repts., p. 147, says "An election to take damages for breach of contract for the sale of land will bar specific performance." What Backes, *V.-C.,* says in the opinion is "If she elected and relying upon the election, the owner sold the property to Becht, the complainant is not entitled to the extraordinary relief of specific performance." The facts in the case however, and in the cases quoted in that opinion, are not particularly relevant, and the theory of estoppel is considered rather than that of election.

It has been decided, however, in New Jersey that the commencement of an action is an elect-

tion of remedies. In the case of *Kvedar* v. *Shapiro* (Errors and Appeals) 98 N. J. L. 225, the facts were not identical, but a vendee was put to it to choose between an action for fraudulent misrepresentation to recover back what he had paid, or to affirm the contract and recover damages. These were two inconsistent remedies, as in the present case. The opinion says "When he instituted his action for fraud and deceit this was an election of remedies. It is difficult to see how the trial judge could have required the plaintiff to make an election he already had made."

It is not, however, necessary to decide this case on the theory of election of *remedies,* but it may be decided on the theory of election of *rights* under the contract. A remedy is a relief afforded by a Court where one party has failed to perform his part of a contract. In this case, the contract itself, gave the complainant the right to choose between two certain things; it might take the property as it was, it might refuse to take the property and have the money paid back. Under the terms of the contract it could not have both; it must choose one or the other. It had no right to exercise that choice before a certain date, to wit, June 1, 1924, but after that date, if a certain thing failed to materialize, it might choose. After June 1st, it did choose. It chose to have its money back. This was not an election of remedies but an election of rights under the contract. Having once made its election, it could not subsequently change. It is true that with the consent of the other party it might abandon its choice and select the other right, but that would have to be with the consent of the other party. Now it may be argued that by refusing to accept the choice and by insisting

in its answer to the original bill of complaint that the defendant waived its right to hold the complainant to that choice. That waiver however could be nothing more than an offer to the complainant to accept the other right, and would be good only until refused or withdrawn. It was both refused and withdrawn before the other right was accepted. In the reply to the answer the complainant in the original suit said: "It (complainant) denies the matters and things set forth in the Answer, and alleges that it is not bound to await the determination of the New Jersey Supreme Court in the suit therein referred to." This was a rejection of defendants' offer. Subsequently thereto, and before the offer was afterward accepted (even assuming that the offer was kept open notwithstanding the rejection of it) the offer was withdrawn when the defendant's solicitors wrote the complainant's solicitors offering to return the deposit and following that up by notice of a motion to withdraw the answer. It will be observed that this notice of motion was served several days prior to the notice that complainant served of his desire to file an amended bill. The Court granted both motions, but, at the time of granting the orders, there was then a withdrawal of the answer, and only permission to file a supplemental bill. The supplemental bill was not filed until May 12, 1925, a full week after the answer had been withdrawn. That, we respectfully urge, left the parties just where they had been at the time issue was joined on the original suit. The complainant had chosen which right to pursue, and no remedy inconsistent with that right might be enforced. In other words, having selected his right, he must bring such action as might be necessary to enforce that and not some different right. If it be said that the contest of the action

by the defendant kept alive the complainant's option, at least that option ceased the moment the defendant withdrew or offered to withdraw that contest and acquiesced in the complainant's action. This all happened before the complainant definitely changed its mind.

It may be argued that the complainant prior to the filing of the supplemental bill withdrew from its attitude and signified its willingness to take the property. This we deny. Any such willingness was always qualified and accompanied with conditions. At the time the hearing was adjourned there was no offer to take the property. It was intimated that if the Supreme Court decision was favorable the deal would go through. But had it been unfavorable it is practically certain that it would not have gone through. And when the Supreme Court did decide favorably, and it was learned that South Orange would appeal, *there was still no offer to take the property unconditionally.* On the contrary there was talk about paying the expenses of the Court of Errors and Appeals suit. The defendant waited for the Nutley decision, confidently expecting that when it was rendered the purchase price would be paid. Disappointed in this defendant waited for the decision in his own case. Again a favorable decision failed to bring performance of the contract on the part of the complainant, who talked only of carrying on the Court of Errors appeal. The defendant had done all he agreed to do in the way of removing zoning objections, and when it appeared that definite action could not be expected before October, he decided to acquiesce in complainant's attitude and let him have his money back. The complainant was given full opportunity to take the property. Having signified its desire to get its deposit back, and never withdrawn definitely from

that attitude, Mr. Ingersoll was justified in accepting that and returning the money. The complainant had no right to make him hold his property open indefinitely.

In *Claron* v. *Thompson,* 2 N. J. Adv. Repts., 1509, at page 1512, the opinion of the Court of Errors says:

> "When on March 7, 1922, following the long lapse of time in which he made no effort to complete the purchase, he instituted suit against Claron to recover the deposit money of $1,000, he irrevocably committed himself in solemn form to a repudiation of all obligation under the agreement. Having taken this step in rescission of the contract, he will not now me permitted to seek its enforcement in a court of conscience."

There the contract was made on September 4, 1921, and the Court held that a suit begun for the purchase money on March 7, 1922, is a long space of time. In the present case the contract was made on March 10, 1924. The suit was begun in August, 1924. It was not until May, 1925, that the complainant attempted to change its mind, a year and two months after the making of the contract.

We urge that the statement of law made in that case is applicable to the present one, and that the complainant "irrevocably committed himself in solemn form to a repudiation of all obligation under the agreement."

In the case of *Naugle* v. *Bauman,* 3 N. J. Adv. Repts., 111, it is true that the Vice-Chancellor said:

> "It was open to him in June or July, 1922, to offer his money to Mackvoy to obtain or seek to obtain conveyances and if such conveyance was refused to have filed bill for specific performance abandoning his suit at

> law for the return of his money in which his appeal was then pending and undetermined. This he did not do. The determination of that appeal was made known by opinion filed November 20, 1922, so that Naugle clearly persisted in a choice and determination to rescind his contract and to procure the return of his money."

We respectfully urge that this statement not being necessary to the decision of that case was *obiter dictum* and hence not binding upon this Court as an authority. In any event, it did not abandon its claim for the purchase price until after the defendant had notified that it would accept its election.

The case of *Cohen* v. *Miller,* 3 N. J. Adv. Repts., 894 is in favor of the defendant's view rather than of the complainant's.

It is urged in the appellant's brief that "The complainant was at the date of the filing of the first bill ignorant of the existence of two remedies for it had no knowledge and could have none, of what would be the outcome of the Supreme Court suit." This is evidently an attempt to bring the case within the principle quoted from 20 C. J. 35, which states:

> "In order to constitute a binding election the party must, at the time the election is alleged to have been made, have had knowledge of the facts from which the co-existing, inconsistent remedial rights arise, since any position taken by a party before knowing all the facts should be classed as a mistake and not as an election. If a party acts in ignorance of material facts, he may, when informed, adopt a different remedy, even though inconsistent, unless of course, the rights of innocent persons have intervened."

The argument, however, is a specious one. There was no mistake made as to the complain-

ant's rights. The complainant had as full knowledge of the existing facts as the defendant had. To be sure, it was unaware of what the result of the Supreme Court action would be but it did have some approximate idea as to the amount of delay necessarily involved. The complainant was then confronted with three alternatives. It might take the property as it stood with the uncertainty as to whether the particular permit would be granted. It might, with the defendant's consent, postpone action until that fact was ascertained. Or it might, under the explicit terms of the contract, call the whole deal off and ask for the return of its deposit. Early in the proceedings, the defendant chose the second alternative and an extension of the terms of the original contract was entered into in writing. At the expiration of this extension, however, the situation continued the same. Thereupon the complainant made a definite choice to consider the contract rescinded and asked for the money back. This it did by making a demand and by commencing this suit in the Court of Chancery. It is not then true to state that the complainant was ignorant of its rights. On the contrary, the evidence shows that the complainant had full knowledge of its rights and was, in every step it took, under the guidance of competent legal advice.

It is further urged that when the bill of complaint was filed, the opinion relating to the permit was "unknowable" for it was non-existing. This being so, there could be no "mistake" in regard to it because a mistake can only occur about a thing actually in existence. The manner in which the complainant made his election was the equivalent of the following statement: "It might be true that at some time in the future this

permit will be granted. Nevertheless, under our contract, we are not obliged to wait until that time and will not do so. We want our money back now no matter what the future may bring." The appellant also states that at the respective times of filing each of his bills of complaint, it was "in different mental zones." This is probably true. Our point is that having definitely chosen one mental zone, it could not afterwards select a different and inconsistent one.

III.

Point two raised by the appellant.

This point can best be answered by the language of the Vice-Chancellor in his opinion:

> "It is the contention of the complainant that the subsequent conduct of the defendants, and the dealings of the parties, released it of its election, or, if not released, that the defendants are estopped from setting up the election. An election once made, being irrevocable, nothing short of a contract reviving the lost remedy will restore it. In Moller *v.* Luska, 87 N. Y. 166, the plaintiffs brought an action in replevin to recover property procured by fraud in the sale. Afterwards the vendee was declared a bankrupt and the plaintiffs filed their claim with the assignee in bankruptcy and received a dividend which they later returned on demand and their claim was repunged. The filing of the claim and acceptance of the dividend was held by the Court below as an affirmance of the contract, a second election, and a bar to the recovery of the property. In reversing the judgment of dismissal the Court of Appeals, speaking through Judge Danforth, said 'The plaintiffs manifested their election by bringing this action. After that, the other way of redress was not open to them; for, according to Comyn (Dig. Elect. C., 2), if a man once determines his

election it shall be determined forever. Hence, they could never successfully assert a claim against the purchaser under the contract, for the election to disaffirm it had been manifested, and to revoke it was not in their power' and 'We are of opinion that by the election made to disaffirm the contract of sale and resume their property, the rights of the plaintiffs to maintain this action became fixed, and could only be extinguished by release or actual payment, or the making of a new engagement.'

"While a contract of release, or a counter estoppel, is not deemed available to the complainant, nevertheless the reasons upon which it seeks to avoid the effect of its election will be considered and disposed of.

"It cannot be said that the answer to the suit for the deposit, that it was not due because the time of performance had been extended until the decision in the mandamus suit, waived the election. The answer amounted to a denial of liability at that time, and the allegations therein of an agreement to extend the time was expressly denied by the complainant in its replication and its right to recover the money was reasserted. The replication constituted a renewal of the disaffirmance of the contract. Nor can the complainant's choice of remedy be considered as falling within the class of cases where relief is given because of mistake of fact or law, for, if there was in fact an extension of the time of performance, as the defendants alleged and the complainant denied, and which denial the complainant cannot escape the indictment that it brought its suit in bad faith and that it made its election with full knowledge of the agreement to which it was a party, if it be true, as it now claims, that there was such an agreement.

"The representation of the complainant's counsel at the time he sought an adjournment of the hearing in January, 1925, that his client intended to take the property if the mandamus suit resulted favorably to his

client, was merely by way of inducement to a consent to the postponement of the trial of the issue then before the Court. There was no retreat by the complainant, or withdrawal of its repudiation of the contract; it was simply a self-serving assurance that it would take if the outcome of the suit at law, and the taking, would be advantageous, but otherwise it would adhere to its disaffirmance.

"The willingness and the offer of the defandants to perform the contract after the Supreme Court ordered a permit was purely voluntary, without consideration, unaccepted until after withdrawal, and unexecuted, and it was only after a sharp rise in the value of the property (nearly double the contract price) pricked the cupidity of the complainant that the supplemental bill was filed."

RECAPITULATION.

1. Blum Building Company was obligated under the contract to make the application for the building permit and to conduct the mandamus proceedings. They did neither.

2. The contract provided that if the Court of Errors had not by June 1, 1924, rendered its decision in the Nutley case, Ingersoll would return the deposit money. This decision was rendered on May 19, 1924, but did not cover the points desired and subsequent to June 1, 1924, Blum Building Company demanded back its money.

3. They rescinded the contract and demanded back the $1,000 and there the matter stood until January, 1926, when Mr. Unger, their counsel, and Mr. Thomas A. Davis, agreed on an adjournment of the case to cover the period that the Supreme Court would give a decision in the mandamus instituted by Ingersoll.

4. When the Supreme Court gave the decision, Mr. Davis notified Blum's attorney (Mr.

Kaplan and Mr. Unger) that they should not take the property or Mr. Ingersoll would return the $1,000 deposit. The Blum Building Company would not take the property after South Orange decided to appeal to the Court of Errors and Appeals but made the offer that they would pay the expenses of Ingersoll in defending the appeal.

5. The following correspondence then took place:

"April 14, 1925.

Milton M. Unger, Esq.,
Prudential Building,
Newark, N. J.

My dear Mr. Unger:

I have a letter from Mr. Ingersoll this morning in which he states he will pay back the deposit of your clients, Blum Building Company, of $1,000. which they paid on the contract for South Orange. Will you please let me have a statement of your costs etc. and I will submit the same to Mr. Ingersoll.

Yours truly,
Thomas A. Davis."

This was answered as follows:

"April 16, 1925.

Howe & Davis, Esqs.,
282 Main St.,
Orange, N. J.

Gentlemen:— Re: Blum vs Ingersoll.

I have your letter of the 14th inst.

Mr. Blum called here yesterday and told me that he had practically concluded arrangements whereby he was to defray the cost of the appeal, if the city took one in the zoning case, and that he was then to take the title.

Is there any misunderstanding about this?

Very truly yours,
Milton M. Unger."

Judge Davis replied as follows:

"April 17, 1925.

Milton M. Unger, Esq.,
763 Broad Street,
Newark, N. J.

Dear Sir:— Re: *Blum vs Ingersoll*

Your letter of the 16th instant is received in the above matter. We submitted to Mr. Ingersoll your client's offer to pay for the expenses on the appeal but he is not willing to accept this proposition. If you will advise us as to your costs, etc., we shall secure a check.

Yours truly,
Howe & Davis."

6. There the matter stood again until April 29, 1925, when Ingersoll's solicitors gave notice of an application to withdraw their answer. Two days later, Blum's solicitors gave notice of an application to file a supplemental bill. Both motions came up before the Court on May 5, 1925. The Blum motion was opposed on the ground that the relief to be asked for in the supplemental bill was absolutely inconsistent and opposed to the relief asked for in the bill before the Court, and directly opposite. The Court granted both motions. In filing answer to the supplemental bill, Ingersoll's solicitors reserved the right to move to dismiss the supplemental bill for the reasons above stated, which was done at the final hearing.

For the foregoing reasons, it is respectfully contended that the decree of the Court of Chancery should be confirmed.

Respectfully submitted,

HOWE & DAVIS,
Solicitors and of Counsel with
Defendants.