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BILL OF COMPLAINT.

In Chancery of New Jersey

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

Complainant, David L. Heller, of the Village of South Orange, in the County of Essex and State of New Jersey, respectfully shows:

1. On or about the 24th day of December, 1924, complainant entered into a certain contract in writing with Patrick Sweeney, a copy of which agreement is hereto attached, wherein and whereby the said Patrick Sweeney agreed to sell to complainant certain premises on the easterly side of Ridgewood road, lying directly South of #413 Ridgewood road, and being fifty feet front by one hundred feet in depth, for the price therein mentioned, upon ten days' notice after the securing of a building permit from the Township of Maplewood, in pursuance of certain proceedings which the complainant was to commence in the New Jersey Supreme Court.

2. Said premises are located in the Township of Maplewood, County of Essex and State of New Jersey, and are described as follows:

BEGINNING at a point in the Southeasterly side of Ridgewood Road distant therein fifty feet Southwesterly from the intersection of the said Southeasterly line of Ridgewood Road with the Southwesterly side of East Cedar Lane; and running thence parallel with East Cedar Lane, South forty-four degrees fifteen minutes East one hundred feet; thence South forty-five degrees forty-five minutes

West fifty feet; thence North forty-four degrees fifteen minutes West one hundred feet more or less to the Southeasterly side of Ridgewood Road; and thence along the same North forty-six degrees seventeen minutes East fifty feet to the point and place of BEGINNING.

3. On May 11th, 1926, the New Jersey Supreme Court granted a writ of mandamus requiring the Township of Maplewood and its Building Inspector to deliver to complainant a building permit allowing the complainant to erect stores on said premises. On May 17th, 1926, an order was entered in the said Supreme Court granting a peremptory writ and on the 18th day of May, 1926, the peremptory writ was granted. The said writ was subsequently served upon the authorities of the Township of Maplewood and a permit duly issued and received by complainant on or about the 27th day of May, 1926.

4. Thereupon complainant caused notice to be given to the said Patrick Sweeney, through his attorneys, Messrs. Howe & Davis, of his intention and desire to take title to the said premises.

5. The said contract referred to in paragraph 1 hereof was recorded in the office of the Register of Essex County on July 24th, 1925, in Book Q 72 of Deeds for Essex County, on page 340. Complainant has been informed and subsequently verified the fact that by deed dated March 11th, 1926, and acknowledged May 6th, 1926, and recorded May 19th, 1926, in the Office of the Register of Essex County, the said Patrick Sweeney, the defendant herein, made and

executed to the National Engineering Company, a corporation of the State of New Jersey, a deed for the premises described in complainant's said contract. Complainant charges that the said conveyance was taken by the said National Engineering Company with full knowledge of the terms of complainant's said contract with said Patrick Sweeney and therefore is bound by the terms thereof.

6. Complainant is desirous of obtaining a conveyance of the said property from the said Patrick Sweeney, and the vendee of the said Patrick Sweeney, the National Engineering Company.

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

1. That Patrick Sweeney and National Engineering Co., who are the defendants to this suit many answer this bill of complaint and each statement therein made.

2. That the said defendants, or one of them, may be decreed specifically to perform the said agreement entered into by the said Patrick Sweeney and complainant, the complainant tendering himself ready and willing and hereby offering to specifically perform the said agreement on his part.

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

HOWE & DAVIS,
Solicitors for and of Counsel
with Complainant.

ARTICLES OF AGREEMENT, made the 24th day of December in the year A. D. One Thousand Nine Hundred and twenty-four BETWEEN Patrick Sweeney of the Village of South Orange, in the County of Essex, and State of New Jersey, party of the first part, AND David L. Heller, of the Village of South Orange, 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 two thousand 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 the said party of the first part, will well and sufficiently convey to the said party of the second part, his heirs and assigns, by Deed of Warranty free from all encumbrance, on or before the hereinafter mentioned next ensuing the date hereof, all that lot, tract, or parcel of land and premises, hereinafter particularly described; situate, lying and being in the Township of Maplewood in the County of Essex, and State of New Jersey:

Being a vacant lot 50 feet front by 100 feet in depth situated on the easterly side of Ridgewood Road lying directly south of #412 Ridgewood Road.

AND the said party of the second part, for his heirs, executors and administrators, doth covenant, promise and agree to and with the said party of the first part, his heirs, executors, administrators and assigns, the said party of the second party, will pay and satisfy, or cause to be paid and satisfied unto the said party of the first part, the said sum of two thousand dollars

as and for the purchase money of the foregoing described land and premises, in the following manner, that is to say;

$ 200	in cash on the execution hereof, receipt of which is hereby acknowledged;
1,800	in cash on the closing of title.
$2,000	

It is understood that the said David L. Heller will apply with the consent of the said Patrick Sweeney for a building permit for the construction of stores on said lot of land and if necessary will undertake court proceedings for the securing of said permit, such proceedings to be at the expense of the said Heller. In the event that he is unsuccessful in securing said building permit either by application or court proceedings, the said deposit of $200 will be returned by the said Sweeney to the said Heller. The said title will close upon ten days' notice after the securing of said building permit, or the final refusal thereof by the court.

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

AND IT IS FURTHER AGREED, by the parties hereto, that the said Deed of Warranty shall be delivered and received at the Law offices of Howe & Davis, Orange National Bank Building, Orange, New Jersey, between the hours of ten o'clock in the forenoon and four o'clock in the afternoon, on the said day hereinbefore mentioned next ensuing the date hereof.

The rents of said premises, insurance premiums, water rents, taxes, and interest on mortgage, if any shall be adjusted, apportioned and allowed as of the day of delivery of said deed.

Gas and electric fixtures and chandeliers, window and door screens, window shades and heating apparatus, if any, are included in this sale.

The risk of loss or damage to said premises by fire or otherwise until the delivery of said deed is assumed by the party of the first part.

In case the premises shall suffer injury beyond the ordinary wear and tear, the party of the first part shall repair the damage before the date set for delivery of said deed or make an appropriate deduction from the purchase price herein stated.

It is understood and agreed that the buildings upon said premises are all within the boundary lines of the property as described in the deed therefore, and that there are no encroachments thereon and that the buildings comply with municipal ordinances and regulations and the regulations of the New Jersey State Board of Tenement House Supervision, to be shown by the report of the Secretary, where such ordinances and regulations apply.

It is expressly understood and agreed that the title to the land and premises hereby agreed to be conveyed is not derived from any Martin Act proceedings or any act for the sale of land for non-payment of municipal taxes or assessments. It is further understood and agreed that said premises are subject to the effect of all municipal zoning ordinances, if any.

The cost of all completed street improvements affecting said premises, whether assessed or not, shall be paid by the seller at the closing of title hereunder.

And for the performance of all and singular the covenants and agreements aforesaid, the said parties do bind themselves and their respective heirs, executors and administrators; and they hereby agree to pay, upon failure to perform the same, the sum of which they hereby fix and settle as liquidated damages therefor.

In witness whereof, the said parties have hereunto interchangeable set their hands and seals the day and year first above mentioned.

PATRICK SWEENEY (L. S.)
DAVID L. HELLER (L. S.)

Signed, Sealed and Delivered
in the presence of

Thomas A. Davis.

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

Be it remembered, That on this 23rd day of July, in the year of our Lord One Thousand Nine Hundred and twenty-six, before me, the subscriber, a Master in Chancery of New Jersey, personally appeared David L. Heller, who, I am satisfied is the grantor mentioned in the within Instrument, to whom I first made known the contents thereof, and thereupon he acknowledged that, he signed, sealed and delivered the same as his voluntary act and deed, for the uses and purposes therein expressed.

EDWARD L. DAVIS,
M. C. C. of N. J.

CONTRACT FOR PROPERTY.

PATRICK SWEENEY

with

DAVID L. HELLER.

Dated December 24th, 1924.

Received in the Register's Office of the County of Essex, N. J. on the 24th day of July, A. D. 1925, at 9:29 o'clock in the forenoon, and recorded in Book Q-72 of Deeds for said County, on pages 340-341.

HOWARD S. DODD,
Register.

ANSWER OF DEFENDANT NATIONAL ENGINEERING COMPANY.

IN CHANCERY OF NEW JERSEY.

Between

DAVID HELLER,
Complainant,

and

PATRICK SWEENEY, *et al.*,
Defendants.

On Bill, &c.

Answer of Defendant, National Engineering Company, a Corporation organized under the laws of the State of New Jersey.

Defendant National Engineering Company, a Corporation of the State of New Jersey having its principal office at No. 24 Branford Place in the City of Newark, answering the bill of complaint, respectfully says that

1. This defendant admits the execution of the contract mentioned in the first paragraph of the bill of complaint and says that the terms of said contract are more fully set forth in the agreement attached to the bill of complaint.

2. This defendant admits the allegations of the second paragraph of the bill of complaint.

3. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph three of the bill of complaint.

4. This defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph four of the bill of complaint.

5. This defendant admits the allegations of paragraph five of the bill of complaint except that this defendant denies that it is bound by the terms of said contract with Patrick Sweeney.

FIRST SEPARATE DEFENSE.

By way of separate defense this defendant says further that

6. Complainant is guilty of laches and is not entitled to relief from this court.

SECOND SEPARATE DEFENSE.

By way of separate defense this defendant says further that

7. In the agreement upon which complainant bases his claim to relief no date is fixed for its consummation.

8. Complainant did not within three months after the date of said agreement commence suit for the specific performance of said agreement, nor did complainant within three months from said date file a notice of the pendency of such suit in the office of the Register of Deeds and Mortgages of the County of Essex.

9. This defendant is a purchaser for value of the premises described in the said agreement, within the contemplation of the statute in such cases made and provided.

10. Therefore, the agreement upon which complainant bases his claim to relief is absolutely

void as against this defendant by reason of said statute.

THIRD SEPARATE DEFENSE.

By way of separate defense this defendant says further that

11. The agreement upon which complainant bases his claim to relief is in its terms too indefinite to be specifically enforced by this court.

ARTHUR R. LEWIS,
Solicitor for Defendant
National Engineering Company.

ANSWER OF DEFENDANT PATRICK SWEENEY.

IN CHANCERY OF NEW JERSEY.

Between	*On Bill, &c.*
DAVID HELLER, *Complainant,*	*Answer of the Defendant Patrick Sweeney.*
and	
PATRICK SWEENEY, *et al., Defendants.*	

Defendant, Patrick Sweeney, residing in the Township of South Orange, County of Essex and State of New Jersey, answering the bill of complaint, respectfully says that:

1. He admits the execution of the contract mentioned in the first paragraph of the bill of complaint and says that the terms of said contract are more fully set forth in the agreement attached to the bill of complaint.

2. He admits the allegations of the second paragraph of the bill of complaint.

3. He has no knowledge or information sufficient to form a belief as to the allegations of paragraph three of the bill of complaint.

4. He admits the allegations of paragraph four of the bill of complaint.

5. He admits the allegations of paragraph five of bill of complaint.

FIRST SEPARATE DEFENSE.

By way of separate defense, this defendant further says that

6. Complainant is guilty of laches and is not entitled to relief from this court.

SECOND SEPARATE DEFENSE.

By way of separate defense this defendant further says that

7. The agreement upon which complainant bases his claim to relief is in its terms too indefinite to be specifically enforced by this court.

THIRD SEPARATE DEFENSE.

By way of separate defense this defendant further says that

8. The complainant did not perform the terms of his contract so as to entitle him to relief in this court in that he failed, neglected and refused to diligently apply for a building permit and to diligently prosecute suit to obtain the same, and he delayed so long in the doing of the same that he greatly prejudiced this defendant's rights and is therefore not entitled to relief in this court.

ALEXANDER M. GOLDFINGER,
Solicitor for Defendant Patrick Sweeney.

REPLICATION.

IN CHANCERY OF NEW JERSEY.

Between DAVID HELLER, *Complainant,* *and* PATRICK SWEENEY, *et al.*, *Defendants.*	*On Bill, &c.* *Replication to Answer of Defendant National Engineering Company.*

This complainant joins issue on the answer of the defendant, National Engineering Company.

HOWE & DAVIS,
Solicitors of Complainant.

REPLICATION.

IN CHANCERY OF NEW JERSEY.

Between DAVID HELLER, *Complainant,* *and* PATRICK SWEENEY, *et al.*, *Defendants.*	*On Bill, &c.* *Replication to Answer of Defendant Patrick Sweeney.*

This complainant joins issue on the answer of the defendant, Patrick Sweeney.

HOWE & DAVIS,
Solicitors of Complainant.

STIPULATION AS TO FACTS.

IN CHANCERY OF NEW JERSEY.

Between DAVID L. HELLER, *Complainant,* *and* PATRICK SWEENEY and NATIONAL ENGINEERING CO., a corporation, *Defendants.*	*Stipulation as to Facts.*

This is an action brought by David L. Heller for specific performance of a contract made between him and the defendant Patrick Sweeney to convey certain property on Ridgewood Road, Maplewood. The defendant, National Engineering Co., is made a defendant because it took a conveyance of the said premises from the said Sweeney under the circumstances hereinafter set forth. It is stipulated that the following are the facts in the case:

1. On December 24th, 1924, Patrick Sweeney agreed in writing to sell to the complainant a lot of land fifty feet by one hundred feet on the Easterly side of Ridgewood Road, Maplewood, for the sum of two thousand dollars ($2,000).

2. The agreement contained this provision: "It is understood that the said David L. Heller will apply with the consent of the said Patrick Sweeney for a building permit for the construction of stores on said lot of land and if necessary will undertake court proceedings for the securing of said permit, such proceedings to be at the

expense of the said Heller. In the event that he is unsuccessful in securing said building permit either by application or court proceedings, the said deposit of $200 will be returned by the said Sweeney to the said Heller. The said title will close upon ten days' notice after the securing of said building permit, or the final refusal thereof by the court."

3. The said agreement was recorded on July 24th, 1925, in Book Q 72 of Deeds for Essex County, on page 340.

4. Application was made to the Building Inspector of the Township of Maplewood on February 16th, 1925, for a permit, which application was denied. In the month of April, 1925, proceedings were commenced in the New Jersey Supreme Court to procure a writ of mandamus requiring the Building Inspector of Maplewood to issue the permit applied for. This resulted in the issuance of an alternative writ of mandamus from the Supreme Court, dated on the 9th day of May, 1925, and returnable at Trenton on the 25th day of May, 1925. The matter was contested by the Township of Maplewood and the case was argued before the Supreme Court.

5. On May 11th, 1926, an opinion was handed down by the Supreme Court granting the writ of mandamus.

6. On the 17th day of May, 1926, an order for the peremptory writ was issued and on the 18th day of May, 1926, the peremptory writ itself was issued.

7. Thereupon notice was given to Patrick Sweeney that the complainant having been sucessful in procuring the building permit, he was ready to take the property at any time fixed by the defendant, Patrick Sweeney.

8. Subsequent to the making of the agreement with complainant and prior to the issuance of the peremptory writ of mandamus by the Supreme Court, a deed was made by said Patrick Sweeney to the other defendant, National Engineering Company, bearing date March 11th, 1926, acknowledged May 6th, 1926 and recorded on May 19th, 1926, in the office of the Register of Essex County.

9. In addition to the constructive notice afforded by the record of the original contract, the National Engineering Co. were actually informed of the existence of the contract between Sweeney and the complainant and of its contents so that in acquiring title to the premises from the defendant Sweeney, the National Engineering Co. had both actual and constructive notice of the issuance and contents of the agreement between the complainant and said Sweeney.

10. Defendant National Engineering Company is a purchaser for value, having paid the entire consideration prior to the filing of the bill in this action, and before the issuance of the writ in the Supreme Court action.

11. Defendant National Engineering Company had no actual knowledge of the pendency of any mandamus proceeding in the New Jersey Supreme Court.

HOWE & DAVIS,
Solicitors of Complainant.

ALEXANDER M. GOLDFINGER,
Solicitor of Patrick Sweeney.

ARTHUR R. LEWIS,
Solicitor of National Engineering Co.

OPINION.

IN CHANCERY OF NEW JERSEY.

Between

DAVID L. HELLER,
Complainant,

and

PATRICK SWEENEY and NATIONAL ENGINEERING CO., a corporation,
Defendants.

On Bill, &c.
Opinion.

Messrs. Howe & Davis for complainant.

Arthur R. Lewis, Esq., for National Engineering Co.

Alexander M. Goldfinger, Esq., for Patrick Sweeney.

CHURCH, *V.-C.*

This is a suit for specific performance. The facts as stipulated by counsel are:

1. On December 24th, 1924, Patrick Sweeney agreed in writing to sell to the complainant a lot of land fifty feet by one hundred feet on the easterly side of Ridgewood Road, Maplewood, for the sum of two thousand dollars ($2,000).

2. The agreement contained this provision: "It is understood that the said David L. Heller will apply with the consent of the said Patrick Sweeney for a building permit for the construction of stores on said lot of land and if necessary will take court proceedings for the securing of said permit, such proceedings to be at the expense of the said Heller. In the event that he is unsuccessful in securing said building permit either by application or court proceedings, the said deposit of $200, will be returned by the said Sweeney to the said Heller. The said title will close upon ten days' notice after the securing of said building permit, or the final refusal thereof by the court."

3. The said agreement was recorded on July 24th, 1925, in Book Q 72 of Deeds for Essex County, on page 340.

4. Application was made to the building inspector of the Township of Maplewood on February 16th, 1925, for a permit, which application was denied. In the month of April, 1925, proceedings were commenced in the New Jersey Supreme Court to procure a writ of mandamus requiring the building inspector of Maplewood to issue the permit applied for. This resulted in the issuance of an alternative writ of mandamus from the Supreme Court, dated on the 9th day of May, 1925, and returnable at Trenton on the 25th day of May, 1925. The matter was contested by the Township of Maplewood and the case was argued before the Supreme Court.

5. On May 11th, 1926, an opinion was handed down by the Supreme Court granting the writ of mandamus.

6. On the 17th day of May, 1926, an order for the peremptory writ was issued and on the 18th day of May, 1926, the peremptory writ itself was issued.

7. Thereupon notice was given to Patrick Sweeney that the complainant having been successful in procuring the building permit, he was ready to take the property at any time fixed by the defendant, Patrick Sweeney.

8. Subsequent to the making of the agreement with complainant and prior to the issuance of the peremptory writ of mandamus by the Supreme Court, a deed was made by said Patrick Sweeney to the other defendant, National Engineering Company, bearing date March 11th, 1926, in the office of the Register of Essex County.

9. In addition to the constructive notice afforded by the record of the original contract, the National Engineering Co. were actually informed of the existence of the contract between the complainant and the said Sweeney.

10. Defendant National Engineering Company is a purchaser for value, having paid the entire consideration prior to the filing of the bill in this action, and before the issuance of the writ in the Supreme Court action.

11. Defendant National Engineering Company had no actual knowledge of the pendency of any mandamus proceeding in the New Jersey Supreme Court.

In my opinion, the contract is too uncertain to permit of its enforcement in a Court of Equity. The contract provides that if Heller is unsuccessful in his application for a permit, or in the court proceedings, his deposit will be returned to him. This language makes it uncertain as to whether the parties meant to imply an option or a contract of sale. Again, there is no day certain in the instrument under consideration. Title was to close upon ten days' notice after the securing of the building permit or the final refusal thereof by the court. It will be observed that there is no stipulation as to how soon after these events the ten days' notice shall be given. Does it mean immediately thereafter, or a month or three months after? What does final refusal of the

court mean? What court was intended? It appears that the Supreme Court granted a writ of mandamus directing the issuance of the permit. Was it intended to stop the litigation there when the parties entered into the agreement or was an appeal contemplated between the parties?

In *McKibben* v. *Brown,* 14 N. J. Equity, 13, Chancellor Green said "No specific performance of a contract can be decreed in equity unless the contract be actually concluded and be certain in all its parts."

Vice-Chancellor Howell said in *Sheehan* v. *Humphreys,* 81 N. J. Equity, 416, at page 418, "There is very grave doubt in my mind about the meaning and effect of this correspondence. This court is debarred from granting relief in specific performance cases where there is doubt concerning either the facts or the law. This has been determined by the court of last resort in a long line of cases. *McKibben* v. *Brown,* 14 N. J. Equity, 13, (affirmed 15 N. J. Equity, 498); *Potter* v. *Hollister,* 45 N. J. Equity, 508, (affirmed 46 N. J. Equity, 609); *Meyers* v. *Metzger,* 63 N. J. Equity, 779; *Doutney* v. *Lambie,* 78 N. J. Equity, 277; *Van Riper* v. *Wickersham,* 77 N. J. Equity, 232."

Another point to be considered is the effect on this contract of Section 116 of the Conveyance Act, 2 Comp. Statutes (1910, page 1575) which reads as follows: "Every agreement for the sale or purchase of any lands or real estate in this state, which hereafter shall be recorded, shall be absolutely void as against * * * subsequent purchasers * * * for value of said lands or real estate unless the vendee * * * within three months after the date fixed in such agreement for its consummation, or, if no date shall

be fixed in such agreement for its consummation, then within three months after the date of such agreement, shall commence suit for the specific performance of said agreement."

As I have said, there is no specific date set for the closing of this contract. The contract was made on December 24, 1924. It was recorded July 24, 1925. And therefore, in my opinion, it is not binding upon the defendant National Engineering Company.

The definition of "date" is set forth in *Heffner* v. *Heffner,* 48 La. Ann. 1088, 20 So. 281, as follows: "The date in its ordinary sense imports the day of the month, the month and the year. That is also the legal significance of the word. The day of the month is quite as much a part of the date as the month or the year * * * The will must be dated and the month without the day is no date."

In the case of *Bement* v. *Trenton Locomotive Company,* 32 N. J. Law, 513, the Court of Errors and Appeals adopts the following construction, at page 515: "The primary signification of the word *date,* is not time in the abstract, nor time taken absolutely, but, as its derivation plainly indicates, time *given* or specified, time in some way ascertained and fixed; this is the sense in which the word is commonly used. When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself. The date of an item, or of a charge in a book account, is not necessarily the time when the article charged was in fact, furnished, but simply the time given or set down in the account, in connection with such charge. And so 'the date of the last work done, or materials furnished,

in such claim' in the absence of anything in the act indicating a different intention, must be taken to mean the time when such work was done or materials furnished, as specified in the plaintiff's written claim * * *.

"It was manifestly the purpose of the legislature in this act, to limit the duration of the mechanics' lien with greater precision than had been previously done; and to do it in such a way that its limits might be readily ascertained by reference to the claim filed in the clerk's office.

"The act passed March 3d, 1835, (Pamph. 148) 'substantially re-enacted April 16th, 1846, (Stat. of N. J. 743), and continuing in force until repealed and superseded by the present act, without requiring any statement in the claim, or elsewhere, of the time when the work was done, &c., merely provided that the action to enforce the lien should be instituted within one year after such work done, &c.' A very serious objection to this mode of limitation was that it was too indefinite to be of any practical value. Failing to establish in the claim, or elsewhere, a fixed point from which the year of limitation should begin to run, the point at which the lien would terminate was, of necessity, involved in uncertainty; and uncertainly alike perplexing and injurious to owners and others interested in the property affected by the lien. This radical defect the legislature have wisely and effectually remedied in the present act, by adopting, as the initial point of the limited year, the last date in the claimant's bill of particulars, a point both definite and visible, a monument unalterably established in the claim itself."

Opinion.

I therefore think that the title of the defendant National Engineering Company should be sustained as valid.

The final question raised in the briefs is that of laches. Complainant's contract was executed December 24, 1924. He took no action in the courts until some time in April, 1925. It does not appear whether or not he pressed his suit in the Supreme Court with diligence, but in the meantime the defendant National Engineering Company took title to the property in March, 1926. More than a year had elapsed since the execution of the contract. It seems to me that this was such laches on the part of the complainant as would justify the court in disregarding his claim.

For these reasons I will advise a decree dismissing the complainant's bill for specific performance.

Decree Dismissing Bill.

DECREE DISMISSING BILL.

(Docket 61-111)

IN CHANCERY OF NEW JERSEY.

Between

DAVID HELLER,

Complainant,

and

PATRICK SWEENEY and NATIONAL ENGINEERING COMPANY,

Defendants.

On Bill, &c.

Decree Dismissing Bill.

This matter being brought to final hearing on an agreed stipulation of facts signed by Howe & Davis, solicitors for complainant, and Alexander M. Goldfinger, solicitor for defendant Patrick Sweeney, and Arthur R. Lewis, solicitor for defendant National Engineering Company; and it appearing that the bill of complaint prayed for specific performance of a contract dated December 24, 1924, between complainant and defendant Patrick Sweeney for conveyance of premises on the easterly side of Ridgewood Road, South Orange, New Jersey, and briefs having been submitted by counsel and it appearing to the Court that complainant is not entitled to the relief prayed for;

It is on this 28th day of December, 1926, on motion of Arthur R. Lewis, solicitor for defendant National Engineering Company, ordered, adjudged and decreed "that the bill of complaint to and the same is hereby dismissed with

Decree Dismissing Bill.

costs, together with a counsel fee of $100 for Arthur R. Lewis, solicitor for defendant, National Engineering Company and a counsel fee of $50 for Alexander M. Goldfinger, solicitor for defendant, Patrick Sweeney; and it is further ordered that the notice of *Lis Pendens* heretofore filed by complainant in the Essex County Register's office be discharged of record."

E. R. WALKER,
C.

Respectfully advised,

ALONZO CHURCH,
V.-C.

A true copy.

THOMAS BARBER,
Clerk.

Notice of Appeal.

NOTICE OF APPEAL.

IN CHANCERY OF NEW JERSEY.

Between

DAVID HELLER,
Complainant,

and

PATRICK SWEENEY and NATIONAL ENGINEERING COMPANY,
Defendants.

On Bill, &c.

Notice of Appeal.

The complainant, David Heller, hereby appeals from the decree dismissing bill in the above-entitled cause made on the 28th day of December, 1926, and made by Honorable Edwin Robert Walker, Chancellor, on the advice of Honorable Alonzo Church, Vice-Chancellor, and from the whole and every part thereof, to the Court of Errors and Appeals in the last resort in all causes.

Dated, January 22nd, 1927.

HOWE & DAVIS,
Solicitors for and of Counsel
with Complainant.

I conceive there is good cause for appeal in the above-entitled cause.

EDWARD L. DAVIS,
Of Counsel with Complainant.

Notice of Appeal.

Service of a copy of the within is hereby acknowledged this 24th day of January, 1927.

ARTHUR N. LEWIS,
Solicitor of Defendant
National Engineering Company.

ALEXANDER M. GOLDFINGER,
Solicitor of Defendant Patrick Sweeney.

Petition of Appeal.

PETITION OF APPEAL.

New Jersey Court of Errors and Appeals

DAVID HELLER, *Complainant-Appellant,* *vs.* PATRICK SWEENEY and NATIONAL ENGINEERING COMPANY, *Defendants-Appellees.*	*On Appeal from the Court of Chancery.* *Petition of Appeal.*

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

The petition of David Heller, the appellant in the above-entitled cause, respectfully shows that:

1. Petitioner finds himself aggrieved by a decree dismissing bill made in the Court of Chancery by his Honor, Edwin Robert Walker, Chancellor of the State of New Jersey, bearing date the 28th day of December, 1926, in a certain cause in said Court of Chancery wherein the said David Heller was complainant and the said Patrick Sweeney and National Engineering Company were defendants, in this respect to wit, that the said decree adjudges that the bill of complaint be dismissed with costs, together with a counsel fee of one hundred dollars ($100) for Arthur R. Lewis, solicitor for defendant, National Engineering Company, and a counsel fee of fifty dollars ($50) for Alexander M. Goldfinger, solicitor for defendant, Patrick Sweeney; and that notice of *Lis Pendens* heretofore filed by complainant in the Essex County Register's office be discharged of record.

And petitioner appeals from the decree of the Chancellor which decrees as aforesaid, upon the ground 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 contract sought to be enforced was too uncertain to be capable of specific performance.

c. The court below erred in finding that the contract sought to be enforced was void as to a subsequent purchaser for value with notice thereof.

d. The court below erred in finding that the plaintiff's right to subsequent performance was barred for laches for delay in taking proceedings to secure building permit.

e. The court below erred in finding that the time for closing, by Section 116 of the Conveyance Act, meant three months from the date of the contract.

Petitioner therefore prays that the said decree of the said Chancellor may be wholly reversed, set aside and for nothing holden and that petitioner may have such other relief in the premises as to this court shall seem proper.

HOWE & DAVIS,
Solicitors for and of Counsel for Appellant.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

DAVID HELLER, *Complainant-Appellant,* *vs.* PATRICK SWEENEY and NATIONAL ENGINEERING COMPANY, *Defendants-Appellees.*	*On Appeal from the Court of Chancery.* *Answer to Petition of Appeal.*

The answer of National Engineering Company, one of the above-named appellees, to the petition of appeal of David Heller, the above-named appellant.

This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on the 28th day of December, 1926, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity; and he prays that the same may be affirmed with costs to be taxed in favor of this appellee.

ARTHUR R. LEWIS,
Solicitor for and of Counsel
with Appellee.

Answer to Petition of Appeal.

ANSWER TO PETITION OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

DAVID HELLER, *Complainant-Appellant,* *vs.* PATRICK SWEENEY and NATIONAL ENGINEERING COMPANY, *Defendants-Appellees.*	*On Appeal from the Court of Chancery.* *Answer to Petition of Appeal.*

The answer of Patrick Sweeney, one of the above-named appellees, to the petition of appeal of David Heller, the above-named appellant.

This appellee, not admitting the truth of all or any of the matters in the said petition of appeal contained, for answer thereto nevertheless admits that a decree was, on the 28th day of December, 1926, made and entered in the Court of Chancery of New Jersey, in the above-entitled cause, for the purposes in said petition mentioned and as therein set forth; but as to the substance and form of said decree, this appellee begs leave to refer thereto when the same shall be produced.

This appellee is advised and believes that the said decree is agreeable to equity; and he prays that the same may be affirmed with costs to be taxed in favor of this appellee.

ALEXANDER M. GOLDFINGER,
Solicitor for and of Counsel
with Appellee.

LASKY PRINTERS, INC. • NEWARK

New Jersey Court of Errors and Appeals

Between DAVID HELLER, *Complainant-Appellant,* *and* PATRICK SWEENEY and NATIONAL ENGINEERING COMPANY, *Defendants-Respondents.*

BRIEF FOR RESPONDENT NATIONAL ENGINEERING COMPANY

Facts.

The facts in this action are not in dispute and are adequately set forth in the stipulation entered into between the parties to this proceeding (State of the Case pp. 15-17). The position of respondent National Engineering Company is that of a purchaser for value, with notice of the existence and recording of the contract between appellant and respondent Sweeney, but without notice of any action under the contract by appellant, except the recording of the contract, until the filing of the bill in this cause.

LAW.

I.

The contract is too uncertain to permit of its enforcement in a Court of Equity.

It is an established principle in Chancery that uncertainty in a contract is fatal to a de-

cree for specific performance. The leading New Jersey case on the subject is *McKibbin* v. *Brown, 14 N. J. Eq. 13*, in which Chancellor Green says, at page 17:

> "No specific performance of a contract can be decreed in equity unless the contract be actually concluded and be certain in all its parts. If the matter still rests in treaty, or if the agreement in any material particular be uncertain or undefined, equity will not interfere."

The contract in its material portion reads: "In the event that he is unsuccessful in securing said building permit either by application or court proceedings, the said deposit of $200 will be returned by the said Sweeney to the said Heller. The said title will close upon ten days' notice after the securing of said permit, or the final refusal thereof by the court." (State of the Case, p. 5, ll. 18-26).

It is submitted that on the face of this contract it is impossible to determine what its effect was intended to be. The contract purports to be an agreement unequivocally binding on both parties. By its terms Sweeney agrees to sell and Heller agrees to purchase the land; and by the clause providing "the said title will close upon ten days' notice after the securing of said building permit or the final refusal thereof by the court," it would appear that the parties intended to close the title in either event. But this interpretation is controverted by the clause immediately preceding, which provides "in the event that he is unsuccessful in securing said building permit by application or court proceedings, the said deposit of $200 will be

returned by the said Sweeney to the said Heller. This language would seem to imply an option in appellant, giving him the privilege of taking or refusing title.

The uncertainty lies in the fact that it is impossible to conclude whether the parties intended a binding contract or an option. As an option it fails for lack of consideration. The seal raises a presumption of consideration; this presumption, however, may be rebutted. "An Act concerning sealed instruments" *2 Comp. Stat. (1910) 2240.*

> "That in every action upon a sealed instrument, or where a set-off is founded upon a sealed instrument, the seal thereof shall be only presumptive evidence of a sufficient consideration, which may be rebutted as if such instrument was not sealed."

The presumption is plainly rebutted by the provision for the return of the entire amount paid by appellant in the event of his failure to take title.

The principle is forcefully illustrated by *Sheehan* v. *Humphreys, 81 N. J. Eq. 416.* This was a bill by a purchaser under an alleged contract for the sale of certain shares of corporate stock. The court held the contract too indefinite to be specifically enforced. Howell, V. C. says, at page 418:

> "There is very grave doubt in my mind about the meaning and effect of this correspondence . . . . . This court is debarred from granting relief in specific performance cases where there is doubt concerning either the facts or the

law. This has been determined by the court of last resort in a long line of cases. *McKibbin* v. *Brown, 14 N. J. Eq. (1 McCart.) 13; affirmed, 15 N. J. Eq. (2 McCart.) 498; Potter* v. *Hollister, 45 N. J. Eq. (18 Stew.) 508; affirmed, 46 N. J. Eq. (1 Dick.) 609; Myers* v. *Metzger, 63 N. J. Eq. (18 Dick.) 779; Doutney* v. *Lambie, 78 N. J. Eq. (8 Buch.) 277; Van Riper* v. *Wickersham, 77 N. J. Eq. (7 Buch.) 232.*

"Again, it is not clear that the parties intended that the correspondence in question should operate either as an option or as a contract. . . . . besides, from a careful examination of the form of so-called option, it is not entirely clear that it is not an agreement for the sale of shares *in praesenti* with payment and delivery postponed.

"There is so much doubt about the matter that I am constrained to deny relief to the complainant. The bill must therefore be dismissed."

Attention is particularly called to the opinion of the Court of Errors and Appeals, *81, N. J. Eq. 513.* The Court, affirming the decree by the Vice Chancellor in a *per curiam* opinion, discusses the uncertainties upon which the Vice Chancellor bases his decree, and says, at page 513:

"In his opinion in the cause he points out the various uncertainties which exist in the agreement, as proved by the complainant. Among them, as he considered, was a want of certainty as to the number of shares bargained for. We are inclined to think that the contract was sufficiently definite in this respect; but in view of the other uncertainties found in the contract,

and pointed out in the opinion, this fact becomes immaterial. We concur in the conclusion of the vice-chancellor, and are satisfied to adopt his opinion as that of this court, with the exception indicated."

A further ground for holding the contract unenforceable because of its uncertainty is the absence in the contract of a certain time for closing title. The only attempt to set a time for closing is that indicated by the words "the said title will close upon ten days' notice after the securing of said building permit or the final refusal thereof by the court." (State of the Case p. 5, ll. 22-26). This provision, as an attempt to fix a time certain, fails completely to meet the requirement of definiteness. There is no limitation whatever on the period when the notice shall be given; nor is there any indication as to how or by whom the notice was to be given. Whether or not the securing of a permit or the final refusal thereof by a court could by any construction be regarded as a definite point of time, it is submitted that by no construction can "ten days' notice after" such an event be construed as sufficiently definite to warrant equitable relief in the enforcement of such a contract.

The contract is further uncertain in that it contemplates "court proceedings" by the purchaser, but fails to define the extent of such proceedings. It is probable that the action instituted in the Supreme Court was in the contemplation of the parties at the time the contract was drawn. It is not clear, however, whether the parties intended to carry the litigation further in the event of an unfavorable de-

cision in the Supreme Court, or whether they intended the contract to continue in the event of an appeal by the municipal authorities from a decision unsatisfactory to them. Furthermore, as heretofore suggested, determination of the proceedings, however far they might be carried, seems on the face of the contract not to be conclusive as to the consummation of the contract in the event of an unfavorable decision.

The contract being uncertain in each of these important particulars, as indicated by the opinion of the learned Vice-Chancellor (State of the Case, p. 20, l. 24 to p. 21, l. 9), it is respectfully submitted that the decree refusing the appellant relief is equitable and should be affirmed. *39 Cyc. 1206; Myers* v. *Metzger, 63 N. J. Eq. 779, 782; Binns* v. *Smith, 93 N. J. Eq. 33, 36; Davila* v. *United Fruit Co., 88 N. J. Eq. 602.*

II.

Appellant is barred from relief by section 116 of the Conveyances Act.

Section 116 of "An Act Respecting Conveyances", *2 Comp. Stat. (1910) p. 1573, P. L. 1907, p. 454,* meets the situation presented by the facts of the case squarely. The pertinent portions of the Section read:

> "Every agreement for the sale or purchase of any lands or real estate in this state which hereafter shall be recorded, shall be absolutely void as against subsequent judgment creditors of the vendor or vendors and as against subsequent purchasers and mortgagees for value of said

> lands or real estate, unless the vendee or vendees, his or their heirs, executors, administrators or assigns, within three months after the date fixed in such agreement for its consummation, or if no date shall be fixed in such agreement for its consummation, then within three months after the date of such agreement, or if the consummation of such an agreement shall be extended by the parties thereto before the date fixed therein for its consummation, beyond the date so fixed, and such extension shall be duly acknowledged and recorded as agreements for the sale of lands are now required to be acknowledged and recorded in order to give them the effect of notice to subsequent judgment creditors, purchasers and mortgagees, then within three months after the date fixed in such extension for the consummation of said agreement, or upon the death of the vendor or vendors or one or more of them within any of such periods of three months, then within three months after such death, shall commence suit for the specific performance of said agreement."

This language is clearly applicable to the facts of this case and the statute is unquestionably directed to meet the exact situation here presented. The legislature has granted to purchasers of land under contract the privilege of recording their contracts; but by the section above cited it has indicated that this privilege cannot be extended unduly. The right of the owner to dispose of his property cannot be impaired, by the recording of a contract, beyond the period limited by this section. The Act clearly evinces the intention of the legislature to prohibit any restraint on alienation of land

through the recording of contracts. No construction may be given to the Act which will impair this primary function.

The language of the Act is clear, and is capable of only one construction. If a vendee under a contract choose to exercise the privilege given him under the Recording Act, he must do so with full knowledge that unless his contract be performed or suit be commenced within the time limited by section 116, the agreement, as against any of the persons named in said section, will be absolutely void. In *Storch* v. *Tepperman, 4 N. J. Adv. Rep. 147,* Vice-Chancellor Backes holds that the provision above referred to does not apply to unrecorded contracts, and adds at page 151:

> "That provision is a limitation upon the right of action against subsequent purchasers with or without notice by vendees who chose to protect their equities by recording their contracts."

A situation of great weight in determining the effect of the statute, on a set of facts similar to that which this defendant had to face at the time it took title, is presented in the case of *Gerba* v. *Mitruske, 84 N. J. Eq. 141,* decided by the Court of Errors and Appeals. The facts which appear in that case are that Gerba entered into a contract with one Kish, which had been recorded. No action was taken under this contract until more than three months after the date set in the contract for the closing of title. Gerba meanwhile entered into a subsequent agreement with Mitruske, who refused to accept title on the ground of the outstanding

recorded contract with Kish. Gerba thereupon filed a bill for specific performance against Mitruske and obtained a decree. The Court held that the existence of the Kish agreement was not a valid ground for refusing title, since that agreement had become absolutely void as to Mitruske by reason of the statute. Gummere, C. J., delivering the opinion of the Court, says, at page 144:

> "We conclude, therefore, that the existence of the Kish agreement at the time of the filing of the bill afforded no ground for refusing the complainant the relief which she sought, in view of the fact that it had become null and void as to the defendant prior to the time of making the decree."

In determining the effect and application of the Act to the matter in dispute the exact language of the statute must be given paramount consideration. The Act requires action under the agreement by the vendee "within three months after the date fixed in such agreement for its consummation, or if no date shall be fixed in such agreement for its consummation, then within three months after the date of such agreement." The word designated by the legislature as indicating its intention is made clear by its dual use. The "date" of an agreement can be taken to mean but one thing: the day specified in the agreement as the day of its execution. This is a definite fixed point, not susceptible of variation. The words "date fixed in such agreement for its consummation," taken in such close proximity with the words "date of such agreement," cannot be given a less certain and definite interpretation.

This position finds support in the universal construction given to the word "date" by all authorities. Webster's dictionary defines the term as:

> "date n. 1. That addition to a writing, inscription, coin, etc, which specifies the time (as day, month, and year) when the writing or inscription was given, or executed, or made; as, the date of a letter, of a will, of a deed, of a coin, etc.
>
> "2. The point of time at which a transaction or event takes place, or is appointed to take place; a given point of time; epoch; as, the date of battle."

Bouvier's Law Dictionary defines the term as:

> "Date, the designation or indication in an instrument of writing of the time and place when and where it was made.
>
> "In general it is sufficient to insert the day, month and year; in recording deeds and other recordable instruments, in Pennsylvania, in noting the receipt of a fi. fa., or writ of execution, the hour of reception must be given."

Corpus Juris supplements the dictionary definitions of the word "date" by adding, *17 C. J. 1130:*

> "The primary signification of the word is not time in the abstract, nor time taken absolutely, but, as its derivation plainly indicates, time given or specified, time in some way ascertained and fixed; this is the sense in which the word is commonly used. The date in its ordinary meaning imports the day, month, and year, and thus stated, it is definite, certain, and complete. This

> is also the legal significance of the word, and unquestionably is the popular as well as the technical meaning, the day of the month being quite as much a part of the date as the month or the year."

The precise question here at issue is the correct construction to be given to the word "date" in the statute. The question has been passed upon in two jurisdictions under statutes which require holographic wills to be written and dated in the handwriting of the testator. In each case the court has ruled that nothing less than the day, month and year will satisfy the demands of the statute so as to constitute a date.

In *Heffner* v. *Heffner, 48 La. Ann. 1088, 20 So. 281,* in passing upon this question, the court says:

> "The date in its ordinary sense imports the day of the month, the month, and the year. That is also the legal significance of the word. The day of the month is quite as much a part of the date as the month or the year. . . . . The will must be dated and the month without the day is no date."

A similar case is *Re Estate of Carpenter 172 Cal. 268, 156 Pac. 464, L. R. A. 1916 E. 498.* Here the court held similarly that the figures which purported to be a date failed to satisfy the act. The court says:

> "In *Re Price, supra,* where the writing under examination had only the year written upon it, the district court of appeal held that the word "date" means the year, month, and day. Unquestionably that is the popular as well as the technical mean-

ing. That case followed the well known authority *(Heffner* v. *Heffner, 48 La. Ann. 1089, 20 So. 281)* . . . . . .

"The alleged date as written by Mr. Carpenter lacked the most essential requisite of a date as defined by our decisions, and that is definiteness."

In the same jurisdiction a similar question was raised under a statute requiring a date to be affixed to a warrant for payment to a contractor doing municipal work. *Shipman* v. *Forbes, 97 Cal. 572, 32 Pac. 599.* It was there held that a warrant bearing only the year is not dated so as to comply with the statute, the court stating that date must include the month and the day of the month as well as the year.

McLean v. *Sworts, 69 Minn. 128, 71 N. W. 925,* was an action in garnishment. The statute provided that service on the garnishee should attach to property of the defendant at the date of such service. The garnishee came into possession of property of the defendant on the same day as the date of service but later in the day. The court held that the garnishment would not attach to the later-acquired property, determining that date meant a fixed point of time, including in this instance even the hour as well as the day.

In our own jurisdiction the word "date" appears to have been construed by the courts in only one case, *Bement and Dougherty* v. *Trenton Locomotive and Machine Manufacturing Co., 32 N. J. L. 513,* affirming the Supreme Court, whose opinion is reported in *31 N. J. L. 246.* This was an action on a mechanics' lien.

The statute in effect at that time required that summons issue within one year from the date of the last item charged in the bill of particulars. Evidence was offered to show that, although summons had been issued more than one year after the date of the last item charged, materials had in fact been furnished subsequently and within one year of the issuance of summons. The court held that, date being a fixed point of time, the date specified in the bill of particulars must control, since any other construction would be directly contradictory to the statute. Woodhull, J., delivering the opinion of the Court of Errors and Appeals, gives the construction adopted by that Court in clear and unmistakable language, at page 515:

"The primary signification of the word *date*, is not time in the abstract, nor time taken absolutely, but, as its derivation plainly indicates, time *given* or specified, time in some way ascertained and fixed; this is the sense in which the word is commonly used. When we speak of the date of a deed, we do not mean the time when it was actually executed, but the time of its execution, as given or stated in the deed itself. The date of an item, or of a charge in a book account, is not necessarily the time when the article charged was in fact, furnished, but simply the time given or set down in the account, in connection with such charge. And so the date of the last work done, or materials furnished, in such claim, in the absence of anything in the act indicating a different intention, must be taken to mean the time when such work was done or materials furnished, as specified in the plaintiffs' written claim.

"That the legislature did, in fact, use the word *date* in this sense, appears still more clearly from other parts of the act. The very next clause of the twelfth section reads thus: 'And the time of issuing such summons shall be endorsed on the claim by the clerk, upon the sealing thereof; and if no such entry be made within one year from *such last date*, such lien shall be discharged.' Here the statute furnishes its own interpretation of the controverted clause, and informs us, in the plainest possible terms, that the words 'date of the last work, &c.,' are to be understood precisely as if they had been written 'last date of the work done, &c., in such claim.'

"It was manifestly the purpose of the legislature in this act, to limit the duration of the mechanics' lien with greater precision than had been previously done; and to do it in such a way that its limits might be readily ascertained by reference to the claim filed in the clerk's office.

"The act passed March 3d, 1835, (Pamph. 148,) substantially re-enacted April 16th, 1846, *(Stat. of N. J. 743,)* and continuing in force until repealed and superseded by the present act, without requiring any statement in the claim, or elsewhere of the time when the work was done, &c., merely provided that the action to enforce the lien should be instituted within one year after such work done, &c.' A very serious objection to this mode of limitation was that it was too indefinite to be of any practical value. Failing to establish in the claim, or elsewhere, a fixed point from which the year of limitation should begin to run, the point at which the lien would terminate was, of necessity, involved

in uncertainty; an uncertainty alike perplexing and injurious to owners and others interested in the property affected by the lien. This radical defect the legislature have wisely and effectually remedied in the present act, by adopting, as the initial point of the limited year, the *last date* in the claimant's bill of particulars, a point both definite and visible, a monument unalterably established in the claim itself."

It is submitted that under the construction given the word "date" by other jurisdictions, and particularly in view of the clear and explicit language used in our court of last resort, the use of this word by the legislature can be taken to mean only a definitely ascertained or fixed point of time.

It is obvious that, in the language of the agreement here in question, no such definitely ascertained or fixed point of time is fixed for its consummation. The agreement contemplates, prior to the fixing of a date for its consummation, a course of action to be pursued by appellant which is indefinite in its time of completion. This in itself is sufficient to establish that the contract lacks a date fixed for its consummation as defined in the decisions. The contract in question goes even further and contemplates, beyond the completion of the indefinite series of events, the giving of a notice, with no stipulation as to the period within which such notice might be given. This provision is conclusive as to the absence of a date in the agreement. Therefore, since no "date," as defined by the courts, is fixed in the agreement for its consummation, the date of the agreement deter-

mines the limit of grace allowed by the legislature to the appellant for instituting his action. This period having elapsed before this respondent took title to the property, the situation of this respondent at that time was closely apalogous to that of the defendant in *Gerba* v. *Mistruke, supra.* This respondent had no alternative but to take title, and the title so taken was properly sustained by the Court of Chancery and the decree sustaining it should be affirmed.

III.

Appellant is in laches and is therefore not entitled to relief.

Appellant's failure to perform the contract on his part promptly should bar him from equitable relief on the ground of laches. The contract was executed December 24, 1924. (State of the Case, p. 15, l. 30). No action was taken by appellant to prosecute mandamus proceedings until some time in the month of April, 1925. (State of the Case, p. 16, l. 18). From the inception of these proceedings until their completion more than a year elapsed. (State of the Case, p. 16, l. 32). To entitle appellant to the extraordinary intervention of the Court of Chancery on his behalf, appellant should have proceeded with far greater diligence. On these facts as submitted in the Court of Chancery, the learned Vice-Chancellor found as a fact that the appellant was guilty of laches. (State of the Case, p. 24, l. 16). This finding of fact, which is amply supported by the record, should be controlling in this Court.

Specific performance of a contract is not a remedy of right, but one which rests in the sound discretion of the court. *36 Cyc. 548; 21 C. J. 34...* If the case is one of doubt, the court should not exercise its discretion, but should leave the parties to their remedy at law. It is respectfully submitted that the decree entered in the Court of Chancery is agreeable to equity, and that the appeal therefrom should be dismissed.

Respectfully submitted,

ARTHUR R. LEWIS.,

Counsel for Respondent
National Engineering Company.